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Principles of Reparations at the International Criminal Court: Assessing Alternative Approaches

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Abstract

While the Rome Statute of the International Criminal Court requires the judges of the Court to establish principles of reparations, the existing case law is developing on shaky doctrinal foundations, failing to take into account legal sources, particularly from national civil torts systems, that offer vital law and practice that could inform the Court's reparations orders. This article evaluates the legal basis of the existing reparations case law of the Court, arguing that undue prominence has been given to soft law human rights instruments while a lack of reference to the framework methodology in Article 21 of the Rome Statute has left the reparations principles weakly articulated. There are alternatives that the Court could consider in future, notably an increased role for and coordination with national justice systems, the potential for drawing on reparation rules from national torts systems, and the relevance of the *lex loci damni* principle. The article assesses these alternatives and proposes routes forward for the Court's reparations practice based on the Rome Statute's legal mandate.

Keywords

International Criminal Court – international crimes – victim rights – reparations – damages – Rome Statute

1 Introduction[1]

The system of reparations for victims at the International Criminal Court (ICC) has been a heavily contested area of the Court's mandate since the negotiation of the Rome Statute. Some critics question the very inclusion of victim participation in the Court's criminal proceedings,[2] contend that victims' rights have been prioritized to the detriment of the fair trial rights of the accused,[3] or ask whether this novel addition to the ICC's architecture (absent from proceedings at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)) is supportive of the Court's central purpose to prosecute core international crimes.[4] Nevertheless, the States Parties agreed at Rome to provide for reparations in the ICC's framework, so the legal question that should be in the mind of the judges of the Court is on what legal foundations they can and should build a coherent system of rules to govern the assessment of reparation awards.

In the jurisprudence of the ICC to date, awards of reparations pursuant to Art. 75 of the Rome Statute have sometimes appeared to be based on normative aspiration and pragmatic consideration rather than the applicable sources of international and domestic law mandated by Art. 21 of the Statute. The current state-of-play in the ICC's case law can be seen in the March 2021 reparations order in *The Prosecutor v Bosco Ntaganda*, which required Mr Ntaganda to pay reparations for no less than US$ 30 million. This was the fourth complex case in which the ICC has sought to establish principles of reparations (after awards in *Lubanga, Katanga,* and *Al Madhi,* the *Bemba* case resulting in an acquittal prior to any award), yet the judicial reasoning often appears 'free-floating', detached from legal sources: the reader cannot help feeling at a loss as to what rules are exactly governing the reparation process at the ICC. The *Ntaganda* reparations order, for example, is loaded with references to 'principles' and

1 The authors would like to thank Chris Dekkers and Georgina Howe for their very helpful assistance in preparing this article. This research was conducted while both authors were members of the VICI project funded by the Dutch national research council (Nederlandse Organisatie voor Wetenschappelijk Onderzoek) 'Rethinking Secondary Liability for International Crimes' at the University of Amsterdam.

2 C.P.J. Muttukumaru, 'Reparations to Victims' in F. Lattanzi and W.A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Il Sirente 1999), at 325–328.

3 H.J. Dijkstal, 'Destruction of Cultural Heritage before the ICC: The Influence of Human Rights on Reparations Proceedings for Victims and the Accused' (2019) 17 (2) Journal of International Criminal Justice, at 391–412.

4 See A. Balta, M. Bax and R. Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System' (2019) 29 (3) International Criminal Justice Review, at 221–248.

to the overarching starting point of developing a victims-friendly reparation practice. A legal analysis, however, leaves us puzzled as to what valid legal rules actually underlie an obligation in *Ntaganda* to pay US$ 30 million in damages. With this problem as its starting point, the present chapter aims to offer a few critical reflections on the ICC's law and practice on reparations and to reiterate the concerns of other scholars that the Court's approach may have more to do with charitable donation than being persuasively rooted in a solid system of civil accountability.

We begin in Section 2 with the foundational principles of reparations in the Rome Statute. The text of Art. 75 of the Statute simply tells us that the system for ICC reparations was left unelaborated by the drafters and must be worked out in the Court's case law. We look to the drafting history of the Rome Statute, which indicates that the 'constructive ambiguity' of Art. 75, through which the drafters left it to judicial chambers to 'establish principles of reparations', was not intended to give ICC judges a free-hand to invent a *sui generis* reparations system. This provision was instead the result of the compromise nature of Art. 75's last-minute negotiations in which the delegates were not afforded sufficient time to carry out a rigorous analysis of existing laws. Neither does the requirement in Art. 75 detract from the *obligation* under Art. 21 to draw on existing sources of reparations law. Hence it is appropriate to take the methodology set out in Art. 21 as an appropriate benchmark for assessing the case law – judges have no discretion as to whether to follow this 'law-finding' process set out statutorily.

In Section 3, we evaluate the existing case law of the ICC in order to gain a better understanding of where the 'principles' in the jurisprudence actually come from. We note the limited breadth of the existing four cases, which cannot be seriously described as 'established' at this young stage in the Court's reparations case law. We find a general lack of rigour in deploying the applicable sources of law set out in Art. 21, with an over-reliance on the soft law human rights instruments referred to in the influential *Lubanga* Appeals Chamber jurisprudence, the fundamentals of which have hardly been revisited since. The *Katanga* and *Al Mahdi* cases largely followed suit, and the Trial Chamber in *Ntaganda* has continued the ICC's focus on collective reparations. We note the impending opportunity in the *Ongwen* case for the ICC to consider alternative approaches to reparations, and to take into account a broader range of existing reparations law.

In Section 4, we explore three possible alternatives to the ICC's current approach that could inspire the Court to deepen its understanding of the Art. 75 principles in future cases, namely, (i) an increased role for and coordination with national justice systems, (ii) drawing on reparations rules from national

torts systems, and (iii) assessing the value of the *lex loci damni* principle for Art. 75 proceedings.

In Section 5, we undertake a synthesis of our analysis and place the three alternatives in the context of the ICC's current work. We assess their potential value in supplementing or replacing the Court's practice to date and reflect on the desirability of the ICC having access to a more comprehensive analysis of these alternative routes forward for the Art. 75 principles of reparations. We reach some tentative recommendations and propose further avenues for expert research and discussion.

2 The Foundation of the Art. 75 Requirement to 'Establish' Principles for Reparations

The foundations of the ICC system of reparations can be found in Art. 75 of the Rome Statute, which provides in Subsection (1):

> [T]he 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.[5]

The provisions of Art. 75 thus impose an unavoidable obligation on ICC chambers to 'establish principles' and, when making reparations decisions, to 'state the principles on which it is acting'. Furthermore, these principles must, *inter alia*, provide a foundation for the judicial determination of restitution, compensation and rehabilitation, in other words, the legal basis on which the Court determines the scope and extent of any damage, loss and injury to, or in respect of, victims.

Like many areas of the Rome Statute, Art. 75 offers an unelaborated legal foundation that must be developed through the Court's practice. Unlike some other areas of 'constructive ambiguity' in the Rome Statute,[6] however, the

5 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, at Art. 75 ('Rome Statute') (emphasis added).

6 C. van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of the ICC Trial Judge' (2011) 44 (1) Case Western Reserve Journal of International Law 475, at 486.

development of reparations practice based on Art. 75 does not leave such great latitude to judicial imagination. It is arguably an area of law in which there are established legal principles at the international and domestic level, including from torts law, that the Court is mandated to take into consideration under Art. 21.

2.1 *Reading Art. 75 in Light of Art. 21*

We start with the first issue of legal interpretation and construction: the sources of law that must be used to interpret Art. 75, rather than jumping straight to the substantive question of what the 'established principles' under Art. 75 should be. The hierarchy of sources of law that apply in ICC proceedings is set out in Art. 21 (1) of the Rome Statute as follows:

> 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 recognized norms and standards.[7]

Which sources of law could be relevant to the judicial 'working out' of established principles of reparations under Art. 75? The requirements of Art. 21 (1) leave limited scope for judicial creativity, due to their mandate that, when faced with a legal question that is not determined by the Court's legal framework under Art. 21 (1) (a), such as the 'established principles' referred to in Art. 75, the judges must look to Subsection (b) and then (c).[8] Rather than inventing an entirely *sui generis* ICC system for reparations, the Court's judiciary must develop principles of reparations with reference to existing bodies of law that are external to the ICC.

7 Rome Statute, at Art. 21.

8 G. Bitti, 'Art. 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009), at 281–304.

In accordance with Subsection (b), there is no multilateral treaty dedicated exclusively to reparations law. Human rights treaties such as the UN Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), American Convention on Human Rights and the African Charter on Human and Peoples' Rights provide the general procedural right to a remedy for violations of the substantive rights provided therein,[9] and in some specific cases imposes a duty to provide reparations.[10]

In light of the lack of treaty law on reparations, an ICC Chamber conducting an analysis under Subsection (b) would then turn to a determination of whether there are relevant principles and rules of customary international law on reparations, most likely finding that the customary status of reparations principles at the international level is a matter of hot debate. Important, non-binding, soft law instruments on reparations exist at the international level, principally, the United Nation's 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

9 See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, at Art. 2 (3) (a); COE 'Convention for the Protection of Human Rights and Fundamental Freedoms' (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights), at Art. 13; American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José), at Art. 25 (2) (a); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter). See also UNGA Res 217 A (III) 'Universal Declaration of Human Rights' (10 December 1948), at Art. 8; International Convention on the Elimination of all Forms of Racial Discrimination (opened for signature 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, at Art. 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112, at Art. 14; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, at Art. 39; Hague Convention respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 277, at Art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, at Art. 91.

10 See COE 'Convention for the Protection of Human Rights and Fundamental Freedoms', at Art. 41 on the ECtHR's power to award 'just satisfaction' where this has not been awarded by the Member State; and International Convention on the Elimination of all Forms of Racial Discrimination, at Art. 6, which provides a right to seek 'just and adequate reparation or satisfaction for any damage suffered as a result of [...] discrimination'.

Humanitarian Law of 2005[11] (also known as the Van Boven/Bassiouni Principles).[12]

We note here the requirement for consistency with human rights laws under Art. 21 (3), although in the present context we see it as less relevant than the potential importance of 'general principles of law' drawn from sources of domestic law.

2.2 *The Legal Value of the Van Boven/Bassiouni Principles under Art. 21*

Art. 21 must be understood as the cornerstone of the Rome Statute when it is applied in practice. There is no judicial discretion to apply the ICC's legal rules in any way other than set out in Art. 21 – and it is therefore appropriate to rely on Art. 21 as the appropriate avenue for interpreting Art. 75, judging the court against this standard, rather than analysing the jurisprudence in isolation without such a standard in mind. It is fair to say that the validity and value of all judicial utterances at the ICC can only be understood in light of this provision. As discussed in greater detail below, the ICC has relied on the Van Boven/Bassiouni Principles extensively (or excessively) in its nascent case law, as well as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985.[13] But, it must be recognized that these are neither binding treaty sources, nor do they necessarily reflect international custom in relation to reparations. Indeed, the Van Boven/Bassiouni Principles, adopted as advisory UN recommendations, state explicitly that the basic principles and guidelines 'do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations'.[14]

Even for those provisions of the Van Boven/Bassiouni Principles that use the term 'shall' in relation to States' obligations, it is highly questionable whether

11 UNGA Res 60/147 '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' (16 December 2005). For an appraisal of the limitations of the Van Boven/Bassiouni Principles and their compromised nature, see M. Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 (4) Netherlands Quarterly of Human Rights, at 641–668.

