Practices of Reparations in International Criminal Justice

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Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

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Abstract

This thesis examines the practical project to make international criminal justice more victim-oriented by giving it an additional reparations function. Animated by the dissonance between the idea of reparations and its practice in international criminal justice, this study relies on the first-ever reparations orders by the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) to complement legalistic accounts in the scholarly literature with a socio-legal inquiry.

Drawing on practice theory, I use the notion of 'practices' as an analytical lens to show forms of social actions that together enable and constrain reparations. Rather than starting with preconceived notions of reparations, this approach draws attention to the multitude of practices of judges, lawyers, diplomats, NGO workers and others that often get overlooked in scholarly research. I ask: what are the practices associated with reparations in international criminal justice? And how do these practices shape the possibilities and meanings of reparations? Building on documentary analysis, ethnographically informed fieldwork and practitioner interviews, this study makes visible the often hidden practices that together form the social life of reparations. This thesis identifies what practices exist, how they come to be, how they work, and what meanings and effects they produce. My observations are structured along four phases of the social life of reparations – norm-making, engagement with conflict-affected populations, adjudication and implementation – and focus on two case studies: the cases *Lubanga* and *Katanga* at the ICC, concerning the Ituri district of the Democratic Republic of Congo, and *Cases 001* and *002/01* at the ECCC in Cambodia.

The thesis shows how contestations over sometimes irreconcilable visions of justice are at the core of the production of reparations. The incorporation of competing rationales into the legal frameworks of both Courts continues to affect their operations. The study demonstrates how actors at and around these Courts actively mediate these tensions, through their practices, when they are giving effect to their reparations mandates in different social contexts. I identify a range of communicative, representational and adjudicative practices that simultaneously constrain action and become sources of flexible adaptation to make reparations fit new circumstances. However, these practices are not able to overcome the limitations that are inherent in the Courts' juridical approach. The thesis indicates that the promise of more 'victim-oriented justice' through reparations has been realised only superficially, and that reparations remain marginalised and subordinated to the dominant logics of the criminal trial. I call for an appreciation of the limits of recasting international criminal justice as a site for realising reparative ambitions. This does not mean that there is no role for reparations in international criminal justice. I argue that the role is a more modest one than the literature or advocates often suggest – one that is rooted in the Courts' symbolic powers to recognise, rather their ability to deliver tangible and equitable reparations to a large number of survivors.

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Preface

"What are 'reparations'?", asks Yang Oun when a local Cambodian NGO worker tries to inform him about the reparations mandate of the Extraordinary Chambers in the Courts of Cambodia (ECCC), a criminal tribunal set up by the Cambodian government and the United Nations in the capital Phnom Penh. Yang Oun belongs to Cambodia's ethnic Vietnamese minority and resides in one of the many picturesque but poor floating villages on the Tonle Sap Lake, roughly two and half hours drive – and another hour boat ride – north of the capital Phnom Penh. During its reign 40 years ago, the Khmer Rouge persecuted him and his community. Yang Oun lost many of his family members and only survived the atrocities because he fled to Vietnam. Years later he decided to participate in the trials "to tell everyone about our suffering". Reparations were initially not on his mind, but is a field in the form that he is required to fill in for his application. My Cambodian colleague patiently assists him, as Yang Oun has never learned the Khmer script. I accompany this local NGO's field mission in my capacity as an Advisor of the German development cooperation (GIZ) to Cambodia's largest human rights NGO coalition.

On this beautiful, if sweltering, day in the wet season of the year 2008 I have the feeling that much of our discussion gets lost in translation. The NGO worker acknowledges the language difficulties – the Khmer and Vietnamese language equivalents to reparations are more similar to monetary compensation. Yang Oun thinks for a moment and then asks whether he could get some money to send his three kids to school and perhaps organise a Buddhist ceremony for his deceased relatives. My colleague explains that this is not possible as the ECCC's mandate is limited to 'collective and moral reparations'. Yang Oun raises his eyebrows; my colleague looks briefly at me and then says, "it means that you cannot get money". Yang Oun is unperturbed and with admirable logic retorts, "well, then I would like a school to be built in our community, so that our children can learn". The NGO worker replies that this is also not allowed under the mandate and that it is anyway the government's responsibility to build schools – reparations should be for the personal harm he suffered during the Khmer Rouge time. Yang Oun looks over the lake into the distance and shrugs, "well, I will be happy if the Tribunal can give justice". My Cambodian colleague seems satisfied with the answer and writes 'justice' into the reparations field of the application form.

This is how I recall the event. It showed me how abstract international concepts or norms, such as reparations, that are often portrayed as universal in their meaning are not self-evident in various local communities around the world – indeed sometimes not even at the very institutions

promoting these concepts. In outreach activities that I attended, it often felt as if the ECCC was engaging in an educational program to convey a concept that was too abstract and removed from people's lives; and once it took hold, it created expectations that the Court could not live up to.

Two years after this field mission, in 2010, I was asked by the GIZ to advise the ECCC Victims Support Section on their collective reparations program. Having worked for three years alongside Cambodian civil society to move the trials against former senior Khmer Rouge cadres forward, I was enticed by the prospect of engaging with activities that would focus more on the survivors of past violence. Coming to the Court as an outsider, the first thing that struck me was how contested the reparations mandate was within the Court and among its legal and administrative professionals. Many lawyers conveyed to me that it should not be the role of a criminal court to engage in this type of work, and the administration was reluctant to invest any resources into this aspect of the ECCC's mandate. Both believed that not much would happen anyway. I wondered at the time, perhaps somewhat naively, wasn't it a good thing to do something for the survivors of the Khmer Rouge, when all those previous years the focus had been merely on prosecuting a handful of suspected elderly perpetrators? Why was there so much resistance within the Court to reparations? And why did the institution take on these unwanted reparative functions in the first place? This experience became the starting point when years later I decided to write this dissertation on reparations in international criminal justice.

These two experiences with the internal dynamics of these courts and the way they engage with survivors provided two pieces in a larger puzzle about how the idea of reparations gradually materialises in the world. Other pieces were still missing. Yet, my experience showed me that this process is not linear but messy, marked by contestations and the competing understandings and motivations of a range of different actors. This process transcends the boundaries of courts and states, and reaches simultaneously from local villages over courtrooms of internationalised tribunals to the diplomatic arenas where global justice and reparations frameworks are negotiated and legalised. My thesis is an attempt to identify these pieces and, where possible, to put them together – aware of the fact that no coherent picture might emerge in the end.

As someone who has worked both practically around such tribunals and now reflects on them academically, I have often pondered how to overcome the continuing divide between scholars and practitioners. Jens Meierhenrich noted that many who are theoretically imaginative about international criminal courts have only little practical experience, and most of those who are experienced with their operation have feeble theoretical imagination. In contrasting the twin

dangers 'imagination without knowledge' and 'knowledge without imagination',[1] he points to some of the challenges involved with integrating in-depth empirical work with creative theorising.[2] Some of the best theoretical work I have come across in my review of the literature for this thesis had little grounding in empirical research, while many practitioners with inside knowledge of the courts and their practices struggle to articulate broader theoretical insights that go beyond the mere descriptive. My experience around the ECCC has made me realise that grasping the day-to-day reality of the work of lawyers, administrators, NGO intermediaries, diplomats, survivor representatives and so many more is key to explaining the operation and effects of international criminal justice, even more so in relation to reparations.

My background influences my positioning as a researcher. The experiences in Cambodia and beyond gave me a preconception that addressing questions of justice in the aftermath of mass atrocities is important to survivors, even decades after the violations occurred. I was personally involved in a number of events that I describe in this thesis – ranging from my engagement with Cambodian NGOs on ECCC-related outreach and victim participation activities through my GIZ assignment at the Cambodian Human Rights Action Committee (CHRAC, 2007-2010) to my advisory role at the ECCC Victims Support Section (VSS, 2010-2011) where I was involved, among others, in the reparations consultation process for civil parties in *Case 002*. Observations from this experience may have coloured my research perspective and design, and the analysis of my data. Yet, overcoming the barriers between scholarly and practitioner accounts requires acknowledging and dealing with such influences in the design of my research.[3] Whilst my personal and professional engagement with my research subject shaped my thesis in many ways, it also provided me access and insider knowledge that I might otherwise not have had. With legal professional networks operating and continuously migrating across different international courts, it also gave me a head start for my research at the International Criminal Court (ICC).

Returning to my desk at the Australian National University, I have made an attempt to write an account of the reparations processes at the ECCC and the ICC that combines empirical insights with theoretical reflections, whilst remaining accessible to non-academic audiences inquiring into responses to the legacies of mass atrocities.

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[1] Borrowed from Alfred North Whitehead's quote, "fools act on imagination without knowledge, pedants act on knowledge without imagination".

[2] Meierhenrich, Jens, 2014, The Practice of International Law: A Theoretical Analysis', 76(3-4) *Law & Contemporary Problems,* 1-83, 1-2.

[3] For instance, Merry speaks of "the slippage between the role of activist and scholar and the impossibility of separating them". Merry, Sally Engle, 2005, 'Anthropology and Activism: Researching Human Rights Across Porous Boundaries', 28(2) *PoLAR*, 240-257.

Introduction

Behind the idea of reparations in international criminal justice is the belief that international justice can be dispensed in a more victim-oriented manner.[1] This belief was nurtured by two concurrent responses to mass atrocities during the second half of the twentieth century: punishment and redress. These two responses found expression in the 'fight against impunity' and the corresponding rise of international criminal justice, and the emergence of international human rights and the increasing attention paid to victims of crimes. Reparations have become one the most important conceptual formulations of victim-oriented justice. In 2005, the UN General Assembly even proclaimed a 'right to reparation' for victims of mass abuses.[2] However, while international criminal justice continued to gain new institutions and widespread support among states, the legal frameworks in place for reparations have remained fragmented and ineffective. The desire for more enforcement eventually drove advocates of reparations into the arms of international criminal justice. Maybe it was possible to have two for one, punish perpetrators and provide reparations to victims of mass atrocities within a single legal and institutional framework?!

The practice of reparations

The promise that reparations can be delivered through international criminal justice has now been around for nearly two decades. Coming into existence in 2002, the International Criminal Court (ICC) was the first international criminal tribunal to which victims can submit claims for reparations.[3] Following this example, some hybrid courts have considered provisions on reparations, notably the ECCC in Cambodia. Yet, it is only in the last few years that the first practice has emerged from these courts.

The adjudication so far of the first reparations claims before the ICC and ECCC has been arduous and revealed disagreement within and outside these Courts over the nature, extent and purpose of reparations in an international criminal justice framework. Considerable uncertainty surrounds whether these reparations schemes can live up to expectations placed upon them. At the same

[1] I note here that the term 'victim' may be controversial, as it often connotes a passive and helpless figure. 'Survivor' may therefore be a more appropriate word to use. I use both terms in my thesis. 'Victim' is mainly used in relation to the ICC and ECCC processes, as it is the term used in the ICC Rome Statute and ECCC Internal Rules, as well as the legal discourse of international criminal law more generally.
[2] *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*, UN Doc A/RES/60/147, 16 December 2005, para. 11.
[3] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, Art. 75.

time, the international community continues to invest significant resources in international criminal justice institutions, and advocates do not give up hope for a more victim-friendly international justice system that can address the multiple needs of survivors of mass atrocities. It is high time to understand what is actually happening at these Courts regarding reparations.

Against this background, a vigorous debate rages among scholars, practitioners and activists over the merits and limitations of these reparations schemes. Some judges have come out with critical reflections about the practicality of the ICC's victim participation and reparations mandate that go to the heart of the question whether or not combining a system of victim redress with international criminal trials is the right approach.[4] This critique coincides with a general quest for meaning in international criminal justice. Akhavan argues that "the era of romanticisation of international criminal justice" is over, and "as the romance fades away, we are confronted with the self-evident complexities and constraints of grafting idyllic rule of law conceptions on to the grim reality of societies emerging from mass atrocities".[5] This much is true for reparations in international criminal justice. Yet, times of doubt are also normal for maturing fields and open up new opportunities for scholars to re-examine international criminal justice – the purpose and function of its novel reparations mandate is one key aspect in this re-evaluation.

Many of these debates among scholars have a normative undertone and reveal longstanding ideological fault lines, but have often limited empirical grounding. They obscure the fact that little is actually known about reparations in international criminal justice, mainly because of the very limited practice to date. Not a single court-ordered reparations award has so far materialised from the ICC's first trials, while the ECCC has only recently completed its second trial, which granted a dozen collective reparations projects. Hence, the timing of the first-ever reparations orders by international(-ised) criminal courts provides an opportunity to complement the prevailing analysis of legal procedural frameworks in the scholarly research with an analysis of the first *practice* of reparations emerging from these courts. At the ICC, Judge Van den Wyngaert has stated, "the Court will have to assess whether the system it has installed is capable of reaching the objectives it has set for itself. By the time the first trials have run their full course, the Court will be in a position to do so."[6] We are now arriving at this critical moment, where such an assessment is both feasible and necessary.

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[4] See for instance Van den Wyngaert, Christine, 2011, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44 *Case Western Reserve Journal of International Law*, 465-496.
[5] Akhavan, Payam, 2013, 'The Rise, and Fall, and Rise of International Criminal Justice', 11(3) *Journal of International Criminal Justice*, 527-536, 527-529.
[6] Wyngaert, Victims before International Criminal Courts, 494.

Thesis aim and object of study

My thesis is animated by the dissonance between the promise of reparations and its practice in international criminal justice. I explore this dissonance by examining the first attempts in international criminal justice to convert reparations for victims of mass atrocities from an idea to actual realisation. In this process, I regard reparations neither as an abstract norm nor a purely institutional outcome, but as produced and reconfigured by various forms of social action. The object of study is the different practices that constitute and shape reparations in international criminal justice. The goal is to identify these practices and to understand their genesis, development and interconnections. In mapping and tracing these practices, I examine how together they construct, change and give meaning to reparations in different contexts.

The social life of norms and rights

Richard Wilson has called for the study of the "social life of human rights". Wilson referred to the social forms that coalesce in and around the formal legal or political processes associated with human rights, but which are usually hidden in practices behind those official processes.[7] My study brings such practices to the forefront of the analysis. This approach situates reparations in the specific social contexts, and not only the legal frameworks, in which they are pursued. It involves studying the birth, spread and materialisation of reparations across different legal, institutional and social settings. In the scholarly literature, these processes are usually studied separately and by different disciplines; obscuring the interconnectedness of practices that constitute the social life of transnational phenomena. My research brings different strands of research and theories on law and society into conversation. Similar efforts at bridge-building between legal and social sciences have resulted in a rich socio-legal or law and society scholarship.[8] This scholarship has accommodated both legal and social science insights with a view "to better understand the social, cultural, political, and economic contexts in which law operates in practice, be it in the past or the present".[9]

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[7] Adapted from Wilson, Richard, 2006, 'Afterword to "Anthropology and Human Rights in a New Key": The Social Life of Human Rights', 108(1) *American Anthropologist*, 77-83.

[8] I am aware that socio-legal and law and society research have each distinct academic histories. Despite these differences, I will use these terms interchangeably in my thesis, mainly as umbrella terms for research that combines legal analysis with theoretical and methodological insights from the social sciences and humanities. See Abel, Richard, 2010, 'Law and Society: Project and Practice', 6 *Annual Review of Law and Social Science*, 1-23; and Calavita, Kitty, 2010, *Invitation to Law and Society: An Introduction to the Study of Real Law*, Chicago: University of Chicago Press.

[9] Darian-Smith, Eve, 2013, *Laws and Societies in Global Contexts: Contemporary Approaches*, Cambridge: Cambridge University Press, 2.

Reparations have both normative and empirical dimensions. Yet, much of the literature on reparations in international criminal justice or on international criminal justice more generally is still formal and legalistic in nature.[10] This scholarship often starts with upfront definitions and theorising of reparations (reparations *are*…), which are then applied to different contexts. This literature obscures what is actually happening and does not reflect the more diffuse reality I encountered around the ECCC. While I acknowledge the value of normative research and the normative impetus driving reparations advocates, my study focuses broadly on empirical aspects of reparations. The objective is to turn away from abstractions to see how reparations are used by practitioners and others involved in the making of reparations.

The rise in social science research on legal phenomena has provided new perspectives and tools to capture these empirical dimensions in order to analyse legal frameworks and their institutions in a larger context of social development. Together with Michelle Burgis-Kasthala, I have highlighted the relevance and the necessity of conducting interdisciplinary research into the field of international criminal justice.[11] Drawing on insights from legal anthropology, new legal realism and the sociology of law, this study uncovers and reveals the often hidden practices that together constitute, shape and give meaning to reparations in international criminal justice.

Practices as a lens to study reparations

Anna Tsing reminds us that "universal claims do not actually make everything everywhere the same",[12] rather universal aspirations should be "considered as practical projects accomplished in a heterogeneous world".[13] My research sheds light on the practical project that was born out of the impetus to make international criminal justice more victim-oriented by giving it an additional reparative function. I use the notion of 'practice' or 'practices' as an analytical lens to make visible forms of social actions that together and simultaneously enable and constrain reparations.

[10] See McEvoy, Kieran, 2007, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', 34(4) *Journal of Law and Society*, 411-440.
[11] The results have been published in a special issue of the International Criminal Law Review. Refer in particular to the introduction at Burgis-Kasthala, Michelle, 2017, 'How Should We Study International Criminal Law? Reflections on the Potentials and Pitfalls of Interdisciplinary Scholarship', 17(2) *International Criminal Law Review*, 227-238.
[12] Tsing, Anna Lowenhaupt, 2005, *Friction: An Ethnography of Global Connection*, Princeton/Oxford: Princeton University Press, 11.
[13] Ibid 16.

In doing so, I build on a long-established literature in sociology[14] and (legal) anthropology.[15] Attention to practices has gained more traction in scholarship in recent years; so much so that some scholars suggest a 'practice turn'.[16] But what does it mean to talk about 'practice' or 'practices'? The literature abounds with definitions.[17] At a basic level, they can be understood as socially meaningful patterns of actions that are embedded in particular organised contexts.[18] Vincent Pouliot adds that not everything that people do can be derived from rational thinking, norm-following or collective deliberation. Instead, practices are often unarticulated and informed by background knowledge, such as beliefs, identities, interests or preferences.[19] Such an understanding is distinct from the rules-based notion of 'practice' prevalent in law, where authoritative rules tell actors how they ought to act (e.g. in sentencing practices), and which actions fall inside or outside of a practice.[20] The notion of practices used in this study is broader and takes into account the fact that practitioners may at times struggle to verbalise or explain their actions. This comes closer to Wilson's objective of studying the "hidden practices" that lie behind formal processes. My thesis examines such practices and describes how practitioners came to adopt them.[21]

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[14] Much of today's practice theory builds on earlier sociological scholarship, in particular Bourdieu, Pierre, 1977, *Outline of a Theory of Practice*, Cambridge: Cambridge University Press; and Giddens, Anthony, 1979*, Central Problems of a Social Theory: Action, Structure, and Contradiction in Social Analysis*, London: Macmillan.

[15] See for instance Goodale, Mark, and Sally Engle Merry, 2007, *The Practice of Human Rights: Tracking Law between the Global and the Local*, Cambridge: Cambridge University Press; and Buerger, Catherine and Richard Ashby Wilson (forthcoming), 'The Practice of Human Rights', in: MacClancy, Jeremy (ed.), *Exotic No More: Anthropology on the Front Lines*, 2nd edition, Chicago: University of Chicago.

[16] See for instance Schatzki, Theodore, Karin Knorr Cetina, and Eike von Savigny (eds.), 2001, *The Practice Turn in Contemporary Theory*, London/New York: Routledge; Adler, Emanuel, and Vincent Pouliot (eds.), 2012, *International Practices*, Cambridge: Cambridge University Press; Bueger, Christian, and Frank Gadinger, 2014, *International Practice Theory*, Basingstoke: Palgrave Macmillan; and Nicolini, Davide, 2013, *Practice Theory, Work and Organisation: An Introduction*, Oxford: Oxford University Press; and Spaargaren, Gert, Don Weenink, and Machiel Lamers (eds.), 2016, *Practice Theory and Research: Exploring the Dynamics of Social Life*, London/New York: Routledge.

[17] For instance, Adler and Pouliot define practices as "socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world". Adler, Emanuel, and Vincent Pouliot, 2011, 'International Practices', 3(1) *International Theory*, 1-36. Meierhenrich describes 'practices' as "recurrent and meaningful work activities – social or material – that are performed in a regularised fashion and that have a bearing, whether large or small, on the operation" of an international(-ised) criminal court. Meierhenrich, Jens, 2014, 'The Practices of the International Criminal Court: Foreword', 76(3-4) *Law & Contemporary Problems*, i-x, i.

[18] Adapted from Adler/Pouliot, International Practices, 4-5.

[19] See Pouliot, Vincent, 2008, 'The Logic of Practicality: A Theory of Practice of Security Communities', 62 *International Organization*, 257-288.

[20] See also Karp, David J., 2013, 'The Location of International Practices: What is Human Rights Practice?', 39 *Review of International Studies*, 969-992.

[21] See also Czarniawska, Barbara, 2015, 'After Practice: A Personal Reflection', 5(3) *Nordic Journal of Working Life Studies*, 105-114.

The existing literature on practices does not make for a unified or coherent theory. I am therefore not claiming that I use 'practice theory'. But the notion of practices does provide an analytical lens that allows us to bring different legal and social science perspectives into dialogue around a common conceptual focal point.[22] Employing practices as an analytical lens means shifting the scholarly focus from upfront theorising to empirically examining how reparations are conceived and produced by the actions of various actor communities. Rather than starting with preconceived notions of reparations (reparations as an ideal), a practice-based approach foregrounds what professionals - judges, lawyers, diplomats, NGO workers and others - are *doing* with regard to reparations. Reparations are seen as constituted and performed through a set of practices.[23] By adopting a practice lens to the study of reparations, this thesis focuses on the various professionals and institutions involved in reparations. Making these practices visible through a combination of documentary analysis, fieldwork observations and practitioner interviews grounds theorising of reparations within their surrounding social, political and institutional contexts.[24] The result is a more dynamic and contextual understanding of reparations.

Practices develop through and are carried out by communities of practice. Etienne Wenger and colleagues characterise a community of practice as sharing three basic elements: "a domain of knowledge, which defines a set of issues; a community of people who care about this domain; and the shared practice that they are developing to be effective in their domain".[25] Adler and Pouliot add that 'background knowledge', such as shared beliefs, goals or reasoning, is crucial to understanding what brings different members of such communities together and disposes them to act in a similar manner.[26] The social life of reparations viewed from this angle emerges from, and is characterised by, interconnected and overlapping communities and sets of practices. Whilst the study of practices in sociology and anthropology has traditionally focused on smaller social phenomena, such as daily routines or professional habits, practice scholars have moved to apply such approaches to larger transnational phenomena.[27] Such phenomena can be regarded as

[22] See also Adler/Pouliot, International Practices, 28.
[23] See Massoud, Mark, 2016, 'Ideals and Practices in the Rule of Law: An Essay on Legal Politics', 41(2) *Law & Social Inquiry*, 490.
[24] Jacob, Cecilia, 2014, 'Practising Civilian Protection: Human Security in Myanmar and Cambodia', 45(4) *Security Dialogue*, 392.
[25] Wenger, Etienne, Richard McDermott, and William Snyder, 2002, *Cultivating Communities of Practice: A Guide to Managing Knowledge*, Boston: Harvard Business School Press, 27. Based on the work of Wenger et al., Adler and Pouliot refer to a community of practice as "a configuration of a domain of knowledge that constitutes like-mindedness, a community of people that 'creates the social fabric of learning', and a shared practice that embodies 'the knowledge the community develops, shares, and maintains'". Adler/Pouliot, International Practices, 18 (partly quoting Wenger et al.).
[26] Adler/Pouliot, International Practices, 16-18.
[27] See Schatzki, Theodore, 2016, 'Keeping Track of Large Phenomena', 104 *Geographische Zeitschrift*, 4-24.

practice bundles, arrangements, clusters or assemblages.[28] In order to study these arrangements, Davide Nicolini suggests a "double movement of zooming in on and zooming out of practice obtained by switching theoretical lenses and following, or trailing, the connections between practices".[29] In conceptualising reparations in international criminal justice as a bundle of different practices, this study provides an alternative account compared to studies that define reparations as either a set of legal obligations and an institutional outcome. Using practices as an analytical lens makes reparations visible as a multi-dimensional and socially constructed practical project. A social inquiry into reparations seeks to identify what practices exist, how they come to be, how they work and transform, and what meanings and effects they produce.

Research questions

Accordingly, my thesis addresses the following research questions:

- What are the practices associated with reparations in international criminal justice?
- How do these practices shape the possibilities and meanings of reparations?

Pursuing these questions means studying reparations in international criminal justice through an empirical examination of its constitutive practices. I am not focusing on demonstrating the existence of causal pathways in the development of reparations.[30] Rather the goal is to identify the overlapping practices involved in the social making of reparations. I do so by way of 'thick' narratives that embrace the complexities of actors' practices and make visible patterns of action involved in reparations.[31] Reparations in international criminal justice, I argue, are construed, contested and produced through the interconnection of these sets of practices as they are performed by varied communities of actors across different times and places. Appreciating the nature and effects of these practices provides us with a deeper understanding of the discrepancies that exist between the reparations ideal and how it imperfectly functions in diverse mass atrocity situations.

[28] Scholars describe these practice arrangements with different terms. For instance, Schatzki uses 'bundles', Nicolini 'practice networks', Latour 'assemblages' etc.
[29] Nicolini, Davide, 2009, 'Zooming In and Zooming Out: Studying Practices by Switching Theoretical Lenses and Trailing Connections', 30 (12) *Organization Studies*, 1391-1418, 1392.
[30] As pursued for instance in the process tracing literature. For an overview refer to Kay, Adrian and Philip Baker, 2015, 'What Can Causal Process Tracing Offer to Policy Studies? A Review of the Literature', 43(1) *The Policy Studies Journal*, 1-21.
[31] See Orford, Anne, 2012, 'In Praise of Description', 25(3) *Leiden Journal of International Law*, 609-625.

Locating practices of reparations

Much of the literature on international justice is caught in a dichotomy of the 'global' and the 'local', or the 'above' and 'below'.[32] These analytical categories have inspired scholarship on the relationship between international norms and local practices. The spread of ethnographic research approaches has allowed scholars to study ideas, concepts, norms and models as they travel across different settings where they adapt to new circumstances.[33] Various concepts, such as 'norm localisation',[34] 'translation'[35] or 'vernacularisation',[36] have tried to capture the dynamic process through which international norms are reframed or reconstituted to suit local cultural understandings and social orders. As a consequence, Alex Hinton notes that "even as they may be initiated with the best of intensions, transitional justice mechanisms almost always have unexpected outcomes that emerge out of the 'frictions' between these global mechanisms and local realities."[37] This literature also provides valuable insights into the socially mediated mechanisms driving the transformation of reparations across different sites and contexts.

At the same time, the 'global' and 'the local' are often assumed as real, rather than as mere analytical categories. My own experience and field research resonates with Leila Ullrich's finding that these meta-categories create many blind spots, especially regarding conflicting justice visions within international institutions and local communities. Ullrich noted that "the fault lines of justice contestations run not only between the ICC and affected communities, but also through the Court and victim communities".[38] For the purposes of my research on reparations, I found it productive to put contestations over its use and meaning at the forefront of my observations. This has enabled me to capture the diverse and often contradictory justice agendas that play out among

[32] See Sharp, Dustin, 2014, 'Addressing Dilemmas of the Global and the Local in Transitional Justice', 29 *Emory International Law Review*, 71-117.
[33] See for instance Rottenburg, Richard, 2009, *Far-Fetched Facts: A Parable of Development Aid*, Cambridge, MA: MIT Press; and Behrends, Andrea, Sung-Joon Park, and Richard Rottenburg (eds.), 2014, *Travelling Models in African Conflict Management: Translating Technologies of Social Ordering*, Leiden/Boston: Brill.
[34] Acharya, Amitav, 2004, 'How Ideas Spread: Whose Norms Matter? Norm Localisation and Institutional Change in Asian Regionalism', 58 *International Organization*, 239-275. On 'norm internalisation' see Finnemore, Martha, and Kathryn Sikkink, 1998, 'International Norm Dynamic and Political Change', 52(4) *International Organization*, 887-917.
[35] See Gal, Susan, 2015 'The Politics of Translation', 44 *Annual Review of Anthropology*, 225-240.
[36] Merry, Sally Engle, 2006, *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago: Chicago University Press, 28-35.
[37] Hinton, Alex, 2010, 'Introduction: Toward an Anthropology of Transitional Justice', in: Hinton, Alex (ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, New Brunswick: Rutgers University Press, 1-22, 9.
[38] Ullrich, Leila, 2016, 'Beyond the "Global-Local Divide"', 14(3) *Journal of International Criminal Justice*, 543-568, 547.

court officials, legal professionals, local NGOs and victim representatives.[39] What all these approaches have in common is that they leave accounts of smooth and linear flows of transnational ideas, norms and people behind and focus instead on the messy, dynamic and contested practices that make up the social life of transnational phenomena and more than often produce unpredictable outcomes and effects.

Instead of structuring my observations along the lines of international and national levels, I examine reparations by looking at the different phases of its social life where the 'global' and the 'local' are often simultaneously present and where the use and meaning of reparations are contested by diffuse constellations of actors and institutions. Based on my own experience and from a review of the secondary literature, I identify four phases that are key in the social life of reparations in international criminal justice:

- *norm-making*, when vague ideas about reparations are turned into concrete rules for international(-ised) criminal courts;
- *engagement with conflict-affected populations* in the specific situations into which these courts intervene;
- *adjudication of reparations* by international(-ised) criminal courts;
- *implementation* of reparations awards.

These phases are not meant to depict a linear or chronological representation of the making of reparations, nor do they encapsulate the totality of practices surrounding reparations in international criminal justice. However, these four phases and the practices associated with them are essential in understanding the pursuit of reparations across time and space. Most of the phases chosen here to study key stages of the social life of reparations occur in the space sandwiched between traditional analytical notions of the 'international' and the 'local'. I concentrate on these intersections as the primary loci where reparations are conceived and take form.[40]

[39] This approach also draws on scholarship that moves away from linear notions of norm diffusion and promotion to an emphasis on norm contestation. See for instance Wiener, Antje, 2014, *A Theory of Contestation*, Berlin: Springer; and Tsing, *Friction*.
[40] See also Merry, Sally Engle, 2006, 'Transnational Human Rights and Local Activism: Mapping the Middle', 108 *American Anthropologist*, 38-51.

Research approach

To capture the transnational dimensions of interconnected institutional and human practices requires combining different research methodologies. I drew primarily on documentary analysis and ethnographically-informed fieldwork,[41] and augmented the research with a case study element.

I first studied the four different phases of reparations through two case studies. The International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia have been the first international(-ised) criminal courts that have allowed victims to claim reparations in their proceedings.[42] The first two cases at each of these Courts have been adjudicated more or less in parallel.[43] They concern two distinct geographical areas – the Ituri district of the Democratic Republic of Congo (DRC) in Central Africa, and Cambodia in Southeast Asia. Both cases address large-scale atrocities that arguably represent especially challenging situations for considering reparations. My fieldwork, carried out between 2014 and 2016, centred on the Courts and their immediate surroundings, and involved among others 58 interviews with individuals from a diverse set of actors, including from the Courts, NGOs and victim associations, external observers or experts, government officials and relevant state parties and donors.[44]

I distilled from this research a set of key practices or patterns of practices that these Courts have developed to give effect to their reparations mandates. This helped uncover comparable objects, which I then brought into conversation with one another. Through comparative observations, I illuminated differences and similarities that have existed in the practices across both cases. The combination of ethnographically-informed in-depth case study research with a comparative perspective has enabled broader explanatory insights into the functioning of court-ordered reparation schemes.

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[41] See Marcus, George, 1995, 'Ethnography in/of the World System: The Emergence of Multi-sited Ethnography', 24 *Annual Review of Anthropology*, 95-117.

[42] In so far as the *Chambres Africaines Extraordinaires* (Extraordinary African Chambers, EAC) in Dakar, Senegal, can be considered an international(-ised) criminal justice process, they could constitute an additional case for inquiry.

[43] At the ICC, this concerns the cases against Thomas Lubanga and Germain Katanga relating to the situation in Ituri, Democratic Republic of Congo. At the ECCC, my thesis only deals with *Cases 001* and *002/01* involving senior leaders of the Khmer Rouge and those most responsible for crimes committed in Cambodia during the 1970s.

[44] See more about the research design at Chapter 2.

Thesis outline

From my research approach flows a thesis structure that follows the social life of reparations in international criminal justice – from its birth to its spread to international(-ised) criminal courts courts and its materialisation in different social contexts. After a first part with some theoretical and methodological background, I structure my inquiry into four parts that follow the four phases of the social life of reparations: norm-making, engaging with conflict-affected populations, adjudication and implementation of reparations.

Part I engages with the question how to study reparations in international criminal justice. In Chapter 1, I sketch out a brief conceptual history of reparations in international criminal justice and engage with the scholarly literature. I show how questions of justice in response to mass atrocities have been informed by two ascending international normative demands: the 'fight against impunity' and the corresponding rise of international criminal justice; and the emergence of international human rights and the increasing attention paid to victims of crimes. I conceive of 'reparations' as a concept whose contours are diffuse and essentially contested. In Chapter 2, I lay out my socio-legal research design and introduce the two case studies. The Chapter provides a brief background to the conflicts and justice responses in the Ituri District in the Democratic Republic of Congo, from which the first cases before the ICC emerged, and to the Khmer Rouge atrocities in Cambodia.

Following these two background chapters, I present the results of my empirical research. **Part II** asks how reparations for victims have become part of international criminal justice institutions. It considers how practices chosen during the negotiations of legal frameworks continue to affect the operation of reparations schemes at the respective courts. My account of the ICC Rome Statute negotiations (Chapter 3) and the ECCC's Internal Rules-making process (Chapter 4) shows that reparations in the Courts' legal framework originated from contested negotiations, in which different visions of international justice stood in competition. In response to these contestations, negotiators adopted practices that enabled consensus. In both cases, negotiators, be they diplomats or the judges themselves, had little appreciation of the competing rationales they incorporated into the legal frameworks, which remain at the core of the tensions within the reparations mandates today.

These competing visions for reparations eventually came into contact with the social contexts that were the subject of the first cases before the ICC (Chapter 5) and the ECCC (Chapter 6): the district of Ituri in the DRC and Cambodia. In **Part III**, I ask what happens to legalised, but non-specific, notions of reparations when they are communicated and enacted in complex post-atrocity

situations. I show that against the background of ongoing uncertainties surrounding reparations, actors at and around these Courts developed specific communicative and representational practices to filter and adjust survivors' inputs into the processes that determine reparations outcomes. I argue that these practices help those working around these Courts to discipline and translate the multitude of survivor demands, while responding to the constraints from conflict-affected situations that do not fit the stringent requirements of legal proceedings. These practices determine critical parameters of court-ordered reparations long before judges embark on the adjudication of reparation requests.

Contested visions of reparations also become visible in the courtrooms of the ICC (Chapter 7) and ECCC (Chapter 8), where ambiguous legal rules and those claiming to represent the survivors converge in the hope for the long-awaited resolution of the reparations predicament. **Part IV** inquires into the question of how reparations have been conceived in adjudicative practices. I argue that the practices adopted by judges at both Courts are attempts to mediate between competing legal and social imperatives. Courtrooms become arenas where various actors compete over tipping the scales in favour of one direction or the other. I show that despite the fact that the first cases at both Courts have developed more or less in parallel, they moved into opposite directions. The ICC, as the central guardian of the future of international criminal justice, settled on a more legally principled path with demanding judicial requirements that are still being litigated. The ECCC at the periphery, on the other hand, became driven by feasibility concerns in an attempt to provide some collective projects; so much so that their reparative value is now debated.

In **Part V** (Chapter 9), I examine the implementation of reparations at the ECCC and, to the degree possible, assess how survivors view these reparations. I consider the effects of communicative and adjudicative practices on the materialisation and meaning of reparations. Behind this question is the dynamic interrelationship between what courts have to offer and what victims accept as reparations. I explore this conundrum by examining two measures that were granted by ECCC Judges as 'reparations' and two measures that were rejected. Juxtaposing these two allows for a discussion of the Court's practices regarding reparations and their effects on the meaning of reparations.

The practice lens has heightened sensitivity to the possibilities and limitations of reparations in international criminal justice. Based on my research findings, I come to the **conclusion** that the initial promise for more victim-oriented justice through reparations has been realised only superficially. The 'victim' remains an anonymous and passive collective whose voice rarely

makes it to the tables where reparations outcomes are determined. The main reason for this unsatisfactory state of affairs is that reparations remain subordinated to the dominant legal and jurisdictional logics of the criminal trial. The contradictions and contestations this has produced have – despite mediating practices by court actors – resulted in a marginalisation of reparations within international(-ised) criminal courts.

In my conclusion, I call for an appreciation of the limits of recasting international criminal justice as a site for realising reparative justice ambitions, and to look beyond these courts in the pursuit of reparations for victims of mass atrocities. The current model is convenient for concerned post-conflict governments and the larger states funding the system, as it has allowed the outsourcing of responsibility for reparations to institutions with limited mandates and capacities. There is a case for recognising and acknowledging victims through international criminal justice. Yet, it will be a more modest one than the current promise suggests.

Whilst at times my account of reparations practices at the ICC and the ECCC may appear rather bleak, I do not abandon the aspiration for a more victim-oriented approach to justice and reparations in the aftermath of mass atrocities. As a scholar and practitioner, I agree with Mark Massoud that disenchanting and strengthening of justice endeavours go hand in hand. Thus, disenchanting is part and parcel of strengthening the collective pursuit of justice, including reparations.[45] The fact that practices of reparations in international criminal justice are characterised by uncertainties, contradictions and imperfections should not be taken as a failure of justice and human rights aspirations.[46] Instead, contestation and adaptive practices represent forms of expression and social mediation through which solutions to pressing global problems are negotiated – be it through resistance or the contextualised reproduction of universal ambitions.

[45] Massoud wrote about the rule of law: "Just as a principled understanding of the rule of law helps us understand our values, hopes, and what we would fight for, an empirical investigation into the rule of law helps us understand what challenges we might face when we join that struggle. Both of these – principles and data – are ultimately essential for a richer understanding of the rule of law's power." Massoud, Ideals and Practices, 497.

[46] In this respect I agree with Mark Goodale at Goodale, Mark, 2007, 'Locating Rights, Envisioning Law Between the Global and the Local', in: Mark Goodale and Sally Engle Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local*, Cambridge: Cambridge University Press, 1-38, 38.

PART I

Studying Reparations in International Criminal Justice

CHAPTER 1

Two for One?!
Reparations in International Criminal Justice

The purpose of this chapter is to locate this study within the scholarly debate and explain some of the key terminology. In sketching a conceptual history of reparations and international criminal justice, I show how reparations for victims of mass atrocities gradually became a concern for international criminal justice. After surveying the existing scholarly literature on reparations and international criminal justice, I highlight how my practice-based account of reparations contributes to the scholarly debate.

