Preliminary remarks on the origin, nature and challenges of the research project

I have worked for many years on the topic of victims’ rights (remedies, reparation…) from an international public law (State as a victim of an international wrongful act) and an international human rights law perspectives (private persons claiming and asking for reparations before international organs). Based on this theoretical background and some in-field experiences, the idea of the current project was born in 2016, when the International Criminal Court (hereafter, ICC) delivered its judgment on the Al Mahdi case regarding the destruction of cultural property and opened the phase of reparation. As I published a chapter on reparation for destruction of cultural property in the context of the Second World War and the 1990’s conflicts in Former-Yugoslavia, I was convinced that there were many international/domestic precedents/practices that could be helpful for the ICC. At the beginning of 2017, I was appointed by the ICC as “expert on reparations”, i.e. that I am free to send to the Court any remarks/reports on the issue.

The nature of my research is doctrinal and theoretical in the aftermath of my previous works but also empirical – delivering a workable document to the ICC. The methodology was rather simple: finding out the best practices in terms of reparation of massive and grave violations of human rights and humanitarian law norms on a comparative basis (domestic courts, transitional justice mechanisms, International Court of Justice if relevant, international human rights organs and practice of other international criminal organs). These best practices would be expected to strike a fair balance between the condemned person’s rights and the victims’ rights and to reach as far as possible the goal of reparation. My model was the case-law of the Inter-American Court of Human Rights and I was rather confident to draw from its rich practice on the topic major principles, rules, innovative ideas...

However, in the course of 2017, the ICC delivered two long reparations orders, which required that I revisited the normative ambition of my project for many reasons. First, they made me dramatically understand how naïve this ambition was and more importantly, how unprepared

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1 The case will be discussed further. Documents, Statute and case-law available on the ICC website: https://www.icc-cpi.int/Pages/Main.aspx

2 This methodology was bolstered and justified by the previous way of reasoning of the other international criminal courts and legally, by Article 21 of the ICC Statute regarding applicable law (“1. The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions. 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”)
the ICC is to deal with reparations of violations suffered by hundreds (or more) of people in so highly complex in-field contexts. Second, even if I have never been very confident in the ICC project\(^3\), I am realizing the gap between the “promise of reparation” conveyed by the ICC, its organs and some NGOs and the perspective of concrete reparation provided for by the Court. And I am struck by the fact that the less the Court is in position to repair grave and multiple harms and injuries, and the more its organs do communicate on this “promise of reparation”.\(^4\)

Hence, at this stage of my research, I am much humbler in reflecting upon the normative goals of my research than I was months ago but also more radical. I am trying to understand the complex scheme of reparation the Court is designing ex nihilo and I am also more radical because if my provisional understanding of the process is correct, I am of the opinion that the ICC should not deal with victims’ reparations at all and should rather focus on bringing criminals to justice. I ignore what the outcome of my research will be and that explains that I have deleted the sub-title initially chosen.

The following pages explain more precisely the state of the law, the state of the ICC’s practice in the field and the main legal challenges faced with by the Court\(^5\). I will try to make my antagonist feelings more understandable: from a theoretical point of view, I am not comfortable with the critical approaches of law if they are only used to deconstruct without a further step. At the same time however, I am convinced that the ICC is based on a such overbearing picture of its role that at this stage of my research I am unable to overcome this pessimism. Putting differently, the dilemma is the following: joining the other critical voices against the ICC project\(^6\) or even assuming the failure and limits of the ICC jurisdiction, working in favor of its reparation jurisdiction.

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\(^4\) See for instance the 2016 Annual Report of the ICC Trust Fund for Victims (hereafter, TFV) available on the website of the Court.

\(^5\) For this paper and the presentation, I put aside the political, philosophical, moral and ethical challenges raised by the ICC project and I do not raise the question of its ability/willingness to bring criminals to justice (but it is obviously questionable). For an in-depth analysis of these challenges, see M. de Hoon, “The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC’s Legitimacy”, International Criminal Law Review 2017, pp. 591-616.