12 Named after special rapporteurs Theo van Boven and Cherif M. Bassiouni who were appointed by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

13 UNGA Res 40/34 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (29 November 1985).

14 UNGA Res 60/147 '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' (16 December 2005) Preamble, at para. 7.

they reflect binding international law obligations on States.[15] Moreover, as Zwanenburg has argued, State practice does not support the proposition that there is an 'individual' right under international customary law to claim a remedy for violations of human rights.[16] In Van Boven's reports preceding the UN General Assembly's adoption of the final text in 2005, there is analysis and discussion of the State practice evidence to support a duty under international customary law for a State to which a violation of human rights can be attributed to make reparation to an individual.[17] An assessment of this State practice would be beneficial for the ICC in its interpretation of Art. 75 in accordance with Art. 21, possibly bolstering the Court's reliance on the Van Boven/Bassiouni Principles in some respects, but also limiting the Court from blindly following the content of the Principles without recourse to the proposed sources.

Although the Rome Statute, a multilateral treaty with significant international support, arguably reflects an increasing focus on the position of victims under international law, the ICC, often considered as a court of delegated jurisdiction, must take care when deploying UN soft law in the context of 'establishing principles' pursuant to Art. 75. At the very least, a judge who takes seriously the principle of legality would need to delve into some of the arguments of legal construction that need to be addressed when relying on the Van Boven/Bassiouni Principles as reflective of customary international law.

2.3 *Subsidiary Sources under Art. 21*

The Court would also need to examine the jurisprudence of international courts and tribunals to the extent that they have recognized reparations principles as reflective of customary international law. However, unlike other substantive and procedural areas of international criminal law, the ICTY and ICTR jurisprudence on reparations is lacking.[18] In Cambodia, the Extraordinary Chambers in the Courts of Cambodia's (ECCC) distinctive system for reparations derives from a Cambodian law system for (non-monetary) reparations to civil parties (who are, unlike ICC victims, legal parties to the proceedings).

15 Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal', at 653.

16 Ibid., at 655.

17 UNGA 'Report of the consultative meeting on the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (27 December 2002) UN Doc. E/CN.4/2003/63, at 6; UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Study of the Special Rapporteur T van Boven concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' (2 July 1993) UN Doc. E/CN.4/Sub.2/1993/8, at 56–58.

18 As discussed below, there is some relevant discussion in the *ad hoc* case law on national coordination issues.

The ECCC's system of symbolic reparations for victims of the Khmer Rouge in Cambodia has developed along markedly different lines to the ICC system, but nonetheless, the ICC could learn valuable lessons from expert comparison with the ECCC's law and practice.[19] Indeed, the ECCC is an unusual example of a hybrid internationalized tribunal awarding reparations in the context of an established domestic civil law system.

More recently, the operation of the Kosovo Specialist Chambers (KSC) is likely to provide an additional source of cross-pollination for ICC case law on reparations.[20] In its decision of 4 February 2022 in the case of *The Prosecutor v Salih Mustafa*, Trial Panel I of the KSC decided that the national courts of Kosovo did not provide a 'realistic avenue' for the victims of the crimes charged in the case to claim reparations. In case of a conviction, Trial Panel I will not refer victims to civil litigation in Kosovo courts pursuant to Art. 22 (9) of the Law of the KSC and Rule 167 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ('RPE'), but issue a Reparation Order pursuant to Arts 22 (8) and 44 (6) of the Law.[21] No doubt the KSC will contribute judicial opinion, which at the least will offer a fertile source of inspiration for ICC chambers.

Given the limited extent of binding international law on reparations, we should expect the ICC judges, in moving down the hierarchy of sources in Art. 21 (1), to next look to Subsection (c) on general principles of law. These must be 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.[22] Importantly, there is a wealth of long-established rules and precedents from national civil torts liability from which the ICC could take inspiration.[23] Expert analysis of such national laws from a diverse range of legal systems around the world would enrich the ICC's reparations jurisprudence.

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19 A. Balta, M. Bax and R. Letschert, 'Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia' (2019) 45(1) International Journal of Comparative and Applied Criminal Justice, at 1, 15, 18, 30.

20 See Republic of Kosovo Law on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015) Law No.05/L-053, at Arts 22 and 44.

21 *The Prosecutor v Salih Mustafa* (*Trial Panel I, Public Redacted Version of Decision on the Application of Art. 22 (9) of the Law, Setting Further Procedural Steps in the Case, and Requesting Information*) KSC-BC-2020-05 (4 February 2022).

22 Rome Statute, at Art. 21 (1) I.

23 See i.e., A. Beever, *A Theory of Tort Liability* (Hart Publishing 2016).

The ICC could also conduct a rigorous analysis of the relevant jurisprudence of regional human rights courts, notably the Inter-American Court of Human Rights (IACtHR) and the European Courts of Human Rights (ECtHR).[24] Again, it should be noted that the case law of these courts would not necessarily rise to the level of reflecting international custom, and is often issue-specific (e.g., the IACtHR's reparations case law is often focused on the particular question of remedies for enforced disappearance). Moreover, as will be further explored below, such case law may assist in determining the existence of a right to reparation, but is not very helpful as to how this right should be implemented.

Similarly, the Court could look to the legal principles that have been applied in international mass claims processes such as those arising from the Iranian Revolution, Iraq's invasion of Kuwait, the Holocaust, and conflicts in the Former Yugoslavia, and the conflict between Eritrea and Ethiopia.[25] Taking a broad-minded legal analysis of relevant principles, there is a wealth of judicial and non-judicial development of principles of reparations in transitional justice programmes and truth and reconciliation commissions at the national level that could, at the least, provide inspiration for the ICC judges, or even contribute to proving the existence of a general principle of law. To pick just two prominent examples from many: in Canada, the Royal Commission on Aboriginal Peoples led in 2006 to the Canadian government instituting a US$ two billion reparations scheme for affected indigenous communities,[26] and in Morocco in 1999, King Mohammed VI created the Independent Arbitration Commission that subsequently awarded over US$ 100 million in reparations to victims of forced disappearances and arbitrary detention during the 'years of lead' from the 1960s to 1990s.[27]

We can see then that Art. 75 imposes a set of foundational principles of reparations that can only be based on an obligation for ICC-convicted persons to pay reparations founded on a system civil torts liability, directly under international law. This raises numerous complex questions of torts law. One can

24 *The Prosecutor v Thomas Lubanga Dyilo* (*Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with Amended Order for Reparations* (*Annex A*) *and Public Annexes 1 and 2*) ICC-01/04-01/06-3129 (3 March 2015), at paras 127–128.

25 H.M. Holtzmann and E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives* (OUP 2007).

26 M.J. Tait and K.L. Ladner, 'Economic Development through Treaty Reparations in New Zealand and Canada' (2018) 33 (1) Canadian Journal of Law and Society/La Revue Canadienne Droit et Société, at 61–83.

27 L. Wilcox, 'Reshaping Civil Society through a Truth Commission: Human Rights in Morocco's Process of Political Reform' (2009) 3(1) International Journal of Transitional Justice, at 49–68.

question whether criminal lawyers and international lawyers who currently occupy the judicial seats at the ICC, are sufficiently equipped for the task of giving hands and feet to establish and develop a system of international torts liability for international crimes. If we look to the drafting history of the ICC, we will see that the rushed pre-Rome-Statute negotiations did not leave Art. 75 to be developed by sole reference to soft law, but rather the Rome Statute drafters did not have sufficient time to conduct the rigorous analysis of other international instruments and national torts law that would have been necessary to fix principles into the text of Art. 75, and so expected the judges to undertake this task in their subsequent jurisprudence.

2.4 *Sources of Law in the Rome Statute Negotiations*

The negotiations that led to the Rome Conference show that the provisions on reparations were a result of compromises between different visions of the system for ensuring victims' justice at the ICC.[28] Significantly, there is little evidence in the *travaux* that the drafters of Art. 75 had in mind a *sui generis* system of reparations in international criminal law detached from existing national laws relating to civil claims. As McCarthy puts it, there was no overarching 'grand design' underlying Art. 75, but rather its text emerged from rather hurried last-minute compromises that did not leave time or opportunity to analyse the existing international law or general principles of law on reparations.[29] This is confirmed by the writings of delegates who were involved in the discussions at Rome.[30]

For context, it is important to note that at the time of the negotiations that led up to the Rome Statute, there was limited customary international criminal law on reparations, bearing in mind the absence of reparations in the practice of the *ad hoc* tribunals. The ICTY and ICTR both included provisions on the restitution of property in, respectively, Art. 24 (3) and Art. 23 (3), but these restitution provisions were not implemented in the ICTY and ICTR practice and the tribunals' Statutes did not provide for broader possible principles on reparations for victims.[31] This meant that in the ICC negotiations, there was a

28 C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (CUP 2012), at 36.

29 Ibid.

30 C. Muttukumaru, 'Reparations to Victims' in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer Law International 1999).

31 UNSC Res 827 (1993) 'Statute of the International Criminal Tribunal for the Former Yugoslavia' (25 May 1993), at Art. 24 (3); UNSC Res 955 (1994) 'Statute of the International Tribunal for Rwanda' (8 November 1994), at Art. 23 (2).

lack of international criminal tribunal practice on reparations law to drawn on. Accordingly, this distinguished reparations law from other areas of the Rome Statute for which the negotiations, whether explicitly acknowledged or not, lent heavily on 'lessons learned' from the ICTY and ICTR. As such, this was an area of the Rome Statute where the contours of the law would be left to subsequent judicial construction through case law.

At the same time, and in a sense filling the lacunae created by the lack of established principles at the international criminal tribunals, the Rome Statute negotiations were guided by the concurrent evolutionary growth in international human rights legal protections (primarily in non-binding soft law instruments). International human rights law was developing to provide for reparations to victims of mass atrocities at the same time as the ICC was becoming a reality. In 1989, the then UN Commission on Human Rights had appointed Theo van Boven (later a delegate in ICC negotiations) as Special Rapporteur to carry out a preparatory study on the right to reparations for victims of gross violations of human rights.[32] The final report published in 1993 was a draft of the 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.[33] The timing is significant, since the UN continued to develop this document (concurrent with the ICC negotiations), adopting it only in 2005.[34] The development of the human rights approach to reparations within the UN at this time may have eclipsed the potential role that civil torts law in national legal systems could have played in shaping the Rome Statute's substantive and procedural law on reparations.

National torts laws had little or no explicit impact on the Rome Conference discussions on reparations. Likely due to time constraints, or because the focus of negotiations was elsewhere, the *travaux* show that substantive torts law from national systems was not relied on as a legal source to shape Art. 75. Similarly, the drafters did not consider questions surrounding the availability and conduct of reparation proceedings at the national level in States Parties,

32 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Study of the Special Rapporteur T van Boven concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' (2 July 1993) UN Doc. E/CN.4/Sub.2/1993/8.

33 Ibid.

34 UNGA Res 60/147 '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' (16 December 2005).

including the questions of whether the torts law of the territorial State in which the crimes would be committed could be of relevance to the substantive and procedural rules on reparations to be applied in the case.

2.5 *Compromise Nature of Art. 75*

However, the omission from the Rome Statute of an explicit requirement to establish principles of reparation based on national torts systems should not detract from the compromise nature of Art. 75 – the negotiations should be read as showing a lack of time to carefully consider the relevance of national torts systems that was left for judges to develop subsequently, rather than a rejection of these legal sources.