1. Normative Responses to Atrocities: Punishment and Redress

More than 70 years after the Holocaust and the creation of the United Nations, violent conflicts and mass atrocity crimes remain the main challenge for the United Nations' objective of saving "succeeding generations from the scourge of war".[1] Despite the optimism that existed after the end of the Cold War to resolve conflicts and to rebuild shattered societies in the aftermath of civil war, mass violence has not disappeared from international affairs.[2] For the purposes of this study, I use the term 'mass atrocity' as an umbrella term to describe various acts of large-scale violence independently from narrow legal definitions.[3]

Despite this increase in international peace efforts, Paul Collier and colleagues at the World Bank found in 2003 that almost 40 per cent of all countries that had emerged from violent conflict relapsed back into conflict within the first five years.[4] Collier called this phenomenon the 'conflict

[1] Preamble of the 1945 UN Charter.
[2] See Karstedt, Susanne, 2012, 'Contextualizing Mass Atrocity Crimes: The Dynamics of "Extremely Violent Societies"', 9(5) *European Journal of Criminology*, 499-513.
[3] Former US Ambassador-at-Large for War Crimes, David Scheffer, proposed the use of the term 'mass atrocity crimes' with the objective "to enable public and academic discourse to describe genocide, crimes against humanity (including ethnic cleansing), and war crimes with a single term that is easily understood by the public and accurately reflects the magnitude and character of the crimes …". Scheffer, David, 2006, 'Genocide and Atrocity Crimes', 1(3) *Genocide Studies and Prevention*, 229-250, 248. At times, I refer more specifically to 'international crimes' as those core crimes defined in the Rome Statute of the International Criminal Court, Art. 5-8.
[4] Collier, Paul et al., 2003, *Breaking the Conflict Trap: Civil War and Development Policy*, World Bank Policy Research Report, Washington, DC/Oxford: Oxford University Press, 79-92, 100-118.

trap', also referred to as 'cycles of violence'.[5] Breaking these cycles of violence is a complex and long-term task. In 1992, UN Secretary-General Boutros-Ghali declared that building sustainable peace requires addressing "the deepest causes of conflict".[6] This proposition is supported by another strand of research that argues that rebuilding peace in these difficult contexts requires that the injustices of the past are addressed. Rama Mani argues that "given the nature of contemporary conflicts, it is as much a political imperative as a social necessity to address issues of justice in the aftermath".[7] The underlying assumption is that there is a link between rebuilding peace in a post-conflict society and restoring justice, and only if this connection is addressed can the cycle of violence be broken.[8]

The scholarly field that deals with questions of justice after mass atrocities nowadays unites under the umbrella of 'transitional justice'.[9] I use transitional justice as a term to describe the range of processes and mechanisms, which societies may use to deal with the legacy of mass violence and atrocities.[10] Societies dealing with a legacy of mass abuse confront dilemmas that distinguish these contexts from other environments where justice responses are considered: difficult transitional contexts, large-scale victimisation, destruction of the judicial infrastructure and human capacities, severe economic obstacles and limited resource, to just name a few. How to conceive and attain justice under such circumstances has continued to preoccupy scholarship.[11] Some scholars have argued that mass atrocity contexts are 'extraordinary' in nature, and that justice responses developed primarily to deal with the more 'ordinary' crimes in peaceful societies

[5] Ibid 79-87.
[6] *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc A/47/277, 17 June 1992, paras. 15 & 21.
[7] Mani, Rama, 2002, *Beyond Retribution: Seeking Justice in the Shadows of War*, Cambridge, UK: Polity Press/ Malden, MA: Blackwell Publishers, 3.
[8] See also Lederach, John Paul, 1997, *Building Peace: Sustainable Reconciliation in Divided Societies*, Washington, DC: United States Institute of Peace Press. Lederach's contribution was influential in bridging the discourse between peace researchers and human rights scholars. See also Minow, Martha, 2002, *Breaking the Cycles of Hatred: Memory, Law, and Repair*, Princeton: Princeton University Press.
[9] For an overview of transitional justice see Teitel, Ruti, 2000, *Transitional Justice*, Oxford/New York: Oxford University Press; Arthur, Paige, 2009, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', 31 *Human Rights Quarterly*, 321-367; and Bell, Christine, 2009, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'', 3(1) *International Journal of Transitional Justice*, 5-27.
[10] I follow here the prevalent understanding at the UN. See *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2004, para. 8.
[11] See for instance Nickson, Ray, and John Braithwaite, 2014, 'Deeper, Broader, Longer Transitional Justice', 11(4) *European Journal of Criminology,* 445-463; Bowden, Brett, Hilary Charlesworth and Jeremy Farrall (eds.), 2009, *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations*, Cambridge University Press: Cambridge; and Fletcher, Laurel E., and Harvey M. Weinstein, 2002, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', 24 *Human Rights Quarterly*, 573-639.

may not be adequate to address the challenging needs of conflict-affected societies.[12] They point to the difficulties associated with importing theories, concepts and practices designed primarily in the context of stable situations into the complex environment of societies emerging from mass atrocities.[13]

While the transitional justice literature emphasises the multitude of justice needs in the aftermath of mass atrocities, including prosecution, truth-seeking, reparation and reconciliation,[14] some issues have received more attention from the international community than others. I argue that international justice has been informed by two main normative responses: the 'fight against impunity' through international prosecutions, and the rise of human rights with its emphasis on victims of abuses. Together these two responses have shaped the way in which policy-makers see and react to mass atrocities.[15]

Both responses are associated with broader social and political movements, which I refer to in the following as the anti-impunity and human rights movements.[16] These two movements and the normative responses they produced have long ideational histories that have their roots in Western liberal states and their historic experience of mass violence during World War II. Their expansion and actualisation during the twentieth century has been linked to broader transnational processes of legalisation and institutionalisation that have gradually converged over time. It is at this point of convergence where my more focussed story about reparations in international criminal justice begins. What follows is a brief account of how these developments unfolded and how scholars have tried to explain them.

1.1. International criminal justice: An expanding field

Over the course of the 1990s, the 'fight against impunity' through criminal prosecutions became a cornerstone of the international community's response to mass atrocities. Payam Akhavan

[12] See for instance Aukerman, Miriam J., 2002, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', 15 *Harvard Human Rights Journal*, 39-97; and Drumbl, Mark, 2005, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', 99(2) *Northwestern University Law Review*, 539-610.
[13] See Clamp, Kerry and Jonathan Doak, 2012, 'More than Words: Restorative Justice Concepts in Transitional Justice Settings', 12 *International Criminal Law Review*, 339-360.
[14] Stephan Parmentier drew attention to the need of taking a comprehensive approach to justice in post-conflict societies. His TARR model identifies four key issues of transitional justice: truth, accountability, reparation and reconciliation. See Parmentier, Stephan, 2003, 'Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court', 41(1-2) *International Annals of Criminology*, 203-224.
[15] See Balint, Jennifer, 1997, 'Conflict, Conflict Victimization and Legal Redress, 1945-1996', 59(4) *Law and Contemporary Problems*, 231-247.
[16] See Engle, Karen, Zinaida Miller, and D.M Davis, 2016, *Anti-Impunity and the Human Rights Agenda*, Cambridge: Cambridge University Press.

declared that the creation of the contemporary international criminal justice system was "a phenomenal revolutionary development" that "signified a seismic shift in global governance" against a hitherto entrenched culture of impunity for mass atrocities.[17] How did we get there?

The beginning of international criminal justice is often associated with the Nuremberg and Tokyo trials in the aftermath of World War II. This model altered the post-World War I justice model in two significant ways. First, it criminalised atrocities and replaced collective sanctions against entire states or nations with the idea of individual criminal responsibility.[18] And second, it shifted responses to mass atrocities – now considered crimes against all of humankind – from the national to the international level.[19] Whilst the Cold War limited the advance of this initial phase of international criminal justice, Nuremberg's legacy remained alive. An imperative gradually took form in an anti-impunity movement, which emphasised criminal punishment in response to individual wrongdoing and stressed the responsibility of the international community to act when states failed to do so.[20]

The end of the Cold War set into motion a rapid expansion and proliferation of international criminal justice mechanisms. This began during the early 1990s with the establishment by the UN Security Council of the two ad hoc tribunals for the former Yugoslavia and Rwanda, followed by the formation of a series of hybrid criminal courts, and culminating, in 1998, with the creation of the permanent International Criminal Court in The Hague.[21] This phase of institutional growth was accompanied by an increase in judicial output generating substantive jurisprudence and expanding international criminal law generally.[22] Kathryn Sikkink and colleagues refer to this development as the 'justice cascade' – a global trend of holding political leaders criminally accountable for past human rights violations through domestic or international prosecutions.[23]

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[17] Akhavan, Rise and Fall, 527-528.
[18] See Ratner, Steven R., Jason S. Abrams, and James L. Bischoff, 2009, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd edition, New York and Oxford: Oxford University Press.
[19] See Koskenniemi, Martti, 2004, 'Hersch Lauterpacht and the Development of International Criminal Law', 2(3) *Journal of International Criminal Justice*, 810-825.
[20] See Bass, Gary, 2000, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton: Princeton University Press; and Beigbeder, Yves, 2005, *International Justice against Impunity: Progress and New Challenges*, Boston/Leiden: Martinus Nijhoff Publishers.
[21] See for instance Mettraux, Guénaël, 2005, *International Crimes and the Ad Hoc Tribunals*, Oxford/New York: Oxford University Press; Romano, Cesare P., André Nollkaemper, and Jann K. Kleffner (eds.), 2004, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford/New York: Oxford University Press.
[22] For a quantitative overview of the work of these tribunals, see Smeulers, Alette, Barbora Hola and Tom van den Berg, 2013, 'Sixty-Five Years of International Criminal Justice: The Facts and Figures', 13 *International Criminal Law Review*, 7-41.
[23] Sikkink, Kathryn, 2011, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, New York: W.W. Norton & Company; and Lutz, Ellen, and Kathryn Sikkink, 2001, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', 2(1) *Chicago Journal of International Law*, 1-33.

Sikkink argues that such prosecutions are affecting the behaviour of political leaders worldwide and have the potential to help diminish human rights violations.[24] Yet, the triumph of the global 'fight against impunity' has also resulted in justice becoming more state-centric and synonymous with 'criminal justice'. It directed attention to individual accountability for atrocities, rather than for instance addressing the underlying structural conditions of violence.[25]

The field of international criminal justice

I use the term 'international criminal justice' to describe a new field that has developed from the anti-impunity movement, comprising its own norms, institutions and actor networks.[26] Drawing on insights from sociology, scholars have used field-based accounts to explain the development of international criminal justice. Field theory is an approach in the social sciences that explains regularities in individual action by recourse to their position to others or their environment.[27] Such approaches have enabled the analysis of interconnected social spaces or spheres of activity, such as institutions, networks, systems or social movements, where actors engage or compete with one another.[28] Following the pioneering work of John Hagan, scholars have examined international criminal justice in its interrelationship with other fields, such as international diplomacy, peacemaking, domestic criminal law and international law.[29] Building on this scholarship, Peter Dixon and Chris Tenove suggest that the field of international criminal justice developed at the intersection of three already established global fields, namely interstate

[24] Sikkink, Kathryn, and Hun Joon Kim, 2013, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations', 9 *Annual Review of Law and Social Science*, 269-285.
[25] See for instance Burgis-Kasthala, Michelle, 2017, 'Holding Individuals to Account Beyond the State? Rights, Regulation and the Resort to International Criminal Responsibility', in: Drahos, Peter (ed.), *Regulatory Theory: Foundations and Applications*, Canberra: ANU Press, 429-444.
[26] See for instance Dezalay, Sara, 2017, 'Weakness as Routine in the Operations of the International Criminal Court', 17(2) *International Criminal Law Review*, 281-301.
[27] Martin, John Levi, 2003, 'What is Field Theory?', 109(1) *American Journal of Sociology*, 1-49. Scholars employing field theory draw on the work of Pierre Bourdieu. See Bourdieu, Pierre, 1986, 'The Force of Law: Toward a Sociology of the Juridicial Field', 38 *Hastings Law Journal*, 805-853. These insights have been further developed to understand modern day social spaces. See Fligstein, Neil, and Doug McAdam, 2012, *A Theory of Fields*, Oxford/New York: Oxford University Press.
[28] Such theoretical approaches have contributed to understanding the creation and transformation of transnational legal regimes and orders. See for instance Dezalay, Yves and Bryant Garth, 2002, *The Internationalisation of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*, Chicago: Chicago University Press; Dezalay, Yves and Bryant Garth (eds.), 2013, *Lawyers and the Construction of Transnational Justice*, New York: Routledge; and Dezalay, Yves, and Mikael Madsen, 2012, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law', 8 *Annual Review of Law and Social Science*, 433-452.
[29] See Hagan, John and Ron Levi, 2004, 'Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice', 1(4) *European Journal of Criminology*, 445-475; Hagan, John and Ron Levi, 2005, 'Crimes of War and the Force of Law', 83 *Social Forces*, 1499-1534; and Mégret, Frédéric, 2016, 'International Criminal Justice as a Juridical Field', 13 *Champ pénal/Penal field* (online version).

diplomacy, criminal justice and human rights advocacy.[30] The authors argue that this positioning at the crossroads of different fields allows international criminal justice to bring together a variety of types of actors, draw on multiple forms of authority and mobilise resources.

Building upon this literature, I understand international criminal justice as a transnational field of practice and scholarship, rather than a mere set of rules and institutions. As such international criminal justice goes beyond the narrower notion of international criminal law, which refers to the legal regime underpinning the field. This field circumscribes the main locus for my observations on reparations. I acknowledge the contributions of field theory, especially to explaining macro-level developments in international criminal justice. This literature goes hand in hand with my practice-based research approach, with the practice lens allowing for a deeper examination of meso- and micro-level dynamics.

Fields and practices

Two insights from the literature on transnational fields have inspired my study of the practice of reparations in international criminal justice, namely (i) that the international criminal justice field is constituted of actors who continuously construct and transform the field; and (ii) that this field is expanding, which in turn produces contestations and competing goals.

As to the first insight, field-based perspectives move our attention beyond a focus on tribunals and jurisprudence towards how actors actively build and shape international criminal justice, including its norms, institutions and social networks.[31] The number of actors involved in the creation and work of international criminal justice is considerable and stretches beyond the boundaries of its institutions. The scholarly literature on professional networks and epistemic communities populating the field of international criminal justice has shown how expansive these networks are, but also how porous the boundaries are between them.[32] Such perspectives help us to identify the practices of overlapping actor communities that stretch beyond the boundaries of courts and reach into different social contexts.

One feature of international criminal justice is the intertwined nature of practice and scholarship. Vinjamuri and Snyder have drawn attention to the roles played by advocates and individuals in

[30] Dixon, Peter, and Chris Tenove, 2013, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', 7 *International Journal of Transitional Justice*, 393-412.
[31] In political science, this has been taken up by the literature on 'norm entrepreneurs' and transnational movements. See for instance Keck, Margaret and Kathryn Sikkink, 1998, *Activists beyond Borders: Advocacy Networks in International Politics*, Ithaca NY: Cornell University Press.
[32] Mégret notes, "yesterdays' 'diplomat' or 'stateman' can be tomorrow's 'NGO activist' or 'scholar'". Mégret, International Criminal Justice as a Juridical Field.

the formation of tribunals and in setting the agenda for scholars.[33] The early scholarly literature on international criminal justice was primarily of a 'formalist' or 'legalist' nature, focusing on legal procedure and defending and expanding international criminal justice.[34] Many authors shared a belief in the promotion of universal standards of justice, and the assumption that individual accountability is necessary for deterring mass atrocities. With the field's expansion and its growing importance for international relations and peacebuilding, scholars from other disciplines joined the debate.[35] This has diversified research, spurring more critical approaches to studying international criminal justice.[36]

As to the second insight, field-based models make visible the mechanics propelling the expansion of international criminal justice; a perspective relevant for my account of how reparations became part of international criminal justice (see Part II). These models are able to capture the dynamic interaction and competition between different fields and their overlapping groups of actors.[37] The expansion and the struggles it produces are manifested in the variety of competing goals associated with the field, with some scholars advocating for more minimalist and others for more expansionist views of international criminal justice. For instance, Damaska argues that international criminal courts should leave behind unrealistic aspirations, including satisfying the demands of victims, and play a more modest role by advancing accountability for mass atrocities.[38] Other scholars maintain that the extraordinary context of atrocities requires a new approach to criminal justice that is different from existing criminal justice models. This includes proposals for re-thinking underlying legal principles[39] or re-defining theories of punishment,[40]

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[33] Vinjamuri, Leslie, and Jack Snyder, 2004, 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice', 7 *Annual Review of Political Science*, 345-262, 345-346.

[34] See for instance Meron, Theodor, 1999, *War Crimes Law Comes of Age: Essays*, Oxford: Oxford University Press; Ball, Howard, 1999, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience*, Lawrence: University Press of Kansas; and Bassiouni, Cherif (ed.), 2002, *Post-Conflict Justice*, Ardsley, NY: Transnational Publishers.

[35] See for instance Clarke, Kamari Maxine, 2009, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge: Cambridge University Press; and Kelsall, Tim, 2009, *Culture under Cross- Examination: International Justice and the Special Court for Sierra Leone*, Cambridge, UK: Cambridge University Press; and Christensen, Mikkel Jarle, 2015, 'The Emerging Sociology of International Criminal Courts: Between Global Restructuring and Scientific Innovations', 63(6) *Current Sociology Review*, 825-849.

[36] The critique has nowadays reached such a breadth that Darryl Robinson sees international criminal law as in an "identity crisis". Robinson, Darryl, 2008, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law*, 925-963.

[37] Dezalay and Garth described these struggles as 'turf battles'. See Dezalay, Yves and Bryant Garth, 2004, 'The Confrontation between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility', 29(3) *Law & Social Inquiry*, 615-638.

[38] Damaska, Mirjan, 2008, 'What is the Point of International Criminal Justice?', 83 *Chicago Kent Law Review*, 329-365.

[39] See Robinson, Darryl, 2013, 'A Cosmopolitan Account of International Criminal Law', 26(1) *Leiden Journal of International Law*, 127-153.

[40] See Drumbl, Mark, 2007, *Atrocity, Punishment and International Law*, Cambridge: Cambridge University Press.

while others demand more attention to historical truth,[41] peacemaking/conflict resolution[42] or restorative justice.[43] Yet, critical scholars argue that this expansion of international criminal justice into new areas has crowded out or subordinated other fields.[44]

This literature suggests that these contestations over the goals and purpose of international criminal justice are not an abnormality, but rather are constitutive of the field. This thesis moves these contestations to the forefront of the analysis. By identifying and examining these contestations, I reveal how they bring about and shape actors' practices through which reparations are produced.[45]

1.2. Human rights, the 'victim' and the emergence of reparations

The expansion of international criminal justice is linked to the growing importance of human rights – a source of support for the anti-impunity movement, but also of new pressures. The scholarly literature has chronicled and explained from different perspectives the rise of human rights during the last century.[46] Two aspects of this development are of particular importance for my story on reparations, namely a re-evaluation of the standing of the individual in its relationship to the state and the increased attention to remedies for individual victims of wrongdoing.

The first aspect concerns the elevation of the individual person in its relationship to the state and the nascent international community. Hans Joas has described the advent of a global human rights culture as an expression of a growing belief in the 'sacredness' of the individual person.[47] Collective experiences of violence and broader socio-structural changes have enabled this belief to become legalised and institutionalised.[48] Grounded in historical experiences of political persecution and state-sponsored crimes during World War II, the post-war human rights

[41] See Joyce, Daniel, 2004, 'The Historical Function of International Criminal Trials: Re-thinking International Criminal Law', 73 *Nordic Journal of International Law*, 461-484.
[42] See Clark, Janine, 2011, 'Peace, Justice and the International Criminal Court: Limitations and Possibilities', 9(3) *Journal of International Criminal Justice*, 521-545.
[43] Findlay, Mark, and Ralph J. Henham, 2005, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process*, Cullompton: Willian Publishing; Findlay, Mark, and Ralph Henham, 2009, *Beyond Punishment: Achieving International Criminal Justice*, Basingstoke: Palgrave Macmillian.
[44] See Schwobel, Christina (ed.), 2014, *Critical Approaches to International Criminal Law: An Introduction*, Milton Park: Routledge.
[45] For instance, Louise Chappell demonstrates this with 'gender justice' at the ICC. See Chappell, Louise, 2013, 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court', 67(1) *Political Research Quarterly*, 183-196.
[46] See for instance Moyn, Samuel, 2010, *The Last Utopia: Human Rights in History*, Cambridge/London: Harvard University Press; and Teitel, Ruti, 1997, 'Human Rights Genealogy', 66 *Fordham Law Review*, 301-317.
[47] Joas, Hans, 2013, *The Sacredness of the Person: A New Genealogy of Human Rights*, Washington D.C.: Georgetown University Press.
[48] See also Madsen, Mikael Rask, and Gert Verschraegen (eds.), 2016, *Making Human Rights Intelligible: Towards a Sociology of Human Rights*, Oxford/Portland: Hart Publishing.

movement was determined to protect the individual from the state, mainly by constraining the state through law. Individual, inalienable rights became a central tool through which this protection manifested and through which notions of absolute state sovereignty could be challenged.[49]

The human rights movement can be understood as a project with transnational ambitions.[50] In international affairs, its ambitions found articulation in the emergence of the individual as a rights-holder under international law. In contrast to the prevailing understanding of international law as governing inter-state matters, progressive international human rights law-making and practice during the past decades has challenged the presumption that states are the only subjects of international law.[51] Ruti Teitel has identified this development in international law as a 'normative shift' – a gradual movement away from states toward protecting individuals.[52] This shift has also been reflected in the growing use of human rights and universal norms to frame demands of change.

In relation to instances of serious human rights violations, the individual person requiring protection manifested in the figure of the 'victim'. I note that the term 'victim' may be controversial, as it often connotes a passive and helpless figure. 'Survivor' may be a more appropriate word to use. While recognising that these labels are not static, I use both terms in my thesis. 'Victim' is mainly used in relation to the ICC and ECCC, as it is the term used in the ICC Rome Statute and ECCC Internal Rules, as well as the legal discourse of international criminal law more generally.

The notion of 'victims' also permeated the rhetoric of the human rights movement, which rose to the role of torchbearer for victims of mass atrocities.[53] A range of international human rights instruments enshrined various forms of protections and entitlements for victims of crime.[54] This

[49] See also Reus-Smit, Christian, 2011, 'Struggles for Individual Rights and the Expansion of the International System', 65 *International Organization*, 207-242.
[50] See Neier, Aryeh, 2012, *The International Human Rights Movement: A History*, Princeton/Oxford: Princeton University Press.
[51] See also Charlesworth, Hilary, 2017, 'A Regulatory Perspective on the International Human Rights System', in: Drahos, Peter (ed.), *Regulatory Theory: Foundations and Applications*, Canberra: ANU Press, 357-373.
[52] The laws associated with this shift – international human rights law, international humanitarian law, and international criminal law – are cumulatively referred to by Teitel as 'law of humanity'. Teitel, Ruti, 2011, *Humanity's Law*, Oxford: Oxford University Press.
[53] See for instance Elias, Robert, 1986, *The Politics of Victimization: Victims, Victimology, and Human Rights*, New York: Oxford University Press; Wemmers, Jo-Anne, 2017, *Victimology: A Canadian Perspective*, Toronto: University of Toronto Press; and Vanfraechem, Inge, Antony Pemberton, and Felix Ndahinda, 2014, *Justice for Victims: Perspectives on Rights, Transition and Reconciliation*, London/New York: Routledge.
[54] See Bassiouni, Cherif, 2006, 'International Recognition of Victims' Rights', 6(2) *Human Rights Law Review*, 203-279.

was most comprehensively articulated in the 1985 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.[55] Following the end of the Cold War, a human protection imperative has taken hold and has been further codified in international policy and legal instruments, including through notions of human security,[56] the Responsibility to Protect,[57] Protection of Civilians in Armed Conflict[58] and the Women, Peace and Security agenda.[59] Didier Fassin has examined these developments through the lens of 'humanitariansm' to describe a new kind of "moral economy" that has spurred demands for rights and the obligation to provide assistance to others.[60]

The second aspect relates to how the centrality of victims in the human rights movement led to an emphasis on remedies in response to rights violations. Many international human rights treaties or regional human rights conventions have incorporated rules that establish the right to some form of remedy for an individual victim of crime.[61] As a result of the intermarriage of human rights with the progressive judicialisation of modern societies, these remedies are structured through law and decided in courts, increasingly so at the international level. Some regional human rights systems, such as the European and Inter-American systems, are regarded as the most effective legal remedy available for individual victims of human rights violations.[62] Reparations to individual victims for harm they suffered as a result of a human rights violation have become one the most important remedies enshrined in these treaties. In 2004, the UN Secretary-General declared, "in the face of widespread human rights violations, states have the *obligation* [italic by the author] to act not only against perpetrators, but also on behalf of victims – including through

[55] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,* UN Doc A/RES/40/34, 29 November 1985.
[56] Humans security challenged traditional notions of state security by promoting the individual as the main referent for security, first laid out since 1994 in UNDP's Human Development Reports.
[57] Endorsed by UN member states at the 2005 World Summit. See Bellamy, Alex, 2014, *The Responsibility to Protect*, Oxford: Oxford University Press.
[58] Propagated in a range of Security Council resolutions since the early 2000. See Jacob, Cecilia and Alistair Cook, 2016, *Civilian Protection in the Twenty-First Century: Governance and Responsibility in a Fragmented World*, Oxford: Oxford University Press.
[59] Articulated in a number of Security Council resolutions, starting with Resolution 1325 on women, peace and security adopted in 2000.
[60] Fassin, Didier, 2012, *Humanitarian Reason: A Moral History of the Present*, Berkeley: University of California Press.
[61] Among the most important treaties are the 1948 Universal Declaration of Human Rights (Art. 8); 1950 European Convention on Human Rights (Art. 5(5)); the 1966 International Covenant on Civil and Political Rights (Art. 2(3), 9(5) and 14(6)); the 1966 Convention on the Elimination of All Forms of Racial Discrimination (Art. 6); the 1969 American Convention on Human Rights (Art. 10) and the 1984 Convention Against Torture (Art. 14).
[62] See for instance Rubio-Marin, Ruth and Clara Sandoval, 2011, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment', 33(4) *Human Rights Quarterly*, 1062-1091.

the provision of reparations".[63] But what reparations exactly is and means has been subject to debate.

1.3. Reparations: A contested concept and emerging norm

Despite the growing importance of reparations in the aftermath of mass atrocities, there exists little conceptual and theoretical agreement in the literature on reparations. Laplante's review of the field noted a lack of "a cohesive theoretical framework to guide our understanding of the overarching justification, purpose and aims of reparations and how they relate to theories of justice".[64] Nevertheless, the use and meaning of reparations has expanded over time, whilst simultaneously remaining ambiguous and unsettled. In fact, reparations could be regarded as what Gallie describes as an "essentially contested concept" – a concept that is internally complex, variously describable and open in character.[65] For the purposes of my thesis, I regard reparations as such a contested concept, and the 'right to reparations' as the associated norm that attempts to capture the concept and use it for the purposes of an expanding human rights agenda.

Despite the term's contested nature, the scholarly literature on reparations continues to proliferate and has expanded its disciplinary base over time.[66] This is visible in the wide array of normative and empirical inquiries into reparations in the aftermath of mass atrocities.[67] The legalisation and judicialisation of reparations have also provided a terrain for legal scholars to engage with reparations.[68] This literature proposes a variety of understandings with regard to 'reparations' and

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[63] *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2004, para. 54.

[64] Laplante, Lisa, 2014, 'The Plural Justice Aims of Reparations', in: Buckley-Zistel, Susanne, Teresa Koloma Beck, Christian Braun, and Friederike Mieth (eds.), *Transitional Justice Theories*, Milton Park: Routledge, 66-84, 67.

[65] Gallie, W.B., 1956, 'Essentially Contested Concepts', 56 *Proceedings of the Aristotelian Society*, New Series, 167-198.

[66] For a general overview of reparations in the aftermath of mass atrocities, see De Greiff, Pablo (ed.), 2006, *The Handbook of Reparations*, Oxford, UK: Oxford University Press; De Feyter, Koen et al. (eds.), 2005, *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp/Oxford: Intersentia; Du Plessis, Max, and Stephen Pete (eds.), 2007, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerp/Oxford: Intersentia Publishers; Ferstman, Carla, Mariana Goetz, and Alan Stephens (eds.), 2009, *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Martinus Nijhoff Publishers.

[67] While I recognise that the demarcation between the two situations is rather fluid, my study is not concerned with questions of reparations for historical injustices. Refer to Barkan, Elazar, 2000, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, Baltimore/London: John Hopkins University Press; Brooks, Roy L. (ed.), 1999, *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, New York, NY/London: New York University Press; and Torpey, John (ed.), 2003, *Politics and the Past: On Repairing Historical Injustices*, Lanham, MD: Rowman and Littlefield Publishers.

[68] See for instance Bottigliero, Ilaria, 2004, *Redress for Victims of Crimes under International Law*, Leiden/Boston: Martinus Nijhoff Publishers; and Randelzhofer, Albrecht, and Christian Tomuschat (eds.),

other associated terms; in fact 'reparations', 'restitution', 'compensation', as well as 'remedy' and 'redress' are often used without clear distinction.[69] At the most basic level, I use these overlapping terms in my thesis as follows: remedy is defined as the *means* legally available by which the violation of a right is rectified; and redress can be described as the *action* seeking remedy or reparations.[70] Reparations refers then generally to the *form* of relief given and the *measures* taken to respond to harm suffered by injured individuals and/or groups. As such the term embraces both the substance as well as the process through which it may be obtained.[71] Given that the term refers to different forms and measures, I use the plural of reparations throughout my thesis, rather than its singular version.

Jo-Anne Wemmers suggests a helpful classification of existing definitions of reparations.[72] She distinguishes between three categories of definitions: legal, criminological and victimological definitions. I draw attention to the existence of these different attempts at conceptualising and defining reparations, as actors in international criminal justice often use them to justify a certain course of action.

In relation to the legal category, scholars and international lawyers have made attempts at different levels, both under international human rights and international humanitarian law, to establish a more coherent conceptual basis for the various elements of reparations.[73] The most prominent attempt emerged from the former UN Commission on Human Rights. In 1989, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities entrusted Special Rapporteur Theo van Boven with the task of preparing a study on the right to reparations for victims of 'gross violations of human rights'. In 1993, van Boven delivered his final report proposing Basic Principles and Guidelines on this topic.[74] After long negotiations the UN General

1999, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, The Hague/Boston: Martinus Nijhoff Publishers.

[69] Haasdijk, Suzan, 1992, 'The Lack of Uniformity in the Terminology of the International Law of Remedies', 5(2) *Leiden Journal of International Law*, 245-263.

[70] This is in line with the basic semantic understanding of those terms in accordance with the Oxford English Dictionary, June 2014 update.

[71] In adopting this understanding, I keep with the general understanding outlined in the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law.

[72] Wemmers, Jo-Anne, 2014, 'The Healing Role of Reparations', in: Wemmers, Jo-Anne (ed.), *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparations*, London/New York: Routledge, 221-233.

[73] The International Law Association established a Committee on Reparation for Victims of Armed Conflict, which has been working on principles and procedures for victims' rights to reparations. For more on reparations in international humanitarian law, see Evans, Christine, 2012, *The Right to Reparations in International Law for Victims of Armed Conflict*, Cambridge: Cambridge University Press.

[74] UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993. During his time as Special Rapporteur, van Boven submitted two other draft versions of the basic principles and guidelines: E/CN.4/Sub.2/1996/17 (24 May 1996) and E/CN.4/1997/104 (16 January 1997).

Assembly eventually adopted, on 16 December 2005, 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* (hereinafter 'Basic Principles and Guidelines').[75]

The main rationale of the Basic Principles and Guidelines was not to create new legal obligations for states, but to assemble the various reparations provisions of existing human rights treaties and other international law instruments and to unite them under a new conceptual framework.[76] The concept of reparations, as advanced by the Basic Principles and Guidelines, includes the following five forms of reparations:

- *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights occurred. Restitution includes the restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.
- *Rehabilitation* should include medical and psychological care as well as legal and social services.
- *Satisfaction* should include, where applicable, inter alia measures aiming at the cessation of violations, verification of the facts and public disclosure of the truth, the search for disappeared persons, restoration of the dignity of victims, public apology, judicial and administrative sanctions against the persons responsible for the violations, as well as commemorations.
- *Guarantees of non-repetition* should include measures, which will contribute to prevention. Such measures include inter alia civilian control of security forces, independence of the judiciary, providing human rights education, changing legislation, as well as promoting mechanisms for preventing social conflicts.[77]

In conceiving of reparations as an umbrella concept that combined various forms of redress in response to mass atrocities, the Basic Principles and Guidelines anchored the term in the wider legal profession and provided a new way to communicate about reparations. It did so by expanding the scope and meaning of the norm. A number of provisions go beyond the needs of individual victims and address society as a whole. Guarantees of non-repetition in particular comprise an extensive agenda for good governance.

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[75] *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, Resolution of the General Assembly*, UN Doc A/RES/60/147, 16 December 2005 (hereinafter 'Basic Principles and Guidelines 2005').

[76] The resolution states 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". Basic Principles and Guidelines 2005, preamble.

[77] Adapted from Basic Principles and Guidelines 2005, paras. 19-23.

Despite these advancements in the legal sphere, the overwhelming challenges in mass atrocities settings have frustrated state-centric judicial responses,[78] providing an opening for other disciplines to engage with the debate. One of the most influential perspectives has emerged from criminology under the banner of 'restorative justice'. This field of research has encouraged different ways of thinking about responses to crime, especially by challenging the dominance of retributive policies in legal systems.[79] Whilst conceptions of 'restorative justice' differ among scholars,[80] they generally emphasise efforts to repair the harm caused by wrongdoing and the relational dimension of this process by involving all concerned parties and stakeholders. This scholarship has led to a diffusion of restorative justice perspectives in the academic debates about reparations in mass atrocity settings.[81] It is also a common term used to describe the context of the ICC's reparations mandate.[82] Yet, other scholars have pointed to the difficulties associated with applying the concept to war crimes trials. Such contexts involve only selected prosecutions of high-level perpetrators, mostly not those directly committing the acts that affected the victims before them, and lack its deliberative element.[83]

Scholars from a victimological perspective share some of same concerns with restorative justice scholars, but emphasise the centrality of the needs and perspectives of survivors and victimised communities in the justice process. The relational and societal dimension that concerns restorative justice scholars moves into the background and is, instead, replaced by a more victim-centred notion of 'reparative justice' with an emphasis on the procedural rights of victims.[84] Scholars in

[78] The extensive legal literature on reparations conceals the fact that most reparations in mass atrocity contexts have hitherto been delivered through state-sponsored administrative reparations programs, rather than through judicial processes.

[79] See for instance Braithwaite, John and Philip Pettit, 1990, *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford: Oxford University Press; Von Hirsch, Andrew, Julian Roberts, and Anthony Bottoms (eds.), 2003, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford/Portland: Hart Publishing; and Van der Spuy, Elena, Stephan Parmentier and Amanda Dissel (eds.), 2008, *Restorative Justice: Politics, Policies and Prospects*, Cape Town: Juta.

[80] These include those adhering to narrower understandings, seeing it as "a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future". Marshall, Tony, 1999, *Restorative Justice: An Overview*, London: Home Office Research Development and Statistics Directorate, 5. Others promote a broader scope where restorative justice is seen to be about more than just the criminal justice system, and that, through deliberative processes, it can bring about transformative changes to people, communities and society. See Braithwaite, John, 2002, *Restorative Justice and Responsive Regulation*, Oxford: Oxford University Press.

[81] See for instance Parmentier, Stephan, Kris Vanspauwen and Elmar Weitekamp, 2008, 'Dealing with the Legacy of Mass Violence: Changing Lenses to Restorative Justice', in: Smeulers, Alette and Roelof Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes*, Antwerp: Intersentia, 335-356; McEvoy, Kieran and Tim Newburn, 2003, *Criminology, Conflict Resolution and Restorative Justice*, Basingstoke: Palgrave Macmillan; and Llewellyn, Jennifer and Daniel Philpott, 2014, *Restorative Justice, Reconciliation and Peacebuilding*, Oxford: Oxford University Press.

[82] See Garbett, Claire, 2017, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Process of Justice', 5(2) *Restorative Justice*, 198-220.

[83] See Clamp, Kerry (ed.), 2016, *Restorative Justice in Transitional Settings*, Florence: Routledge.

[84] See for instance Danieli, Yael, 2014, 'Healing Aspects of Reparations and Reparative Justice for Victims of Crimes against Humanity', in: Wemmers, Jo-Anne (ed.), *Reparation for Victims of Crimes Against*

this field have expanded our views on how to conceive of reparations in contexts of mass victimisation.[85] They also believe that 'reparative justice' more adequately describes the ICC's reparations mandate.[86]

As discussed in the introduction, the goal of this thesis is not to find the most appropriate definition of reparations in international criminal justice, but rather to explore how various people and communities of actors advance different understandings of reparations. There is a difference between defining and conceptualising: whilst defining aims to settle on the meaning of a term, conceptualising keeps the ambiguities alive and makes the mapping of contestations and different uses part of the inquiry. My thesis traces the varying use of reparations in the practices of different actor communities.

Dimensions of reparations

With reparation practices expanding into new geographical areas, more scholars have examined the imperfect attempts at providing reparations to victims of mass atrocities.[87] Researchers from anthropology, social sciences and area studies moved the focus beyond legal and state-centric solutions and brought to the forefront the concerns of culturally diverse communities affected by mass atrocities.[88] There exists much controversy in this literature about the impact and efficacy of reparations mechanisms.[89] The discussion often centres on strategic dimensions that require

Humanity: The Healing Role of Reparations, London/New York: Routledge, 7-21; and Danieli, Yael, 2009, 'Massive Trauma and the Healing Role of Reparative Justice', 22(5) *Journal of Traumatic Stress*, 351-357.

[85] See Letschert, Rianne, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), 2011, *Victimological Approaches to International Crimes: Africa*, Antwerp: Intersentia; and Pemberton, Antony, and Rianne Letschert, 2012, 'Global Justice and Global Criminal Laws: The Importance of Nyaya in the Quest for Justice after International Crimes', 17(2) *Tilburg Law Review*, 296-303.

[86] See for instance Goetz, Marianna, 2014, 'Reparative Justice at the International Criminal Court: Best Practice or Tokensim?', in: Wemmers, Jo-Anne (ed.), *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparations*, London/New York: Routledge, 53-70.

[87] For an overview see Ratner, RS, Andrew Woolford and Andrew Patterson, 2014, 'Obstacles and Momentum on the Path to Post-Genocide and Mass Atrocity Reparations: A Comparative Analysis, 1945-2010', 55(3) *International Journal of Comparative Sociology*, 229-259.

[88] See for instance McEvoy, Kieran, and Lorna McGregor (eds.), 2008, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, Oxford/Portland: Hart Publishing; Shaw, Rosalind, and Lars Waldorf, with Pierre Hazan (eds.), 2010, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, Stanford: Stanford University Press; Johnston, Barbara, and Susan Slyomovics (eds.), 2009, *Waging Wars, Making Peace: Reparations and Human Rights*, Walnut Creek: Left Coast Press; and Rubio-Marin, Ruth (ed.), 2009, *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, New York: Cambridge University Press.

[89] See for instance Kent, Lia, 2012, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor*, Oxford: Taylor & Francis Group; Olsen, Tricia, Leigh A. Payne, and Andrew Reiter, 2010, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, Washington, DC: United States Institute of Peace; Pham, Phuong, and Patrick Vinck, 2007, 'Empirical Research and the Development and Assessment of Transitional Justice Mechanisms', 1 *International Journal of Transitional Justice*, 231-248; and Nickson, Ray, 2013, 'Great Expectations: Managing Realities of Transitional Justice', PhD Thesis, Australian National University.

consideration when conceiving, designing or implementing reparations policies and programs. I highlight three dimensions that are of particular relevance to this thesis, namely the goal, substance and the modalities of reparations.