1. As a starting point: the presumptuous discourse of the ICC and the gap between the “promise of reparative/restorative/transformative justice”\(^7\) and the reality

**Historical and legal background**

The ICC - designing both an international organization and an international court\(^8\) - was established by the Rome Statute in 1998\(^9\) to provide justice for victims of the most serious international crimes\(^10\) and as the Court repeatedly worded, its success “is, to some extent, linked to the success of its reparation system” (Prosecutor v. Lubanga, 7 August 2012, para. 178). On contrary to the previous international criminal courts (from Nuremberg to The Hague and Arusha Tribunals\(^11\)), the Rome Statute of the ICC is supposed to be based on a “victim-centric perspective” (C. Bassiouni\(^12\)) and “has been hailed as the first international criminal tribunal to give serious consideration to the role of victims” (F. Mégrret, p. 124\(^13\)). As the representative of the Coalition for an International Criminal Court affirmed on July 1998, once the Statute was adopted, “[this latter] represents a strong merger of the lessons of Nuremberg, of the Universal Declaration of Human Rights and of the ad hoc tribunals. The rights of victims find their expression in the context of individual criminal responsibility”\(^14\).

States, with the help of the NGOs, have created a remarkable and powerful institution, with the most valuable goals for the Humankind, as expressed in the Preamble of the ICC Statute\(^15\). Victims of international crimes would have been voiced at the international level, represented by NGOs and virtuous States. As a result of this success story, two core provisions were included in the ICC Statute: Article 68 para. 3 on the victim’s right to participate to the criminal proceedings\(^16\) and Article 75 on reparations\(^17\). They were construed as the final step of a long

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\(^7\) This expression is borrowed from the ICC’s reparations orders.

\(^8\) Under Article 4 of the ICC Statute, it shall have “the international legal personality”.

\(^9\) The ICC Statute entered into force on July, 1\(^\text{st}\) 2002 and on October 2017, 124 States are Parties to the Rome Treaty (34 are African States; 19, Asia-Pacific States; 18 from Eastern Europe; 28 are Latin-American and Caribbean States and 25 are from Western Europe and “other States”).

\(^10\) Since 2011, there has been a serious slowdown in the ratification: 1 in 2012 (Guatemala); 1 in 2013 (Côte d’Ivoire); none in 2014; 1 in 2015 (Palestine); 1 in 2016 (El Salvador) and none for the current 2017 year.

\(^11\) In the 1998 ICC Statute, see Article 5 establishing the material scope of the competence of the Court (genocide, crimes against humanity, war crimes and the crime of aggression). The jurisdiction of the Court over the “crime of aggression” was suspended but is currently discussed by the States Parties Assembly, the main organ of the international organization.

\(^12\) More recently, the Extraordinary Chambers in the Courts of Cambodia (ECCC) created by a domestic Cambodian law enacted under a UN-Cambodian Agreement was recognized the power to grant reparations for victims. However, in its first appeal judgment in the ‘Duch’ case delivered on 3 Feb. 2012, the Supreme Court Chamber of the ECCC stated that the Chamber could not grant compensation but only “moral and collective” reparations (paras 638 and 658) See also Internal Rule (Rev. 9), Rule 23.


\(^16\) See also the General Statements on the establishment of the ICC opening the 1998 Diplomatic Conference held in Rome: http://www.legal-tools.org/doc/eb4386/pdf/

\(^17\) Article 68 para 3 of the ICC Statute: “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

\(^17\) Article 75 of the ICC Statute: “1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either
“victim-centric” construction of international law. Plus, they would have reflected a form of humanization and privatization of the international law order (A. Cançado Trindade), the victory of the individuals’ rights over the “Raison d’État” and the Westphalian approach of international law.