A further influence on the drafting of the Rome Statute is that of the initial draft statute of the International Law Commission adopted in 1994 ('ILC draft statute'), which was the starting point for the ICC drafting history.[35] The ILC draft statute lacked provisions on victims' reparations.[36] Interestingly, the ILC records show concerns from some members over 'serious doubts about the wisdom of intermingling strictly criminal proceedings against individuals and civil claims for damages. An international court would find such a mixture difficult to handle'.[37] This now reads with prescience, given that the ICC case law suggests that the Court has largely 'dodged the issue' by considering reparations principles without referring to established substantive and procedural law on civil torts, thus avoiding the issue that ILC members warned would prove difficult.

3 The ICC's Case Law: Weakly Articulated Principles of Reparations with Questionable Adherence to Art. 21's Applicable Sources of Law

The ICC case law to date (analysed below) is notably lacking in reference to existing domestic torts law outside the ICC's 'legal ecosystem', and to the *travaux preparatoires* for the Rome Statute on reparations.

35 UN ILC 'Draft Statute for an International Criminal Court with Commentaries: text adopted by the Commission at its 46th Session' (1994) 2(2) Yearbook of the International Law Commission, at 26.

36 Ibid.

37 UN ILC 'Summary Records of the Meetings of the Forty-Fourth Session, 4 May-24 July 1992' (1992) 1 Yearbook of the International Law Commission, at 12.

3.1 *'Established Principles' in the Prosecutor v Thomas Lubanga*

It was in the *Lubanga* case that the ICC first wrestled with the Art. 75 requirement to establish principles for awarding reparations to, or in respect of victims, including restitution, compensation, and rehabilitation. On 7 August 2012, Trial Chamber I issued a decision on the principles and process to be applied for reparations to victims.[38]

The Appeals Chamber recognized in its judgment of 3 March 2015 that the ('shall') requirement in Art. 75 imposes a mandatory obligation on the Court to establish principles relating to reparations.[39] Furthermore, the Chamber defined the 'principles' that the Court was required to establish, in the following terms: 'principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers'.[40] This seems a rather elastic understanding of an 'established principle of law'. Firstly, it suggests that the Court can formulate/derive the principle from the facts of one specific case, rather than from the legal doctrines mandated by the sources of applicable law in Art. 21. Secondly, it allows for the 'principle' to be 'adjusted' (adapted/expanded/added to) on a case-by-case basis. The distinction between a legal principle that changes from case to case, and a legal principle the application of which is case-dependent, matters.

The *Lubanga* Appeals Chamber held that following consideration of the relevant provisions of the Court's legal texts, the Appeals Chamber holds that an order for reparations under Art. 75 of the Statute must contain, at a minimum, five essential elements,[41] listed here together with our summary of the Chambers' explication of each element (in bullet points):

1) It must be directed against the convicted person
   - Reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence[42]
2) It must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order

38 *The Prosecutor v Thomas Lubanga Dyilo* (*Decision Establishing the Principles and Procedures to be Applied to Reparations*) ICC-01/04-01/06-2904 (7 August 2012).

39 *The Prosecutor v Thomas Lubanga Dyilo* (*Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with Amended Order for Reparations* (*Annex A*) *and Public Annexes 1 and 2*), at para. 52.

40 Ibid., at para. 55.

41 Ibid., at para. 32.

42 Ibid., at para. 65.

- Indigence of the convicted person isn't a reason not to impose liability for any reparations awarded[43]
- Appeals Chamber finds that the Trial Chamber erred in assuming control of the Trust Fund's 'other resources' instead of imposing liability on Mr Lubanga.[44]
- In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Trust Fund may advance its 'other resources' pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund.[45]

3) It must specify, and provide reasons for, the type of reparations ordered (either collective, individual or both)[46]

4) It must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it
   - The Trial Chamber cannot delegate the assessment of harm to the Trust Fund[47]
   - Harm to direct victims includes: physical injury and trauma; psychological trauma and the development of psychological disorders, such as, inter alia, suicidal tendencies, depression, and dissociative behaviour; interruption and loss of schooling; separation from families; exposure to an environment of violence and fear; difficulties socializing within their families and communities; difficulties in controlling aggressive impulses; the non-development of 'civilian life skills' resulting in the victim being at a disadvantage, particularly as regards employment[48]
   - Harm to indirect victims includes: psychological suffering experienced as a result of the sudden loss of a family member; material deprivation that accompanies the loss of the family members' contributions; loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as

43 Ibid., at paras 102–105.
44 Ibid., at para. 116.
45 Ibid., at para. 5.
46 Ibid., at paras 130–168.
47 Ibid., at para. 184.
48 Ibid., at para. 191.

a result of a relevant crime; psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities[49]

5) It must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.[50]

3.2 Applicable Sources of Law in *Lubanga*

Much has been written about the quality of the judgment, its convoluted and opaque legal reasoning, and the principles and modalities for victim reparations that it established.[51] For our purposes, however, it is interesting to consider from a broader perspective the sources relied upon by the Appeals Chamber.

The Chamber briefly recalled the wording of Art. 21 in its discussion of the principles of Art. 75 (1) but its reliance on international law and general principles of law is not made explicit and so there is little rigour in the deployment of Art. 21.[52] As per the holding quoted above, the principles were explicitly based on 'consideration of the relevant provisions of the Court's legal texts'.[53] Outside of the legal texts of the ICC pursuant to Art. 21 (1) (a), the Appeals Chamber referred briefly in parts of its analysis[54] to the UN Basic Principles and Guidelines from 2005[55] and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985.[56] The Chamber drew to a limited extent from references to the reparation jurisprudence of the Inter-American and European Courts of Human Rights.[57] It was not clear how the

49 Ibid., at para. 191.

50 Ibid., at paras 205–228.

51 See i.e., C. Stahn, 'Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or "Juridified Victimhood" by Other Means?' (2015) 13(4) Journal of International Criminal Justice, at 801–813.

52 *The Prosecutor v Thomas Lubanga Dyilo,* (*Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with AMENDED Order for Reparations* (*Annex A*) *and Public Annexes 1 and 2*), at para. 46.

53 Ibid., at para. 32.

54 Ibid., at paras 66 and 100.

55 UNGA Res 60/147 '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' (16 December 2005).

56 UNGA Res 40/34 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (29 November 1985).

57 *The Prosecutor v Thomas Lubanga Dyilo* (*Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012*

limited references to human-rights based guidelines (non-binding subsidiary sources of international law) were used in the Chambers' reasoning, and one is left wondering how this is consistent with the architecture of Art. 21. At the very least, we can say that the *Lubanga* appeals bench would have benefitted greatly from a more rigorous assessment of international instruments related to reparations, as well as a comparative analysis of national torts law in both its procedural and substantive dimensions.

Issues of coordination with national justice systems were not explored extensively in *Lubanga* while the Court instructed the Trust Fund to make contact with the Government of the Democratic Republic of the Congo to explore how the Government might contribute to the reparations process, rather than exploring the possibilities of national coordination inherent in the ICC's legal framework.[58] The Court did not award reparations for the full range of victims that could arguably have been found to have suffered loss from the broader context of international crimes in which *Lubanga's* actions took place. This is especially so since in this sense the ICC's reparations were in that case highly selective, the Court not being in a position to consider reparations for all of the victims linked to the crimes in question, or more broadly all victims in the ICC situation of which the case forms just one part, or even more broadly, to victims suffering in the same conflict or period of atrocity that is not encompassed by the situation. The Court emphasized the collective approach to reparations, and on 6 April 2017, Trial Chamber II approved the programmatic framework for collective service-based reparations. Lastly, in *Lubanga*, the Court's attention can be said to have focused primarily on working out the modalities, rather than the more fundamental question as to what sources of reparations law were applicable.

The collective approach to reparations taken in *Lubanga* paved the way for the predominance of the collective approach drawing on the often-called 'victim-centred' human rights law (in fact a looser approach that often ends up being less 'victim-centred' than more rigorous civil torts laws) and paid scant attention to other international and national sources. Subsequent Chambers have followed the invitation of the *Lubanga* Appeals Chamber finding to develop the established principles on a 'case-by-case' basis. The *Lubanga* case affirmed the Court's leaning towards a collective approach to reparations. On

with AMENDED Order for Reparations (*Annex A*) *and Public Annexes 1 and 2*), at paras 127–128.

58 *The Prosecutor v Thomas Lubanga Dyilo* (*Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'*) ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017).

15 December 2017, Trial Chamber II set the amount of Thomas Lubanga's liability for collective reparations at US$ 10,000,000.[59]

On 18 July 2019, the Appeals Chamber issued its Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'.[60] The Chamber recognized that not all victims will be encompassed by the Court's reparations orders: 'it would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court'.[61]

On 4 March 2021, Trial Chamber II issued a public redacted version of its decision dated 14 December 2020 which approved the implementation of collective service-based reparations to victims in this case. The Chamber approved the programme proposed by the partner of the Trust Fund for Victims, selected by the latter to implement collective reparations in the form of the provision of services.

3.3 Continuing Principles in *Katanga* and *Al Madhi*

In the cases of *Katanga* and *Al Madhi,* the Court did not significantly develop the underlying Art. 75 principles as set out by the Appeals Chamber in *Lubanga*. On 24 March 2017, Trial Chamber II issued an Order awarding individual and collective reparations to the victims of crimes committed by Germain Katanga. The judges awarded 297 victims with a symbolic compensation of US$ 250 per victim as well as collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support. On 8 March 2018, the Appeals Chamber confirmed, for the most part, the Reparations Order in the case.[62]

In the *Al Mahdi* case, the Trial Chamber specifically addressed reparation principles concerning protected cultural property and heritage.[63] On 17 August 2017, Trial Chamber VIII issued a Reparations Order concluding that Mr Al Mahdi is liable for 2.7 million euros in expenses for individual and collective

59 Ibid.

60 *The Prosecutor v Thomas Lubanga Dyilo* (*Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'*) ICC-01/04-01/06-3466-Red (18 July 2019).

61 Ibid., at para. 89.

62 Ibid., at para. 89.

63 *Prosecutor v Ahmad Al Faqi Al Mahdi* (*Reparations Order*) ICC-01/12-01/15-236 (17 August 2017), at paras 51–108.

reparations for the community of Timbuktu for intentionally directing attacks against religious and historic buildings in that city.[64] On 8 March 2018, the Appeals Chamber confirmed, for the most extent, the Reparations Order in the case.[65]

The *Al Mahdi* Trial Chamber continued to reaffirm the prioritization of collective approaches to reparations. The Chamber found that the harm suffered was primarily collective and suffered by the entire community of Timbuktu.[66] Collective reparations were thus considered to be most appropriate. Individual reparations would concern only a limited number of victims:[67] for the economic loss of those whose livelihood exclusively depended upon the buildings,[68] and for the moral harm of those whose ancestors' burial sites were damaged in the attack (for their mental pain and anguish).[69]

Significantly, the *Al Madhi* Trial Chamber reaffirmed a centrality of human rights instruments as legal sources for the Court's reparations principles. The Chamber found that the reparations principles drawing on the UN Basic Principles which were established by the *Lubanga* Appeals Chamber are the adequate framework to address reparations of crimes against cultural heritage.[70]

3.4 *The Prosecutor v Bosco Ntaganda*

In *The Prosecutor v Bosco Ntaganda,* the Court's most recent important reparations jurisprudence, on 8 March 2021, Trial Chamber VI delivered its Order on Reparations to victims against Mr Ntaganda, to be made through the Trust Fund for Victims.[71] The Chamber set the total reparations award for which Mr Ntaganda is liable at US$ 30,000,000 (the highest monetary liability to date in an ICC case).[72]

The Chamber's development of the reparation principles was primarily in relation to their application to sexual and gender-based violence,[73] since,

64 Ibid., at para. 134.

65 *Prosecutor v Ahmad Al Faqi Al Mahdi* (*Judgment on the appeal of the victims against the 'Reparations Order'*) *ICC-01/12-01/15-259-Red2* (8 March 2018).