As to the goal or purpose of reparations, an established principle in law is full restitution. According to the Basic Principles and Guidelines, the idea behind this principle is "to restore the victim to the original situation before the gross violations … occurred" and to compensate in proportion to the harm suffered.[90] In the context of mass atrocities, however, two basic problems arise when adopting full restitution as the goal of reparations. It is impossible to measure and repair all harm in these situations, because of the magnitude of the human rights violations that occurred. As John Torpey puts it, no amount of reparations for victims can truly "make whole what has been smashed".[91] Martha Minow similarly stresses the limitations of reparations that aim to provide "repair for the irreparable".[92] Moreover, the return to the situation prior to the violations might not at all be desirable for many victims, because they may never have been in a satisfactory position in the first place, due for instance to economic inequalities or discrimination. Many scholars argue therefore that reparations should not just be backward-looking, but also comprise forward-looking and transformative elements.[93]

Another dimension relates to the types of reparations measures that are appropriate in a specific situation. The main classification of the substance of reparations in the literature has been made along the lines of individual and collective measures, and material and non-material forms of reparations.[94] Contrary to the predominantly individualised approach to reparations applied in domestic settings dealing with ordinary crimes, programs aiming to address the consequences of mass atrocities often consider collective forms of reparations.[95] The nature and gravity of such crimes, in which entire communities are targeted, may render inappropriate approaches that rely

[90] Basic Principles and Guidelines 2005, para. 19.
[91] Torpey, John, 2007, 'Modes of Repair: Reparations and Citizenship at the Dawn of the New Millennium', 18 *Political Power and Social Theory*, 207-226, 218-221.
[92] Minow, Martha, 1998, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press, 117.
[93] Rombouts and Parmentier argue that reorienting towards a new order and a new balance, both at the individual and the collective level, is a viable solution. They further argue that the best way to achieve this is through a process-oriented approach to reparation. See Rombouts, Heidy, and Stephan Parmentier, 2009, 'The International Criminal Court and its Trust Fund Are Coming of Age: Towards A Process Approach for the Reparation of Victims', 16 *International Review of Victimology*, 149-182. See also Gready, Paul, and Simon Robins, 2014, 'From Transitional to Transformative Justice: A New Agenda for Peace', 8 *International Journal of Transitional Justice,* 339-361.
[94] See Vandeginste, Stef, 2003, 'Reparation', in: Bloomfield, David, and Teresa Barnes and Luc Huyse (eds.), 2003, *Reconciliation after Violent Conflict: A Handbook*, Stockholm: IDEA, 145-161.
[95] See Rosenfeld, Friedrich, 2010, 'Collective Reparations for Victims of Armed Conflict', 92 *International Review of the Red Cross*, 731-746.

solely on individual reparations.[96] Collective reparations are frequently presented as an answer to this dilemma.[97]

Reparations measures can also be categorised into material or symbolic measures. While material reparations measures usually include monetary compensation or the return of property, non-material measures are less tangible and more of a symbolic nature, including the search for disappeared persons, reburials, restoration of citizenship and liberty as well as public apologies or commemoration acts.[98] When designing a reparations program in the aftermath of mass atrocities, the challenge is to put together a balanced and appropriate package of reparations measures that takes into account the characteristics of the respective situation, and the wants and needs of those affected by violence.

Finally, questions arise as to how reparations should be provided and to whom. The discussion of the modalities of reparations in the literature has focused on the mechanisms, judicial or non-judicial, through which reparations are rendered and at what levels, national or international. Judicial approaches to reparations may face serious obstacles in the context of mass atrocities, where there might be no functioning judicial system to rely on.[99] Many scholars also argue that formal justice systems are not designed to deal with a large quantity of reparations claims.[100] Contemporary post-atrocity reparations programs have thus often considered non-judicial approaches, particularly by way of administrative reparations mechanisms. While these mechanisms may be more efficient in their procedures and reach, they may also be more exposed to the politics of transitional societies.

All approaches will need to tackle the difficult question to whom reparations should be addressed. Identifying and targeting the beneficiaries of reparations is inherently selective and involves differentiation of victimhood that comes with undesirable dynamics, including victim competition or politicisation of victimhood.[101] Strategic choices need to be made by domestic or international

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[96] See for instance Roht-Arriaza, Naomi, 2004, 'Reparations in the Aftermath of Repression and Mass Violence', in: Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocities*, Cambridge: Cambridge University Press, 121-139.

[97] See generally International Center for Transitional Justice, 2009, 'The Rabat Report: The Concept and Challenges of Collective Reparations', New York.

[98] The plurality of different forms of reparations is recognised in the Basic Principles and Guidelines.

[99] See for instance Mertus, Julie, 2000, 'Truth in a Box: The Limits of Justice through Judicial Mechanisms', In: Amadiume, Ifi, and Abdullahi An-Na'im (ed.), *The Politics of Memory: Truth, Healing and Social Justice*, London, UK/New York, NY: Zed Books, 142-161.

[100] See Roht-Arriaza, Naomi, 2004, 'Decisions and Dilemmas', 27 *Hastings International and Comparative Law Review*, 157-219.

[101] See for instance Chaumont, Jean-Michel, 1997, *La Concurrence des Victimes: Génocide, Identité, Reconnaissance*, Paris: Editions La Découverte; and De Waardt, Mijke, 2013, 'Are Peruvian Victims Being Mocked? Politicization of Victimhood and Victims' Motivations for Reparations', 35 *Human Rights Quarterly*, 830-849.

policy-makers weighing the difficulties and advantages of each approach, while taking into consideration the circumstances in each context.

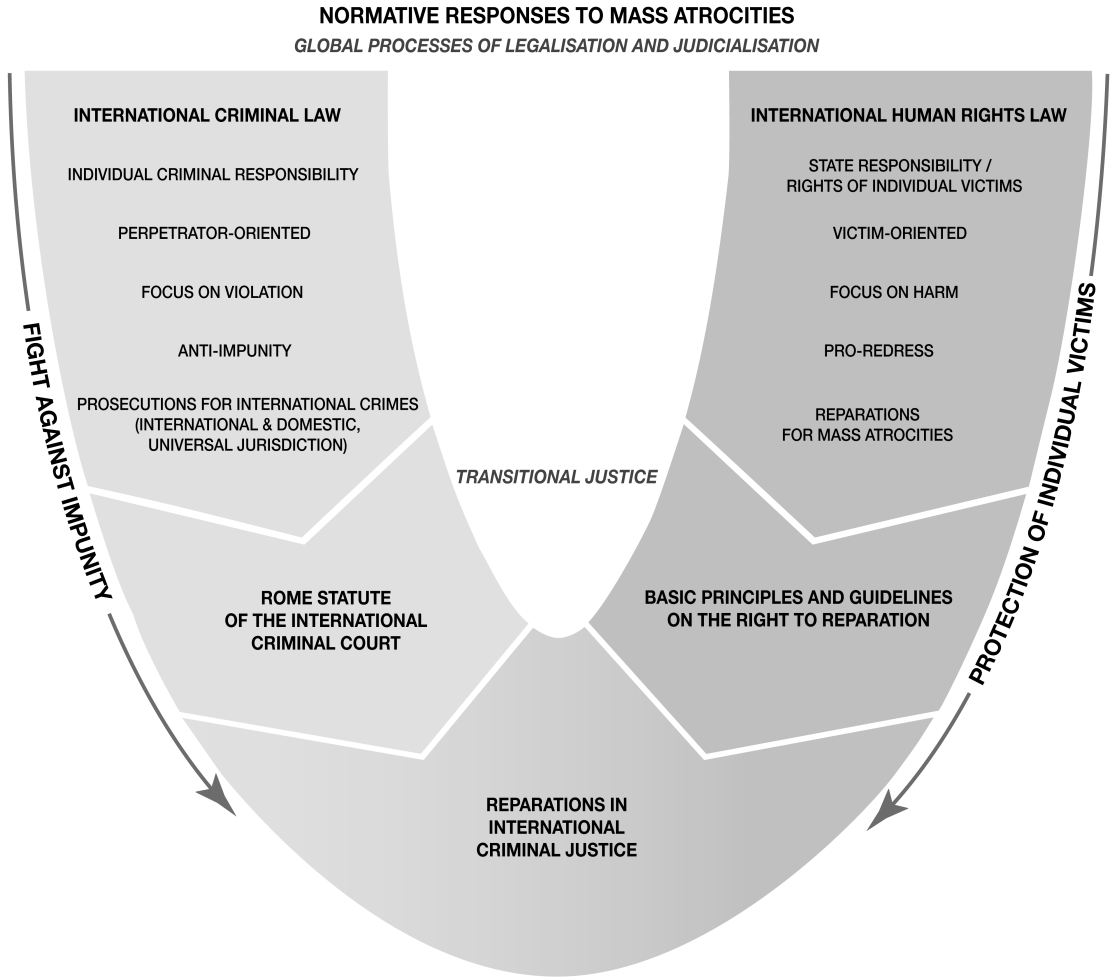
In sum, the concept of reparations has become broader over time, now comprising a range of different forms and modalities that previously had not been associated with the term. In fact, reparations have absorbed an entire transitional justice agenda. It was this broad concept that was subsequently enshrined in the norm of a 'right to reparations' in international human rights law, most prominently in the Basic Principles and Guidelines. The ability to absorb different interests and goals into a single concept and human rights norm enabled the term to proliferate. Reparations became the human rights movement's new flagship for a more victim-oriented justice response to mass atrocities. Yet, the continuous conceptual expansion of reparations also posed challenges for applying it in practice – different goals have been pulling into different directions. This may explain why, despite the success of the Basic Principles and Guidelines in human rights discourses, the adoption of the norm was not accompanied by more considerable progress regarding the institutionalisation and implementation of reparations. Advocates turned therefore to other fields that were viewed to be more effective in attracting attention and resources, including international criminal justice.

2. Reparations and International Criminal Justice

Whilst the historical evolution of the anti-impunity and the human rights movements was never fully separate, these movements pursued different normative and institutional pathways during the post-World War II period. Since the late 1980s, however, the two movements have gradually re-converged. The human rights movement increasingly raised the flag of the anti-impunity imperative.[102] Liberal transitions in the aftermath of the Cold War and a yearning for more enforcement of a largely aspirational rights catalogue drove more human rights advocates into the arms of the state-centric, criminal law-driven anti-impunity movement.[103] Karen Engle, who chronicled this convergence, proclaimed that "since the beginning of the twenty-first century, the human rights movement has been almost synonymous with the fight against impunity",[104] and "individual criminal responsibility became central to the human rights effort".[105]

[102] Engle, Karen, Zinaida Miller, and D.M Davis, 2016, *Anti-Impunity and the Human Rights Agenda*, Cambridge: Cambridge University Press.
[103] See also Commission on Human Rights, *Question of the Impunity of Perpetrators of Human Rights Violations*, Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.
[104] Engle, Karen, 2015, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', 100 *Cornell Law Review*, 1069-1127, 1070.
[105] Ibid 1078.

Figure 1: Convergence of normative responses to mass atrocities



The dual objective of punishment and redress is visible in the Basic Principles and Guidelines, which emphasise that an effective remedy consists of two elements: access to justice and reparations.[106] In obliging states to investigate human rights violations and to prosecute those responsible for the violations, the document affirms the alignment of the anti-impunity and human rights movements. The growing support among the human rights community for criminal punishment in response to atrocities has been instrumental for the success of contemporary international criminal justice. The price of this rapprochement (see Figure 1) has been a push by human rights NGOs for more victim-oriented international criminal justice.[107] As I will show in Part II, demands for more consideration of victim redress in international criminal justice

[106] Basic Principles and Guidelines 2005.
[107] See for instance Funk, Markus, 2010, *Victims' Rights and Advocacy at the International Criminal Court*, Oxford: Oxford University Press.

eventually led to transformations in the existing legal framework and institutional architecture. Promoting an active role of victims in the criminal justice process and ensuring reparations for victims were seen as two central elements to turn the human rights movement's vision into reality.

Victims in international criminal justice

A historical view on the role of victims in the international criminal trial reveals what Susanne Karstedt calls "a road from absence to presence, and from invisibility to the visibility of victims".[108] Victims had no active role to play during the post-World War II trials in Nuremberg and Tokyo.[109] This model influenced the resumption of international criminal justice after the end of the Cold War. The two *ad hoc* tribunals for the former Yugoslavia and Rwanda struggled to relate their processes to conflict-affected populations in both countries. For instance, both Tribunals had no provisions for the participation of victims in their proceedings, apart from that of witnesses of crime.[110] The critique of the experience of both Tribunals by scholars and local populations combined with the increasing recognition of victims' rights, as described above, informed the negotiations of the International Criminal Court.[111] The ICC's 1998 Rome Statute, for the first time in international criminal law, granted victims extensive participation rights in the Court's proceedings, and allowed them to submit claims for reparations. A few hybrid courts have subsequently also adopted provisions on victim participation and reparations, most notably the Extraordinary Chambers in the Courts of Cambodia.

In the scholarly literature, reparations are often addressed as part of a more general discussion about victim participation in international criminal justice.[112] The two are related, but concern distinct stages of the justice process. Although the inclusion of victim redress into the ICC's legal framework was celebrated at the time as an advancement of international law, today, a debate rages among scholars over the merits and limitations of victims' role in international criminal

[108] Karstedt, Susanne, 2010, 'From Absence to Presence, From Silence to Voice: Victims in International and Transitional Justice since the Nuremberg Trials', 17(1) *International Review of Victimology*, 9-30, 9.
[109] See for instance Moffett, Luke, 2012, 'The Role of Victims in the International Criminal Tribunals of the Second World War', 12 *International Criminal Law Review*, 245-270.
[110] Stover, Eric, 2005, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, Philadelphia: University of Pennsylvania Press.
[111] See Doak, Jonathan, 2008, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, Oxford/Portland: Hart Publishing.
[112] See for instance Moffett, Luke, 2015, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court', 26 *Criminal Law Forum*, 255-289; Hirst, Megan, 2013, 'Victims' Participation and Reparations in International Criminal Proceedings', in: Sheeran, Scott and Nigel Rodley (eds.), *Routledge Handbook of International Human Rights Law*, London/New York: Routledge, 683-706; Antkowiak, Thomas, 2011, 'An Emerging Mandate for International Courts: Victim-Centred Remedies and Restorative Justice', 47 *Stanford Journal of International Law*, 279-332; and McGonigle Leyh, Brianne, 2011, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Antwerp/Oxford: Intersentia.

justice.[113] Whilst this debate has similarities with the longstanding debate about the role of victims in domestic criminal proceedings, it also shows some distinct characteristics.

At one end of the spectrum are scholars and practitioners who are concerned that the inclusion of victim redress into an international criminal trial threatens a careful balance of long-established legal principles.[114] They worry about a fair trial for the accused and overburdening still young international criminal justice institutions with unreasonable expectations.[115] Most of these arguments are of a pragmatic nature: they consider primarily procedural and cost-effectiveness aspects and remain within the self-contained institutional framework of the international criminal justice system. O'Shea concludes, "the idea that a criminal court should concern itself with questions of reparations just does not feel right for many lawyers".[116]

On the other end of the spectrum, scholars, as well as activists, advocate for a victim-oriented approach to international criminal justice.[117] For instance, Ralph Henham and Mark Findlay argue for positioning victims in a place of priority through a transformation of the criminal trial. They suggest that factors such as legitimacy and the overall accountability of the system require that victims of mass atrocities are recognised as the "rightful constituency" for international criminal justice.[118] These and similar positions from other scholars who fall into this grouping have normative underpinnings with only partial grounding in empirical research, insofar as they consider victims' disillusionment with international criminal trials. Curiously, these authors do not discard a focus on international criminal justice, with Henham and Findlay arguing against

[113] Drumbl claims the current model has "tended to sideline victims from the process of justice, subordinate traditional approaches to dispute resolution, and externalise justice from afflicted communities". Drumbl, Mark, 2009, 'International Criminal Law: Taking Stock of a Busy Decade', 10 *Melbourne Journal of International Law*, 38-45, 42.

[114] I note here that a more psychosocial strand of research points to the fact that we know little about the psychological effects on participating victims. See O'Connell, Jamie, 2005, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', 46(2) *Harvard International Law Journal*, 295-345.

[115] See for instance Chung, Christine, 2008, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?', 6(3) *Northwestern Journal of International Human Rights*, 459-545; and Trumbull IV, Charles, 2008, 'The Victims of Victim Participation in International Criminal Proceedings', 29(4) *Michigan Journal of International Law*, 777-826.

[116] O'Shea, Andreas, 2007, 'Reparations under International Criminal Law', in: Du Plessis, Max, and Stephen Pete (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerp/Oxford: Intersentia, 179-196, 181.

[117] See Pena, Mariana and Gaelle Carayon, 2013, 'Is the ICC Making the Most of Victim Participation?', 7 *International Journal of Transitional Justice*, 518-535; and Hobbs, Harry, 2014, 'Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice', 49(1) *Texas International Law Journal*, 1-32.

[118] Henham, Ralph J., and Mark Findlay, 2011, 'Introduction: Rethinking International Criminal Justice', in: Henham, Ralph J., and Mark Findlay (eds.), 2011, *Exploring the Boundaries of International Criminal Justice*, Aldershot: Ashgate Publishing, 1-23; Henham, Ralph, 2007, 'Theorising Law and Legitimacy in International Criminal Justice', (3)3 *International Journal of Law in Context*, 257-274; and Findlay, Mark, 2009, 'Activating a Victim Constituency in International Criminal Justice', 3 *International Journal of Transitional Justice*, 183-206.

under-resourced "second-class justice for masses, without the benefit of professional intervention or legal regulation".[119]

Reparations and international criminal justice

It is within this broader context of the role of victims in international criminal justice that much of the debate about reparations in international criminal justice takes place. Yet, compared to the vast literature on victim participation in international criminal proceedings, scholarly research on reparations in international criminal law is rather sparse, albeit growing. Few writings deal specifically with reparations in international criminal justice.[120] Among the most authoritative research that focuses more explicitly on victim reparations in international criminal justice is the work of Conor McCarthy[121] and Luke Moffett.[122]

McCarthy provides an analysis of the conceptualisation of reparations in the ICC's legal framework on reparations. In search for a principled justification of the incorporation of reparations within the institutional framework of an internal criminal tribunal, he sees the central principled role in an 'expressivist' account of victim redress that provides some form of recognition to victims. Although McCarthy recognises the difficulties involved in combining redress and punishment within one institutional framework, he argues that punishment provides limited means of administering justice in the context of international crimes and is therefore cautiously optimistic about the potential of these changes.[123]

Moffett's book elaborates a theory of justice for victims of international crimes and examines the ICC's approach to victims. Moffett concludes that justice for victims at the ICC has thus far been

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[119] Henham/Findlay, Rethinking International Criminal Justice, 6.

[120] In addition to those discussed below, refer to Dwertmann, Eva, 2009, *Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Brill Academic Publishers; Zegveld, Liesbeth, 2010, 'Victims' Reparations Claims and International Criminal Courts', 8 *Journal of International Criminal Justice*, 79-111; and Spiga, Valentina, 2012, 'No Redress without Justice: Victims and International Criminal Law', 10 *Journal of International Criminal Law*, 1377-1394.

[121] McCarthy, Conor, 2012, *Reparations and Victim Support in the International Criminal Court*, Cambridge: Cambridge University Press; McCarthy, Conor, 2009, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory', 3 *International Journal of Transitional Justice*, 250-271; and McCarthy, Conor, 2012, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?', 10 *Journal of International Criminal Justice*, 351-372.

[122] See for instance Moffett, Luke, 2014, *Justice for Victims before the International Criminal Court*, Milton Park/New York: Routledge; Moffett, Luke, 2012, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparations Regime of the International Criminal Court', 17(3) *Journal of Human Rights*, 368-390; and Moffett, Luke, 2015, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague', 13 *Journal of International Criminal Justice*, 281-311.

[123] In the case of the ICC, McCarthy puts much hope in the dual role of the Trust Fund for Victims, which he believes may deliver more tangible forms of justice in the localities where victims live. Arguments summarised by the author, see McCarthy, *Reparations and Victim Support*.

largely symbolic, and that states parties should shoulder more responsibility for complementing the ICC's victim mandate.[124] He argues that there is a need to broaden reparations beyond individual convicted persons, primarily by considering the ability of states parties to give effect to victim provisions and remedial measures. This could be achieved by making the ICC's complementarity regime more victim-oriented, including considerations of what Moffett calls 'reparative complementarity'.[125]

While this literature has made important contributions towards theorising reparations and understanding its role and potential in the legal frameworks of international criminal tribunals, the focus remains predominantly on legal procedural aspects of reparations.[126] What has largely been absent from this research is a perspective that is able to consider the phenomenon within its social context.[127] My socio-legal study complements this research and contributes to the debate an account of the social dimension of reparations. It does so by redirecting the attention away from legal precedents and principles to the actors who, through their practices, shape reparations in international criminal justice. This endeavour is aided by the timing of the first reparations orders at international(-ised) criminal courts. There has been little consideration of the actual *practice* of reparations in the existing literature, in part because most of the above-mentioned scholarly accounts were published prior to the first reparations decisions. The timing of the first reparations orders now provides an opportunity to complement existing scholarly literature with an inquiry into the practice of adjudicating and implementing reparations.

A focus on the social dimension of reparations also enables an examination of reparations in the different conflict-affected contexts in which it is reproduced. The geographic and institutional focus of the scholarly debate has so far been the International Criminal Court and its Trust Fund for Victims in The Hague.[128] Little consideration has been given to the hitherto only other case of

[124] Moffett, *Justice for Victims*, 143-195.
[125] Ibid 187-194, 287-288.
[126] See for instance Bitti, Gilbert, and Gabriela Gonzalez Rivas, 2006, 'The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court', In: Permanent Court of Arbitration (ed), 2006, *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges*, Oxford, UK: Oxford University Press, 299-322; Dwertmann, *Reparation System of the International Criminal Court*; and Henzelin, Marc, Veijo Heiskanen, and Guenael Mettraux, 2006, 'Reparations to Victims Before the International Criminal Court: Lessons From International Mass Claims Processes', 17 *Criminal Law Forum*, 317-344.
[127] Among the exceptions are Wemmers, Jo-Anne, 2009, 'Victim Reparation and the International Criminal Court', 16 *International Review of Victimology*, 123-126; and Wemmers, Jo-Anne, 2014, *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparation*, London/New York: Routledge.
[128] In addition to those already mentioned, see for instance Keller, Linda M., 2007, 'Seeking Justice at the International Criminal Court: Victims' Reparations', 29 *Thomas Jefferson Law Review*, 189-217; Fischer, Peter, 2003, 'The Victims Trust Fund of the International Criminal Court: Formation of a Functional Reparations Scheme', 17(1) *Emory International Law Review*, 187-240; Mégret, Frédéric, 2009, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparation', 16 *International*

reparations at an internationalised criminal court, namely the Extraordinary Chambers in the Courts of Cambodia.[129] The limited attention in scholarly research to the ECCC's reparation mandate is surprising considering the few precedents for this novel feature of international criminal justice.[130] Although the mandates of both Courts are distinct, there are sufficient similarities that justify a comparative assessment.[131] Furthermore, there exists a gap in empirical research into how reparations have been perceived and taken up by local actors in different geographical and cultural situations. In much of the literature survivors and conflict-affected populations appear as mere bystanders to a larger account of global legal and institutional developments. By shifting the research focus beyond the courtrooms in The Hague to other internationalised courts with reparations mandates and the local contexts in which they intervene, this thesis foregrounds the important role of context in the materialisation of reparations. It shows how reparations are contextually reproduced and how practices associated with reparations vary across different local settings.

How a practice-based approach contributes to the scholarly debate

This study is not the first to apply a practice-based approach to matters of international law[132] or international criminal justice.[133] But it is the first study to apply a practice lens to examine

Review of Victimology, 127-147; and War Crimes Research Office, 2010, 'The Case-Based Reparations Scheme at the International Criminal Court', American University Washington College of Law.

[129] With the inclusion of a victim participation and reparation mandate into the statute of the Extraordinary African Chambers in Senegal, the ECCC is not anymore the only hybrid criminal court to which individual victims of crimes can submit their reparation claims. The Special Tribunal for Lebanon recognises the participating victims' right to reparation, but does not allow them to claim reparation before the Tribunal. Instead, it defers the matter to the domestic courts in Lebanon. See De Hemptinne, Jerome, 2010, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon', 8 *Journal of International Criminal Justice*, 165-179.

[130] See Ramji, Jaya, 2005, 'A Collective Response to Mass Violence: Reparations and Healing in Cambodia', In: Jaya Ramji and Beth Van Schaack (eds.), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Extraordinary Chambers in the Courts of Cambodia*, Lewiston: Edwin Mellen, 359-376; Hao Duy Phan, 2009, 'Reparations to Victims of Gross Human Rights Violations: The Case of Cambodia', 4 *East Asia Law Review*, 277-298; Jeffery, Renée, 2014, 'Beyond Repair? Collective and Moral Reparations at the Khmer Rouge Tribunal', 13(1) *Journal of Human Rights*, 103-119; and Sperfeldt, Christoph, 2012, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia', 12 *International Criminal Law Review*, 457-489.

[131] See also Sperfeldt, Christoph, 2013, 'From the Margins of Internationalised Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia', 11 *Journal of International Criminal Justice*, 1111-1137.

[132] See for instance Rajkovic, Nikolas, Tanja Aalberts, and Thomas Gammeltoft-Hansen (eds.), 2016, *The Power of Legality: Practices of International Law and their Politics*, Cambridge: Cambridge University Press, 1-25; and Kurasawa, Fuyuki, 2007, *The Work of Global Justice: Human Rights as Practices*, Cambridge University Press.

[133] See for instance the contributions to the *Law & Contemporary Problems* special issue (Volume 76), including Meierhenrich, Jens, 2014, 'The Practice of International Law: A Theoretical Analysis', 76(3-4) *Law & Contemporary Problems*, 1-83; Kendall, Sara and Sarah Nouwen, 2013, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76(3-4) *Law & Contemporary Problems*, 235-262; Hoover, Joseph, 2014, 'Moral Practices: Assigning Responsibility in

reparations in international criminal justice as a broader social phenomenon. In bringing practices associated with reparations to the forefront of the analysis, I contribute to the existing literature in three ways: making visible what practitioners do when they engage with reparations; demonstrating the importance of contestations as engines for the production of reparations; and expanding the toolkit of socio-legal researchers involved in the study of transnational legal phenomena.

To begin with, neither the doctrine-driven study of international criminal law nor macro-level institutional explanations scrutinise the everyday working of international(-ised) criminal courts and their inner-life as judicial and bureaucratic institutions – a dimension that I experienced to be crucial in the making of reparations in international criminal justice. Meierhenrich drew attention to the multiple ways in which such institutions are "produced, reproduced and reconfigured as a result of the particular and contingent beliefs, preferences, and strategies of the individuals (as well as collectives) acting *within* them as well as *upon* them".[134] What is it that practitioners at and around these courts do when they conceive reparations for victims of far-away conflict-affected situations? Viewing the field of international criminal justice and reparations as constituted through a set of specific practices enables us to unpack the inner-workings of the institutions involved. This allows us to study not only courts' bureaucracies but also the network of actors that exists around them and extends to different geographical areas where international criminal justice intervenes. Such an empirical perspective on norms' productive interaction with different people, places and times builds upon the work of legal anthropologists,[135] legal realists[136] and sociologists.[137] In addition, the practice lens brings these insights into conversation around a

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the International Criminal Court', 76(3-4) *Law & Contemporary Problems*, 263-286; and Mégret, Frédéric, 2016, 'Practices of Stigmatization', 76(3-4) *Law & Contemporary Problems,* 287-318. See also De Vos, Christian, Sara Kendall, and Carsten Stahn (eds.), 2015, *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge: Cambridge University Press; and Christensen, Mikkel, and Ron Levi (eds.), 2017, *International Practices of Criminal Justice: Social and Legal Perspectives*, New York: Routledge.

[134] Meierhenrich, The Practice of International Law, 8.

[135] See for instance Buerger/Wilson, The Practice of Human Rights.

[136] Gregory Shaffer noted, "the New Legal Realism brings together empirical and pragmatic perspectives in order to build theory regarding how law obtains meaning, is practised, and changes over time. In contrast with conceptualists … legal realists do not accept the priority of concepts over facts, but rather stress the interaction of concepts with experience in shaping law's meaning and practice." Shaffer, Gregory, 2015, 'New Legal Realism's Rejoinder', 28 *Leiden Journal of International Law*, 479-486. See also Merry, Sally Engle, 2006, 'New Legal Realism and the Ethnography of Transnational Law', 31(4) *Law & Social Inquiry*, 975-995.

[137] See for instance Madsen, Mikael, 2013, 'Towards a Sociology of International Courts', 1 *iCourts Online Working Paper,* University of Copenhagen; Christensen, Mikkel J., 2015, 'From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and its Professional Practices', 43 *International Journal of Law, Crime and Justice*, 609-625; and Dezalay/Bryant, *Lawyers and the Construction of Transnational Justice*.

common conceptual focal point that makes visible the interconnections between practices and how together they constitute and produce the social life of transnational legal phenomena.

Understanding international criminal justice generally, and its reparations function specifically, to be located at the intersection of different overlapping fields of practice directs attention to how competing goals and rationales of action give rise to contestations and frictions.[138] A practice-based approach makes visible how different communities of actors, through their practices, contest, negotiate and produce the boundaries of reparations' use and meaning. It reminds us that legal categories or fields are socially constructed and subject to continuous transformation. A practice lens helps us to understand this boundary-making not by way of a given normative order but through a socio-legal inquiry into the struggles that produce and shape the practices that together make up reparations. Putting these contestations at the centre of the inquiry shows who determines what reparations means and entails in a given context and thus sheds light on the interplay of different interpretations, actors and power constellations.

Finally, this study contributes to a nascent conversation between socio-legal scholars and practice researchers. This scholarship generally agrees on the premise that norms and practices are mutually constitutive. That is, norms structure social practices, but are simultaneously formed by and receive their meaning from these practices.[139] Yet, often underlying norms and corresponding practices do not align. As mentioned earlier, the dissonance between the promise and practice of reparations is a key motivation for this study. Using practices as an analytical lens broadens the toolkit of the socio-legal researcher and makes it possible to detect and explain such disjunctures. Incoherencies and alterations can occur, for instance, as a result of the continuous evolution of norms, misunderstandings, active resistance or day-to-day improvisations in the context of varied constraints faced by practitioners.[140] According to Laurence and Bernstein, inconsistent practices may both foster adaptation and survival of normative frameworks, or produce contestations and become precedents for change.[141] Thus, a practice perspective moves us beyond questions of compliance. It redirects attention to the social action that is key to determining and shaping the performance and materialisation of reparations in different contexts. The inquiry into the social

[138] In her study on the role of human rights at the World Bank, Galit Sarfaty also refers to 'competing rationalities'. See Sarfaty, Galit, 2009, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank', 103(4) *American Journal of International Law*, 647-683.
[139] See also Rajkovic et al., *The Power of Legality*.
[140] In a paper to the European International Studies Association (EISA) conference, Marion Laurence and Steven Bernstein identified four scenarios for the relationship of norms and practices: (1) norms and practices tightly coupled; (2) practices performed incompetently or misunderstandings; (3) practices as resistance or transgression (challenging norms); or (4) disjunctures arise through micro alterations in practice (when practitioners improvise or norms continue to evolve). Laurence, Marion, and Steven Bernstein, 2017, 'Practices and Norms: Relationships, Disjunctures and Change', paper presented at the 11th Pan-European Conference on International Relations, Barcelona, 14 September 2017.
[141] Ibid.

life of reparations – as a norm brought to life by a set of practices – illustrates how a practice lens makes visible the hidden dimensions that often get lost in formal accounts of law and rights and their institutions.

3. Conclusion

I have shown in this chapter how reparations in international criminal justice emerged from the confluence of two normative responses to mass atrocities: the 'fight against impunity' that enabled international criminal justice, and the rise of international human rights with its emphasis on redress for victims of mass atrocities. I will show in Part II how the convergence of these two normative responses played out in the negotiations of the legal frameworks of the ICC and ECCC.

In surveying the literature on reparations in international criminal justice, I found that most of the scholarly writings are grounded in legal formalism, focus on the ICC at the expense of other international(-ised) criminal justice processes and insufficiently consider how reparations actually work in practice. My research contributes to the scholarly debate by expanding our view of how reparations are practised at these and around these courts. It does so in two main ways: (1) going beyond narrow disciplinary views rooted in legal formalism and static frameworks, and instead applying socio-legal empirical perspectives to study the dynamic institutional and human practices of reparations in international criminal justice; and (2) going beyond a focus on the court rooms in The Hague and redirecting scholarly attention to the expansion of the field of international criminal justice into geographically different terrains. In the next chapter I lay out how I translated these ambitions into my research design.

CHAPTER 2

Research Design and Case Studies

After having shown how a practice-based approach contributes to the scholarly literature on reparations in international criminal justice, the purpose of this chapter is to show how I studied the practices of reparations in my two case studies. This thesis conceptualises reparations as a bundle of different practices. The goal is to identify the practices involved in the making of reparations and describe how they come to be and how they work. In order to make these practices visible, it is necessary to go beyond the legal text and to explore the social and institutional contexts in which practices are performed. This chapter contends that these objectives are best pursued through a research design that is grounded in the socio-legal tradition and applies an ethnographically-informed approach to studying the practices of reparations by way of concrete case studies. The chapter explains the socio-legal research design underpinning this study and makes transparent the sources of information used for the analysis of practices. It ends with a brief introduction to the context of two case studies – the ICC's intervention in the Ituri district, Democratic Republic of Congo, and the ECCC in Cambodia.

1. Research Design

1.1. Ethnographically-informed case study research

Considering that victim reparations in international criminal justice are a fairly novel phenomenon, an inductive and exploratory approach is best suited to chart this new terrain and to identify factors and mechanisms influencing developments at different levels. Moreover, studying the transnational dimension of legal frameworks, as well as institutional and human practices with regards to reparations requires a research design that is able to capture legal and social processes across different times and localities. I first used an ethnographically informed research approach to study the practices of reparations in different phases of its social life and through individual cases.[1] This empirical research uncovered comparable objects, such as patterns and practices regarding reparations, which I then brought into conversation with one another.

[1] See also Henne, Kathryn, 2017, 'Multi-Sited Fieldwork in Regulatory Studies', in: Drahos, Peter (ed.), *Regulatory Theory: Foundations and Applications*, Canberra: ANU Press, 97-114.

I do not claim to do ethnographic research in a classical anthropological sense.[2] Rather, my study is inspired by what Fleur Johns has called a 'quasi-ethnographic' way of seeing.[3] This mode of inquiry seeks to "describe what the people in some particular place or status ordinarily do and the meanings they ascribe to the doing, under ordinary or particular circumstances, presenting that description in a manner that draws attention to regularities that implicate cultural process".[4] Whilst my study involved interviews with practitioners, long periods of participant observation at different sites were not possible.[5] Yet, my ethnographically-informed approach maintains an emphasis on the importance of a detailed description of observations. Such a 'thick' narrative provides the basis for a 'thicker' understanding of the research object across different phases and sites of inquiry.[6]

My approach draws on the work of legal anthropologists who have employed ethnographic methods traditionally associated with micro-level phenomena to the study of macro-level transnational legal processes and interactions. To enable ethnographic inquiry in this fragmented space, George Marcus has suggested researchers engage in what he calls 'multi-sited ethnography'.[7] This approach is particularly suited for studying objects that cannot be examined by remaining focused on one single research site. Marcus proposed various strategies that involve following objects of study that circulate globally, such as people, 'things', metaphors, conflicts or narratives, across time and space, constantly exploring the various connections and associations they create at different times and places.[8] Similarly, Sally Engle Merry used the term 'deterritorialised ethnography' to refer to research into multiple sites of the same social phenomenon that exists in various locations, but is not grounded in any of them – an approach particularly suited to studying the practices of reparations across different sites and levels.[9] These ethnographic approaches share the multi-sited and micro-macro methodological concerns that I confront in tracing the development of reparations practices at international(-ised) criminal courts and through the different phases of their social life. The focus on the relationships and

[2] See for instance Marcus, George, 1998, *Ethnography through Thick and Thin*, Princeton: Princeton University Press.
[3] Johns, Fleur, 2013, *Non-Legality in International Law*, Cambridge: Cambridge University Press.
[4] Wolcott, Harry, 2008, *Ethnography: A Way of Seeing*, 2nd edition, Lanham: AltaMira Press. So quoted at Johns 2013, *Non-Legality in International Law*, 20-21.
[5] See also Faubion, James, and George Marcus (eds.), 2009, *Fieldwork Is Not What It Used to Be: Learning Anthropology's Methods in a Time of Transition*, Ithaca/London: Cornell University Press.
[6] See also Czarniawska, Barbara, 2004, *Narratives in Social Science Research*, London: Sage Publications; and Scheffer, Thomas and Jörg Niewöhner (eds.), 2010, *Thick Comparison: Reviving Ethnographic Aspiration*, Leiden/Boston: Brill.
[7] See Marcus, George, 1995, 'Ethnography in/of the World System: The Emergence of Multi-sited Ethnography', 24 *Annual Review of Anthropology*, 95-117.
[8] Marcus, *Ethnography through Thick and Thin*, 90-99.
[9] Merry, Sally Engle, 2006, *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago: Chicago University Press, 28-35.

interconnectedness between local and transnational processes and how these in turn influence the mutually constitutive relationship between norms and practices is at the core of my research.

Four phases of the social life of reparations

Based on my own prior observations from working in Cambodia and from a review of the secondary literature, I identify four main phases to examine the practices of reparations in international criminal justice: (1) norm-making, where reparations were incorporated into the legal frameworks of international(-ised) criminal courts; (2) engagement with survivors and other conflict-affected populations in the situations into which the courts intervene; (3) adjudication of reparations by international(-ised) criminal courts; and (4) the implementation of reparations awards in specific localities. As mentioned before, these four phases do not encapsulate the entire field of reparations in international criminal justice, but they are essential in understanding how reparations are conceived and shaped across time and space. The graph below might be somewhat inaccurate in its linear representation of these phases as these interact in the long-term in a more recursive manner.[10] Yet, the fact that this study concerns the first cases of reparations in international criminal justice justifies a chronological presentation of my narrative. Together these four phases provide the framework according to which I structure the separate parts of my thesis and analysis.

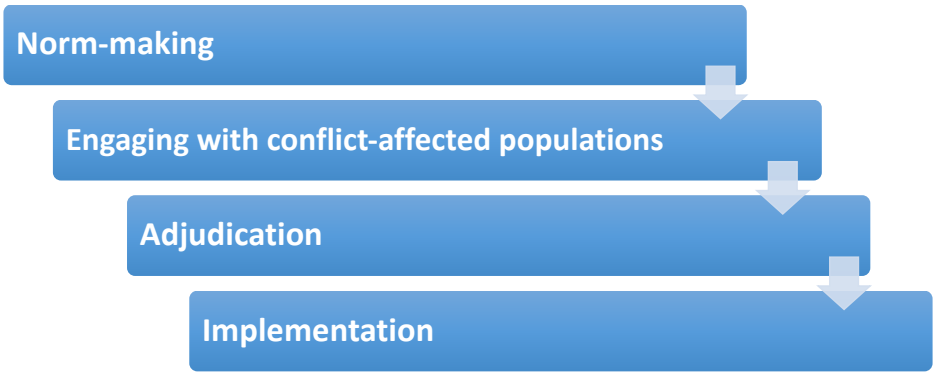

Figure 2: Four phases of the social life of reparations

[10] See Halliday, Terence, 2009, 'Recursivity of Global Normmaking: A Sociolegal Agenda', 5 *Annual Review of Law and Social Science*, 263-289.

Norm-making (Thesis Part II): How have reparations become part of the legal frameworks of international(-ised) criminal courts? International law does not evolve in a vacuum, but through complex processes of transnational politics that extend beyond institutional boundaries. Studying these contestations and associated negotiation practices helps us to understand how international criminal law and its institutions developed beyond their original purpose (i.e. only prosecuting individual perpetrators of international crimes) towards a more victim-oriented justice process.

Engaging with conflict-affected populations (Thesis Part III): What happens when ambiguous norms enter institutions and come into contact with different social contexts? Institutions and their bureaucracies play an important role in giving effect to reparations. I am specifically interested in how generally framed rules on reparations are adapted in institutional practices when they come into contact with conflict-affected situations. In order to guide the inquiry in Part III, I propose an analytical framework based on the two Courts' main aspirations regarding their engagement with survivors (mostly derived from human rights principles) and the modalities chosen to give effect to those aspirations. The engagement practices associated with those modalities can be grouped under outreach, victim participation and reparations claims (including consultations).