The “promise of reparation”

The promise of reparations enshrined in the Rome Treaty should be formulated this way: the international community will bear the consequences of individuals’ “misfortunes” (F. Mégret, p. 143), i.e. when they have been the victims of an international criminal offence (crimes against humanity, act of genocide, war crime). But when one reads closely the recent orders of the ICC, one is struck by the fact that as construed by the ICC, the promise has a much higher content: the Court talks about “restorative” justice but also aims to reconcile “the convicted person with the victims of the crimes” (Katanga, 2017, para. 268). In other documents, the ICC organs use also the expression of “transformative justice”: the compensation and/or assistance programs would have the purpose to help the victims of the crimes under the ICC jurisdiction to improve their daily existence. Put it differently, reparations granted by the Court would have three high goals: restoring the victims’ previous existence; bringing peace amongst former enemies and improving the victims and their relative’s life.

Why is it so presumptuous? The legal challenges pushing back the ICC’s discourse

The challenges are tremendous and of very different nature. I will present them swiftly and they will be better ordered, explained and dwelt on in the final version of the paper.

18 The term is borrowed by F. Mégret, to another author of domestic criminal law.
19 At this stage, the Court has delivered three orders of reparations:
   - Lubanga – found guilty of war crimes (enlisting and conscripting of children), 14 years of imprisonment, order delivered on 20 October 2016 approving the “proposed plan of the Trust Fund of Victims in relation to symbolic collective reparation”;
   - Katanga – found guilty of crimes against humanity and war crimes, 12 years of imprisonment, order adopted on 24 March 2017 (over the more than 3 millions of dollars, Katanga condemned to pay 1 million but the Court admitted that he was “indigent”).
   - Al Mahdi – found guilty of war crimes (destruction of cultural property), 9 years of imprisonment, order delivered on 17 August 2017 (more than 2 millions of dollars).
   One case is still pending:
   - Bemba – found guilty in 2016 of crimes against humanity (rape, murder) + war crimes (rape, murder and pillaging), 18 years of imprisonment.
20 But as C. Bassiouni recognized (p. 22): “it is uncertain how those [ICC Statute ] provisions will be made operative and how such a right will be funded”.

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upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”

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A preliminary remark: the three aims of reparation (restorative/peace-maker and transformative process) construed by the ICC are rather presumptuous and the way the Court enunciates them should suffice by itself to understand the failure of the reparations project. From the Chorzow Factory judgment on merits (1928) delivered by the Permanent Court of International Justice to the recent cases rendered by the International Court of Justice (hereafter, ICJ) or the human rights organs in the field of reparations, the Courts do not enunciate such high virtue of reparation because they are aware that the process rests upon a legal fiction: the judge, by his/her decision to grant reparation, erases the wrongful act and replaces the victim (State/private person) in the situation that would have existed if the wrongful act would have not been committed. The international law of reparation as applied by the ICJ and the regional human rights courts is based on this fictive idea and ideal of reparation (restitutio in integrum); the courts are aware of this inherent and substantial limit of their adjudication power - they do not have the power to erase the passage of time -, but the legal rules tend to limit the consequences for the injured person of this passage of time. Here the ICC does as if it ignore the inherent limits of its reparation power and it does as if it were created to relief the pain and sufferings of “the present and future generations” (Preamble of the ICC Statute). However, one is dramatically struck by the contrast between this high conception of its role and the concrete outcome of its deliberation as the figures I will detail further demonstrate.

Having said that, the legal challenges faced with by the ICC could be drawn as:

(a) Firstly, the applicable law to reparations in this specific context (i.e. grave violations of human rights and humanitarian law committed by private persons with potentially hundreds, thousands or the international community as a whole recognized as victims) is non-existent. The is not “International Tort Law”. To be more specific, the legal grounds of the current ICC’s reasoning rest upon two soft law texts: Resolutions adopted by the UN General Assembly (first in 1985 and the second in 2006, 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). Nevertheless, this latter Resolution - even assuming that it codifies customary norms - is neither relevant nor efficient to deal with the issues the Court has to settle (here it is sufficient to underline that in the 2006 Resolution, States are the debtors of the remedies and reparation, while before the ICC, the perspective is rather different, i.e. inter-personal).