66 *Prosecutor v Ahmad Al Faqi Al Mahdi* (*Reparations order*), at para. 76.

67 Ibid., at paras 67, 82 and 140.

68 Ibid., at para. 81.

69 Ibid., at para. 90.

70 Ibid., at paras 25–26; the principles are set out at paras 27–38.

71 *The Prosecutor v Bosco Ntaganda* (*Reparations Order*) ICC-0/04-02/06-2659 (8 March 2021).

72 Ibid.

73 *The Prosecutor v Bosco Ntaganda* (*First Decision on Reparations Process*) ICC-01/04-02/06-2547 (26 June 2020), at para. 46.

in light of the crimes for which Mr Ntaganda was convicted, eligible victims include: direct and indirect victims of the attacks, of crimes against child soldiers, of rape and sexual slavery, and children born out of rape and sexual slavery.[74]

The predominance in the Court's jurisprudence of collective approaches to reparations continued in *Ntaganda*. The Trial Chamber awarded collective reparations with individualized components. The modalities of reparations may include measures of restitution, compensation, rehabilitation, and satisfaction, which may incorporate, when appropriate, a symbolic, preventative, or transformative value.[75]

The *Ntaganda* Trial Chamber's approach has been described as a 'marked step towards a victim-centred approach to reparations'[76] rather than a principled approach based on the principle of legality. The Chamber found that factors that should be taken into account in determining someone's monetary liability: the harm and the costs to repair it. Modes of liability, gravity of the crimes, or mitigating factors are irrelevant for the determination of the sum. By comparison, in *Lubanga*, reparations had to be 'proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case'.[77]

In general, *Ntaganda* confirmed that the ICC's reparation orders, loaded with references to being victim friendly and to not have the big numbers of reparation applications, can have significant consequences for not awarding damages. The shift towards forms of collective reparations could risk moving towards awards of 'murder by numbers'. While this may be understandable, one can raise questions as to the legal quality and solidity of such collective awards and the fairness towards the convicted person.

Thus, at the time of writing this is the current state-of-play in the ICC's reparations jurisprudence. There is an opportunity to revisit the ICC's approach in the pending reparations proceedings in *the Prosecutor v Dominic Ongwen.* In that case, on 6 May 2021, Trial Chamber IX issued an order for submissions on reparations.[78] The Chamber appeared unlikely to disagree with the *Lubanga*

74 *The Prosecutor v Bosco Ntaganda* (*Reparations Order*), at paras 108–123.

75 Ibid., at paras 191–208.

76 M. Lostal, 'The Ntaganda Reparations Order: A Marked Step towards a Victim-Centred Reparations Legal Framework at the ICC' (24 May 2021) EJIL:Talk!.

77 *The Prosecutor v Thomas Lubanga Dyilo,* (*Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with AMENDED Order for Reparations* (*Annex A*) *and Public Annexes 1 and 2*), at para. 21.

78 *The Prosecutor v Dominic Ongwen* (*Order for Submissions on Reparations Trial Chamber IX*) ICC-02/04-01/15-1820 (6 May 2021).

Appeals Chamber's principles, since the Chamber only requested submissions on the need for 'additional' principles on reparations 'apart from those already established by the consistent jurisprudence of the Court, as recently adapted and expanded in the case of The Prosecutor v Bosco Ntaganda'.[79] One can seriously question whether four cases (largely following the *Lubanga* approach) can be described as 'established by consistent jurisprudence.' A more long-term view of the ICC would consider this as an extremely limited handful of cases that are weakly grounded in Art. 21, should be contested by judges with different views of the law, and which provide only a mere starting point for the Court to deepen its legal principles for reparations in subsequent cases.[80]

3.5 *Existing Commentary on ICC Reparations Practice Has Often Underplayed the Sources Question*

We note that, like the ICC case law, the critical commentary on the Court's current approach to reparations has tended to focus on the substantive content of the 'established principles' pursuant to Art. 75, rather than the preceding question of whether the Court is looking at the right sources. Here, we take the example of the Independent Expert Report (IER) on the ICC of 30 September 2020, perhaps the most important, independent, and far-reaching critical appraisal of the Court's practice in recent years.

We note that the IER criticized the lack of clear principles of reparations in the ICC that permeates through the Court's work across different organs.[81] Although criticizing the problematic outcomes of the Court's unprincipled approach to reparations, and making practical and procedural recommendations, the IER did not address the more substantive questions surrounding applicable legal sources. In its Recommendation R342, the IER encouraged the Court to 'in the context of its judicial proceedings, and as a priority, further the development of consistent and coherent principles relating to reparations in accordance with Art. 75 (1) of the Rome Statute'. Likewise, in R343, the IER encourages the Presidency to 'incorporate in the Chambers Practice Manual standardized, streamlined and consistent procedures and best practices applicable in the reparations phase of proceedings'. Although the IER's findings on 'General (Judicial) Principles on Reparations' depict the Court's practice as

79 Ibid., at para. 5 (1) (a).

80 Rome Statute, at Art. 21 (2) provides that 'The Court "may" apply principles and rules of law as interpreted in its previous decisions' (emphasis added).

81 ICC 'Independent Expert Review of the International Criminal Court and the Rome Statute System' (30 September 2020), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 30 July 2022).

lacking firm principles,[82] the IER's mandate was not to identify the weaknesses in the judicial/legal methodology relied on by Chambers to establish such principles, or the legal sources on which such principles should be developed.

The IER found that reparations processes are laden with complexity and uncertainty, gravely impacting the victims' rights to meaningful participation and reparations.[83] The IER's focus in relation to reparations was on the outcomes for victims of the current law: 'Profound delays in the award and implementation of reparations where victims "wait a lifetime", damaging the credibility of the Court as a whole' as well as the various procedural limitations as to individual requests for reparations, and concerns over outreach, public information and interactions with victim communities.[84] The IER was concerned with the roll-out of reparations within the Court, the governance of the Trust Fund for Victims (TFV) and the institutional design and functioning, noting the absence of updated strategic plans for the Court and the TFV to provide inter-organ guidance on how the Court will approach reparations. The IER also made some novel findings and recommendations, such as the apparent proposal to establish a Specialized Reparations Chamber to which special judges would be appointed for a term, or the discussion by the IER of the proposal to promulgate an 'independent' legal instrument on principles of reparations.[85]

In considering the need for further expert consultation on establishing principles of substantive and procedural reparations law, it is important to note the limited extent of the IER's mandate in relation to doctrinal matters. Indeed, the IER's mandate was inductive from the outset: 'identify ways to strengthen the ICC and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning'[86] and make 'concrete, achievable and actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole'.[87] Further expert consultation could be directed at analysing the roots of reparations laws, including analysis of the drafting history of the ICC, the Preparatory Commissions, and the subsequent drafting of the ICC's Rules of Procedure and Evidence, from a deductive standpoint of legal scholarship.

82 Ibid., at para. 893.
83 Ibid., at para. 879.
84 Ibid., at paras 879, 886, 901 and R346.
85 Ibid., at para. 898.
86 ICC Resolution 'Review of the ICC and the Rome Statute System' (6 December 2019) ICC-ASP/18/Res.7.
87 Ibid., Annex I A at para. 1.

4 Alternatives to the Current Approach

Alternatives to the current ICC approach on victims' reparations have not yet been fully explored. We will offer some reflections on how the ICC could have improved its completion of the task assigned to it under Art. 75 (1). We find that there are at least three issues that should have been considered in the ICC's early case law, drawing heavily from the practice and experience in national justice systems with reparations to victims of crime. The following section looks at the potential merits and limitations of these alternatives, without purporting to carry out any comprehensive comparative study of national systems (which would nonetheless be essential for any coherent effort for the ICC reparations system to benefit from the experience of national systems of torts). These three alternative approaches could replace the current approach, significantly transform it or exist in parallel to the present system. After an overview of these three possible alternatives, we will move to the central issue of this paper, whether any of them would be preferable to the law and practice as set out above.

4.1 *Increased Role for and Coordination with National Justice Systems*

The relationship between the Court's investigations and prosecutions to national criminal justice systems has, rightfully so, received an enormous amount of attention. It has culminated in a system of complementarity. In the pre-judgment phase this means that priority is to be given to national investigations and prosecutions; post-judgment, *the-ne-bis-in-idem*-effect of final conviction or acquittals for the same facts needs to be mutually respected (except for judgments that are the result of non-genuine national proceedings). This has all been regulated in Arts 17–20 of the Statute; a wealth of case law and scholarly literature is available on the principle of complementarity, in relation to the Court's 'criminal proceedings'.[88]

88 For example, see S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013); C. Stahn and M.M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2014); J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Nijhoff 2008); W.W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 Harvard International Law Journal. A number of excellent amicus curiae develop these academic analyses, such as M. Lostal, 'Expert Report – Reparations Phase The Prosecutor v Ahmad Al Faqi Al Mahdi' ICC-01/12-01/15-214-AnxII-Red2 (3 May 2017).

One notices that there has been very limited attention in the law of the ICC as to how 'reparation proceedings' should relate to national criminal justice systems, including the legal issues surrounding the enforcement of, and recognition of, ICC judgments at the national level. This appears nevertheless necessary from the perspective of protecting the rights and interests of both victims and convicted persons (defendants in reparation proceedings). From the perspective of the position of the convicted person, the question arises as to what extent an ICC reparations order protects him or her against potential national reparation proceedings in relation to the same set of facts. While a *ne bis in idem* protection may in torts law not have the same reach and importance as in criminal law,[89] the matter of *res judicata* would have justified some sort of regulation in the legal system of the Court, if not in the ICC Statute, then at least in referring to the subsidiary sources of the law of the ICC.

In addition, the question arises as to the effects of the current system of reparations at the ICC on the rights and interests of victims. In particular, there is the likely scenario in which a victim seeking reparations has to rely on national justice systems because his or her reparations claim was not covered by the ICC reparation proceedings. One can imagine here several situations in which the victim may wish to pursue reparations outside of, or in addition to, the ICC proceedings, such as where the victim failed to submit a claim (in time), where the basis for the victim's claim for damage only materialized at a later stage (e.g., where the harm occurred after the crime concluded), where the ICC's reparation proceedings have finished and the victim considers that her or his individual damage has not been adequately repaired by an ICC Reparation Order, or where the national reparation proceedings offer a distinct advantages such as better access to the convicted person's assets or better enforcement prospects at the domestic level for a national reparation order.

One notices that, in contrast to the ICC, in the context of the ICTY and the ICTR it was envisaged from the very beginning that national justice systems were to play an essential role in the matter of reparations to victims, as is evidenced by the adoption of Rule 106 at the *ad hoc* tribunals. This Rule has remained unchanged over the ICTY's and ICTR's lifespan and reads, like Rule 130 of the International Residual Mechanism for Criminal Tribunals (IRMCT) Rules (the 'successor' of the ICTY and ICTR), as follows:

89 For the civil law origin of the *ne bis in idem* principle in Roman Law, see B. van Bockel, *The Ne Bis in Idem Principle in EU Law* (Kluwer Law International 2010), at 30–31.

Compensation to Victims

(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 paragraph (B) the judgement of the Mechanism shall be final and binding as to the criminal responsibility of the convicted person for such injury.