Adjudication (Thesis Part IV): How are reparations produced and how do they change in the adjudicative practices of international(-ised) criminal courts? These courts are built upon rather vague legal frameworks and outside the ordinary check-and-balance systems that exist in domestic systems. In this context, the agency of individuals – judges, lawyers, administrators, diplomats and NGO advocates – plays an important role in decision-making.[11] Examining the practices regarding reparations among these practitioners yields insights into the constraints and driving forces that shape an emergent reparations regime in international criminal justice.

Implementation (Thesis Part V): What are the effects of engagement and adjudicative practices on the materialisation and meaning of reparations? Scholars use different, often related, terms to study the outcome and impact of judicial decisions, including compliance, effectiveness and others.[12] I use the term 'implementation', simply understood as putting laws or judicial decisions into practice. This takes into account that the practice at the ICC and the ECCC is still at an early stage.

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[11] See also Morison, John, Kieran McEvoy and Gordon Anthony (eds.), 2007, *Judges, Transition and Human Rights*, Oxford: Oxford University Press.

[12] Compliance is understood as "the degree to which state behaviour conforms to what an agreement prescribes or proscribes". Von Stein, Jana, 2013, 'The Engines of Compliance', in: Dunoff, Jeffrey, and Mark Pollack (eds.), 2013, *Interdisciplinary Perspectives on International Law and International Relations*, New York: Cambridge University Press, 477-501. Effectiveness is often defined as the extent to which a law or norm solves the problem that led to its creation, for instance through changes in behaviour or by achieving certain policy objective. See Shany, Yuval, 2014, *Assessing the Effectiveness of International Courts*, Oxford: Oxford University Press.

Case studies and comparative perspective

In order to enlarge the opportunities for analytical inquiry, I examined the development of reparations through the four phases by way of two case studies and by adding a comparative perspective to my research design.[13]

The ICC and the ECCC have been the first international(-ised) criminal courts that allowed victims to claim reparations in their proceedings.[14] My inquiry focused on the first two cases at these Courts. At the ICC, this concerns the cases against Thomas Lubanga Dyilo and Germain Katanga relating to the situation in Ituri, Democratic Republic of Congo. At the ECCC, my thesis deals with *Cases 001* and *002/01* involving senior leaders of the Khmer Rouge and those most responsible for crimes committed in Cambodia during the 1970s.

Table 1: Research design with the two case studies

	Case Study I: ICC		**Case Study II: ECCC**	
Phases	Themes	Sites of observations	Themes	Sites of observations
Norm-making	Rome Statute negotiation; Rules of Procedure & Evidence; TFV regulations	Preparatory Committee; Rome Conference; Preparatory Commission	ECCC Agreement; Internal Rules making	ECCC negotiations; judges plenaries
Engaging with conflict-affected populations	Outreach, victim participation & consultations	Ituri district, DRC; intersection between ICC & Trust Fund with society	Outreach, civil party participation & consultations	Cambodia; intersection between ECCC and society
Adjudication	Adjudication of reparations in *Lubanga* and *Katanga*	ICC & Trust Fund for Victims	Adjudication of reparations in *Cases 001* and *002/01*	ECCC
Implementation	*Reparations phase in Lubanga and Katanga Cases ongoing*	Ituri, DR Congo; [*limited implementation at time of writing*]	Implementation of reparations in *Cases 001* and *002/01*	Cambodia; reparation project sites and locations

I first examined the individual case studies in their context and across the four phases. Documenting and reviewing the case studies separately first avoided oversimplifying the

[13] See also Zartman, William, 2005, 'Comparative Case Studies', 10 *International Negotiation*, 3-15.
[14] In so far as the Extraordinary African Chambers in Dakar, Senegal, can be considered an international(-ised) criminal justice process, they could constitute an additional case for inquiry.

complexities of these cases or missing factors of importance at an early stage. I distilled from this research a set of key practices that these Courts developed to enact reparations. This provided the ground for engaging in a comparative cross-case analysis of these practices, which were brought together in comparative discussions at the end of each part of the thesis.

1.2. Data collection and fieldwork strategy

My data collection and fieldwork strategy relied on the following sources of information: (i) a review of available documentary information (including negotiation records, court decisions, transcripts, NGO reports, etc.); and (ii) observations and interviews gained from fieldwork in Cambodia and Europe. The mix of information sources varied across the different phases (see Table 1). For instance, reconstructing deliberations of closed-door negotiations or on designing certain Court strategies relied more heavily on insider interviews, than my assessment of the adjudication processes at both Courts, where a range of submissions and decisions is publicly available.

The most document-intensive parts of my research relate to the ICC Rome Statute negotiations and the adjudication of reparations in the first cases. This involved an in-depth review of available records from the negotiations of the ICC reparations mandate.[15] As to the adjudication of reparations at the ICC, I focused my review on the records of the 15 Assembly of State Party (ASP) sessions held until 2016. The ASP involves reporting from all relevant Court sections,[16] queries by diplomats and resolutions on matters that require the ASP's attention. As such, the ASP presents a window into the workings of the Court. No similar oversight mechanism exists at the ECCC, which operates more independently from political scrutiny. I also reviewed documents of relevance to the adjudication of reparations in *Lubanga* and *Katanga* at the ICC, and *Cases 001* and *002/01* before the ECCC, including party submissions, judicial decisions, as well as submissions from administrations, NGOs and others.

As to the implementation of reparations, not much can be reported about ICC reparations awards, as no such measures have fully materialised in Ituri at the time of writing. At the ECCC, however, almost a dozen collective projects have resulted from the proceedings in *Case 002/01*, most of

[15] This covered the time period from the beginning of the work of the Preparatory Committee (1995) over the Rome conference (1998) to the adoption of the Trust Fund for Victims Regulations (2005). The official UN website on the Rome negotiations contains only few of the original records, but more documents were subsequently made available through the ICC Legal Tools project.
[16] I focused my review on the Victim Participations and Reparations Section, the Outreach Section, the Trust Fund for Victims, and numerous working groups dealing with victim issues and communication with situation countries.

which have been fully implemented. The comparison between the ICC and the ECCC remains therefore imbalanced regarding the aspect of implementation.

Fieldwork and interviews

Fieldwork was carried out in different phases at the ICC and the ECCC and their immediate surroundings, involving individuals from the respective Courts, NGOs and victim associations, external observers or experts, government officials and donors (see Table 2).[17] At the Courts, I focused on those currently or previously working on victim-related issues, including victim and outreach units, or legal representatives. I chose qualitative, semi-structured interview guides consisting predominantly of open-ended questions to capture personal views of participants. Interviews were conducted mainly in English, with some interviews being conducted in French, German or Khmer (only Khmer requiring an interpreter). Throughout the process I adhered to ANU human ethics protocols.

Table 2: Sampling of interviews across case studies

Sample		ICC	ECCC
Court	Judicial staff (incl. judges)	3	9
	Victims lawyers	2	7
	Court administration	4	6
	Trust Fund for Victims	3	-
Civil Society	National	1	9
	International	5	4
Government		2	1
Others		1	1
TOTAL		21	37

Note: Not recorded in this table are 1 interview with an ICTY staff and informal conversations with diplomats, who did not want to be formally interviewed. 8 interview participants have worked at more than one court and are recorded in relation to the institution, where they provided most input into my research.

[17] I also conducted one field trip to the Extraordinary African Chambers (EAC) in Dakar to attend the opening of the trial against Hissène Habré in 2015. This information is not further considered in my thesis, which focuses only on the ICC and ECCC. The results of the EAC research have been published at Sperfeldt, Christoph, 2017, 'The Trial against Hissène Habré: Networked Justice and Reparations at the Extraordinary African Chambers', 21(9) *International Journal of Human Rights*, 1243-1260.

Overall, I completed 58 interviews, which I subsequently transcribed and analysed. Interviews were conducted between 2014 and 2016 at different locations, including The Hague, Brussels, Paris, London, Phnom Penh and Dakar. Most interviews took place during a period of intensive fieldwork from April to August 2015, when I was an Endeavour Research Fellowship recipient.[18] In terms of gender, 33 participants were male and 25 female, reflecting a more male-dominated participant pool in Cambodia. The identity of all participants remains confidential. This strategy was chosen due to the sensitivities involved with interviewing judicial professionals or survivor representatives. I identified my respondents through their association to professional or social groupings. Some interviewees worked at different times and in different capacities at these Courts, often crossing boundaries between the judiciary, diplomatic service, civil society and academia; evidence of the legal professional networks identified in other scholarly work. Due to my previous work in Cambodia, it was generally easier to gain access to participants there, as is reflected in the sampling size. From among the 37 participants interviewed around the ECCC, 18 were Khmer, 2 from the Cambodian diaspora, and 17 international.

Although the interview participants across the case studies were sampled in a similar way, the sample is not entirely comparable. While I did extensive fieldwork in Cambodia, an important limitation of my study is that security restrictions did not allow me to travel to the Ituri district in the DRC.[19] This resulted in an imbalance, which is reflected in more local-level accounts from Cambodia than from the DRC. I compensated this to some degree by interviewing, outside the country, actors working in the DRC, both from the Court and civil society, and exchanging research findings with scholars who conducted field research in Ituri.[20]

Given the short time period that passed since the first judgments and the ongoing work with implementing reparations, it is too early to assess the longer-term impact on concerned populations. More generally, the scarcity in empirical information about the impact of these Courts' work remains a challenge for any researcher studying the effects of international criminal justice.[21] Taking into account the resource constraints of research at the doctoral level as well as the focus on practitioners, my fieldwork engaged less directly with local community or victims' perspectives. I relied on existing empirical research, where available. In order to compensate for

[18] In addition, I was able to conduct five shorter trips to the ECCC in Cambodia from 2014 to 2017.
[19] Eastern Congo had been designated by the Australian Department of Foreign Affairs and Trade (DFAT), throughout the years 2014 and 2016, with a travel warning level 4 'do not travel', making travel and university support difficult.
[20] Such exchanges took place, for example, with the Human Rights Center at UC Berkeley and Peter Dixon who wrote his PhD thesis on the ICC's justice intervention in Ituri.
[21] See also Nouwen, Sarah, 2014, '"As You Set out for Ithaka": Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict', 27 *Leiden Journal of International Law*, 227-260.

the lack of empirical data, I engaged, outside of my thesis research, in 2015, with a survey in Cambodia that involved interviews with ECCC civil parties.[22]

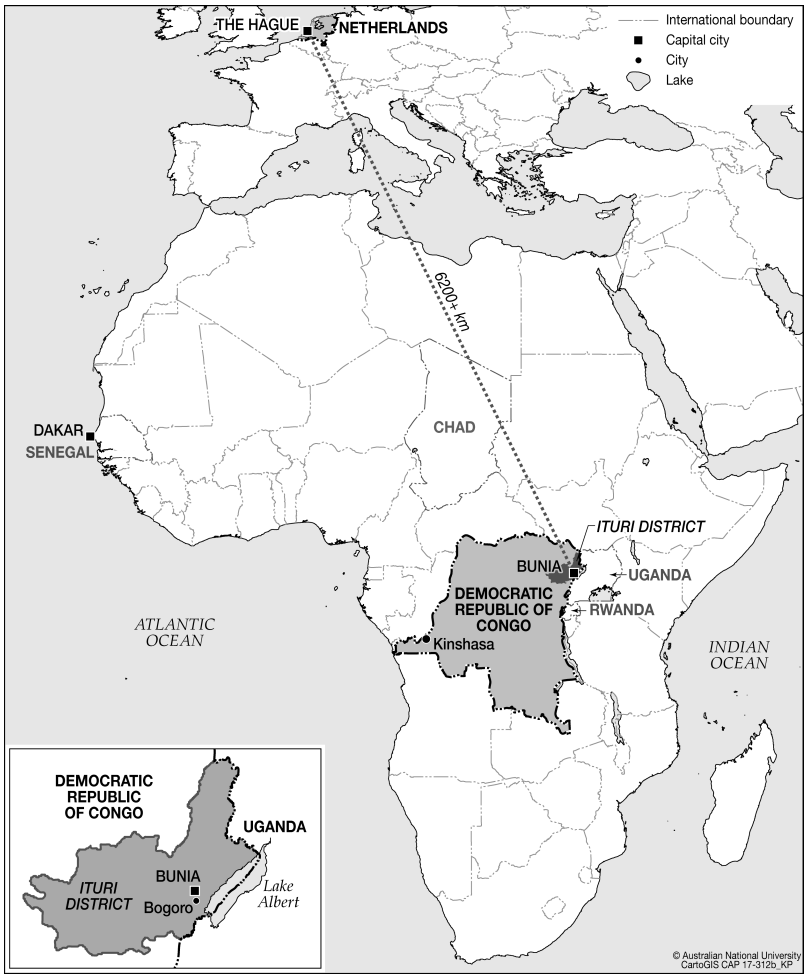
As a result of this interview sampling and the state of proceedings at both Courts, the ICC case study has a stronger emphasis on the negotiations and adjudication. The ECCC case study, on the other hand, involves more engagement with the local level, including an initial assessment of the implementation of collective reparations.

[22] I assisted with the design of the survey instruments and writing up the final survey report. Sperfeldt, Christoph, Melanie Hyde and Mychelle Balthazard, 2016, 'Voices for Reconciliation: Assessing Media Outreach and Survivor Engagement for Case 002 at the Khmer Rouge Trials', Phnom Penh: East-West Center and Handa Center for Human Rights and International Justice.
http://www.eastwestcenter.org/publications/voices-reconciliation-assessing-media-outreach-and-survivor-engagement-case-002-the> (accessed 2 February 2018)

2. Background to Case Studies

2.1. The Ituri situation at the International Criminal Court

Map 1: The ICC and the situation in Ituri, DRC



2.1.1. The conflict in Ituri, Democratic Republic of Congo

The district of Ituri is situated in Orientale Province in the Northeast of the Democratic Republic of Congo (DRC) in Central Africa. The district alone is larger than the Netherlands. The district capital is the city of Bunia. It is estimated that around four to five million people live in the district. Ituri has a diverse ethnical composition being home to at least 18 different ethnic groups. The Hema and Lendu ethnic groups that are at the centre of the first two cases at the ICC comprise together about 40 per cent of the district's inhabitants.[23]

[23] Human Rights Watch, 2003, 'Ituri: "Covered in Blood"', Human Rights Watch, 1. <https://www.hrw.org/sites/default/files/reports/DRC0703.pdf> (accessed 14 February 2018)

The situation in Ituri is closely related to the DRC's history of colonial rule and state failure, especially following the downfall of the authoritarian regime of Mobutu Sese Seko during the mid-1990s.[24] The rapid disintegration of the Congolese state after the end of Mobutu's reign, the spread of violent conflicts and the interventions of neighbouring states in those conflicts have been the subject of scholarly writings.[25] It is estimated that millions of people died in the decade that followed the DRC's descent into violence.[26] My goal here is to convey a sense of the intricate nature of conflict in Ituri and the devastating consequences of violence, which remain at the core of aspirations for justice among its population.

Embedded in the larger context of the DRC and the Great Lakes region, contemporary conflicts in Ituri are multilayered.[27] Whilst earlier analyses focused on the macro-level structures of regional intervention and economic control over resources[28] or simplified accounts of ethnic violence,[29] more differentiated explanations stress the multiple interactions between conflicts and actors. Vlassenroot and Raeymaekers argue that "the outbreak of violence in Ituri is the result of exploitation, by local and regional actors, of a deeply rooted local conflict over access to land, economic opportunity and political power".[30] These tensions provided the background for an escalating conflict between the traditionally pastoralist Hema, who had dominated since Belgian colonial times the politics and administration of Ituri, and the predominately agriculturist Lendu.[31]

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[24] See for instance Young, Crawford, and Thomas Turner, 1985, *The Rise and Decline of the Zairian State*, Madison: The University of Wisconsin Press.

[25] See for instance Reyntjens, Filip, 2010, *The Great African War: Congo and Regional Geopolitics, 1996-2006*, Cambridge: Cambridge University Press; Autesserre, Séverine, 2010, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding*, Cambridge: Cambridge University Press; Prunier, Gérard, 2009, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*, Oxford: Oxford University Press; and Vlassenroot, Koen, and Timothy Raeymaekers (eds.), 2004, *Conflict and Social Transformation in Eastern DR Congo*, Gent: Academia Press.

[26] A report by the International Rescue Committee, which attracted much attention at the time of its publication, estimated that 3.3 million people died as a result of the war from 1998 to 2002. See International Rescue Committee, 2003, 'Mortality in the Democratic Republic of Congo: Results from a Nationwide Survey'. <https://reliefweb.int/report/democratic-republic-congo/mortality-democratic-republic-congo-results-nationwide-survey-apr> (accessed 15 February 2018)

[27] See for instance Vlassenroot, Koen, and Timothy Raeymaekers, 2004, 'The Politics of Rebellion and Intervention in Ituri: The Emergence of a New Political Complex?', 103(412) *African Affairs*, 385-412; Pottier, Johan, 2009, 'Representations of Ethnicity in the Search for Peace: Ituri, Democratic Republic of Congo', 109(434) *African Affairs*, 23-50; and Ndahinda, Felix, 2016, 'Collective Victimization and Subjectivity in the Democratic Republic of Congo: Why Do Lasting Peace and Justice Remain Elusive?', 23 *International Journal on Minority Law and Group Rights*, 137-178.

[28] See also *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, UN Doc S/2002/1146, 16 October 2002.

[29] See a critical discussion at Autesserre, Séverine, 2012, 'Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences', 111(443) *African Affairs*, 202-222.

[30] Vlassenroot/Raeymaekers, The Politics of Rebellion, 387.

[31] See for instance Vlassenroot, Koen, and Chris Huggins, 2005, 'Land, Migration and Conflict in the Eastern DRC', in: Huggins, Chris, and Jenny Clover (eds.), *From the Ground Up: Land Rights, Conflict and Peace in Sub-Sahran Africa*, Pretoria: Institute for Security Studies, 115-194; and Vircoulon, Thierry, 2010, 'The Ituri Paradox: When Armed Groups Have a Land Policy and Peacemakers Do Not', in:

Elites and local strongmen used the aftermath of the Kabila-led rebellion and the proliferation of small arms in the region to seize control over land, resources and populations. The number of local militias increased, with ethnicity proving to be a tool for mobilisation. Ugandan military forces intervened again in Ituri in 1998, supporting local armed factions and engaging in the exploitation of resources. From 1999 onwards, violent attacks turned into large-scale armed conflict.[32]

For the purposes of the first ICC cases, relevant groups from among the dozen or so armed groups in Ituri were the Hema-dominated *Union des Patriotes Congolais* (UPC) of Thomas Lubanga, as well as the *Front des Nationalites et Intégrationnistes* (FNI) of Mathieu Ngudjolo Chui and the *Force de résistance patriotique en Ituri* (FRPI) of Germain Katanga, with the later two being associated with various Lendu militias. By 2002, the number of deaths had reached an estimated 50,000 and more than half a million civilians had been displaced.[33] International pressure led to the withdrawal of Ugandan troops and, in 2003, a French-led European intervention force paved the way for a presence of the United Nations mission (MONUC).[34] It took MONUC (followed in 2010 by its successor mission MONUSCO) years to stabilise Ituri, and the mission struggled to implement a disarmament and demobilisation program.[35] Low-level violence in parts of the district has continued up to today.[36]

Non-governmental organisations and the United Nations have documented serious human rights violations that occurred during the conflict.[37] These reports detailed widespread attacks on civilian populations, often targeting specific ethnic groups, large-scale massacres of local communities, mutilations and disappearances.[38] Two types of violence received particular attention: the prevalent use of rape, sexual slavery and other forms of sexual violence, affecting

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Anseeuw, Ward, and Chris Alden (eds.), *The Struggle over Land in Africa: Conflicts, Politics and Change*, Cape Town: HSRC Press, 209-220.

[32] See also International Crisis Group, 2003, 'Congo Crisis: Military Intervention in Ituri', *ICG Africa Report No 64*, Nairobi/New York/Brussels.

[33] ICG, Congo Crisis, 1; and Human Rights Watch, Covered in Blood, 1.

[34] See International Crisis Group, 2004, 'Maintaining Momentum in the Congo: The Ituri Problem', *ICG Africa Report* No 84, Nairobi/Brussels.

[35] See Veit, Alex, 2008, 'Figuration of Uncertainty: Armed Groups and "Humanitarian" Military International in Ituri', 2(3) *Journal of Intervention and Statebuilding*, 291-307.

[36] See Pottier, Johan, 2008, 'Displacement and Ethnic Reintegration in Ituri, DR Congo: Challenges Ahead', 46(3) *Journal of Modern African Studies*, 427-450; and Autessere, Séverine, 2014, *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention*, Cambridge: Cambridge University Press.

[37] See for instance OHCHR, 2010, 'Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of Congo between Marc 1993 and June 2003'. <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx> (accessed 15 February 2018)

[38] See OHCHR, Report of the Mapping Exercise, 190-194, 218-235; and Human Rights Watch, Covered in Blood, 22-27, 30-38.

disproportionally women and girls;[39] and the recruitment and use of child soldiers by all armed groups in Ituri.[40] This violence was accompanied by forced displacement of civilian populations, pillage, especially stealing of cattle, and destruction of houses. The effects of violence against Ituri's population were also revealed in population-based surveys.[41] These accounts show the widespread and systematic nature of the atrocities committed against Ituri's population, especially during the years from 1999 to 2003. It is this conflict that presents the backdrop for the ICC's first situation.

2.1.2. The cases against Thomas Lubanga Dyilo and Germain Katanga

In response to these atrocities, the DRC established a short-lived truth commission[42] and invested with international donor support in building the capacities for domestic prosecutions of serious crimes.[43] Due to limited capacities, however, justice efforts by the DRC government focused early on the ICC.[44] The DRC was one of the ICC's founding members. In April 2004, President Joseph Kabila referred the situation to the ICC, seeking an investigation into alleged crimes within the Court's jurisdiction committed anywhere in the territory of the DRC since the entry into force of the Rome Statute.[45] With a complex web of political motivations and dynamics at play, the ICC entered what one observer described as "the Congolese chess game".[46]

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[39] OHCHR, Report of the Mapping Exercise, 310-312. See also Duroch, Francoise, Melissa McRae, and Rebecca Grais, 2011, 'Description and Consequences of Sexual Violence in Ituri Province, Democratic Republic of Congo', 11(5) *BMC International Health and Human Rights*, 1-8.

[40] OHCHR, Report of the Mapping Exercise, 333-345. In his 2000 report on children in armed conflict, the UN Secretary-General estimated that there were between 10,000 and 20,000 children under the age of 15 in the various armed groups in the DRC. See *Report of the Secretary-General on children and armed conflict*, UN Doc A/55/163-S/2000/712, 19 July 2000.

[41] Vinck, Patrick, Phuong Pham, Suliman Baldo, and Rachel Shigekane, 2008, 'Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo', Human Rights Center, Berkeley/Payson Center for International Development, and International Center for Transitional Justice. The survey was conducted among a sample of 2,620 individuals in Ituri and the Kivu provinces. The data for Ituri alone show that more than half of all respondents had seen the disappearance of at least one household member, and more than 40 per cent reported the violent death of a household member. Over half of all respondents were forced to work or enslaved, and more than one third had experienced some form of torture.

[42] See Musila, Godfrey, 2009, *Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's Work in the DRC*, Monograph 164, Addis Ababa: Institute for Security Studies, 36-37.

[43] The International Center for Transitional Justice reported that military courts in the Eastern DRC opened at least 39 cases of serious crimes between 2009 and 2014. Seven of those cases concerned Ituri. See Candeias, Sofia et al., 2015, 'The Accountability Landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009-2014)', International Center for Transitional Justice, 22. Mobile court programs have also contributed to accountability.

[44] See Clark, Phil, 2009, 'Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda', in: Bowden, Brett, Hilary Charlesworth, and Jeremy Farrall (eds.), *Great Expectations: The Role of International Law in Restructuring Societies after Conflict,* Cambridge: Cambridge University Press, 244-269.

[45] ICC OTP, 2004, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo', Press Release, ICC-OTP-20040419-50, 19 April 2004.

[46] Cruvellier, Thierry, 2004, 'ICC Joins the Congolese Chess Game', 8 *International Justice Tribune*, 5 July 2004. See also Clark, Phil, 2008, 'Law, Politics and Pragmatism: ICC Case Selection in the Democratic

The case against Thomas Lubanga Dyilo

In March 2005, the DRC authorities issued an arrest warrant against Thomas Lubanga, who was staying in Kinshasa for peace talks, and placed him under arrest.[47] This offered an opportunity for the ICC's Office of the Prosecutor (OTP), which sought an arrest warrant from the Pre-Trial Chamber. The Chamber approved the warrant, and Lubanga was flown to The Hague, where he was placed into custody on 17 March 2006. One Congolese observer criticised that the ICC was only "targeting a small fish" and that "many in the DRC found it deeply disturbing that, after two years of investigations, conscription of child soldiers was all that the OTP was able to point to as being among 'the worst crimes' committed in Ituri".[48] National and international NGOs shared these concerns about the narrow charges laid by the Prosecutor, which were limited to conscripting and using child soldiers; especially regarding the exclusion of sexual violence.[49] The Pre-Trial Chamber confirmed the Prosecutor's charges in 2007 and sent the case to trial.[50]

The trial was characterised by numerous postponements and delays. The most notable aspect at trial was the controversy between the Prosecutor and the Trial Chamber about the balance between the OTP's need to protect the identity of locally-based informants and its reliance on local intermediaries, and the defendant's right to a fair trial. Judges twice suspended the proceedings. Although these matters were sufficiently resolved to resume the trial, observers became critical of the trial and the length of proceedings.[51] The Trial Chamber reached a verdict in March 2012, sentencing Thomas Lubanga to 14 years imprisonment for conscripting and enlisting children under the age of 15 and using them in hostilities.[52] The verdict was appealed

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Republic of Congo and Uganda', in: Clark, Phil and Nicholas Waddell (eds.), *Courting Conflict? Peace, Justice and the ICC in Africa,* London: Royal African Society.

[47] For an overview of Lubanga's trial refer to Freedman, Jim, 2017, *A Conviction in Question: The First Trial at the International Criminal Court*, Toronto: University of Toronto Press.

[48] Kambale, Pascal Kalume, 2015, 'A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo', in: De Vos et al., *Contested Justice*, 171-197, 179-180. Kambale also noted that most of the militia leaders in ICC custody were already being prosecuted or had been indicted by Congolese courts at the time of their transfer to the ICC, including Lubanga and Katanga who had both been arrested prior to ICC transfer.

[49] Human Rights Watch et al., 2006, 'DR Congo: ICC Charges Raise Concern', Joint letter to the Chief Prosecutor of the International Criminal Court, 31 July 2006. See also Chappell, Louise, 2016, *Gender Justice at the International Criminal Court: Legacies and Legitimacy,* Oxford: Oxford University Press.

[50] *Prosecutor v Lubanga*, 'Decision on the Confirmation of Charges', Pre-Trial Chamber I, ICC-01/04-01/06-803tEN, 29 January 2007.

[51] See for instance De Vos, Christian, 2011, '"Someone Who Comes between one Person and Another": Lubanga, Local Cooperation and the Right to a Fair Trial', 12 *Melbourne Journal of International Law*, 217-236; and Anoushirvani, Sara, 2010, 'The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo', 22 *Pace International Law Review*, 213-239.

[52] *Prosecutor v Lubanga*, 'Judgment Pursuant to Article 74 of the Statute', Trial Chamber I, ICC-01/04-01/06-2842, 14 March 2012. See also Ambos, Kai, 2012, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', 12 *International Criminal*

and, in December 2014, the Appeals Chamber confirmed the guilty verdict and the sentencing decision.[53]

The case against Germain Katanga

Expectations were high that individuals from other armed groups would also be targeted. In July 2007, the ICC issued an arrest warrant against Germain Katanga, the former leader of the FRPI. Katanga had already been in custody of the Congolese authorities and was transferred to the ICC in October 2007.[54] The Prosecutor's allegations were similarly narrow. The charges focused on an attack on the village of Bogoro, in February 2003, where FRPI militias jointly with members from the FNI, murdered hundreds of civilians, the majority Hema, pillaged the village and sexually enslaved women and girls, among other crimes. Considering the involvement of the FNI in the attack, the ICC also issued an arrest warrant against Mathieu Ngudjolo Chui, the former leader of the FNI. Ngudjolo was arrested and transferred to the ICC in 2008. However, in 2012, the Trial Chamber acquitted Ngudjolo of all charges. It stated that the Prosecutor had failed to provide sufficient evidence to prove beyond reasonable doubt that the defendant was responsible for the alleged crimes.[55]

Germain Katanga was convicted by the Trial Chamber, in March 2014, for crimes relating to murder, attacking civilians, and destroying and pillaging property,[56] and subsequently sentenced to 12 years imprisonment. He was however acquitted of charges relating to using child soldiers and sexual violence. Carsten Stahn called the outcome "unsatisfactory", arguing that the judgment's "contentious findings leave an incomplete, and partly contradictory picture of the role of actors in the Ituri crisis, which confirms scepticism about the fact-finding function of international criminal courts and tribunals".[57] In December 2015, Thomas Lubanga and Germain Katanga were both transferred to the DRC to serve the reminder of their prison sentences.[58] My

Law Review, 115-153; Drumbl, Mark, 2012, 'The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering', 15 *Yearbook of International Humanitarian Law*, 87-116; and Graf, Roman, 2012, 'The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment', 10 *Journal of International Criminal Justice*, 945-969.

[53] *Prosecutor v Lubanga*, 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction', Appeals Chamber, ICC-01/04-01/06-3121-Red, 1 December 2014.

[54] See Bitti, Gilbert, and Mohamend El Zeidy, 2010, 'The Katanga Trial Chamber Decision: Selected Issues', 23 *Leiden Journal of International Law*, 319-329.

[55] *Prosecutor v Ngudjolo*, 'Judgment Pursuant to Article 74 of the Statute', Trial Chamber II, ICC-01/04-02/12-3, 18 December 2012.

[56] *Prosecutor v Katanga*, 'Judgment Pursuant to Article 74 of the Statute', Trial Chamber II, ICC-01/04-01/07-3436, 7 March 2014.

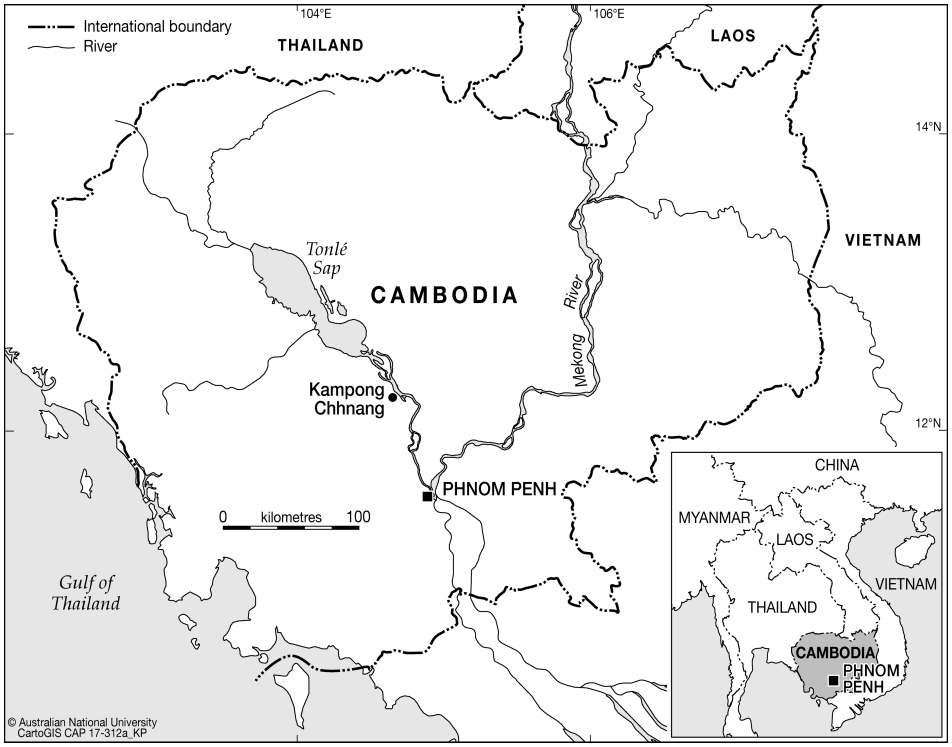
[57] Stahn, Carsten, 2014, 'Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment', 12 *Journal of International Criminal Justice*, 809-834, 809 & 834.

[58] This was first time that the ICC designated a state for the enforcement of imprisonment sentences. ICC, 'Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment', Press Release, ICC-CPI-20151219-PR1181, 19 December 2015. The ICC Appeals

thesis does not deal with the case against Bosco Ntaganda which equally concerns crimes committed in Ituri, but in which proceedings are ongoing at the time of writing.[59]

2.2. The Khmer Rouge Trials in Cambodia

Map 2: The ECCC in Cambodia



2.2.1. Violent conflict in Cambodia and the Khmer Rouge regime

Cambodia is situated in mainland Southeast Asia. The country has a population of around 15 million, and its biggest city is the capital Phnom Penh. The twentieth century has seen many violent conflicts and atrocities in Cambodia. After independence from colonial rule in 1953, the regime of Prince Sihanouk tried to avoid being drawn into the Cold War confrontation between the two superpowers.[60] However, the war in neighbouring Vietnam spilled over onto Cambodian

Chamber granted an early release to Katanga, but the DRC government is considering bringing new charges against him.

[59] Bosco Ntaganda was the alleged commander of operations of the *Union des Patriotes Congolais/ Forces Patriotiques pour la Libération du Congo* (UPC/FPLC) and charged with war crimes committed in Ituri in 2002/2003. Trial hearings began in 2015.

[60] For an overview of Cambodia's post-independence history, see Chandler, David, 1991, *The Tragedy of Cambodian History: Politics, War, and Revolution since 1945*, Yale: Yale University Press.

territory. At the end of the 1960s, communist guerrilla groups began operating in Cambodia, often supported by North Vietnam, which used Cambodia as a staging area for operations in South Vietnam. Large-scale bombing campaigns by the United States and its allies then killed an estimated 150,000 people and devastated Cambodia's Eastern and Southern provinces.[61] Rising violence led to political destabilisation. Following a 1970 coup against Sihanouk, the quasi-military regime of General Lon Nol established the Khmer Republic and aligned with the United States. An influx of military and financial aid, however, was not able to stop the advance of Khmer Rouge forces, which controlled ever-larger areas of Cambodia's countryside. On 17 April 1975, the Khmer Rouge entered Phnom Penh and ousted the Lon Nol regime. During the following more than three and half years, they ruled the country under the Democratic Kampuchea, often referred to as the Khmer Rouge regime (1975-1979).

Most Cambodians remember the Khmer Rouge regime as the time of the worst atrocities in a long series of civil wars. The state and its people were subordinated to the Communist Party of Kampuchea, only referred to as 'angkar' ('the organisation') by ordinary Cambodians. The Khmer Rouge enacted policy measures with the aim of establishing a revolutionary order that intruded deep into people's lives and shattered the country's social fabric.[62] This included the forced transfer of urban populations into agricultural cooperatives, the abolishment of a currency-based economy and the judiciary, prohibition of religion and the closure of schools. This transformation of society was accompanied by extremely violent measures, including the widespread torture and summary execution of those considered to be enemies of the new order, persecution of minorities and forced labour in worksites spread around the country.[63] Nothing symbolised the violence more than the S-21 security centre, the central torture facility of the Khmer Rouge's security service.[64]

The estimated number of those who died is between 1.4 million to 2.2 million, almost a quarter of the population at that time.[65] While many died as a result of starvation and disease, it is

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[61] See Shawcross, William, 1979, *Sideshow: Kissinger, Nixon, and the Destruction of Cambodia*, New York: Simon & Schuster.

[62] See Becker, Elizabeth, 1986, *When the War Was Over: Cambodia and the Khmer Rouge Revolution*, New York: Simon & Schuster; and Short, Philip, 2004, *Pol Pot: The History of a Nightmare*, London: John Murray.

[63] See Kiernan, Ben, 1996, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979*, Yale: Yale University Press; Etcheson, Craig, 2005, *After the Killing Fields: Lessons from the Cambodian Genocide*, Westport: Praeger Publishers; and Hinton, Alexander, 2004, *Why Did They Kill? Cambodia in the Shadow of Genocide*, Berkeley: University of California Press.

[64] See Chandler, David, 1999, *Voices from S-21: Terror and History in Pol Pot's Secret Prison*, Berkeley: University of California Press.

[65] These estimates were collated in a demographic expert report for the ECCC. Tableau, Ewa, 'Khmer Rouge Victims in Cambodia, April 1975 - January 1979: A Critical Assessment of Major Estimates', Democratic Expert Report, ECCC D140/1/1, 30 September 2009, 1-20.

estimated that at least one-third were violent deaths.[66] The scale of this violence left almost no one untouched. Contemporary population-based surveys show that of those who lived under the Khmer Rouge regime over two-third said they experienced starvation (82 per cent), personal property destroyed (71 per cent), forced evacuation (69 per cent) and forced labour (63 per cent). More than one quarter reported being tortured (27 per cent) or having witnessed killings (22 per cent).[67]

In late 1978, the Vietnamese militarily intervened in Cambodia and toppled the Khmer Rouge regime. The remnants of the Khmer Rouge fled to the North of the country where they continued a guerrilla war against the new communist regime in Phnom Penh that was supported by the Vietnamese.[68] The end of the Cold War led to Vietnam's withdrawal from Cambodia and the initiation of peace negotiations. The 1991 Paris peace accords provided through the United Nations Transitional Authority in Cambodia (UNTAC) for a peacekeeping mission to oversee national elections and the transition to the new constitutional order the Kingdom of Cambodia.[69] However, it took another few years before the last Khmer Rouge ended their resistance in 1998, following the death of Pol Pot.

2.2.2. Dealing with the past and the establishment of the ECCC

Efforts to deal with the legacy of mass atrocities began after the fall of the Khmer Rouge regime.[70] In 1979, the new communist regime established the so-called People's Revolutionary Tribunal and instituted a trial *in absentia* against two senior leaders of the Khmer Rouge, Pol Pot and Ieng Sary.[71] Although the trial amassed a large amount of documents and testimonies, it was widely dismissed as a show trial to shore up the legitimacy of the new regime. With large parts of the international community still recognising the Khmer Rouge at the United Nations, the

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[66] Ibid 1-20.

[67] Pham, Phuong, Patrick Vinck, Mychelle Balthazard, Sokhom Hean and Eric Stover, 2009, 'So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia', UC Berkeley Human Rights Center, 25-26.

[68] Chanda, Nayan, 1986, *Brother Enemy: The War after the War,* San Diego/New York: Harcourt Brace Jovanovich Publishers; and Gottesman, Evan, 2003, *After the Khmer Rouge: Inside the Politics of Nation Building,* Yale: Yale University Press.

[69] See Hughes, Caroline, 2003, *The Political Economy of the Cambodian Transition, 1991-2001*; London: Routledge; and Charlesworth, Hilary, 2010, 'Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict', 29 *Australian Yearbook of International Law*, 1-16.

[70] See Balint, Jennifer, 2012, *Genocide, State Crime and the Law: In the Name of the State*, New York: Routledge; Chandler, David, 2008, 'Cambodia Deals with its Past: Collective Memory, Demonisation and Induced Amnesia', 9(2-3) *Totalitarian Movements and Political Religions*, 355-369; and Menzel, Joerg, 2007, 'Justice Delayed or Too Late for Justice? The Khmer Rouge Tribunal and the Cambodian "Genocide" 1975-79', 9 *Journal of Genocide Research,* 215-233.