21 As stated by the Court (and constantly quoted by Human Rights’ Courts), “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.” (judgment on jurisdiction, 26 July 1927).

In its judgment on merits (13 Sept. 1928), it detailed the purposes of reparation: “that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

22 This idea is well documented in doctrine and case-law and in a previous publication, I explained more concretely how this ideal of restitution has designed the international law of reparation since (at least) the 1928 Chorzow Factory case: L. Hennebel & H. Tigroudja, Traité de droit international des droits de l’homme, pp. 1371 and f., paras 1213 and f.

23 Which is not a “cas d’école” as in the Al Mahdi case, the Trial Chambers stated that the UNESCO and the “international community” were also victims of the war crimes committed (destruction of cultural property).


25 And that should be demonstrated.
More, the International Court of Justice’s and European Court of Human Rights’ case-law are reluctant to recognize the existence of a right to reparation in case of violations of humanitarian law. Accordingly, there is another strong gap between the political discourse on the victims’ rights and the legal status of the victims’ claim. Based on Article 75 of the ICC Statute and on the orders, it is obvious that the victims have no right to reparation and this point deserves to be directly clarified by the ICC. The customary law of States’ responsibility as codified by the UN International Law Commission (2001) is either of a limited help because of its inter-state nature and its state-centric paradigm. I should add that even the practice of IHRL’s organs (European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and Peoples Rights) should not be used without caution. When an individual or even a group claims for reparation before the European Court of Human Rights, it is a claim brought against a State and not against another private person.

(b) Secondly – and this remark is closely linked to the previous -, in the ICC reparation process, the State has totally and deliberately disappeared, in order precisely to keep the sharp – even if contested and disputable – distinction between the individual criminal responsibility and the State’s responsibility. It is noteworthy that in the preparatory works of the ICC, some States 26 did not mention the victims’ right to reparation. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted. 27

See ICJ, 3 February 2012 Jurisdictional immunities of the State case (Germany v. Italy – Greece intervening), para. 94 (“In the present case, the violation of the rules prohibiting murder, deportation and slave labor took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.”) (emphasis added).

See also ECtHR (GC), Markovic and others v. Italy (14 December 2006, para. 111: “[…] it is not possible to conclude from the manner in which the domestic law was interpreted or the relevant international treaties were applied in domestic law that a “right” to reparation under the law of tort existed in such circumstances. […]”). For a reaffirmation, see ECtHR, Sfountouris and others v. Germany, decision of inadmissibility 31 May 2011, application No 24120/06.

27 It is worth noting that the integral restitution principle which is a key-element of the States’ responsibility regime is not mentioned by the Court as a principle of reparation it applies.

28 This state-centric approach of responsibility is rooted in a deeper feature of the international society: States are primary subjects of international society and individuals have long been considered as minor. This “old-school” approach of international law/international society has not disappeared: see the pending case before the International Court of Justice, Armed Activities on the Territory of the Congo, opposing Democratic Republic of Congo to Uganda or the France/USA Agreement signed in 2014 on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs.

29 I use the term “organs” and not only “courts” because even if in a formally perspective, reparations can only be granted by the three regional courts of human rights (Article 41 of the European Convention of Human Rights; article 63 para. 1 of the American Convention of Human Rights and Article 27 para. 1 of the Protocol to the African Charter on Human and Peoples’ Rights creating an African Court of Human and Peoples’ Rights), the non-judicial organs as the UN Human Rights Committee or the African Commission of Human and Peoples’ Rights do deliver decisions on this issue that will be taken into account.