The essence of this Rule is that it explicitly envisages national reparation proceedings and that, very importantly, national courts are bound by the findings of criminal responsibility in the ICTY/ICTR/IRMCT-judgment. Such obligatory recognition will assist the victim greatly in national torts proceedings, as it means that two common essential elements of national tort claims have been met: the commission of an unlawful act and fault on the part of the tortfeasor. The suffering of harm as a direct result of the acts of the defendant can also often be inferred from the criminal judgment; at least, it will constitute important and authoritative evidence of such direct damage. A similar rule to Rule 106 (130) of the ICTY/ICTR (IRMCT) can be found in the Rules of Procedure and Evidence before the Kosovo Specialist Chambers, which shows that a more recently created international(ized) court acknowledges the importance of national coordination and left open the door for national civil litigation to 'piggyback' off the final and binding findings of the KSC on the criminal responsibility of the accused.[90]

Although we do not know of national cases in which the combined effect of an ICTY/ICTR/IRMCT judgment and Rule 106 (130 of the IRMCT, 167 of the

90 See Rules of Procedure and Evidence before the Kosovo Specialist Chambers (adopted on 17 March 2017, revised on 29 May 2017, entered into force on 5 July 2017) KSC-BD-03/Rev2/2020/1, at Rule 167:

Referral to Civil Litigation

(1) Where a Panel has included in its Judgement the decision on victims pursuant to Art. 22 (9) and (10) of the Law, and upon application of Victims' Counsel pursuant to Art. 22 (10) of the Law, the Registrar may transmit a certified copy of this decision as well as of the Judgement to the competent authorities of the relevant Third State or directly to the victims.

(2) For the purposes of a claim for compensation made before domestic courts, the Judgement transmitted under paragraph (1) shall be final and binding as to the criminal responsibility of the convicted person for such harm suffered.

RPE) has resulted in awarding damages to victims in national justice systems,[91] and this has not yet had opportunity to occur at the KSC, the mechanism provided for in the rules of these tribunals clearly offers potential and is an appropriate means to connect the system of international criminal justice to national reparation proceedings.

With the ICTY and ICTR precedent of Rule 106 existing as early as 1994, and its recurrence in the legal framework of the relative newcomer to international justice – the KSC – the question arises as to why this approach has not been followed in the context of the ICC. One obvious explanation could be that, contrary to the ICTY, ICTR and IRMCT, the ICC provides for reparation proceedings itself. Hence, it could be felt that there was no need to improve the chances of reparation proceedings elsewhere, i.e. at the national level.[92] But it was obvious that the ICC would never be able to process all claims for reparation fully and in a satisfactory manner.[93] Hence, there will always remain a need for the availability of adequate national reparation proceedings, for

91 We know of one situation in which victims have tried to obtain legal aid with a view to initiate tort proceedings against Ratko Mladic in the Netherlands. See, for example, Administrative Jurisdiction Division of the Council of State (ABRvS – the Netherlands) (23 July 2014) ECLI:NL:RVS:2014:2723, where a victim sought legal aid for a civil reparations claim against Ratko Mladic for the damages suffered as a result of his commission of genocide (for which he had been convicted by the ICTY). The Court ruled the rejection of legal aid had not been unlawful, because there was no connection between the Netherlands and the victim, the unlawful act, the damages, or Mladic. The Court considered the fact that the ICTY was located in the Netherlands not sufficient and noted that imposing the costs of civil proceedings of thousands of victims of ICTY detainees on the Netherlands would 'go too far'.

92 In this respect it is noteworthy, the introduction of the ICC *sui generis* reparations system and the move away from national proceedings was seen by some as a step in the right direction. They argue that the current ICC system does not leave victims 'at the mercy of their domestic legal system, [rendering] them dependent on whether the national legislation foresees the possibility of compensation claims', See C. Evans, *The Right to Reparations in International Criminal Law* (CUP 2012), at 92; see also, F. McKay, 'Are Reparations Appropriately Addressed in the ICC Statute?' in D. Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000), at 174. However, in our view these authors wrongly perceive the regulation of coordination with national justice systems in respect of reparation proceedings as potentially undermining an effective reparation system within the ICC. The point is, we think, to have reparation possibilities at both the national level and at the ICC. The legal framework of the KSC shows that this is very well possible.

93 It suffices to consider that at the time of a reparation judgment, not every victim may have filed an application for reparation and, very importantly, the type and amount of damage may change over the years (e.g., effects of the crime which are felt only considerably later, such as PTSD being the result of trauma).

example in cases after the ICC reparation proceedings have ended.[94] The law of the ICC could have encouraged the availability of national reparation proceedings, for example by obliging States Parties to fully recognize the authority of ICC convictions as a direct basis for national reparation proceedings.

4.2 *Drawing on Reparation Rules from National Torts Systems*

As follows from our analysis in Sections 2 and 3, it is far from clear that the way reparation principles have been established by the ICC in its case law to date is what the drafters had in mind. As per our analysis in those sections, the exercise of establishing reparations-principles should have been conducted, by applying the law-finding methodology provided for Art. 21. This would call upon the Court to conduct a comprehensive assessment of the relevant substantive and procedural laws relating to reparations from numerous jurisdictions in order to represent the major legal systems of the world. While such an assessment is well beyond the scope of the current analysis, we discuss here the need for such an analysis, its potential benefits and limitations, and some of the possible legal principles that could emerge therefrom, providing a few examples from the Netherlands national torts system.

The strong reliance of ICC Chambers on international (soft) law instruments, which is the prevailing practice until now, has a number of shortcomings. First, international law on reparations sets out a very basic and rudimentary framework on victims' rights and State obligations, which does not properly lend itself to direct application in the framework of concrete reparation proceedings. While these principles are well-suited to the UN's initiatives to foster and develop States' respect for victim rights using supranational coordination mechanisms, they are less appropriate, or perhaps inappropriate, to providing a substantive and procedural blueprint for reparations to be determined in a judicial forum. In other words, the principles flowing from the international law framework need to be supplemented by additional reparation principles directly related to 'proceedings'. A second shortcoming relates to the previous point and is that the international law framework on reparations is largely silent on the operation of reparation principles in the context of a 'criminal trial'. As it is generally left to States to choose means and methods of implementing international reparation obligations, they have considerable leeway in how to organize this domestically. This means that reparation does not have to be part of criminal proceedings at all, and if it is part of criminal

94 The law of the ICC does not allow for multiple reparation proceedings, and this would, in light of considerations of judicial efficiency, also be unwise to provide for.

proceedings, it is possible to build in limitations and restrictions, to ensure, for example, that the reparation component of the criminal proceedings does not disproportionally burden the criminal trial.

In a number of respects, this search could be assisted by reference to national legal systems of the world, and attempts to distil common principles of relevance. Here, we look primarily to the Netherlands, as only one of many relevant jurisdictions, which may nonetheless be a useful source of inspiration, as a starting point for comparative analysis across other jurisdictions. One would have expected the ICC's search for principles of reparation would not have stopped at international instruments related to reparations, but would include principles of reparation proceedings 'being part of criminal proceedings', as it exists in many national criminal justice systems.[95] This is where a great deal of directly relevant experience and practice can be found, especially over the last few decades when the position of victims in national criminal trials has significantly improved in many countries.[96] This begs the question: why has a more rigorous analysis of domestic law and practice in respect of reparation proceedings as part of a criminal trial not taken place?

It can be argued that in the context of a concrete reparation case, this broader analysis could grow too comprehensive and too time-consuming for a Trial Chamber to do by itself. However, there is no reason why the task of establishing principles of reparations should have only been taken up in the context of an ongoing case. For example, a group of experts could have been set up early in the lifespan of the Court, in anticipation of a future reparation procedure. Such a group could have done much more than a Trial Chamber confronted with reparation proceedings and, very importantly, would also methodologically have filled a number of essential gaps which still exist in the Court's reparation laws and practice.

Indeed, the possibility of establishing a group of experts is encouraged by the Court's legal texts. To the extent that the ICC has requested expert assistance on reparations, this has tended to focus on practical, institutional, and

95 Dutch Code of Criminal Procedure (entered into force 1 January 1926), at Art. 51f (1); Swiss Criminal Procedure Code (adopted 5 October 2007, entered into force 1 January 2011) AS 2010 1881, at Art. 122 (1); see also Council Directive 2004/80/EC of 29 April 2004 relating to Compensation to Crime Victims [2004] OJ L 261, at Art 1; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA that Stimulates Victims Reparations in the Context of Criminal Proceedings [2012] OJ L 315.

96 R. Holder, T. Kirchengast and P. Cassell, 'Transforming Crime Victims' Rights: From Myth to Reality' (2021) 45(1) International Journal of Comparative and Applied Criminal Justice.

factual questions concerning the harm to victims and the scope of reparations to be awarded, rather than directed at the doctrinal question as to applicable sources.[97] This expertise has been sought pursuant to Rule 97 (2) of the RPE, which grants, *inter alia*, the 'Court' a discretion to appoint experts to assist it in determining the scope and extent of damage, loss or injury to, or in respect of victims, or to suggest various options concerning the appropriate types and modalities of reparations.[98] The Registry has played an important role in shaping the nature of the issues on which Chambers' has appointed experts, through the Registry's power to make recommendations pursuant to Regulation 110 (2) of the Regulations of the Registry.[99] The IER, in discussing the need for reparations expertise at the Court, noted 'the types and modalities of reparations are context and case specific', and the IER's findings and recommendations did not explore the possibility of cross-pollination from legal sources in national torts law.[100] While the Court's appointment of experts to date has been essential to improving and developing its reparations mandate, the focus on practical, institutional and factual questions has obscured the need for greater attention to the doctrinal question of sources.

Rule 97 (2) could be a basis for the Court to seek advice and proposals from legal scholars suited to assisting the Court in deepening the legal foundations of principles of both substantive and procedural reparations law. In this regard,

97 As one example, taken into account in the 2021 *Ntaganda* reparations order, see 'Experts Report on Reparation: Presented to Trial Chamber VI' (29 October 2020) ICC-01/04-02/06-2623-Anx1-Red2, available at https://www.icc-cpi.int/RelatedRecords/CR2020_05969.PDF (accessed 30 July 2022).

98 International Criminal Court Assembly of States Parties 'Rules of Procedure and Evidence' (3–10 September 2002) Official Records ICC-ASP/1/3, at Rule 97 (2), at provides in full: '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 of victims and to suggest various options concerning the appropriate types and modalities of reparations. 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'.

99 ICC 'Regulations of the Registry' (6 March 2003) ICC-BD/03-01-06-Rev.1, at Regulation 110 (2), provides in full: 'For the purpose of rule 97, 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 accordance with rule 97, sub-rule 2'.

100 ICC 'Independent Expert Review of the International Criminal Court and the Rome Statute System', at para. 918.

the text on 'options concerning the appropriate types and modalities of reparations' would encompass the preceding legal question about which laws under Art. 21 provide the legal basis for those types and modalities of reparations. It is also relevant that Rule 97 (2) is not tied to a particular stage of proceedings (it appears in the 'general' Chapter of the RPE, rather than the specific Chapters on investigations, trials, sentencing, and appeals).[101] Notwithstanding the prevailing Chambers practice in ICC cases to date, experts could be appointed by the Court at any time. It exceeds by far the scope of the present paper to even start doing here this thorough comparative exercise among various national reparations systems, in which, as we described, the assistance by experts could play an important role. We will confine ourselves to a few reflections only on this matter. We believe that as far as reparation principles go, in the context of criminal proceedings three questions are essential:

– What is the basic substantive law governing reparation proceedings?
– What is the basic procedural law governing reparation proceedings?
– How should the procedural and substantive law and principles be applied in the context of a criminal trial?