[71] See De Nike, Howard, John Quigley, and Kenneth Robinson (eds.), 2000, *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, Philadelphia: University of Pennsylvania Press; and Fawthrop, Tom, and Helen Jarvis, 2005, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal,* Sydney: UNSW Press.

government initiated the so-called 'Renakse' petition. The petition consisted of approximately 1,250 handwritten submissions with over one million signatures, appealing to the United Nations to deny recognition of the Khmer Rouge.[72] Furthermore, the government began to preserve some of the sites of the atrocities – most notably the Tuol Sleng museum, protecting the site of the S-21 security centre, and the associated killing site at Choeung Ek – and built memorials throughout the country.[73]

Accountability for past atrocities did not feature in the 1991 Paris peace agreements, which merely committed the parties to avoid "a return to the policies and practices of the past".[74] Following the passage of the US Cambodian Genocide Act, in 1994, the Yale Cambodian Genocide Program intensified the study of Khmer Rouge atrocities. The program's local research arm developed into the Documentation Center of Cambodia (DC-Cam), whose collections laid the evidentiary foundations for subsequent accountability efforts.[75] The Cambodian government's more pragmatic approach to the remaining Khmer Rouge relied on an amnesty policy to encourage defections, which led to the implosion of the Khmer Rouge as a force. Attention then shifted to the few remaining Khmer Rouge leaders holding out near the Thai border. In 1997, the then two Cambodian Co-Prime Ministers wrote to the UN Secretary-General requesting assistance to bring to justice those most responsible for the crimes committed during the reign of the Khmer Rouge regime.[76] It was only in 2003, after many years of protracted negotiations, that both parties were able to conclude an agreement to establish the Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge Tribunal.[77]

The Khmer Rouge Tribunal

The ECCC is a hybrid court[78] of national and international composition.[79] The hybrid character of the Court, manifested in a mixed representation of the judicial and administrative leadership,

[72] See Gordon, Amy, 2007, 'The Renakse Petitions: Background and Suggestions for Future Use', Phnom Penh: DC-Cam.
[73] See Hughes, Rachel, 2003, 'Nationalism and Memory at the Tuol Sleng Museum of Genocide Crimes, Phnom Penh, Cambodia', in: Hodgkin, Katharine, and Susannah Radstone (eds.), *Contested Pasts: The Politics of Memory*, New York: Routledge, 175-192.
[74] *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, 1663 UNTS 56, 23 October 1991.
[75] See DC-Cam website at http://www.dccam.org (accessed 7 February 2018)
[76] *Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General*, UN Doc A/51/930-S/1997/488, 24 June 1997, Annex.
[77] See Fawthrop/Jarvis, *Getting Away with Genocide*.
[78] The terms 'hybrid court' and 'internationalised court' are used interchangeably in this thesis.
[79] Refer to Ciorciari, John, and Anne Heindel, 2014, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia,* Ann Arbor: University of Michigan Press; and Meisenberg, Simon, and Ignaz Stegmiller (eds.), 2016, *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law*, Den Haag: Springer/Asser Press.

is more pronounced than in any previous internationalised criminal court.[80] The international component is organised in form of the United Nations Assistance to the Khmer Rouge Tribunal (UNAKRT). The ECCC's mandate is limited to the "senior leaders" and "those who were most responsible" for crimes committed in between 17 April 1975 and 6 January 1979.[81] Crimes committed before and after the Khmer Rouge regime are beyond the purview of the ECCC. The Court was set up in 2006 and began a year later to make the first indictments and arrests. A number of difficulties, such as allegations about corruption and political interference, arose because of the ECCC's hybrid nature and the political context in which it operates.[82] The United Nations and international donors supporting the ECCC have struggled to contain these problems and to ensure the trials accord with international standards of justice.

The ECCC has investigated four cases so far, simply referred to as *Cases 001, 002, 003* and *004*. Thirty years after the crimes occurred, all cases involve elderly defendants. My thesis focuses on *Case 001* and *Case 002/01* – the only cases that have completed the appeals stage and rendered decisions on reparations for participating civil parties. *Cases 003* and *004*, not further discussed in this thesis, are still at the investigative stage and involve another five defendants, of which one has already died.[83]

Case 001

The first case before the ECCC concerns Kaing Guek Eav, alias Duch, a former mathematics teacher and then head of the S-21 security centre in Phnom Penh.[84] After being detained by a Cambodian military court since 1999, he was transferred into ECCC custody in July 2007. Charges laid against Duch focused on his role in overseeing the S-21 security centre and another

[80] See Bertelman, Hanna, 2010, 'International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia', 79 *Nordic Journal of International Law,* 341-382; and De Bertodano, Sylvia, 2006, 'Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers', 4 *Journal of International Criminal Justice*, 285-293.

[81] *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, 6 June 2003, Art. 1.

[82] See for instance McCargo, Duncan, 2011, 'Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal', 87(3) *International Affairs*, 613-627. Refer also to the regular monitoring reports published by the Cambodia program of the Open Society Justice Initiative.

[83] These two cases involve individuals belonging to the Khmer Rouge leadership outside the Central Committee. *Case 003* initially involved two suspects, Sou Met, and Meas Muth, the former Commander of the Khmer Rouge Navy. Sou Met passed away in 2014. *Case 004* involves three suspects Im Chaem, Ao An, and Yim Tith. In early 2016, the Co-Investigating Judges severed the case, with proceedings against Im Chaem now being dealt with in a separate *Case 004/01*. The Cambodian government has expressed opposition against these cases.

[84] Trial hearings in *Case 001* commenced in March 2009 and ended with Closing Statements in November 2009.

smaller prison nearby Phnom Penh. Trial hearings took place between March and November 2009 and ended, in 2010, with a conviction and a sentence to 35 years imprisonment.[85] The Trial Chamber noted the widespread torture in S-21 and founded that at least 12,000 people were killed there or at the mass execution site at Choeung Ek. On appeal, in a judgment rendered in 2012, the Supreme Court Chamber largely confirmed the conviction, but increased the sentence to life imprisonment.[86]

Case 002/01

Case 002 against the remaining senior leaders of the Khmer Rouge is considered the ECCC's most important case. Investigations initially involved four accused: Nuon Chea, the former Deputy Secretary of the Party; Khieu Samphan, the former Head of State; Ieng Tirith, the former Social Action Minister; and her husband Ieng Sary, former Deputy Prime Minister for Foreign Affairs. The latter two defendants have died before a verdict could be reached.[87] Due to the extensive list of charges, the Trial Chamber decided to sever the case into a series of consecutive sub-trials. The first of these sub-trials, referred to as *Case 002/01*, dealt mainly with the forced movements of populations, especially the forced transfer of around two million people from Phnom Penh in April 1975 under violent circumstances.[88] After 222 days of trial hearings, the Trial Chamber convicted, in August 2014, Nuon Chea and Khieu Samphan to life imprisonment.[89] The sentence was upheld on appeal with a final judgment rendered in 2016. The remaining charges against these two accused are tried in *Case 002/02*, including genocide against the Cham and ethnic Vietnamese minorities, forced marriages and various other crimes against humanities.[90] A trial judgment in that case is expected in mid-2018.

[85] *Case 001*, 'Judgment', Trial Chamber, Case File 001/18-07-2007/ECCC/TC, E188, 26 July 2010.
[86] See Asian International Justice Initiative, 2009, 'Lessons Learned from the "Duch" Trial: A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia', Report by the AIJI KRT Trial Monitoring Group.
[87] In November 2011, Ieng Thirith was found by the ECCC Trial Chamber not be fit to stand trial. She died in 2015. Ieng Sary died in March 2013.
[88] Trial hearings in *Case 002/01* commenced in November 2011 and concluded with Closing Statements in October 2013.
[89] *Case 002/01*, 'Judgment', Trial Chamber, Case File No 002/19-09-2007/ECCC/TC, E313, 7 August 2014. See also Cohen, David, Melanie Hyde and Penelope Van Tuyl, 2015, 'A Well-Reasoned Opinion? Critical Analysis of the First Case against the Alleged Senior Leaders of the Khmer Rouge', Asian International Justice Initiative, East-West Center.
[90] Trial hearings in Case 002/02 commenced in October 2014 and ended with Closing Statements in June 2017. At the time of writing, the trial judgment is pending.

2.3 Comparative remarks regarding the two case studies

The two case studies concern mass atrocities at a large scale, killing or otherwise affecting millions of people. The DRC and Cambodia share a colonial past and are both low-income developing countries struggling with various socio-economic challenges. Both countries have eventually favoured international or hybrid mechanisms over national-level responses. The DRC and Cambodia were early supporters of international justice and jointly deposited their ICC ratification instruments on 11 April 2002. Governments of both countries actively sought involvement of the international community in the accountability process. In both cases the international(-ised) courts focused only on selected aspects of the atrocities and a handful of defendants, whilst excluding other instances of conflict and violence. Few complementary justice initiatives, in addition to international(-ised) prosecutions, exist in both countries.

Apart from these similarities, there exist a number of differences. The ICC investigations in Ituri deal with fairly recent violations in a context of ongoing low-level armed conflict. Displacements of populations and other security challenges have hampered investigations and affected the justice process. Almost 40 years after the Khmer Rouge regime, Cambodia is in a more peaceful state, with few security concerns for the ECCC. Yet, investigating abuses at the scale as those committed by the Khmer Rouge in Cambodia three to four decades after the crimes were committed has been challenging. Many eyewitnesses and suspects have died; others struggle to remember some of the details of their experiences. Finally, both case studies concern different cultural contexts – one a predominantly Buddhist country in Southeast Asia, the other a large, diverse Central African country with different ethnicities and religions. These contextual features are important for the consideration of reparations.

PART II

Contested Foundations: Negotiating Reparations

Part I showed how the idea of incorporating reparations into international criminal justice emerged from the convergence of two normative responses to mass atrocities: the 'fight against impunity' that enabled international criminal justice, and the rise of international human rights with its emphasis on redress for victims of mass atrocities. How did this convergence play out in the negotiations that crafted the legal frameworks of the ICC and the ECCC? A growing body of scholarly work analysed the complex processes behind the creation of new laws and norms that regulate international affairs.[1] This work has expanded to include the role of NGOs and other non-state actors as 'norm entrepreneurs' who seek to promote certain political or normative change in an increasingly globalised world.[2] Scholarly research demonstrated that international law and international courts do not evolve in a vacuum, but through complex processes of transnational politics that extend beyond institutional boundaries. State politics and strategies, as well as national and transnational non-state actors, add to a complex web of agents.

Against this background, Part II studies the main debates during the negotiations of the ICC's and the ECCC's foundational laws and identifies the most salient negotiation practices that were chosen during these debates to mediate between competing objectives. My observations focus on the arenas where these norms were negotiated: in the case of the ICC, the Rome negotiations; and in the case of the ECCC, the drafting of its Internal Rules. The purpose of Part II is to inquire into the compromises that emerged from these negotiation practices and to examine the effects of these compromises on the subsequent operation of the ICC's and ECCC's reparations scheme.

[1] See also the work on transnational legal processes by Koh, Harold, 1996, 'Transnational Legal Process', 75 *Nebraska Law Review*, 181-207; and Halliday, Terence, and Gregory Shaffer (eds.), 2015, *Transnational Legal Orders*, Cambridge/New York: Cambridge University Press.
[2] See for instance Keck, Margaret E, and Kathryn Sikkink, 1998, *Activists Beyond Borders: Advocacy Networks in International Politics*, Ithaca: Cornell University Press.

Prelude: The Absence of Reparations at the Ad Hoc Tribunals

Before I examine the emergence of reparations at the ICC, I address their absence at the two *ad hoc* international criminal tribunals that preceded the permanent ICC – the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). A closer look reveals that reparations were present during the drafting of the Tribunals' legal frameworks, but they never gained sufficient support from the small group of states involved in the negotiations.[3]

Faced with serious crimes against civilian populations in the former Yugoslavia, the UN Security Council considered options for holding accountable those responsible for these crimes. On 22 February 1993, the Council adopted Resolution 808, in which it established an *ad hoc* international criminal tribunal.[4] In early 1993, proposals from UN member states were circulated in preparation for drafting the Tribunal's statute. A proposal by France noted that the Tribunal must offer "due consideration for victims".[5] Yet, French diplomats – who became a few years later in Rome the most important state proponent for reparations – were in 1993 still sceptical of including such provisions into the Tribunal's mandate, mainly on the grounds of trial efficiency:

> [i]t does not seem reasonable to admit civil actions before the Tribunal. That would lead to a flood of claims, which the international court would not be in a position to process effectively. It seems preferable to proceed from the principle that it will be for the national courts to rule on claims for reparation by victims or their beneficiaries.[6]

Not all proposals were opposed to a reparations mandate. The Conference on Security and Cooperation in Europe (CSCE) forwarded a draft convention providing for victims to participate in the criminal proceedings and "the right to claim restitution of property and appropriate compensation".[7] Similarly, the Organisation of the Islamic Conference recommended that "there shall be a victim compensation scheme" and that "governments found responsible for crimes

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[3] As the ICTR very much followed the ICTY Statute and Rules of Procedure and Evidence, I focus in the following largely on the origin of the ICTY legal framework. See particularly Morris, Virginia and Michael Scharf, 1995, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis*, New York: Transnational Publishers.

[4] SC Res 808, UN Doc S/RES/808, 22 February 1993.

[5] *Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, forwarding a report of the Committee of French Jurists to study the establishment of an international criminal tribunal to judge the crimes committed in the former Yugoslavia*, UN Doc S/25266, 10 February 1993, Introduction, 9, para. 23.

[6] Ibid 27, para. 100.

[7] *Draft Convention on an International War Crimes Tribunal for the Former Yugoslavia*, Art. 33. Submitted as annex to document *Letter dated 18 February 1993 from the Permanent Representative of Sweden to the United Nations addressed to the Secretary-General, forwarding the decision by the Conference on Security and Cooperation in Europe on the proposal for an international war crimes tribunal for the former Yugoslavia*, UN Doc S/25307, 18 February 1993, Annex 6. Reproduced at Morris/Scharf, *An Insider's Guide*, 287-288.

committed by individuals in the service of such governments or acting for and on behalf of such governments should be required under principles of state responsibility to pay such compensation".[8] NGO submissions also supported some reparative functions. The National Alliance of Women's Organisations argued, "the same problem that requires establishment of an international body to prosecute criminally – the hostility and unreliability of national tribunals – also requires that the system established by the tribunal provide for the award of compensation to victims".[9] However, most NGO submissions did not think that this task be carried out necessarily by the Tribunal, but instead through an auxiliary mechanism.[10] The United Nations Claims Commission, established in the aftermath of the 1991 Gulf War, was frequently cited as a precedent.

Despite these calls for reparations, most states ignored the matter.[11] The United States, which was influential in the formulation of the Statute, did not contemplate remedies for victims.[12] The UN Secretary-General's subsequent report considered these various proposals and submitted a draft Statute with limited ambitions regarding reparations. A provision on restitution of property survived under the penalties section in draft Article 24(3), allowing the trial chamber to order the return of any property acquired by criminal conduct to their rightful owners.[13] Morris and Scharf contend that "this was considered to be particularly important in light of the reports of persons being deprived of their property by means of duress as part of the practice of ethnic cleansing".[14] However, states were mindful to exclude notions of state responsibility, limiting the restitution

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[8] *Recommendations of the Organization of the Islamic Conference on the Establishment of an Ad Hoc International War Crimes for the Territory of the Former Yugoslavia*, Part III (4) & (5). Annex to *Letter dated 31 March 1993 from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal, and Turkey to the United Nations addressed to the Secretary General*, UN Doc S/25512, 5 April 1993, Annex. Reproduced at Morris/Scharf, *An Insider's Guide*, 405-408.

[9] National Alliance of Women's Organisations (NAWO), 1993, *Gender Justice and the Constitution of the War Crimes Tribunal Pursuant to Security Council Resolution 808*, para. 9. Reproduced at Morris/Scharf, *An Insider's Guide*, 399-403.

[10] NAWO recommended that a Security Council-mandated fund could be financed through seizing the assets of aggressor governments, and the forfeiture of property and payment of fines. Ibid para. 10. Amnesty International proposed "the establishment of a separate international commission to process compensation claims against individuals as well as claims against states". Amnesty International, 1993, 'Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia', *AI Index Eur 48/02/93*, Recommendations XI. Reproduced at Morris/Scharf, *An Insider's Guide*, 403.

[11] Other proposals were put forward by the governments of Brazil, Canada, Mexico, the Netherlands, the Russian Federation, and the United States.

[12] See Morris/Scharf, *An Insider's Guide*, 32. See also *Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, UN Doc S/25575, 12 April 1993, Annex II with draft charter.

[13] The Report stated, "in addition to imprisonment, property and proceeds acquired by criminal conduct should be confiscated and returned to their rightful owners. This would include the return of property wrongfully acquired by means of duress." See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 3 May 1993, para. 114.

[14] Morris/Scharf, *An Insider's Guide*, 284.

provision to transactions between individuals. The Security Council approved the Statute under Resolution 827. An almost identical provision was later included in the ICTR Statute under Article 23(3). Hence, both *ad hoc* Tribunals recognise victims' right to restitution of property, but they do not provide any further remedies for victims of other serious international crimes.[15]

The ICTY Statute provided that the Tribunal's Judges adopt Rules of Procedure and Evidence (RPE).[16] The Judges considered proposals submitted by states, of which the United States' proposal was the most comprehensive one.[17] The influence exerted by US lawyers led to a system that was predominately modelled on Anglo-American jurisdictions.[18] The final RPE only contain one rule on restitution and one on compensation.[19] The ICTR Judges adopted similar rules.[20] The negotiations were driven by two concepts from domestic criminal laws, restitution and compensation. The term 'reparations' was not used at that time. The year the ICTY Statute was negotiated was also the year Theo van Boven published the first draft of the Basic Principles and Guidelines – but its hallmark achievement, the re-conceptualisation of reparations, did not have an impact on the *ad hoc* Tribunals.[21]

To date, neither the prosecutors nor the chambers of both Tribunals have had recourse to the restitution procedure.[22] Likewise, whilst Rule 106 of both Tribunals confirmed that victims may bring an action for compensation before a national court, a senior staff member at the ICTY said, "no one at the ICTY seriously believed in the 1990s that anyone would receive compensations

[15] Former ICTY President Antonio Cassese described this provision adopted by the Security Council as "highly questionable". Quoted from Randelzhofer, Albrecht, and Christian Tomuschat (eds.), 1999, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, The Hague: Martinus Nijhoff Publishers, 48.
[16] ICTY, *Rules of Procedure and Evidence*, adopted on 11 February 1994.
[17] Benjamin Schiff noted, "coming from U.S. sources, the tribunals were constructed as primarily common-law, old-justice-paradigm institutions". Schiff, Benjamin, 2008, *Building the International Criminal Court*, Cambridge/New York: Cambridge University Press, 59.
[18] In this adversarial system, the Prosecutor assumed the role of representing the interests of the international community, presumably by inclusion those of the victims. This procedure, so Jorda and Hemptinne suggest, reduced the victims to nothing more than an "instrument" of the prosecution. Jorda, Claude, and Jerome Hemptinne, 2002, 'The Status and Role of the Victim', in: Cassese, Antonio, Paola Gaeta, and John Jones, *The Rome Statute of the International Criminal Court*, Oxford University Press, 1387-1419, 1389.
[19] ICTY, *Rules of Procedure and Evidence*, adopted on 11 February 1994, Rule 105 on restitution and Rule 106 on compensation.
[20] ICTR, *Rules of Procedure and Evidence*, adopted on 29 June 1995, Rule 105 on restitution and Rule 106 on compensation.
[21] *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: The Final Report Submitted by Mr. Theo van Boven, Special Rapporteur*, UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993.
[22] There exist expressions of intention to raise the issue of restitution in a number of pre-trial briefs by the Prosecutor, but this has so far not been pressed through to trial. Chifflet, Pascale, 2003, 'The Role and Status of the Victim', in: Boas, Gideon, and William Schabas (eds.), *Developments in the Case Law of the ICTY*, Leiden/Boston: Martinus Nijhoff Publishers, 75-111, 101.

through the domestic courts of the former Yugoslavia".[23] Indeed, the practice of the *ad hoc* Tribunals has shown that the central premise behind their compensation provision – namely that domestic jurisdictions would handle reparations claims and that they could rely on the Tribunals' criminal judgments in this process – can be described as ineffective at best. Theo van Boven argued that it was more likely that "these provisions were included in the rules as a symbolic afterthought rather than being expected to produce concrete results".[24]

This account has shown that some states and NGOs raised the matter of reparations during the negotiations of the *ad hoc* Tribunals' legal frameworks. However, these proposals did not get the support of the most powerful states, nor did some prominent human rights NGOs believe that a criminal tribunal would necessarily be the most adequate avenue for addressing reparations. Moreover, the founding Security Council's resolution had made punishing those most responsible of serious international crimes the "the sole purpose"[25] of the Tribunal. The Council simply left no space for additional purposes such as providing reparations to victims.[26]

The absence of reparations both at the *ad hoc* Tribunals and domestically in the former Yugoslavia and Rwanda, influenced their introduction at the ICC. Scholars have argued that the lack of reparations at the ICTY and ICTR ultimately guided the ICC negotiators towards creating a more "victim-friendly" court.[27] My interviews with international NGO representatives who attended the Rome conference a few years later similarly confirmed that the non-implementation of the Tribunals' restitution provisions and the lack of any further reparative measures at domestic levels drove advocates to take a stronger position on victim reparations during the ICC negotiations.[28]

[23] Interview with senior ICTY prosecutor, 22 October 2015.
[24] Van Boven, Theo, 1999, 'The Position of the Victim in the Statute of the International Criminal Court', in: Hebel, Herman von, Johan Lammers, and Jolien Schukking (eds), *Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos*, The Hague: TMC Asser Press, 81-82.
[25] SC Res 827, UN Doc S/RES/827, 25 May 1993, para. 2.
[26] Morris and Scharf argue, "there was no indication that the Security Council intended this tribunal to deal with questions of victim compensation." Morris/Scharf, *An Insider's Guide*, 286.
[27] Stathis Palassis noted, "one of the most important outcomes from the ICTY was that the States parties to the Rome Statute on the Establishment of the ICC heavily relied on the ICTY's experience... The biggest lesson learnt was the importance of creating a victim-friendly institution." Palassis, Stathis, 2014, 'From The Hague to the Balkans: A Victim-Oriented Reparations Approach to International Criminal Justice', 14 *International Criminal Law Review*, 1-41, 32.
[28] Interview with international NGO representative (ICC5), 16 May 2015.

CHAPTER 3

Rome's Legacy: Negotiating Reparations for the ICC

The negotiations of the ICC's reparations mandate were a critical juncture where arguments and their proponents became particularly visible.[1] How did reparations become for the first time part of international criminal justice? What were arguments in favour and against reparations at that time, and who were the main actors advocating for reparations at the ICC? This chapter examines how international criminal law changed as a result of a resurgent international human rights movement. Through a range of negotiation practices, reparations were re-conceived at the intersection of a set of different agendas and actors to fit an international criminal justice framework. I argue that many of the challenges confronted by the ICC today in activating its reparations mandate have their origin in past compromises that resulted from these negotiation practices.

The negotiations that led to the establishment of the ICC have been the subject of numerous scholarly inquiries, but few have examined the process through which reparations became part of international criminal law. The issue is touched upon either as an introductory note in scholarly writings on reparations,[2] or mentioned on the sidelines in the literature examining the negotiation of the Rome Statute.[3] The most detailed accounts exist from those involved in the negotiations.[4] The existing scholarly literature is not limited to legal scholars,[5] but also includes social scientific

[1] An abbreviated and adapted version of this chapter was published at Sperfeldt, Christoph, 2017, 'Rome's Legacy: Negotiating the Reparations of the International Criminal Court', 17(2) *International Criminal Law Review*, 351-377.

[2] See Dwertmann, *Reparation System of the International Criminal Court*; McCarthy, *Reparations and Victim Support in the International Criminal Court*; and Moffett, *Justice for Victims*.

[3] See Struett, Michael, 2008, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*, New York: Palgrave Macmillan.

[4] Most notably from Muttukumaru, Christopher, 1999, 'Reparations to Victims', in: Lee, Roy S. (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results*, The Hague/Boston: Kluwer Law International, 262-270; and Donat-Cattin, 1999, 'Article 75 – Reparations', in: Triffterer, Otto, Kai Ambos et al. (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden: Nomos, 1399-1412; and McKay, Fiona, 2000, 'Are Reparations Appropriately Addressed in the ICC Statute?', in: Shelton, Dinah (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, Ardsley, NY: Transnational Publishers, 163-174.

[5] See for instance Bassiouni, Cherif (ed.), 2003, *The Statute of the International Criminal Court and Related Instruments: Legislative History 1994-2000*, Ardsley: Transnational Publishers; and Sadat, Leila Nadya, 2002, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Ardsley, NY: Transnational Publishers.

and anthropological perspectives examining the broader context of legalisation and institutionalisation that led to the ICC's establishment.[6] As written elsewhere, "the success, as in other constitutional moments, was made possible by a unique period in time and driven by dramatic, compelling, and specific current events, which in turn aroused unique influences for those directly involved".[7]

The following account of the negotiations of the ICC's reparations mandate relied on three main sources: publically available records starting from the initial draft statute of the International Law Commission (1994) and ending with the work of the Preparatory Commission and the establishment of the ICC (2002);[8] the literature on these negotiations, which is heavily influenced by the writings of those involved;[9] and a limited number of interviews with individuals involved in these negotiations.[10]

This chapter first provides a background to the consideration of reparations at the International Law Commission. The account then traces the actors and main debates during the ICC Preparatory Committee leading up to the Rome Conference and the subsequent drafting of the Rules of Procedure and Evidence, explaining how and why, despite opposition, reparations were eventually incorporated into the Rome Statute. From this account, I identify five key features of negotiation practices that had an impact on the nature and effectiveness of the ICC's reparations regime.

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[6] See for instance Schiff, Benjamin, 2008, *Building the International Criminal Court*, Cambridge: Cambridge University Press; Deitelhoff, Nicole, 2009, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case', 63(1) *International Organization*, 33-65; and Funk, Markus, 2010, *Victims Rights and Advocacy at the International Criminal Court*, Oxford/New York: Oxford University Press.

[7] Benedetti, Fanny, Karine Bonneau and John Washburn, 2014, *Negotiating the International Criminal Court: New York to Rome, 1994-1998*, Leiden/Boston: Martinus Nijhoff, 1.

[8] Primary materials are available on the UN's website on the ICC Rome Statute at <http://www.un.org/law/icc/index.html> (accessed 16 February 2018). Further materials are available on the ICC Legal Tools database at <http://www.legal-tools.org> (accessed 16 February 2018)

[9] Accounts from those involved have dominated the literature about the negotiations, especially during the early years. I treat this literature as a source of eyewitness accounts and views from the very actors shaping the course of the events. See Lee, Roy S. (ed.), 1999, *International Criminal Court: The Making of the Rome Statute*, The Hague: Kluwer Law International; and Lee, Roy S. (ed.), 2001, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, NY: Transnational Publishers; Hebel, Herman von, Johan Lammers, and Jolien Schukking (eds.), 1999, *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, The Hague: T.M.C. Asser Press; Triffterer, Otto (ed.), 1999, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, Baden-Baden: Nomos; Cassese, Antonio, Paola Gaeta and John R. W. D. Jones (eds.), 2002, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press.

[10] I interviewed three former government delegates and two former NGO representatives involved in the negotiations.

1. The Work of the International Law Commission

The end of the Cold War reinvigorated the International Law Commission (ILC)'s work on a 'Code of Crimes against the Peace and Security of Mankind'. Following controversies among UN member states about the draft code, the ILC decided to disassociate it from the idea of the establishment of a permanent international criminal court.[11] In September 1994, the ILC adopted a draft statute for an international criminal court, which did not mention the possibility for victims to participate in the court's proceedings or to seek reparations. While an earlier draft, in 1993, had still contained provisions for the Court to order restitution or forfeiture of property used in conjunction with the crimes, these were deleted in the final draft statute.[12] ILC commentaries to the articles indicate that many of its members felt that an international criminal court might not be the appropriate forum for these matters: "on balance the Commission considered that these issues were best left to national jurisdictions and to international judicial cooperation agreements …".[13]

The reluctance to incorporate a reparative function into the Court's mandate is also visible from meeting records, where some ILC members articulated "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."[14] And Theo van Boven found that "from the beginning a majority of ILC members were very reluctant to grant victims a broader position under the authority of the proposed ICC".[15] Nevertheless, the issue came up again when the ILC confronted the question of what to do with fines imposed on convicted persons. Under

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[11] Crawford, James, 1997, 'An International Criminal Court?', 12 *Connecticut Journal of Law*, 255-263, 257.

[12] The deleted paragraph stated, "the Chamber may also order (a) the return to their rightful owners of any property or proceeds which were acquired by the convicted person in the course of committing crime; and (b) the forfeiture of such property and proceeds, if the rightful owners cannot be traced." Cited in *Revised Report of the Working Group on a Draft Statute for the International Criminal Court – Reproduced in document A/48/10, Annex*, UN Doc A/CN.4/L.490 and Add.1, Art. 53(3). Available in *Yearbook of the International Law Commission*, 1993, Vol II(2).

[13] The commentaries note that "some members of the Commission questioned the ability of the court to determine the ownership of stolen property in the absence of a claim filed by the original owner, which might need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. ... On balance the Commission considered that these issues were best left to national jurisdictions and to international judicial cooperation agreements". *Draft Statute for an International Criminal Court with Commentaries*, International Law Commission, adopted at the 46th session. Published in *Yearbook of the International Law Commission*, 1994, Vol II(2), 60.

[14] *Summary Records of the 2253rd to 2294th Meeting*, in: International Law Commission, 1992, 'Summary Records of the Meetings of the Forty-Fourth Session, 4 May to 24 July 1992', *Yearbook of the International Law Commission*, Vol. 1, 12.

[15] Van Boven, Theo, 1999, 'The Position of the Victim in the Statute of the International Criminal Court', in: Hebel, Herman von, Johan Lammers, and Jolien Schukking (eds.), Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos, The Hague: TMC Asser Press, 77-89, 82.

Article 47(3), the draft statute provided that fines paid may be transferred to, among other places, "a trust fund established by the Secretary-General of the United Nations for the benefit of crime victims".[16] Thus, the ILC was willing to contemplate some form of reparative action for the benefit of victims more generally as part of penalties against the convicted person.[17] As the ILC draft statute provided the authoritative basis for the subsequent ICC negotiations, this offered an entry point for further discussions on reparations.[18]

2. Negotiating the ICC's Reparations Mandate

Complex international negotiations, such as those surrounding the Rome treaty, consist of a specific set of procedures and methods that frame the interactions of participants. Accounts of the negotiation process show that these procedures became more dynamic over time, expanding to include formal working groups, but also more informal fora for discussions, such as the so-called 'informals' and inter-sessional meetings.[19] This gradual opening-up of the traditional inter-state diplomacy space allowed for increasing involvement of other actors, especially from civil society. These multilayered negotiations culminated in a five-week finale at the Rome conference in 1998. While the issue of reparations had been around since the beginning of the negotiations, a review of this process shows that the topic was not among the priorities on the negotiators' agenda.

In the following, I provide a chronological narrative of the negotiations as they concern the ICC's reparations mandate, which evolved in two different stages: first the negotiation of the Statute's reparations provisions, and then the negotiation of the Rules on Procedure and Evidence (RPE) and the drafting of the regulations of the Trust Fund for Victims. As the RPE were also drafted by state delegates, and not by the Court's Judges, I consider them part of the political negotiations.

Negotiating the ICC's Statute (1995-1998)

After the ILC had completed its draft statute, the UN General Assembly established an Ad Hoc Committee to consider the outcome. The Ad Hoc Committee met twice throughout 1995, but did

[16] *Draft Statute for an International Criminal Court with Commentaries*, International Law Commission, adopted at the 46th session. Published in *Yearbook of the International Law Commission*, 1994, Vol II(2), 26-74.
[17] The ILC recognised the limited nature of this provision, stating that these measures "are not intended in any way to substitute for reparation or to prevent any action which victims may take to obtain reparation through other courts or on the international plane". See *Draft Statute for an International Criminal Court with Commentaries*, International Law Commission, adopted at the 46th session. Published in *Yearbook of the International Law Commission*, 1994, Vol II(2), 60.
[18] As a consequence of this arrangement, discussions on reparations for victims took initially place in the Working Group on Penalties within the Preparatory Committee.
[19] See Benedetti/Bonneau/Washburn, *Negotiating the International Criminal Court*, 4-6.

not engage in any substantive negotiations or re-drafting of the ILC draft.[20] This task was left to the Preparatory Committee. During the second meeting of the Preparatory Committee, in August 1996, two separate initiatives proposed a draft set of rules. The first proposal, introduced jointly by Australia and the Netherlands, was largely modelled on the ICTY Statute.[21] It was the second working paper on a draft statute, introduced by France, that made the first attempt to go beyond the limited precedents set by the *ad hoc* Tribunals. One feature of the French proposal was to allow the chambers to establish principles on 'compensation of victims' that would be binding on national jurisdictions.[22] The idea behind proposing such principles was to empower the new international court vis-à-vis national courts and to provide victims with more than just a guilty verdict when pursuing reparations through national avenues. The responsibility for adjudicating and implementing victims' requests for reparations would still lie with national jurisdictions.[23]

The French delegation subsequently became the main state proponent of a reparations function for the ICC.[24] The delegation was composed of members from three different ministries, namely justice, defense and foreign affairs.[25] While the Ministry of Justice and the Ministry of Foreign Affairs were generally supportive of the ICC, the situation changed drastically, when in the aftermath of the Srebrenica massacre in July 1995 accusations were raised against the French general heading the UN peacekeeping force in the former Yugoslavia. This event led to a more active involvement of the Ministry of Defense in the negotiations and a general hardening of the French position.[26] France was increasingly perceived as a sceptic of the ICC project, especially

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[20] Several delegations at the Ad Hoc Committee made proposals that the Statute should provide for restitution of property and compensation for victims, while other delegations expressed concern as to the appropriateness of such provisions. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc A/50/22, 6 September 1995, paras. 188 and 190.

[21] *Draft Set of Rules of Procedure and Evidence for the International Criminal Court*, Working Paper submitted by Australia and the Netherlands, UN Doc A/AC.249/L.2, 26 July 1996. The proposal incorporated by and large the compensation and restitution provisions of the ICTY, but left those in brackets.

[22] *Draft Statute of the International Criminal Court*, Working paper submitted by France, UN Doc A/AC.249/L.3, 6 August 1996, Art. 126 and 130. Article 130(2) and (3) stipulated, "the victim or his successors and assigns may, in accordance with the applicable national law, institute proceedings in a national jurisdiction or any other competent institution in order to obtain compensation for the prejudice caused to them. The judgment of the Court shall be binding on the national jurisdictions of every State party as regards to the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property unlawfully acquired by the person convicted."

[23] Some elements of the 1996 French proposal were considered as part of a renamed Article 45. See *Decisions Taken by the Preparatory Committee on its Session Held from 4 to 15 August 1997*, Preparatory Committee, UN Doc A/AC.249/1997/L.8/Rev.1, 14 August 1997.

[24] I note here that the idea of compensation to victims in criminal proceedings was not unknown in civil law countries.

[25] Observers noted that "in-house discussions seem to have been the most difficult aspect of all for the French delegation because of the internal political and structural circumstances within the French government". Benedetti/Bonneau/Washburn, *Negotiating the International Criminal Court*, 109.

[26] Observers reported that most internal arbitrations between the three ministries were systematically lost by the Ministries of Justice and Foreign Affairs. See Benedetti/Bonneau/Washburn, *Negotiating the International Criminal Court*, 110.

by NGOs. It was in this context that the French delegation adopted a victims' rights and reparations agenda, as a way to promote the French legal tradition and to improve France's public standing.[27] One former member of the delegation noted that advocating for reparations was also a negotiating strategy for France to re-balance its otherwise stricter attitude during the ICC negotiations and re-polish its image.[28] Many NGOs that criticised France's positions on the ICC quickly found the delegation to be the most outspoken ally for a more victim-oriented court.

French diplomats actively liaised with key NGOs to build a more coherent position on the issue ahead of the Rome conference.[29] NGOs are perhaps the most discussed actor in the scholarly literature on the ICC negotiations, due to the significant role they played in influencing the outcomes of the negotiations and the way they re-shaped traditional inter-state treaty-making.[30] During the early stages of negotiations, many NGOs were not yet fixated on an integrated reparations function for the new court, but considered parallel mechanisms that could deliver reparations in a more flexible manner.[31] Observers highlighted the role of the UK-based NGO REDRESS in raising the importance of reparations, noting that "the group's intense advocacy was increasingly met with the support of other NGO representatives".[32] Eventually, it was not only individual strength that allowed NGOs to punch above their weight in Rome, but rather their organised approach under the umbrella of the Coalition for the International Criminal Court (CICC), including within its Victims' Rights Working Group (VRWG).[33] This allowed NGOs to expand their substantive inputs during the negotiations and to build subject-specific partnerships,

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[27] Ibid 110-111.

[28] Interview with former government delegate (ICC2), 29 April 2015.

[29] See Dobelle, Jean-Francois, 1998, 'La Convention de Rome Portant Statut de la Cour Pénale Internationale', 44 *Annuaire Francais de Droit International*, 356-369, para. 18. Leading international NGOs involved in the negotiations included Amnesty International, Human Rights Watch, the Women's Caucus for Gender Justice, the International Federation for Human Rights, No Peace Without Justice, and REDRESS.

[30] See for instance Glasius, Marlies, 2006, *The International Criminal Court: A Global Civil Society Achievement*, London: Routledge; Zoe, Pearson, 2006, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law', 39(2) *Cornell International Law Journal*, 243-284; and Lohne, Kjersti, 2018 (forthcoming), *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*, *Oxford:* Oxford University Press.

[31] For instance, Amnesty International had suggested in 1994 that "an international civil court or claims commission should be established", arguing that "this body might be better suited to grant relief to victims…" Amnesty International, 1994, *Establishing a Just, Fair and Effective International Criminal Court*, AI Index IOR 40/05/94, 53.

[32] Benedetti/Bonneau/Washburn, *Negotiating the International Criminal Court*, 154-155. See also REDRESS, 1997, *Promoting the Right to Reparation for Survivors of Torture: What Role of a Permanent International Criminal Court?*, Research written by Stuart Maslen, London: The Redress Trust.

[33] The CICC, founded in February 1995 and coordinated by its convener William Pace, grew rapidly during the course of the negotiations and reached a membership of more than 800 NGOs at the time of the Rome conference. 238 NGOs alone were accredited to participate in the Rome conference. See Bassiouni, Cherif, 1999, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court', 32 *Cornell International Law Journal*, 443-469, 455.

such as with the 'Like-Minded Group' of states, which initially consisted of smaller or mid-sized states that advocated for a strong and independent Court.[34]

With only half a year left before the deadline for the completion of the Committee's work, the delegates reconvened in December 1997 for a crucial fifth meeting of the Preparatory Committee. The French delegation took the lead and proposed a modified paragraph to Article 45*bis* that sought to provide the Court with some leverage over the national-level adjudication of reparations:

> Where necessary, the trial Chamber shall also determine the scope and extent of the victimization and establish principles relating to compensation for damage caused to the victims and to restitution of property unlawfully acquired by the person convicted, in order to allow victims to rely on that judgment for the pursuit of *appropriate forms of reparation, such as restitution, compensation and rehabilitation*, either in national courts or through their governments, in accordance with national law. (emphasis in original)[35]

Meeting summaries show the contested nature of the French position and highlight the opposition of Japan, which would remain a stumbling block throughout the negotiations in Rome.[36] Yet, the UK delegation came around to the idea of supporting a reparations mandate for the Court and tabled its own proposal.[37] The proposal provided a more freestanding framework for a reparations procedure that differed in one important point from the French proposal: the UK's proposal did not grant the Court any leverage over national jurisdictions, instead limiting reparations to awards against convicted persons that would be given effect through national jurisdictions. The two delegations eventually agreed to consolidate their separate proposals and submitted a joint proposal to the sixth Preparatory Committee meeting.[38]

The fifth Committee meeting, as well as the informal meetings that followed it, were key moments for the formulation of a separate reparations function for the ICC. This is not to say that by that time a majority of states supported a reparations mandate, but a review of the available sources

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[34] See Atkinson, Rush, 2011, 'Knights of the Court: The State Coalition behind the International Criminal Court', 7 *Journal of International Law and International Relations*, 66-103; Deitelhoff, Nicole and Linda Wallbott, 2012, 'Beyond Soft Balancing: Small States and Coalition-Building at the ICC and Climate Negotiations', 25(3) *Cambridge Review of International Affairs*, 345-366.