30 See for instance the proposal from Japan (16 June 1998, available on the ICC website): the draft did not mention any form of State’s responsibility but under paragraph 4 of the draft Article 73, it was established that “Victims or their successors or assigns may seek enforcement of an order [or judgment] under the present article by competent national authorities. A State Party shall ensure that its competent national authorities give effect to the order [or judgment] in accordance with national law”. This paragraph was withdrawn from the final version of Article 75.
and NGOs made the proposal of a different wording, involving States in the process. In a previous version (ex-Article 73 para 2(c))\textsuperscript{31}, the Court would have had the power to “recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation]”. The preparatory works of the ICC were concomitant to the UN International Law Commission’s debates on States’ responsibility for international wrongful acts and some States’ representatives put forward the question of “State’s crime”. Others raised the idea of a “subsidiary State responsibility” (and not only for the crime of aggression). Nevertheless, the majority of States, fearing the idea of criminalization of their responsibility, did reject the formulation and in the final version of the provision, there is no reference to States responsibility left\textsuperscript{32}. And here is one of the main weaknesses in the jurisdiction of the ICC and the more significant source of its limits when dealing with reparation\textsuperscript{33}, for at least two reasons. Theoretically, this non-involvement of States demonstrates that beyond the vocal communication, there are probably “intractable disagreements on basic principle”\textsuperscript{34}, i.e. the issue of victims’ status and that point shall be addressed.

From a more pragmatic point of view, this jurisdiction is also an international organization, allegedly established to defend very high values but evolving in an inter-state society, without its own financial resources. That means that if the condemned person is declared indigent - as in two over the three cases I will develop -, the Court will have to imagine new forms of reparation disconnected from the State. I guess that this new approach could be positive if applied in a different international structure but here, it makes the ICC look like a clumsy institution.\textsuperscript{35}

To summarize, when the Court was created in 1998, there was no political agreement on fundamental issues\textsuperscript{36}: the existence of a right in favor of victims; the political/legal/financial States’ involvement in the process; the aims and purposes of reparations and as a legal standpoint the applicable rules. That is the reason why I do consider that the “promise of reparation” that would restore the victims’ lives and even transform them is a promise that cannot be kept and if one can understand the 1990’s optimist discourses welcoming and hailing the establishment of the Court, I am of the opinion that the ICC should be brought into a more “low-profile” conception of its role. And the recent orders invite to such a revision.

2. Concerns raised by the practice of the ICC

*The three cases at the stage of reparations*

As indicated above, the ICC has delivered three reparations orders in the *Lubanga* case, the *Katanga* case and the *Al Mahdi* case. In the first case, the Court decided to “grant” collective and symbolic reparations; in the second case, a mix of individual and collective reparations and in the third case, individual, collective and symbolic reparations.

\textsuperscript{31} Proposal from France and The Netherlands.

\textsuperscript{32} As said previously, the Rome Statute was adopted on July, 17 1998 and on July, 9, the provision on reparation was still pending.

\textsuperscript{33} The question of States involvement in the implementation of the ICC’s decisions (warrant arrest, orders, judgements…) goes far beyond the reparation’s stage but once again, I deliberately focus on this stage.


\textsuperscript{35} As R. Kolb rightly underlines, the evolution of international law and the international society opens the door to a “fédéralisme normatif mais sur un socle de relativisme organique. Dès lors, la communautarisation est claudicante : elle affirme mais ne se donne pas les moyens de son affirmation” (Réflexions de philosophie du droit international, Bruxelles : Bruylant, 2003, p. 31, emphasis added).

\textsuperscript{36} I use the terms “political agreement” in the sense of Sunstein, i.e. from a legal theory perspective.
As I am currently trying to understand what the design of the reparation process is, I will limit to list here the main criticisms I could formulated.

- First, from a formal standpoint, the orders are rather complex and complicated to read and it raises a real problem of effective access to justice. At this stage of my research, I have read once the three orders and the decisions annexed but if I had to advice a victim, I am still unable to affirm what he/she can reasonably expect from the decisions.