In respect of substantive law, it is very clear that in many national justice systems, a claim for reparation of damages is a civil claim governed by substantial civil law, notably the laws of torts, or: a non-contractual civil obligation, as a sub-branch of civil law.[102] The fact that a reparation claim is introduced and handled in the context of criminal proceedings does not make this any different.[103]

101 Rule 97(2) is in Chapter 4 of ICC 'Regulations of the Registry': 'Provisions relating to various stages of the proceedings'. Investigations, trials, sentencing, and appeals are covered in Chapters 5, 6, 7 and 8, respectively.

102 There are different bases for a civil claim, one of which is tort. Other bases include breach of contract, and breach of trust (in common law jurisdictions) or *negotiorum gestio* (in civil law jurisdictions). These bases can be categorized into breaches of contractual obligations and of non-contractual obligations. A tort is a breach of a non-contractual obligation.

103 In the context of the Netherlands, see J. Candido et al. (eds), *Slachtoffer en de rechtspraak – Handleiding voor de strafrechtspraktijk 2nd Edition* (de Rechtspraak 2017): 'In the event that the injured party is admissible in the claim submitted in the context of the criminal proceedings, this claim must be assessed substantively. That assessment must answer the question of whether the suspect is liable under civil law for the damage caused to the injured party by the criminal offence. The claim of the injured party is based on this criminal offence, which must be classified as an unlawful act under civil law. Whether the injured party is entitled to compensation under civil law is a question that is therefore answered on the basis of the doctrine of torts' (translation by the authors).

The application of substantive torts law has a number of consequences. The most important is that the elements of a tort-based claim must all be fulfilled before reparation can be ordered.[104] As was already said earlier, the first two elements, the existence of an unlawful act and fault on the part of the defendant, have already been established as a result of the criminal conviction. Therefore, the reparation proceedings in the context of a criminal trial tend to focus on matters such as the existence, type and amount of damages, whether the damage is the direct result of the crimes of which the accused has been convicted, and whether the relativity requirement has been met. These issues can be quite complex and the principle of legality dictates the need for solid applicable substantive torts law to deal with this.

The substantive relevant aspects of torts law are, however, not confined to meeting all the elements of a reparation obligation under torts law. Other important matters of substantive law can also arise. One of them is the issue of Statutes of limitations. Art. 29 of the Rome Statute rules out the applicability of Statutes of limitations as far as criminal liability goes for the crimes within the jurisdiction of the ICC.[105] But this does not mean that civil claims based on such crimes are also subjected to such exclusion on the grounds of Statutes of limitations.[106] Indeed, Statutes of limitations tend to be shorter and generally more favourable to defendants in civil cases than in criminal cases.[107] At the

104 For tort liability, five requirements must be met.
1) There must be an unlawful act.
2) This unlawful act can be attributed to the perpetrator (suspect).
3) There must be (some) damage or still to be suffered damage.
4) Between the damage and the (unlawful) act, a causal relationship exists.
5) There is no obligation to pay compensation when the violated standard does not serve to protect against the damage suffered by the injured party (relativity requirement).

105 A matter outside the scope of this paper is whether it is reasonable to also apply this to the Art. 70-crimes.

106 See, again, in the Dutch context, Candido et al. (eds), *Slachtoffer en de rechtspraak – Handleiding voor de strafrechtspraktijk 2nd Edition*, at 176–177. 'Criminal law and civil law have their own rules with regard to the prescription of the right to prosecute (Art. 70 et seq. Dutch Civil Code) and the right to compensation (Art. 3:310 (1) of the Dutch Civil Code). The criminal court must apply the rules of prescription proprio motu. This is different in civil law; there, the court is prohibited from applying proprio motu prescription and the defending party must explicitly invoke it' (translation by the authors).

107 However, in the Netherlands the legislator has equalized the time period of statutes of limitations for criminal prosecutions and civil claims based on a criminal conviction. See Dutch Civil Code (entered into force 1 October 1838), at Art 3:310(4): 'If the event that caused the damage constitutes a criminal offence to which the Dutch Penal Code is applicable, the right of action to claim damages against the person who committed the criminal offence shall not become prescribed as long as the penal action has not ceased to exist due to its prescription or the death of the liable person'.

moment, it is absolutely uncertain what rules would govern this issue in reparation proceedings at the ICC.

As far as procedural law is concerned in respect of reparation proceedings, this is generally regulated in national codes of civil procedure. The fact that reparation claims are being dealt with in the context of a criminal trial does not tend to exclude the applicability of procedural and evidentiary principles related to these torts claims, as they can be found in civil law and practice.[108] One needs to bear in mind that key differences exist between civil and criminal procedure and evidence. We mention just a few, very broad and general points, which by no means do justice to the complex issues of procedure and evidence that can arise in concrete cases.

The burden of proof in respect of the elements of torts – such as the type and amount of damage – that have not yet been established by the criminal conviction is on the claimant (victim).[109] The standard of proof is generally lower when compared to criminal proceedings (often a 'preponderance of evidence' or 'balance of probabilities' standard instead of 'beyond a reasonable doubt'). The sanctity in criminal proceedings of the burden of proof placed squarely on the prosecuting authority has major ramifications for criminal procedures – these are not present in civil claims. The defendant must actively dispute a civil claim and the evidence submitted by the claimant, otherwise the facts can be considered to be established and the claim granted.[110] The

108 See, for example: Overzichtsarrest vordering benadeelde partij, (Netherlands Supreme Court) (28 May 2019) ECLI:NL:HR:2019:793, at para. 2.8.3: the applicable evidentiary rules in criminal reparation proceedings are those from civil procedural, not criminal law. Thus, in the Netherlands the principles of civil procedure and evidence are applicable, unless there is a conflict with rules and principles of criminal procedure and evidence; in that case, the latter take precedence: 'The basic principle is therefore that the civil rules of the obligation to state and the sharing of the burden of proof apply. Where civil rules conflict with the mandatory rules of criminal procedure or with the principles of a fair trial (for both suspects and injured parties), these will have to give way' (translation by authors), Candido et al.(eds), *Slachtoffer en de rechtspraak – Handleiding voor de strafrechtspraktijk, 2nd Edition*, at 94.

109 In short, this means that the claimant (the injured party) must submit sufficient facts, that is to say all the facts necessary to establish the legal effect intended by him.

110 See, in the Dutch context, Candido et al. (eds), *Slachtoffer en de rechtspraak – Handleiding voor de strafrechtspraktijk 2nd Edition*, at 92: 'A fact that is asserted by the claimant (the injured party) and that is not contested or is insufficiently substantiated by the defendant (the suspect) must be regarded as an established fact in the proceedings between them (Art. 149 DCCP). Depending on the extent to which the claimant (the injured party) has substantiated his claim, the defendant (suspect) will therefore not be allowed to suffice with disputing a particular fact without any motivation' (translation by the authors).

defendant must take care to raise certain defences, such as a defence of applicability of Statute of limitations; it is generally not for the judge to deal with this *proprio motu*.[111]

Looking at the ICC's law and practice on reparations, it is clear that in their early case law on reparations,[112] Chambers have been grappling with issues such as the conditions that a victim must satisfy in order for their application to be identified as a beneficiary, the mandate of the Trust Fund for Victims (TVF), the scope of harm (direct and indirect victims), quanta of damages, the modalities of reparations and the role of traditional justice mechanisms, and the collective nature of awards and their implementation. Yet one notices only very limited attention to applicable rules and principles in respect of procedure and evidence that (should) be the legal basis for all of these issues. What is clear is that the ICC judges have taken upon themselves an overly active role in the organization and handling of reparation claims, which is in our view clearly inconsistent with the far more passive role a judge at the national level generally plays in respect of reparation proceedings.[113] We note here that executing the law as set out in Art. 75 of the Statute in accordance with the required sources of applicable law in the Statute (Art. 21) would reflect a less active, more appropriately restrained judicial role.

Third and finally, when trying to fit reparation proceedings into a criminal trial, there may of course be a need for certain adjustments. Indeed, one may argue that the starting point of full applicability of substantive and procedural civil law to reparation proceedings as part of the criminal trial could raise a number of problems and tensions.[114]

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111 See Candido et al. (eds), *Slachtoffer en de rechtspraak – Handleiding voor de strafrechtspraktijk 2nd Edition*, at 176–177. 'Criminal law and civil law have their own rules with regard to the prescription of the right to prosecute (Art. 70 et seq. Dutch Civil Code) and the right to compensation (Art. 3:310 (1) of the Dutch Civil Code). The criminal court must apply the rules of prescription proprio motu. This is different in civil law; there, the court is prohibited from applying proprio motu prescription and the defending party must explicitly invoke it' (translation by the authors).

112 See Section 2.

113 See, for the Dutch context, Candido et al. (eds), *Slachtoffer en de rechtspraak – Handleiding voor de strafrechtspraktijk, 2nd edition*, at 92: 'The obligation to provide evidence and the burden of proof also have significance for the role of the (civil) judge in the assessment of a claim: he is bound by the parties' debate, he may not supplement facts (Art. 149 Dutch Code of Civil Procedure) or base his judgment on facts other than the parties wished to base their claim or defence on (Art. 24 Dutch Code of Civil Procedure)' (translation by the authors).

114 See, e.g., this means that the claimant (the injured party) must submit sufficient facts, that is to say all the facts necessary to establish the legal effect intended by him.

One concern in national justice systems is to avoid the criminal trial being burdened in a disproportionate manner by any civil proceedings that are attached to it.[115] This can happen, for example, if a claimant (victim) wishes to make use of their procedural rights under applicable codes of civil procedure to call witnesses, or to bring other evidence, to sustain a claim. If this were to happen in the Netherlands, and other justice systems as well, there are substantial chances that a claim for damages would be declared inadmissible on account of overburdening the criminal trial.[116]

One notices that in the context of the ICC the consideration of whether reparations proceedings may impose a disproportionate burden on the criminal trial has not been a reason, as yet, to impose any significant limitations and restrictions on the handling of claims of reparation, or to declare claims inadmissible altogether. Without the existence of a safety net, such as the clear possibility of bringing one's claim for reparation before a civil court, and bearing in mind that the ICC will in its vast majority of cases always deal with a massive number of claims of reparations, one could understand why Chamber have paid no attention to the relevant legal rules from national systems of law that have evolved in domestic courts to ensure that the procedures for assessing and awarding reparations do not disproportionally burden criminal proceedings.

On the other hand, reparation proceedings that could be regarded as disproportionally burdening a criminal trial are not something to which the ICC can afford to turn a blind eye. In addition, the ICC could learn from the practical experience and pragmatic problem-solving that is apparent when studying national developments, such as those tools and mechanisms that have been put in place to effectively handle mass claims for damages, for instance in class actions in United States courts.[117]

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115 See, in the Dutch context, Candido et al. (eds), *Slachtoffer en de rechtspraak – Handleiding voor de strafrechtspraktijk, 2nd Edition*, at 107–108: 'The condition that the injured party's claim should not impose a disproportionate burden on the criminal proceedings seems to be related to the ancillary nature of the injured party's claim, [and] it obliges the criminal court to declare inadmissible if it does not consider itself assured that both parties have had sufficient opportunity to put forward their respective defences in support of the claim, and to provide evidence thereof, to the extent necessary and possible' (translation by the authors).

116 Art. 126 (3) of the Swiss Criminal Procedural Code allows criminal courts to only decide on civil reparation claims in principle and otherwise relegate them to civil courts if a complete judgment would be disproportionately extensive; a similar provision can be found in Art. 136 (3) Dutch Code of Criminal Procedure, which relegates reparation claims, the handling of which would constitute a disproportionate burden, to civil courts.