[35] *Proposal of France: Article 45bis Compensation to Victims*, Preparatory Committee, UN Doc A/AC.249/1997/WG.4/DP.3, 5 December 1997.

[36] CICC observers noted "several delegations expressed concerns regarding the French proposal that the court would be able to order reparations by states (US, UK, Argentina, Egypt, Austria, Israel, South Africa, Poland, China). Other supported this provision (Lebanon, Syria, Malawi, Kuwait). One delegation (Japan) voiced opposition to including a provision on reparations." CICC, 1998, 'Report on the March-April 1998 Session of the Preparatory Committee on the Establishment of an International Criminal Court'.

[37] *Proposal by the United Kingdom: Article 45bis Reparations*, Preparatory Committee, UN Doc A/AC.249/1997/WG.4/ DP.13, 10 December 1997, introductory paragraph.

[38] The joint proposal did not merge the two texts, but maintained them as two separate options. See *Proposal by France and the United Kingdom of Great Britain and Northern Ireland: Article 66 (45bis)*, Preparatory Committee, UN Doc A/AC.249/1998/WG.4/DP.19, 10 February 1998.

indicates that an alignment of views emerged between a number of key state delegations and the larger NGO community to advocate for a reparations function as a centrepiece of a more victim-oriented court. It is significant that two P-5 state delegations now supported a reparations mandate that would go beyond the mere question of what to do with fines paid by convicted persons.[39] Many delegates saw the inclusion of reparations initially through the lens of a common law-civil law divide on the broader topic of the role of victims in the future court. The support of both France and the United Kingdom transcended this divide, with Christopher Muttukumaru, a member of the British delegation, recounting that "the fact that two states with very different legal traditions were able to attain a consensus reflects the central importance of ensuring that victims' interests were given proper recognition in the Statute".[40]

When the Rome conference began in June 1998, the reparations proposal did not command universal support.[41] Perhaps taking these uncertainties into consideration, France and the United Kingdom submitted a simplified draft to the Rome Conference that contained no reference to state responsibility.[42] Even so, the matter continued to be queried by various delegations. However at that point, one former delegate observed "it was not possible to oppose victim reparations anymore".[43] With some minor amendments to Article 73, the initiative was able to gain enough support among states and deflect sufficiently the resistance by other states to some of its provisions in order to be retained in the final draft statute. The ICC had its reparations mandate, breaking new ground in international criminal law.

Negotiating the Rules of Procedures and Evidence (1998-2002)

The task of drafting the Rules of Procedure and Evidence (RPE) was entrusted to the Preparatory Commission, and there was some debate about whether states or the ICC's Judges should draft the rules. Ultimately, it was decided that states would not only adopt the RPE, but also draft the rules and decide any future amendments.[44] The ICC retained therefore a stronger political element when moving towards operationalising its legal framework on reparations.

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[39] As a result, various delegations expressed the view that the matter might be dealt with more appropriately within the Working Group on Procedural Matters. *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997*, UN Doc A/AC.249/1997/L.9/Rev.1, 18 December 1997, Annex V and footnote 151.
[40] Muttukumaru, Reparation to Victims, 270.
[41] Ibid 263.
[42] *Proposal Submitted by the Delegations of France and the United Kingdom of Great Britain and Northern Ireland: Article 73 Reparations to Victims*, UN Diplomatic Conference, Working Group on Procedural Matters, UN Doc A/CONF.183/C.1/WGPM/L.28, 26 June 1998, introductory note.
[43] Interview with former government delegate (ICC2), 29 April 2015.
[44] See Kirsch, Philippe, and Valerie Oosterveld, 2001, 'The Preparatory Commission for the International Criminal Court', 25 *Fordham International Law Journal*, 563-588.

France used the momentum it had gained at the Rome conference in the Preparatory Commission.[45] The delegation tabled a detailed draft set of RPE, including provisions on victim participation and reparations.[46] In keeping with its multi-track diplomacy, France then invited delegations, at an early stage of the negotiations, to an inter-sessional meeting with experts in Paris. The international seminar on victims' access to the ICC (hereinafter 'the Paris seminar'), held in April 1999, brought together state delegates and experts from different intergovernmental or non-governmental organisations. One of four thematic workshops focused exclusively on reparations. Seminar participants compiled a series of recommendations that France forwarded to the Preparatory Commission.[47] The fact that the Paris seminar was scheduled even before the issue was considered at the Preparatory Commission shaped the subsequent discussions about reparations and provided the basic structure for the reparations section in the final RPE. The Paris seminar was yet another indication of the changing nature of collaboration between governments and NGOs in crafting the ICC's rules.[48] Some of the key issues that emerged during the subsequent negotiations at the Preparatory Commission are discussed in the following section.[49]

This account of the negotiations shows that the combined efforts of key state delegations, namely France and the United Kingdom, and international NGOs were instrumental for incorporating a reparations mandate into the Rome Statute. The opening up of the inter-state diplomacy space did not only lend legitimacy to the new Court, but it also brought in technical expertise on reparations that many state delegations lacked. William Pace of the CICC summarised this as a dual function of 'service vs. advocacy'.[50] While it is clear from various accounts of participants that both NGOs and state delegations appreciated the new arrangement, this change in the mode of involvement

[45] Observers noted: "In Rome the US delegation had the biggest team … In New York the French delegation was for example larger than the US delegation during the first week." Vergili, Ferid, and Matthias Neuner, 1999, 'Report on the PrepCom about the Establishment of an International Criminal Court from 16th until 26th of February in New York', International Criminal Law Society, 8.

[46] The draft set of rules was more elaborate than a separate proposal put forward by Australia, which relied largely on the ICTY RPE. See 'Preparatory Commission for International Criminal Court Hears Briefings by Coordinators of Working Groups', Press Release L/2909, 22 February 1999.

[47] *Report on the International Seminar on Victims' Access to the International Criminal Court*, Preparatory Commission, UN Doc PCNICC/1999/WGRPE/INF/2, 6 July 1999.

[48] Peter Lewis and Håkan Friman, who coordinated the Commission's discussions on reparations, acknowledged, "throughout the discussions on reparations for victims, participating NGOs have been particularly helpful in assisting delegations with advice, proposals and background information". Lewis, Peter, and Håkan Friman, 2001, 'Reparations to Victims', in: Lee, Roy S. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, NY: Transnational Publishers, 474-491, 477.

[49] A review of the proceedings of the Preparatory Commission shows that the draft rules relating to reparations were considered by the Commission especially during its second, fourth and fifth sessions.

[50] Pace, William, 1999, 'The Relationship between the International Criminal Court and Non-Governmental Organisations', in: Von Hebel, Herman, Johan Lammers, and Jolien Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, The Hague: TMC Asser Press, 189-211, 203-204.

did not come without trade-offs.[51] By engaging in a partnership role with states, and later with the ICC, many NGOs have found themselves in a difficult balancing act of striving to make the reparations mandate a 'success', primarily by lending technical expertise, while at the same time safeguarding their independent and often critical advocacy position.

Many states on the other hand, especially those who were not involved in the smaller circle that had negotiated the establishment of the *ad hoc* Tribunals, did not feel bound by this precedent. The convergence of different motivations within a fractured French delegation – arguing variously on moral, pragmatic or national interest grounds – allowed the issue to be pushed onto the agenda of the delegation, and the subsequent building of a broader coalition with other state delegations and NGOs around the issue. Observers noted that victim rights had become a "breaking point" for a large group of civil law delegations headed by France, and supported by numerous delegations from Southern Africa and Latin America.[52]

3. Negotiation Practices and their Effects

From this review of the negotiation history of the ICC's reparations mandate, I identify five practices that had lasting effects on the nature and effectiveness of the ICC's reparations regime: (1) legitimising reparations as a central feature of a more victim-oriented court; (2) broadening the scope of reparations as a result of human rights advocacy; (3) states' defence of their sovereignty and insistence on limitations to state responsibility; (4) practices of 'gap filling' to accommodate competing demands during the contested negotiations; and (5) the last minute addition of the Trust Fund's assistance mandate.

3.1. Legitimising reparations: Victim-orientation

The account of the negotiations offered above shows that the journey of the concept of reparations into international criminal law began in the context of penalties against convicted persons and was thus initially considered a secondary by-product of the Court's output. However, state and NGO proposals on the subject, made at the Preparatory Committee in 1996 and 1997, were instrumental in carving out a more distinct reparative function aimed at victims of crime. In this context, proponents adopted legitimisation practices during the negotiations of reparations with the aim of anchoring a central role for victims in the ICC's legal framework.

[51] See also Haddad, Heidi Nichols, 2013, 'After the Norms Cascade: NGO Mission Expansion and the Coalition of the International Criminal Court', 19(2) *Global Governance*, 187-206.
[52] Benedetti/Bonneau/Washburn, *Negotiating the International Criminal Court*, 153.

The notion of 'victim' was central to the discursive practices around reparations and the process of their legitimation.[53] Reparations came to be seen in the negotiations as an operationalisation of the larger push for a more 'victim-oriented' or 'victim-centred' international criminal justice.[54] As discussed before, the perceived gap in the legal and institutional framework of the two *ad hoc* Tribunals also contributed to forming opinions in favour of a more expanded role for victims, including reparations. France's position was articulated by Elisabeth Guigou, then Minister of Justice, when speaking at the 1999 Paris Seminar:

> Victims are and must remain at the heart of our concerns. The recognition of their rights and the reparation of the harm they have suffered are both the origin and the purpose of international criminal law … This ambition must translate into our will to depart from the traditional models of international criminal justice and modify the idea itself that we have of the victim. We must cease, once and for all, to consider that victims are mere witnesses.[55]

Hence, reparations were not anymore a by-product of the criminal trial, but rather became one of the purposes of international criminal justice.[56] The language suggests that some state delegates and many NGOs thought it also 'morally' right to provide victims of mass atrocities the right to claim reparations through the ICC.[57]

The victim-oriented rhetoric was underpinned by a legalistic framing strategy that drew predominately on international human rights law and emphasised the 'rights' of victims.[58] The negotiation of the ICC's reparations mandate was for many participants a journey into uncharted territory. In this context, delegates had to draw on different sources of knowledge that were not available in international criminal law at that time. International human rights NGOs within the CICC were adept at framing issues on reparations to make them resonate with agreed-upon universal human rights principles and norms. This aligns with William Schabas' observation that

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[53] See Lohne, Kjersti, 2017, 'Global Civil Society, the ICC, and Legitimacy in International Criminal Justice', in: Hayashi, Nobuo and Cecilia Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge: Cambridge University Press, 449-472; and Mégret, Frédéric, 2015, 'In Whose Name? The ICC and the Search for Constituency', in: Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge: Cambridge University Press, 23-45.

[54] See McEvoy, Kieran and Kirsten McConnachie, 2013, 'Victims and Transitional Justice: Voice, Agency and Blame', 22(4) *Social & Legal Studies,* 489-513; and Moffett, *Justice for Victims*, 8-57.

[55] *Accès des victimes a la Cour pénale internationale*, Speech of the Garde des Sceaux, Elisabeth Guigou, Paris, 27 April 1999. Unofficial translation quoted from Chifflet, The Role and Status of Victims, 105, footnote 121.

[56] The French delegation stressed during the last meeting of the Preparatory Committee that international criminal justice would only make sense, if it would accord an important place for the rights of victims. Delegation of France, *Sixième session du Comite préparatoire sur la création d'une Cour criminelle international: Réparations dues aux victimes*, Intervention de la France, New York, 17 March 1998 (original in French).

[57] See also Jorda/Hemptinne, The Status and Role of the Victim, 1400.

[58] See Moffett, *Justice for Victims*, 87-90.

"without any doubt [the ICC Statute's] creation is the result of a human rights agenda that has steadily taken centre stage within the United Nations".[59]

Accordingly, proponents argued that because a right to reparations for victims of mass atrocities is recognised under international human rights law, it must equally be recognised under international criminal law and therefore be enshrined in the ICC Statute. The two reference documents most cited by delegations and NGOs to support this proposition were the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the draft Basic Principles and Guidelines.[60] Some advocates went one step further by contending that international criminal justice institutions must not just recognise, but also give effect to such a right.

Statements from numerous delegations reveal a belief that a victim-oriented court with a reparations mandate would ultimately be more effective in serving broader goals of peace and transitional justice, including reconciliation.[61] Speaking a few months before the Rome Conference, Canadian Foreign Minister Lloyd Axworthy stated that "we cannot allow ourselves, as we lay the foundations of the ICC, to forget our ultimate goal: not the court as an end in itself, but peace, reconciliation and justice for the victims".[62] Combining victim-centric rhetoric with human rights language-based advocacy produced a mix of moral and legal framing that proved a powerful and persuasive practice in the negotiations.[63] The effectiveness of these communication and legitimisation practices with state delegations was illustrated in my interviews, with one former delegate stating, "you could not be seen as anti-victim" at that time.[64] What was less discussed was the issue of whether the Court actually constituted the most appropriate avenue to achieve these goals. The negotiations on this point seemed to have perceived the Court as an isolated, free-standing institutional framework, rather than one embedded in a complex array of different responses to peace and justice at the international, national and local levels.

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[59] Schabas, William, 2001, *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press, 20.
[60] During the early stages of the negotiations, participants relied on van Boven's 1993 final report. However, it was van Boven's 1996 and 1997 revised basic principles and guidelines and their inclusion in reporting to the UN General Assembly that gained more attention among negotiators and advocates.
[61] Muttukumaru observed during the negotiations, "it was increasingly recognised that reparations could contribute to a process of reconciliation". Muttukumaru, Reparation to Victims, 264.
[62] *Ministerial Statement by the Honourable Lloyd Axworthy*, Minister of Foreign Affairs, to the Preparatory Committee on the Establishment of an International Criminal Court, 3 April 1998.
[63] See Deitelhoff, The Discursive Process of Legalization, 44-45.
[64] Interview with former government delegate (ICC2), 29 April 2015.

3.2. Broadening the scope of reparations

This rights-based advocacy practice had an impact on the negotiations about the forms of reparations that should be delivered through the ICC. Public records reveal gradually changing views amongst negotiators on the concept of reparations. While the ILC draft statute started out with considerations of 'restitution' of stolen property, similar to provisions of the ICTY Statute, the initial proposals by France during the Preparatory Committee used mainly the term 'compensation'. In fact, 'compensation' remained the heading of most draft provisions on reparation until the fifth Committee meeting. The conception of reparations either as restitution or compensation indicates that the drafters were guided by forms of reparations that they were familiar with from domestic legal frameworks. These were also the two forms of reparations that most aligned with a model of direct transaction between a convicted person and an individual that suffered harm as a result of criminal conduct.

From 1997 onwards, the influence of the draft Basic Principles and Guidelines as a source of inspiration became visible.[65] Much of the subsequent negotiations of the Basic Principles and Guidelines took place in parallel with the ICC negotiations.[66] Not only did the principles and guidelines in their draft form serve as a source of reference for the ICC negotiations, but there was also a cross-over of individuals and NGO representatives involved in both projects.[67] By the time of the fifth Preparatory Committee meeting in 1997, van Boven had published his third revised draft set of principles, which began to penetrate the language and conceptualisation of reparations during the pre-Rome negotiations. REDRESS and other NGOs were at the forefront of advocating for bringing the language of the statute in line with human rights principles, and thus to replace the narrow term 'compensation' with the umbrella term 'reparation', as used in the draft Basic Principles and Guidelines.[68] The French delegation eventually endorsed REDRESS' proposal and now referred in its proposal to "appropriate forms of reparation, such as restitution, compensation and rehabilitation".[69]

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[65] Special Rapporteur Theo van Boven had already delivered his final report in 1993. Commission on Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final Report Submitted by Mr Theo van Boven, Special Rapporteur, UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993.

[66] During his time as Special Rapporteur, van Boven submitted two other draft versions of the basic principles and guidelines: (E/CN.4/Sub.2/1996/17, 24 May 1996) and (E/CN.4/1997/104, 16 January 1997). The UN General Assembly eventually adopted the final document on 16 December 2005.

[67] The special rapporteurs, first Theo van Boven and then later Cherif Bassiouni, were both involved in the ICC negotiations as members of their respective state delegations.

[68] McKay, Are Reparations Appropriately Addressed in the ICC Statute?, 168.

[69] This language was proposed in a modification to Article 45bis. *Proposal of France: Article 45bis Compensation to Victims*, Preparatory Committee, UN Doc A/AC.249/1997/WG.4/DP.3, 5 December 1997. See Benedetti/Bonneau/Washburn, *Negotiating the International Criminal Court*, 156.

While the UK's proposal also used the word 'reparations', the procedure proposed by the delegation mentioned explicitly only monetary compensation and restitution of property, not rehabilitation, while providing a degree of flexibility for the Court in allowing other awards it considered appropriate.[70] Muttukumaru, a member of the delegation, noted that "there was considerable doubt about the value of awarding reparations by way of rehabilitation against a convicted person", as many rehabilitative measures, such as resettlement or certain forms of medial support, are "almost certain to be outside the ability of a convicted person".[71] McKay also observed concerns about "how to avoid turning the Court into a social service agency".[72]

With REDRESS closely liaising with France and the UK in the months leading up to the Rome conference, 'rehabilitation' eventually joined restitution and compensation to complete a triad of proposed forms of reparations in most documents submitted by proponents.[73] Not explicitly mentioned were the two other forms of reparations contained in the draft Basic Principles and Guidelines, namely satisfaction and guarantees of non-repetition, which presumably were more difficult to envisage in an international criminal law framework. The inclusion of rehabilitation and 'other appropriate forms of reparations' did not just broaden the scope of reparations, it also altered the very conceptualisation of reparations in the context of a criminal trial. This represented a move away from sole reliance on a direct transaction model between a convicted person and a victim towards a system where the Court would play a more active role (e.g. by turning monetary awards or other financial contributions into rehabilitation projects).

Another issue that remained contentious was the question of whether it was appropriate to make collective reparations awards. Lewis and Friman recounted from the negotiations of the RPE that "some delegations found it difficult to understand the concept of collective awards", mainly because these delegations saw reparations as a way for victims to bring their civil claims through the Court.[74] After lengthy discussions, the view prevailed that the Court should have flexibility when granting reparations awards, and the final text of Rule 97 stipulated that "the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both".[75]

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[70] Observers stated that the UK delegation also doubted the feasibility of rehabilitative measures ordered against a convicted person. See Benedetti/Bonneau/Washburn, *Negotiating the International Criminal Court*, 156-157.
[71] Muttukumaru, Reparation to Victims, 265.
[72] McKay, Are Reparations Appropriately Addressed in the ICC Statute?, 168.
[73] Benedetti/Bonneau/Washburn, *Negotiating the International Criminal Court*, 156-157.
[74] Lewis/Friman, Reparations to Victims, 483.
[75] According to Lewis and Friman, this rule "emphasises that reparations should normally be on an individual basis unless the Court considers it appropriate to make the award on a collective basis or both". Lewis/Friman, Reparations to Victims, 483.

Simultaneously, there were discussions about the scope of possible beneficiaries. The Working Group on Procedural Matters at the Rome Conference closed with a final draft that stipulated for the Court to establish principles relating to reparations "to, or in respect of victims".[76] Thus, the drafters were of the view that the group of beneficiaries could go beyond the direct victims participating in the Court's proceedings. State delegates, supported by NGO advocates, agreed to this expanded notion of beneficiaries of court-ordered reparations by making specific reference to human rights principles, which apply broad definitions of victims of crime.

Thus, delegates borrowed from international human rights law and principles not only to justify the inclusion of reparations, but also to determine their scope and beneficiaries. One way to translate the above mentioned framing practices into rights and obligations for the purposes of treaty-making was to adapt legal concepts.[77] The journey of conceptualising reparations for the purposes of the ICC legal framework began with traditional notions of individual forms of reparations, namely restitution and compensation – curiously, the two most neglected forms of reparations in the current practice of international(-ised) criminal courts. Rather than making use of these established concepts known from domestic legal contexts, human rights-based advocacy practices had the effect of incorporating a more expansive, human rights-inspired concept of 'reparations'. This concept included rehabilitative and 'other appropriate' measures that have now come to dominate the largely collective reparations approaches at these courts. By creatively mobilising sources of knowledge from outside the criminal law field and relabelling established concepts into new, ambiguous concepts, proponents were able to weaken resistance against the inclusion of reparative measures for victims.

3.3. State practice: Drawing red lines regarding state responsibility

One effect of these human rights-based advocacy practices was that they brought the responsibility of states more into the spotlight. Questions of state responsibility became the most contentious issue during the negotiation of reparations and forced state delegations to take a more defensive line.

[76] The draft noted in a footnote: "Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims' families and successors (in French ayant-droit). For the purposes of defining 'victims' and 'reparations', reference may be made to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power … and the revised draft basic principles and guidelines." *Report of the Working Group on Procedural Matters*, UN Diplomatic Conference, Working Group on Procedural Matters, UN Doc A/CONF.183/C.1/WGMP/L.2, 24 June 1998, incorporating corrections up to 17 July 1998, footnote.

[77] See Block-Lieb, Susan and Terence Halliday, 2017, *Global Legislators: How International Organizations Make Commercial Law for the World*, Cambridge: Cambridge University Press.

At the Preparatory Committee, French proposals had sought to provide the Court with some standing *vis-à-vis* national jurisdictions and authorities. The delegation tried to achieve this by making the reparations principles in the Court's judgments binding on national jurisdictions of state parties.[78] In addition, the French delegation proposed at the fifth Preparatory Committee meeting that "if the national competent authorities are no longer able, due to their total or partial collapse or unavailability, to proceed upon the judgment, the Court shall do so directly".[79] This proposition would have effectively extended the principle of complementarity to the reparations function by providing the Court with the power to act directly in situations where the competent authorities were not able to give effect to the Court's judgment.

These proposals met fierce resistance from other state delegations, which either did not want to consider a reparations mandate at all, or saw the matter as the responsibility of domestic jurisdictions. Muttukumaru wrote that "it was widely believed that the reparations article was a stalking-horse for awards of reparations against states".[80] At the last Preparatory Committee, in March 1998, the French delegation stressed that it did not intend to create a new international responsibility for states, but it believed that sometimes only states would be able to address the consequences of crimes committed by convicted persons and that therefore the Court needed some leverage over national bodies for implementing Court-ordered reparations.[81] Yet, Donat-Cattin observed that "the great majority of states participating in the ICC Statute negotiations firmly opposed any form of 'subsidiary state responsibility' in the framework of reparations to victims".[82]

Muttukumaru summarised the mood ahead of the Rome conference as follows: "judging by the tenor of the debates, the likelihood is that a significant number of delegations would have opposed Article 75 in its entirety, had it included provisions on state responsibility".[83] An alternative was briefly considered that would have enabled the Court to make 'recommendations' to states, but even this weak proposition was not able to gain support. An unattributed note accompanying the text stated: "I believe that recommendations, even if limited to states implicated in the crime, will not be negotiable. We must produce a revised version which we can negotiate with a minimum

[78] *Draft Statute of the International Criminal Court*, Working paper submitted by France, Preparatory Committee, UN Doc A/AC.249/L.3, 6 August 1996, Art. 130.
[79] *Proposal of France: Article 45bis Compensation to Victims*, Preparatory Committee, UN Doc A/AC.249/1997/WG.4/DP.3 of 5 December 1997.
[80] Muttukumaru, Reparation to Victims, 264.
[81] This would especially be the case where illegally confiscated property was not in the hands of convicted persons, but in the state's possession; or where measures were envisaged that aim to restore victims' civil, political, social or economic rights. See Delegation of France, *Sixième session du Comité préparatoire sur la création d'une Cour criminelle internationale: Réparations dues aux victimes*, Intervention de la France, New York, 17 March 1998 (original in French).
[82] Donat-Cattin, Article 75, 973.
[83] Muttukumaru, Reparation to Victims, 268.

of debate; otherwise we might lose the whole article".[84] The draft text presented at the Rome conference therefore contained no reference to state responsibility, indicating how contentious it was to include even non-binding recommendations to states.

States' negotiation practice had a considerable impact on the effectiveness of the ICC's reparations mandate. The account shows that the borrowing from human rights law was selective in nature. On the one side, state delegates were prepared to borrow from human rights, and did so by expanding the scope of reparations beyond what was traditionally available in criminal trials. On the other side, however, they did not accept providing the Court with the means that would otherwise exist under human rights law, to give effect to this expanded conception of reparations, such as by giving it minimal leverage to encourage cooperation by states. Instead, a broad human rights-inspired concept of reparations was introduced into a system that strictly adhered to the bedrock of criminal law – the notion of individual criminal responsibility – that translated in the reparations realm to individual liability for the harm caused by crimes. This imbalance constitutes one of the main challenges today for creating a system that can actually deliver reparations in the context of mass atrocities.

3.4. Bridging the trenches: Reparations principles, experts and the Trust Fund

This gap between the aspirations of the legal framework and the means available at the ICC to turn these into tangible reparations created numerous challenges and threatened to lead the negotiations into an impasse. In this situation, negotiators came up with a number of practices to fill the gaps in the framework with mechanisms to defer the resolution of intractable problems into the future.

A first way out of this dilemma was for negotiators to adopt the French proposal that delegated to the Court the task to "establish principles relating to reparations to, or in respect of, victims".[85] Initially, the idea of reparations principles did not so much originate from a desire to ensure coherence *within* the Court, as currently often seen as their primary purpose, but rather to provide guidance to national jurisdictions when adjudicating reparation requests of victims of crimes under the ICC's jurisdiction.[86] Whatever the drafters' original intentions, the principles soon

[84] Unnumbered draft of Article 73, circulated at the Working Group for Procedural Matters, 16 June 1998 (document accessed from ICC Legal Tools Database).
[85] Rome Statute of the International Criminal Court, Art. 75(1) (hereinafter 'ICC Statute').
[86] It would be interesting to contemplate how the original purpose of the principles could be re-activated for Luke Moffett's call for 'reparative complementarity'. See Moffett, Luke, 2013, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court', 17(3) *International Journal of Human Rights*, 368-390.

turned into a stop-gap solution for the many contested questions delegates could not resolve during the negotiations. The Preparatory Commission ultimately determined that the task of establishing reparations principles should remain fully with the judges.[87] NGOs by and large supported this approach, with Human Rights Watch noting that "the rules should not endeavour to pre-empt the Court's decision or to restrict its flexibility".[88] Thus, states left a wide discretion to the Court through its power to establish reparations principles. Lewis and Friman referred to this as "the substantive law regarding reparations that the Court will apply".[89]

While the conception of reparations in the ICC Statute remained vague, it is clear from a review of the negotiation records that the state delegations intended that the Court take the lead in filling these broad statutory provisions with meaning. Few limitations were set to restrict the Court's powers. Thus, the responsibility was put on the judges' shoulders, with states expecting answers from the bench to questions they themselves were not able to solve during the negotiations. As I show in Part IV, ICC Judges struggled years later with this responsibility.

Second, many discussions during the negotiations touched upon very technical issues, further complicated in the context of mass atrocities and mass victimisation. There was recognition at the Paris seminar that a reparations function for the ICC would require specialised expertise that was not available at these tribunals. The Paris draft therefore proposed that the Court might appoint experts to assist with determining the harm and assessing the scope and form of reparations.[90] Such a provision was included in Rule 97, which allowed for the involvement of experts.[91] Lewis and Friman predicted that "allowing room for experts assisting the Court with such preparatory tasks, which will often be time-consuming, may prove very important in order to enhance the Court's capacity to deal with reparations in an appropriate way".[92] The involvement of external experts was a recognition that the Court was taking on functions that went beyond its usual expertise and for which it might simply not have the required capability available in-house.

Finally, one of the novelties of the reparations mandate that emerged from the negotiations is the establishment of a Trust Fund for Victims (TFV). While the independent Trust Fund is nowadays seen as an integral part of the Court's reparations regime, its origin reveals a different story. The idea of a Trust Fund was already on the table at the ILC, even before judicial reparations were seriously contemplated. The issue arose when ILC members confronted the question of what to

[87] Lewis/Friman, Reparations to Victims, 478-479.
[88] Human Rights Watch, 1999, 'Commentary to the Second Preparatory Commission on Rules and Procedure and Elements of Crime', July 1999, 47.
[89] Lewis/Friman, Reparations to Victims, 490.
[90] *Report on the International Seminar on Victims' Access to the International Criminal Court*, Preparatory Commission, UN Doc PCNICC/1999/WGRPE/INF/2, 6 July 1999, Working Group 4, Rule D.
[91] International Criminal Court, *Rules of Procedure and Evidence*, Rule 97(2) ('ICC RPE').
[92] Lewis/Friman, Reparations to Victims, 484.

do with fines imposed on convicted persons, and in this context contemplated some benefits for victims as part of the penalties – not as reparations. Thus, the negotiations started with what is today perhaps the least successful aspect of the ICC's reparations scheme, namely the assets/fines of convicted persons. This was initially the sole purpose of the Trust Fund.[93]

When delegates began to consider a more expansive reparations mandate for the Court, they soon encountered a gap, if the system would only rely on the assets of convicted persons. Complementary voluntary contributions to a trust fund emerged as a compromise that was acceptable to state delegations. Delegates also felt that the TFV was a suitable vehicle to solve the controversy around collective reparations, as the body seemed suited to administer collective awards.[94] Considering the difficulties that may arise when the TFV engages in collective reparations projects, the Preparatory Commission considered it appropriate for the Trust Fund to collaborate with intergovernmental, international or national organisation to carry out such tasks on its behalf.[95]

While negotiation practices to fill the gaps in the legal framework with such mechanisms – reparations principles, use of experts and creation of the Trust Fund – brought about consensus in Rome, it has also obscured the underlying tensions in the ICC's reparations framework that resulted from the above-mentioned selective borrowing from human rights law. The role of the Trust Fund in particular changed throughout the negotiations, mainly filling operational and procedural gaps that arose from the adoption of a more expanded conception of reparations, including collective and rehabilitative awards. As I show later, this perception of the Trust Fund as a default for solving complex reparations problems that the Court is either unwilling or unable to deal with itself remains alive today.

3.5. A last minute addition: The Trust Fund's assistance mandate

Whilst the Trust Fund was not discussed in any detail during the negotiations of the Rome Statute, its role in the ICC's reparations scheme gained more prominence during the negotiations of the RPE and the drafting of the Trust Fund's regulations.[96] In this process, the Trust Fund's role gradually expanded to include other forms of victim support beyond Court-ordered reparations, which later would become a central feature of the ICC's system of victim redress. The Statute

[93] Discussions on the trust fund and possible reparations for victims took initially place in the Working Group on Penalties within the Preparatory Committee.
[94] ICC RPE, Rule 98(1). At the same time, the delegates also clarified in Rule 98(1) that individual awards for reparations would not need to involve the Trust Fund and could instead be made directly against a convicted person. Thus, the TFV was only seen an option, not the default.
[95] ICC RPE, Rule 98(4).
[96] See Ferstman, Carla, 2002, 'The Reparations Regime of the International Criminal Court: Practical Considerations', 15(3) *Leiden Journal of International Law*, 667-686.

merely stipulated that the Trust Fund would be established for "the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims" – defining victims more broadly, beyond those participating in the Court's proceedings.[97] In this regard, neither the Statute nor the subsequent RPE made reference to the term 'reparations'. International human rights NGOs had therefore concluded early that the Trust Fund is "more than a tool for providing reparations".[98]

The first concrete proposal to articulate a mandate for the Trust Fund beyond reparations was made at the 1999 Paris seminar, when participants discussed the need for interim relief for victims, who were in desperate situations or urgent need of medical attention.[99] It was the first attempt to provide the Fund with an additional humanitarian function. The debate was motivated by the experience of the ICTR where challenges were encountered in providing urgent medial assistance to survivor witnesses, such as for those who contracted HIV-AIDS or other sexually transmitted diseases as a result of rape and other sexual violence.[100] The Paris seminar-inspired draft rules therefore recommended the provision of interim relief through the Trust Fund.[101] However, many delegations felt that it would be prejudicial to an accused person, if such measures would be awarded as part of the Court's reparations function before a conviction was reached.[102] Lewis and Friman observed, "after much soul-searching, and with all delegates acknowledging the terrible

[97] ICC Statute, Art. 79.

[98] Amnesty International, 2001, 'Ensuring an Effective Trust Fund for Victims', *AI Index: IOR 40/005/2001*, 4 & 18. See also Ingadottir, Thordis, 2001, 'The Trust Fund for Victims (Article 79 of the Rome Statute)', *ICC Discussion Paper No. 3*, Project on International Courts and Tribunals (PICT). <http://www.pict-pcti.org/publications/ICC_paprs/Trust_Fund.pdf> (accessed 17 February 2018)

[99] The issue of interim relief is also discussed at Dixon, Peter, 2016, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of Congo', 10(1) *International Journal of Transitional Justice*, 88-107.

[100] The need for interim relief was raised at the Paris seminar by a representative of the ICTR witness unit and received attention by various NGO and state representatives. The importance was also raised in my interviews with NGO representatives involved in the negotiations. Interview with international NGO staff (ICC5), 16 May 2015. See FIDH, 2000, 'CPI: La Commission Préparatoire a Mi-Chemin', Rapport de Position No 288, March 2000, 15-16.

[101] *Rules of Procedure and Evidence*, Preparatory Commission, UN Doc PCNICC/1999/L.5/ Rev.1/Add.1, 22 December 1999, Addendum, Rule 6.31(E). Costa Rica also argued that the Court and the Trust Fund should afford interim relief. See *Proposal submitted by Costa Rica concerning the rules of procedure and evidence relating to Part 4 of the Statute*, Preparatory Commission, UN Doc PCNICC/2000/WGRPE(6)/DP.6, 23 March 2000. Other state proposals suggested interim relief to remain within the responsibility of the Court, such with the victims and witness unit.

[102] A footnote was inserted in the draft RPE stating that "further discussion is needed to clarify under which circumstances the Court should provide interim relief to victims ... Consideration should also be given to the consequences of interim relief in cases where the Court ultimately makes no finding of guilt and consequently is unable to order reparations and whether receiving this kind of relief could create the appearance of bias on the part of a potential witness." See *Rules of Procedure and Evidence*, Preparatory Commission, UN Doc PCNICC/1999/L.5/ Rev.1/Add.1, 22 December 1999, Addendum, Rule 6.31(E).

plight of some victims, it was decided that reparations were not an appropriate place to deal with interim relief".[103] The provision was therefore deleted from the draft RPE.

The matter resurfaced during the drafting of the TFV regulations. After the formal establishment of the TFV in 2002 and the election of its first Board of Director one year later, the Directors became involved in drafting the regulations.[104] REDRESS and other NGOs were actively involved in this process.[105] Apart from a broad definition of beneficiaries, the main entry point was the use of resources other than those obtained from the convicted person.[106] Considering the independent nature of the Trust Fund, as a body overseen by the ASP and not the ICC, there was recognition that the Court could not control the use of voluntary contributions made to the TFV. However, views among states remained divided over how much discretion the Trust Fund should have in determining the use of these 'other resources'.[107] On one side were a group states and the majority of international NGOs advocating for a more autonomous Trust Fund able to engage flexibly with the different situations before the Court. On the other side, numerous states believed that the TFV should be limited to a reparations function and only act upon orders by the Court.[108] The fact that this debate intersected with the question of the TFV's independence *vis-à-vis* the ICC, a matter advocated for by international NGOs,[109] allowed the Board of Directors to secure a wide discretion in determining the use of its 'other resources'. The TFV regulations now allow the Trust Fund to use these voluntary funds where the Board "considers it necessary to provide

[103] Lewis/Friman, Reparations to Victims, 488.
[104] Consultants and experts assisted the TFV Board with producing the first set of draft regulations, which were then discussed in the ASP's Working Group on the Trust Fund for Victims, chaired at the time by Trinidad and Tobago. Interview with international NGO staff (ICC5), 16 May 2015.
[105] REDRESS made detailed recommendations for draft regulations for the TFV. See REDRESS and Forensic Risk Alliance, 2003, 'The International Criminal Court's Trust Fund for Victims', discussion document. <http://www.vrwg.org/downloads/publications/02/TFVReport.pdf> (accessed 17 February 2018)
[106] ICC RPE, Rule 98(5): "Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79."
[107] See also *Report of the Bureau on the Draft Regulations of the Trust Fund for Victims*, Assembly of States Parties, ICC-ASP/4/29, 21 November 2005.
[108] The VRWG noted that the UK, Canada, Australia and other states tried to limit the Trust Fund's discretionary powers and to link it more tightly to the Court. See Victims' Rights Working Group, 2005, 'Draft Regulations of the ICC Trust Fund for Victims: Comments on the Proposal Submitted by Australia, Canada, Croatia, Japan, the Netherlands, New Zealand, Norway and the United Kingdom'. <http://iccnow.org/documents/VRWG_teampaper_Sept05.pdf> (accessed 15 February 2018)
[109] The VRWG and other individual NGOs lobbied actively for a more independent Trust Fund, including providing it with flexibility in the use of its 'other resources'. Interview with international NGO representative (ICC1), 14 November 2014. See Victims' Rights Working Group, 2005, 'Submission to the Second Meeting of the Bureau's Working Group on Regulations of the Trust Fund for Victims, 3-4 August 2005'.

physical or psychological rehabilitation or material support for the benefit of victims and their families".[110] This new role is now generally referred to as the TFV's 'assistance mandate'.

The TFV regulations adopted by the Assembly of State Parties, on 3 December 2005, provide the Trust Fund with more leverage to act beyond reparations than earlier suggestions in relation to interim relief, which had focused more narrowly on those in immediate need of humanitarian assistance.[111] As a consequence, the Trust Fund enjoys wide discretion to engage in various forms of support for the benefit of victims of crimes in situations within the jurisdiction of the Court. Although not completely dissociated from the criminal process, this enables the Fund, for instance, to intervene before and during a prosecution, but also to complement Court-ordered reparations with funds from its 'other resources'.[112] The story about how the assistance mandate came into existence reveals how actors who fought for an independent Trust Fund succeeded in significantly reshaping the nature of the ICC's system for victim redress, beyond what states had initially envisaged in Rome – and all that purely through subsidiary regulations to vague statutory provisions. I examine in Part III how the Trust Fund used this room for manoeuvre to engage with survivors of mass atrocities in the DRC.

4. Conclusion: Negotiation Practices and their Aftermath

My account concurs with Conor McCarthy's conclusion that the ICC's regime of victim redress "was not the result of some overarching 'grand design'".[113] Rather, reparations in the ICC's legal framework originated from contested political negotiations, in which different visions of international justice stood in competition. Negotiators adopted a range of practices that enabled consensus and brought about what many think is one of the ICC's most innovative features. However, these practices led to the incorporation of a number of competing rationales into the legal frameworks that continue to influence the effectiveness of the resulting reparations regime.

Born out of the movement to end impunity for mass atrocities, the nascent field of international criminal law was under considerable pressure from a human rights community that advocated for a more victim-oriented ICC. International NGOs and human rights advocates skilfully engaged with the complex negotiations in Rome and unsettled the traditional international criminal model

[110] *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, 3 December 2005, Annex, Part III, 50(a) (hereinafter 'TFV Regulations'). The only limitation is that the TFV has to notify the relevant Chamber of its planned activities and that the Chamber finds that the activity does not predetermine any issue to be determined by the Court.
[111] In 2007, the TFV Regulations were amended to allow for voluntary contributions earmarked for specific purposes.
[112] See also McCarthy, *Reparations and Victim Support*, 84-92.
[113] Ibid 36.

conceived for the *ad hoc* Tribunals. With regard to reparations, two main contestations surrounded the insertion of human rights logics (focus on giving effect to the rights of individual victims to redress and reparation): first with criminal law logics (focus on prosecuting perpetrators), and second with the logics of sovereignty (focus on sovereignty of states and resistance to notions of state responsibility).[114] The competition between common law and civil law lawyers was also present during the negotiations, but it became a sideshow to the more fundamental issues at stake.[115] Human rights advocates from a well-coordinated international NGO network simultaneously clashed with an epistemic community of criminal lawyers, and international lawyers and diplomats from state delegations over the very purpose of the new permanent Court. The contest of these different logics shaped the contours of the ICC's reparations mandate.