- Second, the three cases delivered by three different benches have no homogenous methodology regarding the applicable law under Article 25 of the ICC Statute. Some did use the case-law of other international tribunals, domestic courts, transitional justice mechanisms (Lubanga case, 2012 and Katanga case, 2017), whereas the Al Mahdi order was delivered without any external references. And even when the chambers do use external resources, it is not made on a rigorous basis: for instance, in the Katanga order, some issues are properly and rigorously justified – standard of proof, notion of family, the content of psychological harm and its monetary evaluation -, while others are not (definition of economic loss for instance).

- Third, the legal reasoning is totally de-structured and to some extent, illogical and hardly understandable, as shown by the Katanga decision hereafter explained.

But I presume that these concerns can be easily and rather simply fixed by the ICC.

Others are more serious and challenge more dramatically the ICC’s jurisdiction:

- the pragmatic question about who will pay for the harms and injuries is not settled by the orders and the construction imagined by the ICC Statute and the current practice is so complicated for a such uncertain result that it ruins the interest of Article 75. Indeed, in the Katanga case, more than 300 victims lodged a reparation application and after a long analysis, the trial chamber did consider that the total amount of harms caused by the war crimes (preparation and launching of an attack against civilians) was of more than US dollars 3.5 million. Then, the Court sets the “sum-total of Mr Katanga’s liability for reparation at USD 1 000 000” (para. 264). In a third step, the chamber did examine the “modalities of individual reparations” and it decided “that each victim to whom it has accorded such locus standi receive a symbolic award of USD 250 compensation” (para. 300), which does not correspond to the monetary evaluation of the economic/moral harms made in the first part of the reasoning. In a fourth part, the chamber found “Mr Katanga indigent for the purposes of reparations at the time of the present order” and finally, opened the implementation procedure that involves another organ of the ICC, the Trust Fund for Victims, which is based on States and private persons’ voluntary contributions. However, the order gives no precise information about the way this implementation phase will work.

The scheme is even much more complicated and obscure in the 2017 Al Mahdi reparations order (139 victims): the liability of Mr Al Mahdi was set for a total of Euros 2.7 million37 but as Mr Al Mahdi was recognized indigent, “the Chamber encourages the TFV to complement the extent and collective awards to the extent possible, and to

37 Note that there is no agreement between the chambers on the currency (US Dollars/Euros) that is to be used.
engage in fundraising efforts to the extent necessary to complement the totality of the award”. In a further paragraph, the chamber opened the questions of “prioritization” (para 140) and articulation between individual and collective reparations but left it at the discretion of the TFV. Moreover, as on the contrary of the Katanga case, the chamber made no monetary evaluation of the economic harm due to the individual victims (economic loss for instance), it will also rest upon the TFV.

These decisions raise two others key-questions not clearly addressed by the ICC: what can be the victims’ reasonable expectations? And who does really decide? As explained previously, the ICC does neither use the “rights-based” vocabulary nor the “integral reparation principle” and I agree that the state of the law is ambiguous on this recognition. Accordingly, the over-optimistic interpretation of the state of law is unhelpful. However, even putting aside this legal question, the orders give no clear picture of what is granted to the victims (and precisely, the meaning of the term “grant” is unclear).

The decision seems to formally rest upon the chambers (trial/appeal chambers) but substantially, upon the TFV, which is not a judicial organ and therefore does not offer proper guarantees of equitable treatments of victims.

The results of the shortcomings and failure of the reparations issues that are dealt with by the Court are their counter-productive effects: rather than repairing the harm suffered by victims, these latter are suffering a “secondary victimization”.

3. Fixing the unfixable?

At the very first stage of reflection upon my research project, the subtitle was: “Fixing the unfixable: importing a human rights-based approach”. However, at this level I am convinced that the significant aim would be to assess and fix first the ICC reparation process. The pending cases and situations before the Court are numerous, complex and do concern potentially thousands or millions of victims. If some of the accused are condemned, the reparations issue will be raised again.