117 In this regard we would also like to refer to a similar type of law in the Netherlands that has entered into force on 1 January 2020, and which allows for claiming mass damages,

4.3 *Assessing the Value of the Lex Loci Damni Principle for Art. 75 Proceedings*

As far as the substantive law on reparations is concerned, there is a third alternative approach that needs to be discussed. This final alternative approach can be referred to as the principle of *lex loci damni*, which means that a court should apply the substantive torts law of the State where the damage is incurred by the plaintiff. It is a refinement of the principle of *lex loci delicti commissi*, i.e., the law of the State where the unlawful act was committed.[118] We leave this distinction aside, as in the vast majority of cases, and particularly those cases that are likely to come before the ICC, *lex loci damni* and *lex loci delicti commissi* would both involve applying the (torts) law of one and the same State.[119]

The *lex loci damni* principle, based on which the applicability of substantive torts law is determined, reigns in many countries.[120] In the EU, it is obligatory for all EU members, based on Regulation 'Rome II'.[121] The provisions of Art. 4 of the 'Rome II' Regulation read as follows:

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by a lead plaintiff: 'Wet afwikkeling massaschade in collectieve actie' (translation by authors: 'Act on Mass Damage Settlement in Collective Action').

118 *Lex loci delicti commissi* was the law and practice in many States, before the need was felt to replace it by *lex loci damni*. See Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40 (Rome II), at Preambular para. 15: 'The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable'.

119 And when there is doubt that more than one State is involved, the principle can relate to both where the damage occurred and where the crime has been committed. Cp. Situation Myanmar/Bangladesh, where the crime of humanity against deportation took place in part on the State territory of Myanmar and in part on that of Bangladesh. See ICC Pre-Trial Chamber I 'Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"' (6 September 2018) ICC-RoC46(3)-01/18-37. See also D. Guilfoyle, 'The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar' (2019) 73(1) Australian Journal of International Affairs, at 2–8.

120 Some countries offer a more distinctive approach, for instance Swiss law follows the *lex loci delicti commissi* principle. However, if the State where the unlawful act was committed differs from the one where the damage occurred, the *lex loci damni* principle takes effect, as long as the injuring party can be expected to have foreseen such a divergence. See Swiss Federal Act of Private International Law (adopted 18 December 1987, entered into force 1 January 2017), at Art. 133(2). Similarly, under US law, the *lex loci damni* principle is only applied if the injuring party had foreseen that the damage would have occurred in a different State. See *Nippon Fire Marine Ins. Co. v M.V. Tourcoing* 167 F.3d 99 (2d Cir. N.Y. 1999).

121 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40 (Rome II).

> General rule
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

In the preambular paragraphs of the Rome II Regulation one can find the rationales for the *lex loci damni* principle. See, for example, paragraph 16:

> Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

The result of the application of *lex loci damni* is that in many countries, foreign torts law is applied in civil cases with cross-border effects (notably, cross-border damage). In the Netherlands, a well-known example concerns the torts case against Shell, dealing with environmental damage suffered by Nigerian farmers, in which substantive Nigerian torts law is being applied.[122] Also, in

122 Gerechtshof Den Haag (The Hague Court of Appeal) (29 January 2021) ECLI:NL:GHDHA:2021:132, ECLI:NL:GHDHA:2021:133 and ECLI:NL:GHDHA:2021:134.

criminal proceedings concerning international crimes, one notices that foreign substantive law is being applied in respect of reparation claims that have been filed in connection with those cases, when damage had been suffered outside the Netherlands.[123]

The question arises whether the *lex loci damni* principle, or the related concept in the *lex loci delicti commissi* principle, as they existed at the time of the Rome Statute negotiations, were seriously considered when drafting Art. 75 of the Statute. One could easily conclude that this was not the case, and we found no mention of these principles in the drafting documents nor the Court's case law to date. Arguably, the need to assign to the Court the task of establishing principles of reparation would have been heavily mitigated had the *lex loci damni* principle was the preferred approach. In fact, had the drafters decided to follow *lex loci damni* with no exceptions, they could have simply inserted a provision in the Statute requiring that the Court should apply the substantive torts law of the State where the damage is incurred by the plaintiff. This would be an analogous approach to Art. 4 of the 'Rome II' Regulation and would ensure that an established set of rules and principles from the national substantive torts law would always be available to be applied. The task of establishing reparation principles would then have been confined to the procedural aspects only (e.g. burden and standard of proof), and the ICC would not have been required to start afresh in establishing reparations principles and to 'reinvent the wheel' to the same extent. On the other hand, it could also be the case that the *lex loci damni* approach was implicitly considered by the drafters, but was left for what it is, namely one of the existing sources of law that the Court could have drawn on when completing the task assigned to it under Art. 75. As such, the Court could have ruled in its early case law that the principles of reparation would consist of a. the *lex loci damni* principle in respect of substantive

123 See e.g., the Van Anraat (criminal) case, in which Iraqi and Iranian torts law was applied (Rechtbank 's-Gravenhage (The Hague District Court) (23 December 2005) ECLI:NL:RBDHA:2005:AV6353), though the victims' reparations claims were declared inadmissible on appeal (Gerechtshof 's-Gravenhage (The Hague Court of Appeal) (9 May 2007) ECLI:NL:GHSGR:2007:BA4676), because their handling would lead to a disproportionate burden on the criminal trial. Later, in the civil reparations case, Iraqi and Iranian torts law was applied (Gerechtshof Den Haag (The Hague Court of Appeal) (7 April 2015) ECLI:NL:GHDHA:2015:725); see also, the Rwandan genocide case, where Rwandan torts law was applied (Rechtbank 's-Gravenhage (The Hague District Court) (23 March 2009) ECLI:NL:RBSGR:2009:BI2444); the Ethiopian war crimes case, in which Ethiopian torts law was applied (Rechtbank Den Haag (The Hague District Court) (15 December 2017) ECLI:NL:RBDHA:2017:14782).

torts law, and b. a set of principles developed by the Court to the extent necessary to address the procedural and evidentiary aspects of reparation claims.

There would be a number of pros and cons to relying on the *lex loci damni* principle in the context of the ICC's reparation proceedings.

A major advantage of the *lex loci damni* principle in the context of the ICC is, of course, the immediate availability of generally well-developed substantive torts law, including case law and literature on sometimes complex issues of civil liability (many of which the ICC has not yet had to face). The principle would also reflect the modern approach towards civil liability and correspond to the law and practice in many countries. A choice for *lex loci damni* could thus certainly have enhanced, from the outset, the doctrinal authority and legitimacy of the Court's approach towards reparation claims.

Another factor in favour of a choice for *lex loci damni* can be found in the law-finding methodology of Art. 21. When having to resort to general principles of law, explicit reference is made in Art. 21 (1) (c) to the national laws of States that would normally exercise jurisdiction over the crime. When for example Congolese torts law, as the *lex loci damni*, would have been applied in respect of a reparation claim in the *Lubanga*, *Katanga* or *Ntaganda* case this would resonate well with this provision. It can thus be said that the *lex loci damni* fits perfectly within a systematic reading of the Statute, especially Art. 21 (1) (c). This is a particularly resonant argument when considered in light of the limited provision in the Court's legal framework or in hard law on reparations at the international level.

We are less persuaded, however, that the EU's claim that *lex loci damni* strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage is a factor in favour of *lex loci damni* at the ICC. In the unique context of the ICC, where the matter of conflicting substantive torts law is not as important as in a situation of conflict of laws between sovereign States, this assumed fair balance is arguably significantly less relevant.

One can also immediately come up with some significant disadvantages in case of application of *lex loci damni* in the context of the ICC.[124] A first concern is also relevant in the national context, namely, the inherent complexity and difficulty in the application of foreign law. The ICC Judge, like a national judge, is neither trained nor equipped, one can argue, for the application of foreign torts law. There is the risk of errors being made in the process of attempting

124 See also G. Sluiter and S. Polm, 'Putting an End to the Application of Foreign Law in Cross-Border Tort Cases for Serious Human Rights Violations?' (14 November 2019) Rethinking SLIC*.

to apply unfamiliar legal rules, compounded by the inevitable linguistic challenges that judges would face when deriving appropriate ICC practice from States whose legislative languages may be unknown to the judge and their staff. In addition, the reparation procedure could become seriously more complex and lengthier, when parties bring in expert reports and call expert witnesses on the application of foreign law.[125]

A second disadvantage is more relevant to the unique ICC context and concerns the difference in treatment of victims across different cases, which would undeniably result from *lex loci damni*. This can already be seen in the national context, where the *lex loci damni* principle entails that some victims – or defendants – will be better off than those in a different case, for the simple reason of differences in the substantive torts law between countries.[126] However, it should be noted that in national justice systems the application of *lex loci damni* is sporadic, applied in only a relatively small proportion of the overall amount of tort cases (since the vast majority involve harm suffered in the state of adjudication). Differences in treatment are therefore less visible, and perhaps therefore considered to be less problematic. In the context of the ICC, *lex loci damni* would result in the applicability of different torts law in almost every different situation. It is understandable that a multitude of differences in treatment of victims – and suspects – would immediately become more noticeable and may be more difficult to accept in the context of the ICC. Deployment of the *lex loci damni* principle across different ICC situations would result in different concrete outcomes in different cases. While it should be understood that this would not represent inconsistency or fragmentation of international law *per se*, but rather a recognition of differing standards from national legal systems, it would nonetheless result in ICC victims (and defendants) receiving different treatment depending on the situation country.

Having briefly set out some of the pros and cons of the *lex loci damni* principle, we find it impossible, without further study, to express a preference or

125 The Shell case in the Netherlands is very lengthy as a result of this. However, in the context of Dutch war crimes prosecutions this was less of a burden, although then the question can arise whether foreign torts law was properly applied. See, The Hague Court of Appeal (7 July 2011) ECLI:NL:GHSGR:2011:BR0686, in which Rwandan torts law was applied to victims' reparations claims in relation to war crimes committed in the Rwandan Civil War in 1994.

126 Cp. the differences between statutes of limitations between countries governing tort claims, and the huge impact this can have on reparation claims in a given case. See 'Limitation Periods' (1 May 2021) Thomas Reuters Practical Law, available at https://uk.practicallaw.thomsonreuters.com/1-518-8770?transitionType=Default&contextData=(sc.Default) (accessed 30 July 2022).

not for its application. What can be said, though, at this stage, is that it should have been seriously considered by the Court when completing its task under Art. 75. It cannot be denied that not only now, but also in 1998, *lex loci damni* was an essential principle of law, actually a very hard rule, in many countries.

5 Synthesis – The Way Forward

While the elaboration of solid reparation principles is a task that requires much more research and should ideally involve a wide range of experts with knowledge and understanding of procedures in different jurisdictions, we will offer at this point some tentative views as to how the Court could seek to improve its current approach towards reparations.

First, we need to reflect on some of the flaws in the present approach. It is based too much on doing justice to victims as a normative objective in itself, and risks being detached from a proper legal construct of individual liability for damages. This would be fine if the inclusion of reparations in the Court's mandate was intended to provide a charitable component to the Court's proceedings as an 'add-on' to its criminal prosecutions, or if there were no aspirations in the law and practice of the Court to have a proper and solid legal basis for liability for damages. Trying to do both does not work. The desire to ensure victims receive monetary awards 'at all costs' undermines the credibility of the Court as a judicial institution, and while the original intentions of the drafters do point towards developing a system of civil liability for perpetrators of international crimes, the different Chambers have not yet properly carried out the task assigned to them under Art. 75 in this regard. There is thus good reason to consider possible alternatives seriously, and to recognize that future ICC judicial benches are free to choose a different tack from the current (loosely established) *Lubanga* principles.