State delegations adopted negotiation practices that signalled clear limitations as to how much international criminal law and human rights law would mix. Notions of state responsibility for reparations and leverage of the new Court over state conduct became a red line that powerful state delegations staunchly guarded. Unlike the *ad hoc* Tribunals, states did not relinquish any control over the rule-making process. From the Statute over the RPE to the TFV regulations, states made sure that the new institutions would be kept in check. Human rights advocates, fearful that reparation provisions would end up as ineffective as the ones at the *ad hoc* Tribunals, lobbied instead for a more lone-standing reparations framework. As a result, more responsibilities for reparations shifted to the Court, which henceforth would get more directly involved in reparations.

One way to resolve these differences temporarily was through negotiation practices that allowed for pushing problem-solving into the future. Legal ambiguity, especially regarding the term of 'reparations' and the scope of beneficiaries, was able to weaken resistance from other delegations. While the criminal justice aspects of the Rome Statute are spelled out in much detail, the reparations framework remains ambiguous. With leverage over state responsibility out of reach and ongoing contestations over the challenges associated with the implementation of a Court-centred reparations framework, negotiators created mechanisms (the reparations principles, the use of experts and the Trust Fund) that allowed assigning the resolution of these problems to the ICC. This ultimately brought about consensus during the negotiations.

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[114] Benjamin Schiff described the competition surrounding the ICC Statute as one between an old (retributive) and new (restorative) justice paradigm. See Schiff, *Building the International Criminal Court*, 32-33.

[115] Philippe Kirsch, as Chairman of the Preparatory Commission, remembered that one challenge in the RPE drafting process was "the need, already encountered in Rome, to reconcile national criminal justice systems with different concept and practices. … [I]t fell to the negotiators of the Preparatory Commission to try to bridge the gaps, or oppositions, between the systems." Kirsch/Oosterveld, The Preparatory Commission, 574.

These negotiations practices were successful in getting the reparations mandate through challenging negotiations. By combining old goals (punishing perpetrators) with new goals (providing redress to victims), the young international criminal law enterprise could adapt to new circumstances and audiences. This allowed the movement to mobilise new resources and increase its legitimacy, mainly by reinvigorating its partnership with international NGOs, which resulted in getting the Rome Statute adopted and the ICC established much sooner than thought. It also laid the ground for ongoing international NGO support and a subsequent expansion of ICC-related activities by NGOs following the Court's establishment; a feature that would prove essential to the implementation of the reparations mandate.[116]

The price of these negotiation practices, however, was that they inserted a range of contradictions and competing rationales into the legal framework, which remain at the core of the tensions within the ICC's reparations mandate today. By incorporating a broad, human rights-inspired concept of reparations into the ICC's highly legalised criminal justice framework without ensuring that the Court would be able to give effect to such an expansive mandate, the resulting model is at risk of raising expectations of a potential of reparations that are at odds with the means and resources at the ICC's disposal. The innovative qualities of the ICC reparations mandate that made the Statute attainable and attractive to so many advocates also constitute one of the main challenges to its successful realisation.

[116] On expansion NGO activities post-ICC establishment, see Haddad, Heidi Nichols, 2013, 'After the Norms Cascade: NGO Mission Expansion and the Coalition of the International Criminal Court', 19(2) *Global Governance*, 187-206.

CHAPTER 4

Reparations through the Back Door: Judicial Rule-Making at the ECCC

One year before the ICC Rome conference, in 1997, the two Cambodian Co-Prime Ministers wrote to the UN Secretary-General requesting assistance to bring to justice those most responsible for the crimes committed during the reign of the Khmer Rouge regime.[1] In contrast to the negotiations of the ICC Statute, reparations to victims did not play a role in the subsequent protracted political negotiations between the Cambodian government and the United Nations. Instead, reparations made their way into the ECCC's legal framework through the procedural rules (referred to as 'Internal Rules') drafted and adopted, in 2007, by the Court's Judges. The context and set of actors involved in the negotiations are therefore rather different from the ICC. States have played a minimal role in negotiating reparations at the ECCC. How is it that the Judges came to decide to incorporate reparations into the ECCC's legal framework, when states had not? And how did negotiation practices influence the final compromise? In this chapter, I reconstruct this deliberation process, which largely happened behind closed doors.[2] The purpose is to examine relevant negotiation practices and their effects on the future operation of the ECCC's reparations scheme.

1. Negotiating the ECCC Statute (1999-2003)

In response to the Cambodian Prime Ministers' request for assistance, the United Nations sent a Group of Experts to Cambodia to assess the feasibility of bringing Khmer Rouge leaders to justice.[3] In February 1999, the Group of Experts published its report, which took note of assertions

[1] *Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia Addressed to the Secretary-General*, UN Doc A/51/930-S/1997/488, 24 June 1997, Annex.
[2] Since meeting minutes are not public, I rely on interviews with participants and observers, while validating and cross-checking information across different interviews.
[3] The Group of Experts consisted of Sir Ninian Stephen (Australia), Judge Rajsoommer Lallah (Mauritius), and Professor Steven Ratner (USA).

that "certain members of the Khmer Rouge have amassed vast amounts of wealth in the years since their ouster from power",[4] and recommended

> that any tribunal provide for the possibility of reparations by the defendant to his victims, including through a special trust fund, and that States holding such assets arrange for their transfer to the tribunal as required to meet the defendant's obligations in this regard. Beyond this, States in which Khmer Rouge assets obtained illegally are present should explore other options for providing compensation to victims from these assets.[5]

With the report being published only a few months after the adoption of the Rome Statute, the experts appeared to affirm the Rome consensus by recommending a reparations function for the future court, including the establishment of a trust fund. Despite being raised at an early stage, however, these recommendations were not addressed during the political negotiations that established the ECCC. Neither the 2003 Agreement between the Cambodian government and the United Nations for the establishment of a hybrid court, nor the corresponding Law on the establishment of the ECCC make any reference to reparations.[6]

Admittedly, the negotiation context was different from the one of the ICC in Rome. Whereas the ICC negotiations were driven by a complex diplomatic process that involved over one hundred state delegations and allowed for NGO participation at various stages, the ECCC process was plainly geared towards a single situation and had to accommodate concerns of the Cambodian government over its national sovereignty. The resulting 'hybrid' model of the ECCC, with a mix of national and international features in the Tribunal's design, and its in-country location provide for a different set of political dynamics than those at the ICC.[7]

Irrespective of these differences, it seems that both sides of the ECCC negotiations had ignored questions of reparations for victims of crime. As for the United Nations, the fact that Hans Corell, then Under-Secretary-General for Legal Affairs, had represented the UN at the Rome conference did not seem to affect the position he took, only a few years later, when negotiating the ECCC

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[4] The experts further noted about these assets that "these have come principally from timber and gem concessions, the fruits of which have been illegally provided to Cambodian and foreign business interests in the areas the Khmer Rouge has controlled. Some of this money is said to be in foreign banks." *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly resolution 52/135*, GA 53rd session, 18 February 1999, para. 211.

[5] Ibid para. 212.

[6] *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, 6 June 2003 (hereinafter 'ECCC Agreement'); and *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia*, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006 (hereinafter 'ECCC Law').

[7] See Bertelman, Hanna, 2010, 'International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia', 79 *Nordic Journal of International Law*, 341-382.

agreement on behalf of the United Nations. David Scheffer, who led the US delegation in Rome and was deeply involved in the ECCC negotiations, later recounted that

> The ECCC was never conceived by those who negotiated its creation as an instrument of direct relief for the victims, although the protection and use of victims as witnesses in the investigations and trials is addressed in detail. The victims' numbers are simply too colossal and the mandate and resources of the ECCC far too limited to address the individual needs, including the award of reparations, for so many victims.[8]

Similarly, there is no indication that the Royal Government of Cambodia brought reparations onto the agenda. While Cambodia became, in 2002, a founding member of the ICC, it would not grant the same avenue to redress only one year later to victims of mass atrocities among its own citizenry. Moreover, the same international NGOs that had so adamantly advocated for a reparations mandate at the ICC were rather quiet during the negotiations of the ECCC.[9] Only Amnesty International expressed "grave concern" about the lack of reparations in the agreement, noting that "unless this is provided for, it would constitute a major retreat from the Rome Statute, a treaty which Cambodia has ratified, and is obliged to adjust its domestic law accordingly."[10] Clearly, Phnom Penh was at the periphery and far away from the centre of gravity of international justice.

2. Negotiating the ECCC's Internal Rules (2006-2007)

Four years later, the ECCC Judges adopted Internal Rules that provided for the participation of victims in the proceedings, including the right to request reparations. My interviews reveal two accounts of how reparations made their way into the ECCC's Internal Rules. These two accounts complement each other, as interview participants may have emphasised certain developments in a different manner. Together, these accounts provide a more nuanced perspective on the practices involved than many explanations in the literature suggest, which often reduce the debate to a simple contest between common law and civil law traditions.[11]

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[8] Scheffer, David, 2007, 'The Extraordinary Chambers in the Courts of Cambodia', Abridged book chapter, 17-18. <http://www.cambodiatribunal.org/sites/default/files/resources/Cambodia_Scheffer_Abridged_Chapter_July_2007.pdf> (accessed 15 February 2018).

[9] Human Rights Watch's report on the final agreement did not comment on the absence of reparations. Human Rights Watch, 2003, 'Serious Flaws: What the UN General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement'. <https://www.hrw.org/legacy/backgrounder/asia/cambodia040303-bck.htm> (accessed 18 February 2018)

[10] Amnesty International, 2003, 'Amnesty International's Position and Concerns Regarding the Proposed Khmer Rouge Tribunal', AI Index: ASA 23/005/2003, 9.

[11] See Acquaviva, Guido, 2008, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers', 6 *Journal of International Criminal Justice*, 129-151; and Skilbeck, Rupert, 2010, 'Frankenstein's Monster: Creating a New International Procedure', 8 *Journal of International Criminal Justice*, 451-462.

Implicit assumptions: Reparations and Cambodian law

The first account is grounded in the applicable law. The ECCC Law and Agreement both provide that the Court's procedure "shall" be in accordance with Cambodian law.[12] The foundational legal documents provide only a few instances where the procedural framework could depart from Cambodian law and resort to international rules.[13] Yoshi Kodama, a former Japanese diplomat who followed the negotiations through the ECCC's donor coordination group, referred to this provision as "the single most different aspect of the Khmer Rouge trials"[14] from the precedent set by previous international(-ised) criminal courts where the dominance of international rules had been taken for granted.[15]

As a former French colony, Cambodia's procedural framework is largely modelled after French criminal procedural law, allowing victims to participate as *partie civile* in criminal trials.[16] Taking the applicable law into account, "one result of establishing the [ECCC] within this civil law system is that the victims of the Khmer Rouge have the right to participate actively in the trials", wrote one ECCC officer who was involved in the drafting process.[17] An advisor to the Cambodian government noted that many involved in the negotiations of the Internal Rules, especially on the Cambodian side, may have simply "assumed" that victims would be participating in the trials, with the right to claim reparations, as this was the procedure under Cambodian law.[18] Indeed, the Secretariat of the Cambodian government's Khmer Rouge Tribunal Task Force included, in 2004, two years before the judges began negotiating the Internal Rules, the following paragraph in its

[12] ECCC Agreement, Art. 12(1); and ECCC Law, Art. 33new. The new Cambodian Criminal Procedure Code, which was drafted with technical assistance from France, was not yet adopted at the time of the deliberations, but the Rules Committee was in possession of an advanced draft.
[13] The agreement stipulated, "where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level". ECCC Agreement, Art. 12(1); and ECCC Law, Art. 33new.
[14] Kodama, Yoshi, 2010, 'For Judicial Justice and Reconciliation in Cambodia: Reflections upon the Establishment of the Khmer Rouge Trials and the Trials' Procedural Rules 2007', 9 *Law and Practice of International Courts and Tribunals*, 37-113, 51.
[15] Kodoma concluded that the trials "are required to follow Cambodian law on criminal procedures and, if necessary, supplement it with 'guidance' from internationally established procedural rules". Ibid 82.
[16] See Meas Bora, 2012, 'The Cambodian Code of Criminal Procedure: Some Remarks', in: Hor Peng, Kong Phallack, and Joerg Menzel (eds.), *Introduction to Cambodian Law*, Phnom Penh: Konrad-Adenauer Foundation, 227-244.
[17] Boyle, David, 2006, 'The Rights of Victims: Participation, Representation, Protection, Reparations', 4 *Journal of International Criminal Justice*, 307-313, 307. The author published this statement while the rules were still being negotiated. Similarly Jarvis, Helen, 2014, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia', 8(2) *Genocide Studies and Prevention*, 19-27, 21.
[18] Interview with government advisor (ECCC7), Phnom Penh, 10 December 2014.

first information booklet – foreshadowing a compromise that was later reached in the Rules Committee:

> Will victims be entitled to compensation? Under the current Cambodian law on criminal procedure, victims may claim reparation in criminal cases for damages they suffered from the crimes being tried. It is not yet clear whether or how the Extraordinary Chambers will hear such claims. It is difficult to imagine how the many millions of Cambodian victims could receive anything more than symbolic compensation.[19]

In addition, the proponents of more victim-oriented justice often cited in interviews Article 36 of the ECCC Law in support of their view, which provides victims with the right to appeal a judgment by the Trial Chamber – the only place in the Law that explicitly mentions 'victims'. Those sceptical of the intentions of the drafters, however, often interpreted this provision to be a "redactional error", an oversight by the drafters of the Law.[20] Beyond these technical disputes, many respondents assigned validity and force to the argument that the two parties to the ECCC Agreement, the Cambodian government and the United Nations, had stipulated that the ECCC's procedure should first and foremost be based on Cambodian law, subject to specific exceptions where "guidance" could be sought from international standards.[21] Thus, the origin of the ECCC's reparations scheme remains a matter of perspective between those emphasising that it was not explicitly mentioned in the founding legal documents, and those stressing that the ECCC was always to be based on Cambodian law, including its civil party system.[22] One international ECCC Judge agreed, "since the applicable law foresaw victim participation, it was basically on the table from the beginning".[23]

Transnational advocacy and mobile lawyers

The second account complements this perspective by emphasising the role of a group of French legal professionals who used the proximity of Cambodian and French criminal procedure to build – while closely liaising with the French-Cambodian diaspora and local NGOs – an advocacy platform for the inclusion of the *partie civile* mechanism into the ECCC's legal framework. The

[19] Secretariat of the Royal Government Task Force, 2004, *An Introduction to the Khmer Rouge Trials*, Phnom Penh: Secretariat of the Royal Government Task Force, Office of the Council of Minister, 17.
[20] Interview with former ECCC legal officer (ECCC17), 6 July 2015.
[21] ECCC Legal Officer David Boyle argued in 2006, "solutions should be compatible with the internal logic of the civil law system used in Cambodia and should not be taken as yet another opportunity to simply import wholesale the rules of international tribunals". Boyle, The Rights of Victims, 309.
[22] Former Japanese diplomat Kodama agreed that the inclusion of civil party participation was in accordance with the domestic law, but noted "it is doubtful that while the UN-Cambodia Agreement and the Cambodian law on the Establishment of the Chambers were being drafted the participation of victims, such as the granting of reparation, was explicitly considered ... Thus, the rules on civil participation are clearly new and override the Agreement." Kodama, For Judicial Justice and Reconciliation in Cambodia, 87-88.
[23] Interview with international ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.

starting point for this endeavour was the so-called 'Livre Blanc' that was published by the French-Cambodian diaspora *Collectif pour les Victimes des Khmer Rouges* with the help of mostly French lawyers.[24] The 'Livre Blanc', made public in April 2006 only three months before the judges would meet for their first plenary, put forward a case for why the ECCC should adopt the civil party mechanism and provided a detailed draft set of rules on civil party participation and reparations. In going beyond the traditional civil party mechanism, the proposed reparations provisions also built upon the 'ICC reparations formula', including broader forms of reparations and a trust fund that could be involved in administering reparations.[25]

The publication of the 'Livre Blanc' benefited from the support of the International Federation for Human Rights (FIDH), which maintained a network among Cambodian NGOs.[26] This network was important in carrying the momentum for victims' rights from the Rome Statute system into the negotiations of the ECCC's Internal Rules,[27] with Cambodian civil society organisations becoming more active in advocating for a survivor-friendly Court.[28] One NGO worker from the Cambodian diaspora recalled, "we conducted a lot of lobby activities and information activities, to make sure that everybody understands … the civil right institution, as existed in France, at the ECCC".[29] In May 2006, when FIDH and the Cambodian Human Rights Action Committee (CHRAC) presented the 'Livre Blanc' to Cambodian government and ECCC officials,[30] they publically called for a role of victims in the ECCC's proceedings:

> The ICC provides a historic set of rights for victim participation, protection, representation and reparation. FIDH and CHRAC urge Cambodia, as a State party to the ICC, to ensure that these

[24] This association of French diaspora groups was created in June 2005 with the objective of facilitating the participation of diaspora victims in the ECCC proceedings. Various French and international lawyers had come together one year earlier in the group *Justice pour le Cambodge* to support this process with legal advice and later representation before the ECCC. See Mey, Elyda, 2007, 'Le Rôle de la Diaspora dans la Justice Transitionnelle: L'Exemple du Cambodge', International Center for Transitional Justice, 2, 12-14.
[25] The Livre Blanc did not argue that such a trust fund be established necessarily within the framework of the Internal Rules, but that at the minimum Judges should give themselves the powers to order that assets from convicted persons be put into such a fund, if it would be established. Collectif pour les Victimes des Khmers Rouges, 2006, 'Proposition Relatives aux Droits des Victimes des Khmer Rouges devant les Chambres Extraordinaires Cambodgiennes', Paris, April 2006, 22-24 (hereinafter 'Livre Blanc') (on file with the author).
[26] See FIDH, 2006, 'International Criminal Court: Implementation of the Rome Statute in Cambodian Law', Report No 443/2, March 2006.
[27] See FIDH, 2005, 'Cambodge: Articulation entre la Cour Pénale Internationale et le Tribunal pour Juger les Khmer Rouges: La Place des Victimes', Report No 420, 33. The report called for victim participation at the ECCC, as well as collective and symbolic reparations from confiscated Khmer Rouge assets.
[28] In 2005, a delegation from the Cambodian Human Rights Action Committee (CHRAC), an umbrella organisation of Cambodian human rights NGOs, met with the Director of the ECCC Office of Administration and suggested that the Court's Internal Rules include a mechanism that can address the victims' suffering. CHRAC, 2005, 'Internal Report about the Delegation Visit to the ECCC', (on file with the author).
[29] Interview with former NGO worker (ECCC2), Phnom Penh, 7 December 2014.
[30] Interview with former international NGO staff (ECCC18), Paris, 7 July 2015.

> fundamental rights are also guaranteed in the Khmer Rouge trials. After more than 30 years, justice for victims is a central element of the search for truth and the fight against impunity.[31]

When in mid-2006 ECCC Judges gathered for the first time, they already came into an environment where a number of legal professionals and NGO advocates were favouring the inclusion of victims into the proceedings. While the RPE at the ICC were drafted with the involvement of state parties, at the ECCC it was the Judges who drafted their own procedural rules.[32] One international Judge remembered that "it was very much a matter of judges legislating, and we were very much aware of this and we were nervous about it".[33]

Deliberations among Judges

In embarking on the process of making their own laws, the Judges first established a Rules Committee.[34] From the beginning, they were able to rely on at least two different drafts. First there were the draft provisions of the 'Livre Blanc', whose dissemination within the Court was greatly aided by the fact that a number of legal professionals involved with this project joined the ECCC, especially the team of the French Co-Investigating Judge, Marcel Lemonde, who then was a proponent of the civil party system.[35] A second draft set of procedural rules was presented by the government's Khmer Rouge Tribunal Task Force, developed mainly by US law professor Gregory Stanton and other international advisors. Building upon the statutes of the *ad hoc* Tribunals and the ICC, this set of rules made provision for victims to participate in the proceedings and to claim reparations, including restitution, compensation and rehabilitation.[36] Thus, when

[31] FIDH and CHRAC, 'Civil Society Urges the Cambodian Government to fully Implement the Statute of the International Criminal Court', Joint Press Release, 12 May 2006.
[32] There was some discussion about whether ECCC Judges actually had rule-making authority, as this was not explicitly dealt with in the ECCC Law or Agreement. See Starygin, Stan, 2011, 'Internal Rules of the Extraordinary Chambers in the Court of Cambodia: Setting an Example of the Rule of Law by Breaking the Law?', 3(2) *Journal of Law and Conflict Resolution*, 20-42.
[33] Interview with international ECCC Judge (ECCC5), Phnom Penh, 9 December 2014. Judge Marcel Lemonde also wrote in his memoir, "nous allons donc devoir créer notre propre loi, ... ce qui n'est guère satisfaisant en termes de séparation des pouvoir". Lemonde, Marcel, 2013, *Un Juge Face aux Khmers Rouges*, Paris: Editions du Seuil, 31.
[34] The Rules Committee was composed of three national Judges and two international Judges, namely Prak Kim San, You Bunleng, Mong Monichariya, Agnieszka Klonowiecka-Milart and Marcel Lemonde, with Gregory Stanton as an expert member. All Judges on the Committee were from civil law jurisdictions. See ECCC, 2007, 'Annual Report on Achievements of the ECCC for 2006', Office of Adiministration, 6 February 2007.
[35] See Lemonde, *Un Juge Face aux Khmers Rouges*, 230-237. See also leaked US Embassy cable stating "the attention focused on victims as civil parties within the draft rules has been attributed to the deputy international co-investigating judge, who reportedly has a strong interest in victims' rights and their role in international tribunals". Wikileaks, 2006, 'Cablegate: ECCC Issues Draft Internal Rules', 16 November 2006. <http://www.scoop.co.nz/stories/WL0611/S01142.htm> (accessed 6 June 2017)
[36] Reparations were mentioned in Article 94 of the draft. See Jarvis, Justice for the Deceased, 21.

Judges met for the first time, these ideas were already part of the drafts before them.[37]

After two months of intense meetings, it was therefore not a surprise that the Rules Committee presented draft Internal Rules that incorporated rules on civil party participation, including the right to claim reparations.[38] The Judges then took the unprecedented step of releasing the draft rules to the public for comment from interested parties, especially NGOs and academia, indicating some of the main legitimacy audiences of the Judges.[39] State representatives of key donor countries, who regularly gathered in so-called 'Friends of the ECCC' meetings, seem to have stayed largely out of these discussions.[40]

More than 20 comments were received, mostly from international organisations.[41] Among the few Cambodian submissions, CHRAC "applauded" the involvement of victims, noting that "victim participation will help bridge the gap between the court and the people and will give victims a voice in this important process".[42] On reparations, however, CHRAC found the draft rules "to be unclear and insufficient. The reparations process is a key element to the success of the process, which ultimately aims at national healing and reconciliation. CHRAC encourages the ECCC to consider a Trust Fund on the model of the ICC."[43] A number of other NGO submissions similarly found the civil party system's limitation to the assets of convicted persons insufficient for satisfying the needs of participating victims.[44]

Noting continued "substantive disagreement" over certain provisions, the Judges further revised

[37] Interview with international ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[38] Rule 27(12) stipulated, "injury may be compensated by awarding [proportionate] damages. The Chambers may also award collective or symbolic reparation." 'ECCC Draft Internal Rules', public draft for comments, 3 November 2006.
[39] ECCC, 'ECCC Rules Committee Releases Draft Internal Rules', Press Release, 3 November 2006. See Cruvellier, Thierry, and Anne-Laure Porée, 2006, 'What Rules for the Cambodian "Model"' in *International Justice Tribune*, 20 November 2006.
[40] It is difficult to assess the level of indirect communication by the donor countries that funded the ECCC's budget. Leaked US cables indicate some resistance from the Japanese Embassy: "the Japanese Embassy is particularly sensitive to this point [the proposed role of victims as civil parties to the proceedings], and raised it at the last Friends of the ECCC meeting … In addition to the time and administrative burden, the Japanese are worried about the added financial burden to a court that is already struggling with inadequate financing." Wikileaks, 2006, 'Cablegate: ECCC Issues Draft Internal Rules', 16 November 2006.
[41] ECCC, Annual Report 2006, 23. This included submissions from the following NGO: Amnesty International, Cambodian Human Rights Action Committee, FIDH, ADHOC, LICADHO, Human Rights Now, Human Rights Watch, International Center for Transitional Justice, and Documentation Center of Cambodia.
[42] Cambodian Human Rights Action Committee, 2006, 'Comments on the ECCC Draft Internal Rules', 17 November 2006, 7.
[43] Ibid 8.
[44] FIDH, ADHOC, LICADHO and The Collective for Khmer Rouge Victims, 2006, 'Key Comments and Proposals on ECCC Draft Internal Rules', 17 November 2006, 6. These NGOs suggested "that a Trust Fund be set up based on the example of the Fund existing in the context of the International Criminal Court. Such Fund would be operated independently and would receive confiscated assets, fines, as well as voluntary contributions."

the draft with a view to finding an agreement at the next plenary session.[45] Rather than disagreements between common law and civil law Judges, there existed considerable differences among international Judges from civil law jurisdictions. Many of the non-French civil law Judges, although not generally opposed to victim participation, regarded participation of civil parties as not feasible in the context of the ECCC. One international Judge said about the proposed civil party model

> We were worried about the way it would slow down the Court … and we were painfully aware of the fact the civil claim was bound by the statute of limitations. … So, not only was it a problem of identifying the victims … in this massive victimisation; not only would there be problems of proving any individual claim, we also knew that the claims were expired as such … And on top of it all, we knew by then that all suspects were indigent. So, whatever assets they had were not traced or they got rid of them. So, the model of *partie civile* as in French law was totally inappropriate for this Court.[46]

Another international Judge from a civil law jurisdiction added "there was a strong will from a couple of Judges to involve victims and perhaps at time do it without thinking all the consequences through … Those of us who knew the system said to be cautious", noting further "the mere idea to adjudicate in proceedings that should be half way expeditious even 100 civil claims was a problem".[47] Many Judges therefore pressed for some form of adaption of Cambodian criminal procedural law to account for the challenges resulting from mass crimes. The most important of these changes was to exclude individual monetary compensation and instead limit reparations to "collective and moral" measures.[48] This limitation was crucial to ensure that reparations made it through the negotiations.

With most of the discussions being conducted in English, the Cambodian Judges were often on the sidelines of these contests among the international Judges.[49] The fact that the French Co-Investigating Judge was the only international Judge permanently based in Phnom Penh throughout the negotiations allowed one of the proponents of the civil party system to liaise more closely with Cambodian colleagues, with the argument in favour of an application of Cambodian procedural law proving particularly persuasive. Whilst some Cambodian Judges remained sceptical of victim participation – with one Judge explaining his opposition on the basis that "we

[45] ECCC, Annual Report 2006, 23. See also ECCC, 'Joint Press Release by the National and International Judicial Officers at the Conclusion of the first Plenary Session for the Internal Rules', 25 November 2006.
[46] Interview with international ECCC Judge (ECCC29), Phnom Penh, 26 August 2015.
[47] Interview with international ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[48] Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (v1)*, adopted 12 June 2007, Rule 23(11) (hereinafter 'ECCC Internal Rules').
[49] Interview with former ECCC legal officer (ECCC17), 6 July 2015. A leaked cable from the US Embassy also noted in relation to the Internal Rules, "our understanding is that the international judges did the lion's share in developing the draft". Wikileaks, 2006, 'Cablegate: ECCC Issues Draft Internal Rules', 16 November 2006.

just wanted to make it very fast to close the case"[50] – a majority of Cambodian Judges eventually supported the participation of victims as civil parties.[51] As one of the final matters to be resolved during the negotiations, the Judges adopted Internal Rules,[52] which incorporated provisions allowing civil parties to claim reparations.

3. Conclusion: An Accidental Reparations Scheme?

This account of how reparations to victims made their way into the ECCC's legal framework shows that reparations were never seriously debated during the political international negotiations. Five years after the Rome Conference and one year after Cambodia joined the Rome Statute, neither UN negotiators nor the Cambodian government thought that the agreements made in Rome should affect justice processes in Phnom Penh. While the Group of Experts had raised the issue of reparations early, it was simply crowded out of highly politicised negotiations that left no room for further consideration of victims' interests. Moreover, international human rights NGOs had limited presence and access to the negotiations, leaving the main advocacy actor for reparations in Rome outside of the decision-making space. However, it appears that negotiators had not given much thought to the consequences resulting from the fact that they themselves had stipulated that the ECCC's procedures should primarily be based on Cambodian law.

Despite the fact that states and the United Nations showed little inclination to carry the momentum from Rome into the ECCC negotiations, some NGOs and legal professionals were influenced by the new conceptual and legal post-ICC landscape. Once legal professionals took over from diplomats after the adoption of the 2003 ECCC Agreement, victim participation and reparations were quickly pushed onto the agenda. Late but not too late, a transnational network involving a small group of mobile lawyers and French-Cambodian diaspora representatives seized upon Cambodian civil society's genuine desire to see some involvement of survivors in the justice process in order to advocate for a mechanism modelled after the French *partie civile* system.[53] Mey described the way in which French lawyers and international human rights NGOs leveraged

[50] Interview with Cambodian ECCC Judge (ECCC30), 28 August 2015.
[51] When presenting, in June 2007, the final Internal Rules to the public, ECCC Supreme Court Chamber Judge, Kong Srim, confirmed that ensuring the involvement of victims was a "complex issue", noting further, "while a familiar element of Cambodian law, this was not spelled out in detail in the ECCC Law and Agreement …We interpreted this to mean that victims have the right to join as civil parties. However, due to the specific character of the ECCC, we have decided that only collective, nonfinancial reparation is possible." Cited from Xinhua, 'Roundup: ECCC Overcomes Complexity, Adopts Internal Rules', 13 June 2007.
[52] Jarvis, Justice for the Deceased, 21.
[53] See Cambodian Human Rights and Development Association (ADHOC), 2007, 'Comment on the Right of the Civil Party in the Proceedings of the Extraordinary Chambers in the Courts of Cambodia', 2nd edition (on file with the author).

initiatives emerging from Cambodian survivors in the French diaspora community as "*parrainage*" (or 'godfathering').[54]

The argument put forward by advocates that the application of the civil party system meant to give effect to Cambodian law – as laid out in the draft Cambodian Criminal Procedure Code, itself a product of multi-year efforts of French development assistance[55] – proved persuasive among Cambodian NGOs and Cambodian judicial officers at the ECCC. It also gave the endeavour the appearance of "respecting the spirit of the local initiative".[56] One local NGO worker said "given the fact that the tribunal was established in Cambodia and that the ECCC Law also used the Cambodian law, we tried to bring in the Cambodian perspective with regard to the legal procedures – the civil law system".[57] Many of the Cambodian NGOs, whilst won over by these arguments, had little understanding or experience with the civil party system due to limited domestic practice. One Cambodian NGO worker recounted this process as follows,

> [p]eople were looking for a way how to get justice … and we were wondering 'how can we provide an opportunity for the survivors to involve in [the ECCC]' … and then we met the international co-investigating judge [Judge Lemonde] who advised us on the civil party … an opportunity for the victim to attend the proceeding. During this period, I also did not understand well these issues… I learned more from my colleague [from the French Cambodian diaspora] … this was one way for people to join the trial.[58]

International and national advocates' attention focused on the participation of Khmer Rouge survivors in the ECCC's proceedings. Reparations only appeared as a secondary matter attached to the participation process. Statements show that prospects for serious reparations efforts were viewed as limited at the time given the large number of potential victims[59] and that participation itself was regarded as holding a "significant reparative and restorative function".[60]

When international Judges arrived in Cambodia in mid-2006, they saw themselves by and large confronted with a *fait accompli*. While Judges felt increasingly comfortable in their role as rule-makers, the subsequent contest among international Judges was focused on the feasibility of reparations provisions rather than their existence in the legal framework. These debates were

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[54] Mey, Le Rôle de la Diaspora, 16.
[55] France had supported the preparations for the draft criminal procedure code for almost ten years through the provision of technical assistance. The code was formally adopted in 2007.
[56] Kodoma stressed "the fundamental need to cater to local initiatives, in all aspects of the trials". Kodama, For Judicial Justice and Reconciliation in Cambodia, 40-41.
[57] Interview with Cambodian NGO worker (ECCC10), Phnom Penh, 13 December 2014.
[58] Interview with Cambodian NGO coordinator (ECCC24), Phnom Penh, 7 August 2015.
[59] An example for a frequently raised (rhetorical) question is "What happens if three million survivors claim reparations – who will be able to pay for the compensation?". See FIDH, 2005, 'Cambodge: Articulation entre la Cour Pénale Internationale et le Tribunal pour Juger les Khmer Rouges: La Place des Victimes', Report No 420, 28.
[60] ADHOC, Comment on the Right of the Civil Party, 47.

shaped by the international Judges' background from diverse domestic legal systems and left many Cambodian Judges as bystanders.

During the negotiations, Judges used two main practices to bring about consensus over the reparations provisions. Similar to the ICC negotiations, legal ambiguity with regards to reparations was central to the agreement. The term 'moral and collective' reparations was not defined and remained vague in the Internal Rules.[61] One international Judge remembered, "we had this wonderful construct which provided for collective and moral reparations. We put this into our rules without any real consideration what it meant."[62] At the same time, ECCC Judges were aware of the challenges associated with reparations. In this context, they excluded individual monetary compensation from the permissible forms of reparations that civil parties could seek, mainly with the intention to avoid dealing with individual reparations claims. Due to the vagueness of the wording of the Internal Rules, however, the Judges' intention was not so clear to external observers and local NGOs.[63] This would create challenges for communicating reparations, as I will discuss in Part III.

The end result was what proponents described a procedure "à la française" – and an "innovation intéressante mais extrêmement ambitieuse".[64] Whilst some scholars described the Internal Rules as "a sensible and workable solution to the complex issue of victims' reparations",[65] many NGOs thought that the compromise paid insufficient attention to how such a model would work in the context of mass atrocity crimes. One of the practical concerns related to the limitations of a reparations scheme bound to the assets of convicted persons. Recommendations for the establishment of a trust fund, either within or outside of the ECCC's institutional framework, showed how solutions from the ICC informed advocacy efforts in Cambodia. None of this was taken up during the Internal Rules-making, where a complex deliberation process among the Judges was only able to accomplish some form of risk management by limiting reparations to 'moral and collective' measures, but without conceiving a workable reparations scheme for the Cambodian context. Although some Judges at the time thought that the scheme could be fine-

[61] The wording of the first Internal Rules was as follows: "Subject to Article 39 of the ECCC Law, the Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons. Such awards may take the following forms: (a) an order to publish the judgment in any appropriate news or other media at the convicted person's expense; (b) an order to fund any non-profit activity or service that is intended for the benefit of Victims; or (c) other appropriate and comparable forms of reparation." ECCC Internal Rules (v1), Rule 23(11) and (12).
[62] Interview with international ECCC Judge (ECCC5), Phnom Penh, 9 December 2014.
[63] Even former Japanese diplomat Kodama wrote, "amongst 'collective and moral reparations', civil financial reparation is included as the Chambers can award '[a]n order [to convicted persons] to fund any nonprofit activity or service that is intended for the benefit of Victims'." Kodama, For Judicial Justice and Reconciliation in Cambodia, 88.
[64] Lemonde, *Un Juge Face aux Khmers Rouges*, 28.
[65] Acquaviva, New Paths in International Criminal Justice, 141.

tuned at a later stage with additional rules amendments,[66] the first Internal Rules laid the foundations for what was later presented as a predictable outcome in *Case 001*.

[66] Interview with international ECCC Judge (ECCC29), Phnom Penh, 26 August 2015.

Part II: Comparative Discussion

The examination of the origin of the ICC's and ECCC's reparations mandates confirms that these mandates were not part of a grand design to refashion international criminal justice, but rather they were the product of intense political or judicial negotiations. The drive for more victim-oriented ways of doing justice in the aftermath of mass atrocities – manifested in the insertion of human rights principles and further propelled by a resurgence of well-organised international human rights NGOs – questioned the traditional purpose of international(-ised) criminal justice. A range of practices adopted during the negotiations managed to obscure the underlying conflict between competing logics surrounding a reparative function for international tribunals.

International norms on reparations were hardly in question during the negotiations, but the rules and mechanisms for implementing these norms within an international criminal justice framework remained highly controversial. Despite the fact that states agreed to a reparations scheme at the ICC, this did not significantly change state behaviour when establishing other courts, such as the ECCC. Similarly, while the ICC Statute was considered the cutting-edge of international criminal law, the international judicial profession remained divided. For example, when Judges of the two *ad hoc* Tribunals – the most senior international criminal justice practitioners at that time – called upon the UN Security Council, two years after the Rome conference, to consider reparations for the victims in the former Yugoslavia and Rwanda, they also provided reasoned opposition against including victim compensation into the legal framework of the two Tribunals.[67] The Judges were especially concerned about the procedural and operational challenges associated with constructing a workable reparations scheme within the framework of an international criminal tribunal. Instead, they favoured avenues beyond the Tribunals not only as the more efficient response, but also one that would ensure fairer outcomes for victims. The letters show that the politically negotiated outcome of Rome was not shared across the international judicial profession and that the movement towards reparations has not been one of a progressive evolution towards more victim rights in international criminal justice. These observations already suggest that unless practical solutions are found to relieve the Judges' concerns about issues such as length of trials,

[67] *Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General*, UN Doc S/2000/1063, 3 November 2000, Annex; *Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General*, UN Doc S/2000/1198, 15 December 2000, Annex. The two Presidents of the Tribunals, and authors of these letters, ICTY President Claude Jorda and ICTR President Navanethem Pillay, would later both be elected to the first panel of ICC Judges.

workload and sources of financing reparations, it is unlikely that reparations will take up a more prominent place in international criminal justice.

My account in these two chapters therefore shows the relevance of the context surrounding the negotiation of legal frameworks and how it shapes negotiation practices. The presence of international NGOs in Rome enabled a potent human rights-based advocacy campaign for reparations, which forged a new partnership between these NGOs and the ICC.[68] However, the composition of actors at the ECCC gave rhetoric and practices a different spin. The involvement of Cambodian Judges in the negotiation of the Internal Rules and the active role of Cambodian NGOs gave more force to arguments in favour of the application of national law than abstract human rights principles. While practices at the ICC were driven by victim-oriented human rights standards, bringing survivors' voices into the justice process and applying domestic law were more decisive motivations in Cambodia. A small group of legal professionals adroitly used these dynamics in Cambodia to advocate for a particular form of victim participation inspired by domestic models (i.e. the civil party mechanism and its associated reparations function).

Both case studies also show resort to some similar negotiation practices. This included the adoption of a broader conception of 'reparations' than was available under domestic laws, which, coupled with legal ambiguity and the drawing of some unnegotiable red lines – such as in relation to state responsibility at ICC or the exclusion of monetary compensation at the ECCC – made the legal frameworks on reparations acceptable to diplomats and judges. Vaguely formulated reparations provisions were integrated into highly legalised international criminal law frameworks in the hope that the newly created Tribunals would find solutions to the problems that negotiators were unable to resolve. The resulting tensions and competing rationales in the ICC's and ECCC's legal frameworks on reparations were now inherited by the institutions they created.

[68] Subotic, Jelena, 2012, 'The Transformation of International Transitional Justice Advocacy', 6 *International Journal of Transitional Justice*, 106-125.