A radical proposal would be to encourage the ICC to follow the ECCC’s or the ECrtHR example: as mentioned above, from its very first case (the Duch case), the Cambodian organ chose to focus on moral and symbolic reparations and not on monetary forms of compensation. As far as the European Court is concerned, it may happen that in some cases, it considers as a form of reparation that “the finding of a violation constitutes sufficient just satisfaction”. This proposal will be taken seriously in the project and the benefits and risks should be properly weighed on a victims-based perspective. A more constructive approach shall consist in pointing out the main challenges and purposing some workable tools/reflections that could be used by

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38 Para. 138 (emphasis added and original footnotes omitted).
39 As the C. Bassiouini’s position.
40 On October 1st 2017, ten “situations” were opened before the ICC (Uganda, Democratic Republic of Congo, Central African Republic I and II, Mali, Libya, Kenya, Côte d’Ivoire, Darfur/Sudan and Georgia) and ten others are under a “preliminary examination” by the Office of the Prosecutor. Eleven individual cases are at pre-trial stage; four are at the trial stage; two are at appeals level; three are at reparation/compensation stage and two cases were closed.
the ICC. In the present paper, I would like to mention some of them that should urgently be addressed by the Court, as a judicial organ or through the States Parties Assembly (article 112 of the ICC Statute\textsuperscript{43}), as an international organization.

1) \textit{Adopting a non-presumptuous approach of the reparations’ and victims’ rights topics}

I do use the terms “non-presumptuous approach” as an invitation addressed to the Court and the judges to properly and in a realistic manner perceive their role and place within the international society. For the reasons explained above (structural/legal obstacles, uncertainty of law, lack of States’ support, lack of financial resources, massive number of potential victims…), the ICC cannot keep claiming that its orders will restore the victims’ situation, transform their lives and bring peace in countries at war. It implies a strong theoretical reflection - from the ICC’s judges themselves – upon the Sunstein’s statement: “There is a familiar image of justice. She is a single figure. She is a goddess, emphatically not a human being. She is blindfolded. And she holds a scale. In the real world, the law cannot be represented by a single figure. Legal institutions are composed of many people. Our courts are run by human beings, not by a god or goddess. Judges need not be blindfolded; what they should be blind to is perhaps the key question for law. And judges have no scale. Far from having a scale, they must operate in the face of a particular kind of social heterogeneity: sharp and often intractable disagreements on basic principle.”\textsuperscript{44} This theoretical statement is my starting point to engage a critical appraisal of the ICC’s perception of its role and to demonstrate that it has counter-productive effects: rather than improving the victims’ situations, these are double-victimized.

2) \textit{Securing the applicable rules to reparation by adopting a clear, precise and understandable methodology and legal reasoning}

As said previously, the ICC presumptuous approach of “victims’ rights” blurs many major issues that are silenced/underestimated in the ICC orders. Based on Article 21 of its Statute (applicable law), the ICC shall clarify its rules of interpretation of the principles of reparation (use of external sources, comparative law methodology…) and better articulate its decisions. Key-concepts of the law of reparation should also be better and more rigorously construed by the ICC: notion of victims and of beneficiaries; situation of heirs (ayant-droit) of a dead person; situation of a victim who did not take part to the ICC proceeding; scope and extent of the economic loss; articulation between individual and collective reparations; currency used by the Court; reflections upon the protection of the monetary value of compensation from the passage of time\textsuperscript{45}… I assume that these methodological/technical concerns could be addressed by taking some human rights organs’ and transitional mechanisms’ practice as a model (case-law of the Inter-American Court when dealing with Colombian massacres cases for instance or case-law of the European Court when facing inter-states applications\textsuperscript{46}).

\textsuperscript{43} The States Parties Assembly is the main decisional organ of the ICC.

\textsuperscript{44} Sunstein, p. 1734.

\textsuperscript{45} The currency used by the Court and the protection from the devaluation of the monetary compensation are very significant in order to preserve the integrity of the amount, as the human rights courts’ practice illustrates. As a measure of protection, the European Court as the Inter-American Court use for instance the practice of default interest.