Secondly, out of the three alternative approaches that should have been considered by the ICC, one in particular deserves to be implemented and applied irrespective of whether or not the ICC changes its current approach developed in *Lubanga*. This concerns the need for enhancing the role for and improving coordination with national justice systems. The principles established in *Lubanga*, and moderately developed in subsequent cases, do not purport to provide legal foundations for the Court to resolve any and all issues of reparations that may come up in future ICC cases. Notably, these principles are insufficient to account for the range of national coordination issues that may arise, for instance, where victims claim compensation from a convicted person in a national civil claim recognizing the ICC's conviction decision, or,

more originally, where reparations are sought from the relevant State. State responsibility for reparations (which was proposed at several stages of the Rome Statute negotiations) could arise in situations where the State is unwilling or unable to investigate and prosecute crimes over which the ICC then asserts jurisdiction. A conviction at the ICC could then operate in tandem with the notion of a State's obligations to punish international crimes, such that the final judgment would be a basis for victims to seek reparations from their home State, not due to the involvement of the State in the commission of the crimes, but as a reparative award based on the State's failure to subsequently address the crimes.

Even with reparation proceedings being available at the ICC, it remains relevant and important to consider the availability and conduct of reparation proceedings at the national level. Other international criminal tribunals have rules coordinating with national justice systems in reparation proceedings, especially with the aim of providing victims with a good starting point for national reparation proceedings; this coordination is also available when the relevant international criminal tribunal has its own reparation procedure (KSC). There is every reason for the ICC to adopt rules on national coordination as well, even though its case law has not yet encountered the myriad national coordination issues that could arise. New ICC provisions should not only be aimed at increasing reparation chances for victims, but also at preserving the rights and interests of a defendant who has complied with a reparation order (the civil law *ne bis in idem* protection).

We believe the ICC could deepen its approach on the potential integration of the Court's reparations orders with existing procedures at the national level for 'satellite' civil tort claims at the national level. Developing this integration would build-on existing scholarship on the notion of 'reparative complementarity',[127] according to which States are responsible for reparations that are complementary to the ICC proceedings.[128] Moffett has described 'reparative complementarity' as arising in two situations. First, the ICC may call upon a responsible State Party to supplement reparation orders made by the ICC. Second, the State Party may be required to pay reparations under the State's general obligation to provide a national reparation scheme for victims outside of the ICC in order to end impunity effectively.[129] Moffett points out that

127 L. Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' (2013) 17(3) The International Journal of Human Rights, at 368.

128 Ibid., at 368.

129 Ibid., at 381–382.

other States Parties to the Rome Statute could even bring a claim before the International Court of Justice (ICJ) against a State that failed to investigate and prosecute ICC crimes, on the grounds that the State has breached the other States Parties' collective interests in ending impunity.[130] The ICJ would then, in effect, act as an enforcement mechanism to ensure that States with responsibility for reparations comply with the effects of the ICC's reparations orders. Moffett asserts that '[w]ithout such enforcement, the ICC would become powerless, abstract and an ineffective remedy for victims'.[131] We agree with Moffett's notion of 'reparative complementarity' but suggest that, in addition to Moffett's focus on State responsibility and the need for the ICC judgments to be consistent with international human rights law, the notion needs to be fleshed out by drawing on civil claims procedures at the national level and reinforced by reference to 'general principles of law' under Art. 21 (1) (c). The notion of 'reparative complementarity' would need to be significantly expanded in order to provide legal rules on how ICC proceedings can integrate with national torts systems.

We also would like to mention recent case law of the KSC in which it was discussed, amongst other things, under which circumstances a victim may be referred to civil litigation in other courts of Kosovo, as is provided for in Art. 22 (9) of the Law on the KSC and Special Prosecutor's Office.[132] Interestingly, the Chamber made such possible referral conditional upon whether or not the victims would have an effective remedy with regard to their compensation claims.[133] One can imagine that such a test of 'available effective remedy' would also need to be part of a possible future principle of reparative complementarity.

Third, we wonder whether the current approach towards reparation is sound policy and practice in the long run. We see two ways forward here. Either it could be replaced by establishing principles of substantive torts law and elements of civil procedure, based on overview and comparative analysis of national torts law; this could then result in the ICC's own substantive and procedural reparation law. Or, existing substantive torts law can be applied on

130 Ibid., at 380.

131 Ibid., at 381.

132 Republic of Kosovo Law on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015) Law No.05/L-053. The provision reads, in full, as follows: 'Where appropriate, the Specialist Chambers may refer the Victims to civil litigation in the other courts of Kosovo'.

133 *Prosecutor v Salih Mustafa* (*Decision on the Appointment of Expert*(*s*) *Trial Panel I*) KSC-BC-2020-05 ICL 2060 (KSC 2021) (20 May 2021), at para. 19.

the basis of the *lex loci damni* rule, which means that torts law of the country where the damage occurred needs to be applied.

It seems to us that especially in the early stages of the ICC's existence, the *lex loci damni* rule would have been a proper and solid basis to process reparation claims. It would have been a relatively easy way out of the daunting task imposed on the Court in Art. 75 (1). Even without explicit acknowledgment in the drafting history that the *lex loci damni* was envisaged, it could have been deployed temporarily by Chambers to 'fill the gap' until the Court's jurisprudence was in a better position to establish its own principles of substantive reparation law. As we have acknowledged, even with *lex loci damni*, the Court would still have to establish its own procedural law on reparations.

However, as things stand now, more advanced in the lifespan of the Court and with a reparation law and practice being based on international rules and principles, and bearing mind some of the disadvantages associated with the *lex loci damni* rule, our preference would be for the first option, thus setting up an expert group with the task of establishing principles of both substantive and procedural reparations law, aimed at ensuring that Art. 75 is properly read in conjunction with the Art. 21 sources. Since there is no formal *stare decisis*, judges could 'start again' with the text of Art. 75 without following *Lubanga*.

Although rejecting *lex loci damni* as a general principle, we would therefore suggest that under our proposed approach, the Court would draw from the jurisdictions that would normally exercise jurisdiction over the crimes (on a case-by-case basis) when applying its principles of substantive reparation law. In this regard, there is some existing comparative research on national compensation regimes,[134] but the analysis of these sources would need to be legally driven by the Rome Statue, and heavily tailored to the context of Art. 75 and the pragmatic questions facing the Court.[135] A significant and very sensitive issue will be to what degree the Court will, in the development of its future principles on reparation proceedings, cater for restrictions and limitations, as they can be found at the national level, with a view to not disproportionally overburdening its criminal proceedings.

134 E.g. M.E.I. Brienen and H.H. Ernestine, 'Compensation across Europe: A Quest for Best Practice' (2000) 7 (4) International Review of Victimology, at 281–304.

135 D. Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' (2014) 20 (1) International Review of Victimology, at 145–168.

6 Conclusion

The practice of the ICC when it comes to reparations is open to the criticism that it lacks rigour and has so far failed to fulfil the task assigned to it under Art. 75 of the Rome Statute. Pursuant to that statutory provision, the Court is required to establish a system of principles to provide the legal basis for judicial orders for restitution, compensation and rehabilitation. Importantly, the legal construction of principles from Art. 75 must be done in accordance with the sources of applicable law in Art. 21, and since Art. 75 explicitly provides that this task ('establish principles') was not carried out by the drafters and is left to the Court, this means that to work out the substantive and procedural law on reparations, we must look beyond the Statute, Elements of Crimes and its Rules of Procedure and Evidence set out as primary applicable sources in Art. 21 (1) (a). We must then ask whether existing ICC case law on reparations has sufficiently engaged, in a rigorous way, with existing international law pursuant to Art. 21 (1) (b) and, failing that, general principles of law in Art. 21 (1) (c).

As discussed in Section 2, the range of sources that the ICC could draw on in determining its established principles is extensive: the scope for legal construction in Art. 75 is confined by the mandatory requirements of Art. 21 (1) (b) and (c) to pointing in a direction that should draw on a full analysis of international law sources of reparations and general principles of law derived from national systems. Notably, the richest sources are those emerging from long-established systems of civil torts liability. The sources may also include the jurisprudence of international tribunals including the ECCC and nascent KSC, the case law of the IACtHR, ECtHR and other human rights courts, international mass claims processes, judicial and quasi-judicial truth and reconciliation commissions at the national level, and of course the non-binding Van Boven/Bassiouni Principles.

Based on Art. 21, there is only limited space for the Court to rely on international soft law instruments regarding reparations. A rigorous approach to developing the Court's approach to liability for international crimes would indeed require a thorough comparative analysis on torts laws, in which national approaches – especially of those national justice systems in which reparation proceedings have been integrated in criminal proceedings – are being compared and evaluated and which could lie at the heart of a set of general rules and principles. A focus on international soft law instruments can never replace the requirements for torts liability as they actually operate in practice.

We also question whether it would be possible or realistic for the ICC to develop a coherent *de novo* reparations practice without relying extensively on these existing sources of applicable law, wherein centuries-old practices of

awarding damages in civil claims have been elaborated. The Court's attempts to build a *sui generis* legal system will be held back if Chambers omit to draw on the wealth of existing reparations practice at the international and national level. Even if coherent principles of reparations could be established 'new and afresh' without building on existing international and domestic laws, it is highly doubtful whether the application and interpretation of such a system would be consistent with internationally recognized human rights – both to victims and defendants – risking a violation of Art. 21 (3). We are sure, then, that in future reparations jurisprudence, the ICC cannot avoid engaging, in far more depth, with expert analysis of existing international and domestic reparations law, including those principles and rules that relate to human rights at stake during reparations awards.

In Section 4 we have provided three alternative approaches compared to the current ICC approach. We explored, firstly, the current potential for the Court to give an increased role for and coordination with national justice systems in its principles on reparations and the very limited attention in the law of the ICC as to how 'reparation proceedings' should relate to national criminal justice systems. The Court seems ill-prepared at present for the likely situations in which the victim may wish to pursue reparations outside of, or in addition to, the ICC proceedings, and we noted that other international criminal tribunals have squarely addressed some of these possibilities, at least in their foundational legal texts. In essence, we draw attention to the reality that ICC proceedings are going to have to engage with the 'satellite' national reparation proceedings that will be brought by victims in relation to some ICC situations. Our second alternative approach was for the ICC to draw from the wealth of available 'reparation rules from national torts systems'. A more rigorous analysis of domestic law and practice in respect of reparation proceedings 'as part of a criminal trial' needs to take place if the ICC is to develop a coherent and legally grounded set of principles on reparations, and there is a procedural starting point in Rule 97 (2) for activating such an expert analysis. Thirdly, an alternative approach to supplement the ICC's nascent case law would be to consider how the *lex loci damni* principle, that has not yet been explicitly acknowledged in the Court's law and practice, should impact judicial interpretations of Art. 75.

It follows from Section 5 that we consider that at the very least the ICC should develop a system of better coordination with national civil justice systems. The legal foundations of a principle of 'reparative complementarity', with due regard for effective remedy-prospects for victims in national civil litigation, is something worth developing, particularly in light of the three alternatives we have discussed here. When it comes to the Court's own law and principles,

we would, at this stage, not favour a choice for the *lex loci damni* approach. Rather, the time has come for the Court to develop and clearly state the substantive torts law and the procedural and evidentiary rules which should be the solid foundation of reparation proceedings and the articulation of clear and direct civil rights and obligations. National justice systems will offer the Court a wealth of practices, all aimed at striking the delicate balance between securing victims' rights and not overburdening the criminal trial. While the ICC can make its own choices, based on the unique character and context of the Court, they need to be theoretically and doctrinally sound.