\textsuperscript{46} See for instance the inter-State case before the ECtHR Grand Chamber \textit{Cyprus v. Turkey}, judgment (just satisfaction) 12 May 2014, paras 47, 58: “In view of all the relevant circumstances of the case, and making its assessment on an equitable basis, the Court considers it reasonable to award the Cypriot Government aggregate sums of EUR 30,000,000 for non-pecuniary damage suffered by the surviving relatives of the missing persons, and EUR 60,000,000 for non-pecuniary damage suffered by the enclaved residents of the Karpas peninsula, plus any tax that may be chargeable on these amounts. The aforementioned sums are to be distributed by the applicant
3) Reflections on the merits

A provocative reflection 47 shall consist in reopening or pursuing the conversation on the nexus between the individual’s criminal responsibility and the State’s international responsibility and accordingly, the articulation between the ICC jurisdiction and the other domestic/international adjudication mechanisms. Concrete cases (Bosnia and Herzegovina/Croatia v. Serbia 48; Ukraine/Georgia v. Russia…49; the preliminary investigation on British forces’ acts in Iraq50) illustrate that the distinction between the two regimes of accountability is more and more artificial. It would probably be too much provocative – and not useful – to reopen the question of “State crime” but the other paragraphs of Article 75 should be taken seriously by the ICC and especially paragraph 6 (“Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law”).

At this step of my research, I am of the opinion that a reflection upon the articulation of the ICC level and the other fora (domestic/international) would be an added-value. In the light of the strong failures of the ICC reparation system, the articulation principle could be based on complementarity – as a core principle of the ICC Statute (article 1751) – or subsidiarity – as it

Government to the individual victims of the violations found in the principal judgment under these two heads (see, mutatis mutandis, the judgment of the International Court of Justice in the case of Diallo (compensation), cited above).”

47 In the Latin sense, provocor, i. e. to call forth.

48 In 1993, an international criminal court (International Criminal Tribunal for the former Yugoslavia) was established by a UN Security Council Resolution to bring to justice perpetrators of “serious violations” of humanitarian law committed since 1991 within the territory of former Yugoslavia and at the same time, the ICJ was seized by Bosnia and Herzegovina against Serbia on the basis of the International Convention on Prevention and Punishment of the Crime of Genocide (the ICJ’s judgment was delivered on Feb. 26 2007). In 1999, Croatia lodged the ICJ on the same legal ground and the ICJ judgement was delivered on Feb. 3 2015.

49 See for instance the ongoing territorial/sovereignty conflict between Ukraine and Russia: it gave raise to litigations before the European Court of Human Rights (inter-state complaints lodged by Ukraine against Russia and thousands of individual complaints lodged by Ukrainians); an ongoing proceeding before the International Court of Justice (seized by Ukraine on January 2017 on the basis of the UN International Convention on Elimination of Racial Discrimination and the International Convention for the suppression of the financing of terrorism) and the situation is under “preliminary examination” by the ICC Prosecutor.

50 Partially dealt with by the UK Supreme Court and the ECtHR’s Grand Chamber judgments Al-Skeini v. UK and Al-Jedda v. UK (7 July 2011).

51 Article 17 of the ICC Statute (Issues of Admissibility): “1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”
is designed in the ECHR or the ACHR.\textsuperscript{52} When a State or an available human rights organ is not in position to provide for reparation based on the ICC conviction, the chambers could declare the request for reparation admissible. This articulation principle would definitely extend the length of legal proceedings and raises many theoretical and practical questions (links between the fields of international; articulation between international adjudication mechanisms…) that will be dealt with in the research. Nevertheless, it implies that the ICC partly renounces to its affirmation that its raison d’être rests upon the victims’ rights but I am convinced that it is the only avenue to preserve (or restore) its credibility and legitimacy.

\textsuperscript{52} See for instance the wording of Article 41 of the ECHR: “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”