PART III

Practices of Engaging with Context and Survivors

Perhaps more than any other aspect of the ICC's and ECCC's mandate, reparations forces these criminal courts to move beyond their comfort zones and engage with the diverse socio-political and cultural contexts before them. At the core of this process is the Courts' engagement with conflict-affected communities and survivors of mass atrocities, who were largely absent during the negotiations. The legal literature on reparations tends to neglect this aspect of reparations' production. Yet, it is at the level of survivors and the ways how courts engage with them, where much of the meaning of reparations is determined. What happens to legalised, but ambiguous, notions of reparations when they are communicated and enacted in complex post-atrocity, real-life situations? And what are the practices associated with engaging with conflict-affected populations? I show that a range of engagement practices shape key parameters of reparations even before judges adjudicate reparations requests and, as such, they form a key stage in the social life of reparations. My observations focus on the intersections between the formal justice processes enacted by the ICC and the ECCC and the social contexts with which they engage. It is at those intersections where the construction of reparations is most productive. As my thesis examines the first cases before the ICC and the ECCC, the following observations are limited to the time period prior to the first reparations orders at both Courts.

Analytical framework for Part III

When engaging with survivors, the two Courts were guided by both international human rights principles and the past experience of the *ad hoc* Tribunals. International human rights, such as those enshrined in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Basic Principles and Guidelines, stipulate principles that guide justice mechanisms' engagement with victims of crime, including: providing victims with

information concerning reparations,[1] giving victims access to justice,[2] and allowing victims to present claims for reparations.[3]

These human rights principles embody aspirations guiding the engagement policies at both Courts. After the two *ad hoc* Tribunals had struggled to relate their processes to the populations in Rwanda and the former Yugoslavia, communication with and involvement of victims are now seen as central aspects of linking international(-ised) justice to affected populations.[4] Information and access to justice translate at these courts into the concepts of 'outreach' and 'victim participation'. Reparations are intrinsically linked to outreach and participation of affected populations; both as an enabling condition and an integral part to their implementation. Moreover, it is generally undisputed that victims should have a say in the reparations measures decided before these Courts. Both the ICC and the ECCC have given effect to this goal through 'consultations' through which they seek survivors' views about reparations. These forms of engagement structure my analysis of the practices that developed at the ICC and ECCC when engaging with survivors of mass atrocities (see Figure 3). I focus on aspects of outreach, participation and consultations that are of relevance to reparations.

[1] The Declaration provides that "victims should be informed of their rights in seeking redress through such mechanisms". *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,* UN Doc A/RES/40/34, 29 November 1985, paras. 4-5 ('UN Victim Declaration 1985'). The Basic Principles and Guidelines stipulate that remedies include "access to relevant information concerning violations and reparation mechanisms." Basic Principles and Guidelines 2005, para. 11.

[2] The Basic Principles and Guidelines provide for "equal and effective access to justice", including "allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings". Basic Principles and Guidelines 2005, paras. 10-11. This is similarly expressed at UN Victim Declaration 1985, para. 6(b).

[3] The Basic Principles and Guidelines enshrine victims' right to "adequate, effective and prompt reparation for harm suffered", including "procedures to allow groups of victims to present claims for reparation". Basic Principles and Guidelines, paras. 11-13. See also UN Victim Declaration, paras. 8-13.

[4] See Clark, Janine, 2009, 'International War Crimes Tribunals and the Challenge of Outreach', 9 *International Criminal Law Review,* 99-116; and Peskin, Victor, 2005, 'Courting Rwanda: The Promise and Pitfalls of the ICTR Outreach Programme', 3 *Journal of International Criminal Justice,* 950-961.

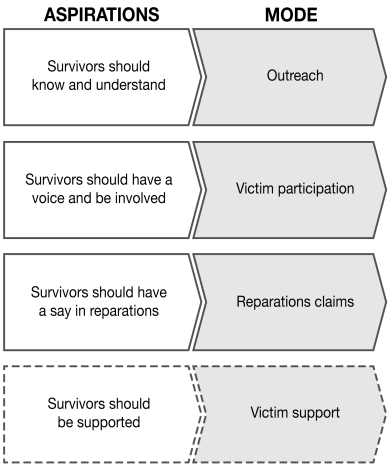

Figure 3: Part III analytical framework

CHAPTER 5

Between The Hague and Ituri: Engaging with Survivors

The district of Ituri is located in a remote area of Central Africa. The distance between The Hague and Bunia, the district's capital, is around 6,400 km – even the DRC's capital of Kinshasa is 2,200 km away from Bunia.[1] These distances are greater than those from Arusha (ICTR) to Rwanda or from The Hague (ICTY) to the former Yugoslavia. Fundamental questions arose as to how the ICC would implement a remote justice process that is both 'victim-oriented' and meaningful to affected populations in Ituri. It took almost a decade for the ICC's first cases to reach the reparations stage. In this chapter, I examine how the ICC went about giving effect to its legal framework and aspirations when engaging survivors in Ituri on reparations during those early years. This involves identifying the practices associated with reaching out to survivors and victim participation. These observations are complemented with an examination of the TFV's early practice of providing assistance in Ituri. The purpose is to identify the practices most relevant to reparations and to examine their effects on the possibilities and meaning of reparations.

Institutionalising engagement with conflict-affected populations

Still riding on a wave of enthusiasm as ground-breaking development in international law, the ICC had to engage its first cases while simultaneously building up its structures and policies. Set up as a permanent institution, the ICC and its first staff were keenly aware that they were building an architecture that not only had to be able to engage with the situation in Ituri, but also with many other instances of mass atrocities in future. Under constant scrutiny by international media and NGOs, the ICC was therefore more in the business of drafting policies and strategies to guide its daily operations, as compared for instance to the temporary ECCC. These documents acknowledge that the ICC's legal framework went beyond the traditional roles of a criminal court: "A key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function".[2] The ICC's aspiration to become a 'victim-

[1] ICC, *Report on the Review of Field Operations*, 9th Assembly of States Parties, ICC-ASP/9/12, 30 July 2010, para. 21.
[2] ICC, *Report of the Court on the Strategy in Relation to Victims*, 8th Assembly of States Parties, ICC-ASP/8/45, 10 November 2009, para. 3 (hereinafter 'ICC Strategy in Relation to Victims 2009').

oriented' Court is most visibly articulated in its first victim strategy, published in 2009.[3] According to the strategy, the drafters of the Statute recognised that "positive engagement with victims can have a significant effect on how victims experience and perceive justice and, as such, contribute to their healing process".[4] In pursuing these goals, the strategy emphasised the centrality of communication – "so that the Court's mandate on victims is widely understood by victims and in order to listen to victims" – and participation – so that victims "have a voice" and "effective access to the Court".[5]

The victim strategy noted that the challenge would be "to make these aspirations an operational reality".[6] In an effort to institutionalise these commitments, a number of sections within the ICC Registry work on distinct aspects of the victims and reparations regime: The Public Information and Documentation Section (PIDS) is responsible for public information and outreach (including an outreach unit), and the Victim Participation and Reparations Section (VPRS) has a mandate to inform victims about their rights and to facilitate their participation. The Office of Public Counsel for Victims (OPCV), established in 2005, provides legal support and assistance to victims and their legal representatives. The Trust Fund for Victims is an entity separate from the ICC, but a key institution in its reparations regime.

These institutional arms of the ICC have engaged with situation countries by way of three general modes of operation: through field missions from The Hague, by establishing field presences and by collaborating with states, international organisations and civil society in those situations.[7] For an outsider institution with little local knowledge, such an engagement involves significant security, logistical and cultural-linguistic challenges. In the case of the Ituri, the affected communities are located far away from the capital, often in remote areas with ongoing low-level armed conflict, poor infrastructure and limited access to means of communication. Establishing a functioning ICC field presence was therefore a slow undertaking.[8]

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[3] See Carayon, Gaelle, and Jonathan O'Donohue, 2017, 'The International Criminal Court's Strategies in Relation to Victims', 15(3) *Journal of International Criminal Justice*, 567-591.
[4] ICC Strategy in Relation to Victims 2009, para 2. These beliefs were reaffirmed in the 2012 revised victim strategy. ICC, *Court's Revised Strategy in Relation to Victims*, 11th Assembly of States Parties, ICC-ASP/11/38, 5 November 2012, para. 2 (hereinafter 'ICC Revised Strategy in Relation to Victims 2012').
[5] ICC Strategy in Relation to Victims 2009, para. 15
[6] Ibid para. 1.
[7] These modes have also been referred to as "field engagement", which "encompasses both a substantive, sustained ICC presence in or as close as possible to situation countries and an approach by the ICC that prioritises effective interaction with affected communities in court policy and practice". Human Rights Watch, 2008, 'Courting History: The Landmark International Criminal Court's First Years', 99. <https://www.hrw.org/reports/2008/icc0708/8.htm#_Toc202933689> (accessed 6 February 2018)
[8] See Darehshori, Sara, 2008, 'Lessons for Outreach from the Ad Hoc Tribunals, the Special Court for Sierra Leone, and the International Criminal Court', 14 *New England Journal of International and Comparative Law*, 299-307.

1. Communicating Reparations

Communication plays an important role in the reparations process. Through communication survivors learn about the opportunities and avenues available to them, and through communication courts are able to ascertain survivors' views and preferences regarding reparations. Such communication is not straight forward, but involves a range of different actors who facilitate and mediate communication. These actors' communicative practices shape the way reparations are framed and perceived. 'Consultations', as a specific form of communicative practice, are discussed in a separate section.

Recognition of the central place of communication with survivors is explicit in the ICC's 2006 strategic plan for outreach, which stated the objective as follows:

> …in order for the Court to fulfil its mandate, it is imperative that its role and judicial activities are understood, particularly in those communities affected by the commission of crimes under the Court's jurisdiction. The Court must therefore put in place mechanisms to ensure that affected communities can understand and follow the Court through the different phases of its activities. To this end, it must seek to bridge the distance between the Court and these communities by establishing an effective system of two-way communication.[9]

The ICC's first victim strategy reconfirmed this commitment to 'two-way communication', understood as conducting "interactive activities, to listen to victims and respond to what they are saying, and to take into account victims' concerns when developing policies".[10] The goal of two-way communication is an ambitious goal for an institution that is located thousands of kilometres away from situation countries.[11]

During the early phases of the ICC's engagement with the DRC, there was little sign of such communication. Following the stages of the judicial process, the Office of the Prosecutor (OTP) was the first ICC section with operations in the DRC.[12] The OTP kept a low profile during the investigations, due to concerns over security and witness protection.[13] Outreach was limited, and

[9] ICC, *Strategic Plan for Outreach of the International Criminal Court*, 5th Assembly of States Parties, ICC-ASP/5/12, 29 September 2006, 3 (hereinafter 'ICC Strategic Plan for Outreach 2006').
[10] ICC Strategy in Relation to Victims 2009, para. 22.
[11] The two-way communication approach is also mentioned in interviews with ICC outreach staff in Clark, International War Crimes Tribunals and the Challenge of Outreach, 114-115; and in Hellman, Matias, 2015, 'Challenges and Limitations of Outreach: From the ICTY to the ICC', in: De Vos et al., *Contested Justice*, 251-271, 256.
[12] It took almost three years from the first announcement of the Prosecutor, in mid-2003, that he was following the situation to the transfer of Thomas Lubanga to The Hague in March 2006.
[13] Human Rights Watch noted the frustration among local NGOs in Ituri, which referred to the OTP field office in Bunia at times as "Guantanamo" because of its "perceived bunker mentality". Human Rights Watch, Courting History, 104.

there existed little direct contact with local populations.[14] The situation changed slowly, in 2007, when the Court set up the outreach unit and increased its resources for outreach. This allowed the outreach unit to shift activities from Kinshasa to Ituri; one year after Lubanga had been taken into the ICC's custody.[15] However, outreach was repeatedly hampered by security concerns, which often limited activities to urban areas.[16] Moreover, the outreach unit had no focus on engaging directly those affected by the conflict, in part because this was considered to be within VPRS' mandate.

Looking behind the façade of the ICC's outreach statistics requires consideration of the actual resources made available for its field presence. The ICC's central field presence remained in Kinshasa with only a small forward office in Bunia. The outreach unit initially deployed two outreach assistants to the Bunia office,[17] and the first DRC-based staff of the VPRS did not follow until 2006.[18] The ICC's presence in Bunia was thus more of a staging area to accommodate field missions from Kinshasa and The Hague. Such low staffing levels at temporary field presences are no exception, but rather the rule at the ICC.[19] Outreach more generally has come under budget pressure as many states parties do not see outreach to constitute a core activity of the ICC.[20]

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[14] See Petit, Franck, 2007, 'Sensibilisation à la CPI en RDC: Sortir du "Profil Bas"', International Center for Transitional Justice. <https://www.ictj.org/sites/default/files/ICTJ-DRC-Sensibilisaton-CPI-2007-French.pdf> (accessed 18 February 2018)

[15] ICC PIDS Outreach Unit, 2007,'Outreach Report 2007', 21-22. The main means of outreach in Ituri was a community outreach program, including workshops and town hall meetings, as well as radio broadcasts. The Outreach Unit cooperated with local radio stations in Ituri to broadcast various programs about the ICC in French, Lingala and Swahili. These programs were claimed to reach an estimated 1.5 to 1.8 million persons in Ituri. See ICC PIDS Outreach Unit, 2008, 'Outreach Report 2008', 32-40; ICC, *Report on the Activities of the Court*, 7th Assembly of States Parties, ICC/ASP/7/25, 29 October 2008, para. 73.

[16] Musila noted, "the ICC's engagement in the DRC and the NGO involvement … has targeted almost exclusively the educated sectors of society such as media, functionaries, judicial officers and the army, to the exclusion of the wider population who are perhaps most affected by atrocities under inquiry." Musila, Godfrey, 2009, *Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's Work in the DRC*, Monograph 164, Addis Ababa: Institute for Security Studies, 51.

[17] It appears that only one staff member remained permanently in that office. See ICC PIDS Outreach Unit, 2007, 'Outreach Report 2007', 21-22; and ICC, *Eleventh Diplomatic Briefing of the International Criminal Court: Information Package*, The Hague, 10 October 2007, 9.

[18] Field staff at both units had a low-level classification, which left most decision-making in The Hague. For 2009, an ICC field office staffing table showed for the VPRS one P2 and two local assistants in Kinshasa (none in Bunia), and for PIDS one P2 and two local assistance in the Kinshasa office, and three local outreach assistants in the Bunia office (temporarily increased due to the trial of Thomas Lubanga), out of a total of 27 court staff (local and international) in the DRC. ICC, *Report of the Court on the Enhancement of the Registry's field operations for 2010*, 8th Assembly of States Parties, ICC-ASP/8/33, 4 November 2009, 12.

[19] The capacities in the DRC did not improve over time. As the number of situations before the ICC increased, PIDS was forced to reduce the level of operations in some situations, including the DRC, and redeploy staff to other situations. See ICC, *Court Report on Revised Victim Strategy: Past, Present and Future*, 11th Assembly of States Parties, ICC-ASP/11/40, 5 November 2012, para. 64.

[20] Hellman noted that "while the number of situations subject to investigation and prosecution increased from four to eight between 2008 and 2014, funding for the Public Information and Documentation Section (which includes outreach) has only increased by 30 per cent during the same period". Hellman, Challenges and Limitations of Outreach, 267.

Throughout the proceedings in *Lubanga* and *Katanga* there remained a significant discrepancy between the rhetoric on outreach and engagement with victims, and the limited resources made available for their realisation. The less than a handful of ICC field staff in the DRC struggled to achieve the self-imposed objectives. Asked about the lack of resources, an outreach officer lamented, "our impact is very limited because of that".[21]

Indeed, the impact of this outreach work is hard to measure, as empirical information from Ituri is scarce.[22] While a population-based survey conducted by UC Berkeley's Human Rights Center more than one year after Lubanga's transfer showed support for accountability among the population of Eastern DRC (85 per cent),[23] few respondents in Ituri had heard about the proceedings against the former warlord (29 per cent) or the ICC (27 per cent).[24] A follow-on survey, conducted in 2013 after the *Lubanga* trial judgment, found that 52 per cent of respondents in Eastern DRC had heard of the ICC. Despite this increase, the overall level of knowledge remained low, with only 9 per cent of respondents describing their knowledge as good.[25] These numbers show the difficulties of the terrain in Ituri, with the ICC acknowledging that it was "exceedingly difficult to communicate effectively with victims in remote and/or hard to reach locations".[26] Years after the ICC began working in Ituri, large parts of the population had no, or limited, knowledge of the Court and its reparations mandate.

Communicative challenges regarding reparations

The slow launching of the outreach program meant that the information landscape was already full of rumours and misunderstandings regarding reparations.[27] The 2006 outreach strategy found

[21] Interview with ICC outreach officer (ICC18), 15 July 2015.
[22] The ICC and other international(-ised) criminal courts rarely evaluate their outreach programs. See Vinck, Patrick, and Phuong Pham, 2010, 'Outreach Evaluation: The International Criminal Court in the Central African Republic', 4(3) *International Journal of Transitional Justice*, 421-442.
[23] Respondents in Ituri wanted justice to be handed out through the national court system (61 per cent); 33 per cent wanted the ICC involved. The majority wanted trials to take place in the DRC, only 9 per cent of respondents in Ituri wanted international trials abroad. There existed a low level of knowledge about the ICC at the time. Vinck et al., Living with Fear, 46. A survey conducted by the local NGO *Coalition Nationale pour la Cour pénale internationale* (CN-CPI) shortly after Lubanga's transfer to the ICC found that 71 per cent were of the view that Lubanga's arrest was a good thing, 14 per cent thought it was a bad thing. Coalition Nationale pour la Cour Pénale Internationale (CN-CPI) RDC, 2006, 'Sondage d'Opinion: Affaire Procureur de la Cour Pénale Internationale contre Thomas Lubanga', 13. <http://www.vrwg.org/APROVIDI/APROVIDI_2006_sondage_Lubanga.pdf> (accessed 18 February 2018)
[24] Vinck et al., Living with Fear, 47.
[25] Vinck, Patrick, and Phuong Pham, 2014, 'Searching for Lasting Peace: Population-Based Survey on Perception and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of Congo', Harvard Humanitarian Initiative and United Nations Development Programme, 72.
[26] ICC, *Court Report on Revised Victim Strategy: Past, Present and Future*, 11th Assembly of States Parties, ICC-ASP/11/40, 5 November 2012, para.17.
[27] See also Human Rights Watch, Courting History, 118-130.

that "there are high expectations for the work and impact of the Court … particularly in relation to reparations for victims".[28] Population-based surveys highlight how pressing humanitarian needs among the population informed expectations for reparations. When asked what should be done for victims, Ituri respondents in the Human Rights Center survey most frequently cited material reparations, including money (48 per cent), housing (37 per cent) and food (34 per cent) – only then followed requests for education support (24 per cent), psychosocial counselling (21 per cent) and official recognition of suffering (16 per cent).[29]

The Registry worried that "the intervention of the Court has triggered high expectations among victims".[30] It further found that "reparations are of concern to nearly all victims and it is unequivocally the most commonly raised question in victim consultations"; and with few other avenues to turn to people rely on the ICC "as their only realistic chance of receiving reparations and being able to start a new life".[31] Reading through the ICC's outreach reports, which recorded frequently asked questions at outreach events, it is evident that questions about reparations came up regularly.[32] Dealing with such expectations was a major theme in all my interviews at the ICC. An outreach officer confessed, "I would say this is the biggest challenge we have faced … how to communicate on the topic of reparations".[33] At the most basic level, the Registry found it difficult to explain the concept of reparations, as

> in many African cultures, including all current situation countries, monetary compensation is a standard method for compensating victims through traditional justice mechanisms. In many local languages … there is no word for reparations as such, but only words denoting related concepts such as compensation.[34]

The Court struggled to respond to such expectations and to develop a proactive communication strategy. Prior to any judicial reparations ruling, ICC officers in the field had little or no

[28] ICC Strategic Plan for Outreach 2006, para. 88.
[29] The material demands among the Ituri respondents were more pronounced than among the respondents in the two Kivu provinces. In average among all respondents of the survey, not only Ituri, 40 per cent had asked for money, 28 per cent for housing, and 28 per cent for food; perhaps indicating the greater material needs in Ituri. See Vinck et al. 2008, Living with Fear, 51. These findings seem to align with Wemmers' discussion of victims' pyramid of needs. See Wemmers, The Healing Role of Reparations, 224-231.
[30] ICC, *Turning the Lens Victims and Affected Communities on the Court and the Rome Statute System*, Review Conference of the Rome Statute, RC/ST/V/INF.2, 30 May 2010, 2.
[31] Ibid 6. The report found that "victims often express doubt that any reparation award granted would not be implemented by a national court, whereas they believe that the ICC would honor any reparation orders granted by a Chamber". Ibid 10.
[32] Refer to ICC annual outreach reports from 2007 to 2010 on the ICC's website (no regular outreach reports available for the time period after 2010).
[33] Interview with ICC outreach officer (ICC18), 15 July 2015.
[34] ICC, *Turning the Lens Victims and Affected Communities on the Court and the Rome Statute System*, Review Conference of the Rome Statute, RC/ST/V/INF.2, 30 May 2010, 6.

guidance.[35] The Registry summarised, "the overall situation is currently characterised by a high degree of uncertainty which makes planning for reparations very challenging, particularly as there are no precedents or framework on which to base future plans".[36] One ICC official working on victim issues explained, "it has been difficult, when there is so much interest in reparations, and yet there is so little you can say".[37] Against this background, one outreach officer described the approach as follows,

> First, at some point you have to tell the people, listen … it is too early to talk about reparations, I completely understand that you are interested … Second, there is an ongoing assistance provided by the trust fund … And third, you have to tell them that it is very difficult to let them know how exactly it is going to happen, because we don't know… because nobody at the Court knows ...[38]

Communicative practices: Managing expectations

In this context, the responsible units and their field staff adopted certain communicative practices in response to inquiries from local populations. One outreach officer recounted that "the only role that we have played since the day one, when we arrive to a country, is to manage the expectation of the people with regard to reparations".[39] This is how an ICC officer working on victim issues described it,

> we explain about reparations, but what we really try to do is to reduce the expectations, because people do have high expectations when it comes to reparations. … We really emphasise, as one of the things we do, 'don't think that there will be any reparations'. … First of all there has to be an investigation, there has to be a case, a trial; there has to be a conviction, and then the Court has to decide whether that it is appropriate to award reparations. … So, we really try to dampen down the expectations.[40]

Hence, not only did the resources assigned to the task never match the outreach objectives that the Court had set itself, but there was a tension between the two stated goals of the ICC's outreach strategy, namely ensuring two-way communication and managing expectations.[41]

Most outreach actors, be they from the Court or intermediary NGOs, generally agreed on what they refer to as the imperative of 'expectation management', so as not to oversell what the Court

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[35] ICC, *Report of the Bureau on Victims and Affected Communities*, 10th Assembly of States Parties, ICC-ASP/10/31, 22 November 2011, para. 34.
[36] ICC, *Court Report on Revised Victim Strategy: Past, Present and Future*, 11th Assembly of States Parties, ICC-ASP/11/40, 5 November 2012, para. 48.
[37] Interview with ICC officer working on victims-related issues (ICC10), 2 June 2015.
[38] Interview with ICC outreach officer (ICC18), 15 July 2015.
[39] Ibid.
[40] Interview with ICC officer working on victims-related issues (ICC10), 2 June 2015.
[41] Managing expectations appear as a goal both in the 2006 Strategic Plan for Outreach and the 2009 integrated communication and outreach strategy. ICC Strategic Plan for Outreach 2006, paras. 43-46; and ICC (undated), 'Integrated Strategy for External Relations, Public Information and Outreach', 2.

can achieve and to avoid further harm among survivors from unreasonable expectations.[42] Yet, there is disagreement over how best to achieve this. As one ICC officer concluded, "expectations will be raised no matter what, and you cannot not talk about reparations", arguing that rather than not addressing reparations informed messages can help to manage expectations.[43] The Victims' Rights Working Group (VRWG), an international network through which NGOs voice their views regarding ICC reparations, similarly argued that "dedicated information and sensitisation on reparations needs to be undertaken by the Court in order to provide accurate information about what will and will not be possible. Expectations may otherwise not match the relatively narrow legal framework." [44] Thus, many NGOs shared the Court's concern about expectation management regarding reparations, but rather than recommending less engagement they saw more and targeted outreach as the most adequate response to the challenge.[45]

During the ten years before the ICC's first reparations decision, communicative practices as performed in outreach in Ituri became dominated by concerns around managing expectations, in effect trumping the original goal of two-way communication. These practices, adopted by Court actors against the background of ongoing uncertainties, had the effect of impeding the flow of information on reparations in both directions. This limited victims' understanding of the ICC's reparations mandate and Court officials' knowledge of victims' views and preferences regarding reparations.

2. Practices of Participation and Representation in Reparations

Participation of victims in the proceedings beyond the role of mere witnesses for the prosecution was one of the novel features that delegates in Rome agreed to include into the ICC's legal

[42] Based on their survey work, Vinck and Pham argue that "unmet expectations and disenchantment will ultimately undermine the legitimacy of the courts in the eyes of survivors. Managing expectations and perception should therefore be central to the outreach message." Vinck, Patrick, and Phuong Pham, 2014, 'Consulting Survivors: Evidence from Cambodia, Northern Uganda, and Other Countries Affected by Mass Violence', in: Stern, Steve, and Scott Straus (eds.), *The Human Rights Paradox: Universality and its Discontents*, Madison: University of Wisconsin Press, 107-124, 119.
[43] Interview with ICC court officer working on victim issues (ICC16), 13 July 2015.
[44] Victims' Rights Working Group, 2010, 'The Impact of the Rome Statute System on Victims and Affected Communities', 9. Musila agreed that "for the most part, views among victims arise from their lack of knowledge about the ICC. … A fair amount of responsibility rests with the ICC, which appears to have had, until recently, limited contact with communities and victims on the ground." Musila, *Between Rhetoric and Action*, 56.
[45] Similar recommendations were made at FIDH, *ICC Review Conference: Renewing Commitment to Accountability,* Review Conference, RC/ST/V/M.8, 31 May 2010, 8-9. See also Goetz, Mariana, 2014, 'Reparative Justice at the International Criminal Court: Best Practice or Tokenism', in: Wemmers, Jo-Anne, 'Reparation for Victims of Crimes against Humanity: The Healing Role of Reparations', London/New York: Routledge, 53-70.

framework. Few other issues have garnered as much attention as victim participation.[46] The ICC's first victim strategy set a high bar:

> By providing victims with an opportunity to articulate their views and concerns, enabling them to be part of the justice process and by ensuring that consideration is given to their suffering, it is hoped that they will have confidence in the justice process and view it as relevant to their day to day existence rather than as remote, technical and irrelevant.[47]

The first cases in the Ituri situation were the testing ground for this victim participation scheme. In examining how the Court translated this mandate into practice, I look beyond the narrow procedural focus of the existing literature to show how the practices surrounding participation influenced the course of reparations in these two cases.[48] Who were the 'victims' before the ICC? And how did they participate in the justice and reparations process? I show that targeting[49] and representational practices have shaped participation and had a direct impact on who receives reparations and how these reparations are conceived. My observations in this section build upon the work of Kendall and Nouwen on 'representational practices', which I apply to the case of reparations with its own particularities.[50]

[46] Chung, Christine, 2008, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?', 6(3) *Northwestern Journal of International Human Rights*, 459-545, 459.
[47] ICC Strategy in Relation to Victims 2009, para. 44.
[48] For the early procedural experience of the ICC with victim participation refer for instance to Perrin, Benjamin, 2015, 'Victim Participation at the International Criminal Court: Examining the First decade of Investigative and Pre-Trial Proceedings', 15 *International Criminal Law Review*, 298-338; and Vasiliev, Sergey, 2015, 'Victim Participation Revisited: What the ICC is Learning about itself', in: Stahn, Carsten (ed.), *The Law and Practice of the International Criminal Court*, Oxford: Oxford University Press, 1133-1201.
[49] See also discussion of the targeting of reparations at Dixon, Peter, 'Reparations and the Politics of Recognition', in: De Vos et al., *Contested Justice*, 326-351.
[50] Kendall, Sara, and Sarah Nouwen, 2013, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76(3-4) *Law and Contemporary Problems*, 235-262.

2.1. Targeting reparations: Juridifying victimhood and harm

Considering the extent of atrocities in Ituri, one could expect potentially tens of thousands of survivors to apply at the ICC for reparations. The Human Rights Center survey showed that among those who had heard about the ICC in Ituri, 68 per cent wanted to participate in its activities.[51] However, victimhood as a *legal* category in the criminal trial is much narrower than the large number of people who suffered harm from mass atrocities.[52] Through such legal categories and associated targeting practices courts focus their reparations efforts and determine eligibility for participation and reparations. The construction of victimhood at these courts occupies therefore a central place in reparations.

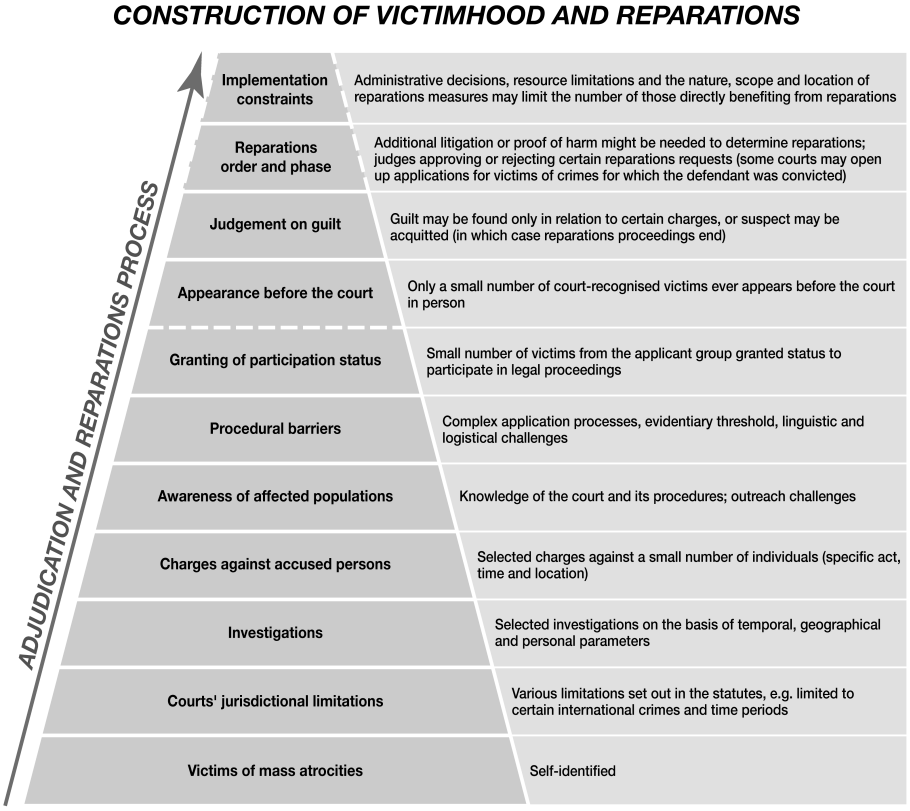
The ICC's legal framework defines 'victims' quite generally. The RPE merely note that "'victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".[53] Yet, subsequent litigation in *Lubanga* clarified that, for the purposes of the trial, the notion of victim is narrower and associated with the charges against an individual accused.[54] Hence, there exists a direct link between assigning responsibility for atrocities, enacted through the individualisation of criminal responsibility, and the legal construction of victimhood.[55] The ICC has tried to capture the difference between broad statutory definitions and the more confined practice by distinguishing between 'victims of a situation', i.e. those affected by ICC crimes in Ituri – and 'victims of a case', i.e. those who suffered harm as result of crimes for which Lubanga and Katanga had been charged.[56] It is the 'victims of the case' that have more opportunities to participate at the ICC and receive reparations.[57] Yet, the nexus between participation and reparations at the ICC is not automatic. Victims can participate in the ICC's proceedings with or without asking for reparations, and they can make requests for reparations without ever having participated in prior proceedings.

Kendall and Nouwen have referred to this construction of legal categories of victims as 'juridified victimhood'.[58] This construction of victimhood, through the legal categories created by the

[51] Vinck et al., Living with Fear, 47.
[52] See also Garbett, Claire, 2016, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim Identities at the ICTY and ICC', 15(1) *Journal of Human Rights*, 40-59; and Jacoby, Tami Amanda, 2015, 'A Theory of Victimhood: Politics, Conflict and the Construction of Victim-based Identity', 43(2) *Journal of International Studies*, 511-530.
[53] ICC RPE, Rule 85.
[54] See *Prosecutor v Lubanga*, 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008', Appeals Chamber, ICC-01/04-01/06-1432, 11 July 2008. See also to Moffett, *Justice for Victims*, 91-93.
[55] See also Clarke, *Fictions of Justice*, 100-105.
[56] ICC (undated), 'Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court', information booklet, 15.
[57] Moffett, *Justice for Victims*, 91-94.
[58] Kendall/Nouwen, Representational Practices, 241-252.

judicial process, determines who is to receive reparations through the ICC. A range of legal parameters determine who the ICC and other international(-ised) criminal courts recognise as 'victims', including jurisdiction, selective investigations and prosecutions (e.g. only for specific acts in a specific time at a specific location), procedural obstacles (e.g. awareness among survivors, complex application processes, logistical challenges) and judicial findings. Applying these parameters to the universe of victims in a given atrocity situation, such as Ituri, gradually narrows the numbers of 'legal victims' and gives rise to what the two scholars refer to as a 'pyramid of juridified victimhood'.[59] Only a few victims from among the large number of affected individuals in Ituri ever make it to the top of that pyramid, where they are granted the recognition of ICC victim status. In order to illustrate this stark contrast, I adapted Kendall and Nouwen's metaphor and applied it to the case of reparations (see Figure 4).

Figure 4: Legal categories and the construction of victimhood



Source: Visualisation inspired by Kendall/Nouwen 2013, adapted for reparations purposes

[59] Ibid 241-246.

The following illustrates some of the challenges and practices involved in targeting reparations at the ICC. A precondition for participation is that survivors of mass atrocity in Ituri know about the ICC's work. As discussed previously, such knowledge was limited.[60] Even if a survivor heard about the possibilities for participation and reparations, the procedural and logistical challenges for accessing the Court were considerable.[61]

To administer access to the proceedings, the VPRS designed standard application forms, initially one for participation and one for reparations.[62] The complexity and length of the forms, consisting of 17 pages, made it impossible for most survivors to complete an application without help.[63] With no VPRS staff in the field until 2006, it was for the most part NGOs rather than ICC staff that assisted victims in the labour-intensive process of completing and submitting the forms.[64] Until 2008, only 625 victims had applied to participate in the judicial proceedings for the entire DRC situation.[65] Often those victims were close to NGOs assisting them with the application.[66]

The Chambers in these cases took a decision on a case-by-case basis about whether an applicant satisfied the legal criteria for participation. The narrow charges laid by the Prosecutor in first two cases concerning the Ituri situation made it difficult for a survivor to be recognised as 'victim of the case'. In *Lubanga*, the Prosecutor chose to lay only one charge, namely enlisting and conscripting children under the age of 15 years as soldiers and using them to actively participate in hostilities. Only those child soldiers who suffered harm by being enlisted and used in Lubanga's

[60] Human Rights Watch lamented in 2008 that "an inadequate outreach strategy to date has left many victims unaware of the possibility of participation and, of those who are aware of victims' participation, many are ill-informed about its operation in practice". Human Rights Watch, Courting History, 180.
[61] See International Refugee Rights Initiative and APRODIVI-ASBL, 2012, 'Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri', Discussion paper no. 2, 13-15.
[62] Since these forms were not finalised until 2006, the first applicants did not rely on the form when requesting participation or reparations. See Human Rights Watch, Courting History, 193.
[63] Yet, the experience of filling in the application form is perhaps for many survivors the most intensive engagement with the Court they will ever have. The importance of this experience was confirmed in the HRC victim participant study, which found "victim participants find value in filling out individual applications" and that this process gave them "confidence that their experiences would be known at the court and aid in building a case against the accused". Human Rights Center (HRC), 2015, 'The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court', UC Berkeley, Human Rights Center, 3 & 42. <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf> (accessed 18 February 2018)
[64] ICC, *Court Report on Revised Victim Strategy: Past, Present and Future*, 11th Assembly of States Parties, ICC-ASP/11/40, 5 November 2012, para. 39. REDRESS provided a list with what it saw to be the main shortcomings of the system in place. See REDRESS, 2007, 'Making the ICC Relevant to Affected Communities', Report prepared for the 6th Assembly of States Parties, New York, 5-6.
[65] ICC, *Report on the Activities of the Court*, 7th Assembly of States Parties, ICC-ASP/7/25, 29 October 2008.
[66] Walleyn, Luc, 2016, 'Victim Participation in the ICC Proceedings: Challenges Ahead', 16 *International Criminal Law Review*, 995-1017, 1003.

UPC militias between 2002 and 2003 were admitted to participate in the trial.[67] While hailed as a signal for ending impunity for an often-neglected crime, child soldiers as 'victim-perpetrators' were also a problematic category of victims in the views of local populations.[68] Those harmed by child soldiers were not recognised as victims, not even as indirect victims.[69] Whilst the Prosecutor laid more extensive charges against Katanga, these remained geographically limited to a single attack on the village of Bogoro.

As a result of these multiple limitations, only a total of 129 victims were admitted to participate in the *Lubanga* proceedings,[70] and 366 victims were admitted to the *Katanga* trial.[71] If those who eventually received the ICC's recognition expected to be actively involved in the trial, or perhaps even appear before the Court, they were disappointed.[72] In *Lubanga* only three of the victim participants were invited to give testimony in Court; and only two victim participants in *Katanga* testified. Thus, only 1 to 3 per cent of the already small number of victim participants ever addressed the Court in person.[73] *In situ* hearings in the DRC, long discussed by the ICC also in relation to reparations, never materialised in the first two cases. Godfrey Musila summarised the mood ahead of the start of the *Lubanga* trial as follows:

> [NGO representatives and victims] seem particularly unhappy with the mechanisms of identifying and selecting victims to participate in the proceedings and the permissible modes and scope of participation in these proceedings, which according to them are very limited. Victims seem to be coming to the painful realisation that only a few of them can participate in any process …. It appears that victims may have been under the illusion that the ICC process would be an open process where they will all have a voice.[74]

In addition to disciplining participation, these targeting practices surrounding the juridification of victimhood also classify and categorise populations.[75] The 'victim' becomes a legal identity that is produced by jurisdictional standards. Garbett argues that "the law shapes identities and actions

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[67] See Catani, Lucia, 2012, 'Victims at the International Criminal Court: Some Lessons Learned from the Lubanga Case', 10 *Journal of International Criminal Justice*, 905-922.
[68] See Clarke, *Fictions of Justice*, 91-112.
[69] See *Prosecutor v Lubanga*, 'Redacted Version of "Decision on 'indirect victims'", Trial Chamber I, ICC-01/04-01/06-1813, 8 April 2009.
[70] Among the 129 victims were 34 female and 95 male victims. *Prosecutor v Lubanga*, 'Judgment Pursuant to Article 74 of the Statute', Trial Chamber I, ICC-01/04-01/06-2842, 14 March 2012, paras. 13-21.
[71] Trial Chamber II later withdrew victim status from two participants, and by acquitting Katanga in the final judgment of charges relating to child soldiering, was not able to recognise another 11 child soldiers who had participated at trial, brining the final number recognised in the judgment to 353 victims. *Prosecutor v Katanga*, 'Judgment Pursuant to Article 74 of the Statute', Trial Chamber II, ICC-01/04-01/07-3436, 7 March 2014, para. 36 and Annex A.
[72] I note that not all victim participants seek an active participation in the proceedings. See also HRC, A Victims' Court, 3.
[73] See Kendall/Nouwen, Representational Practices, 241-251.
[74] Musila, *Between Rhetoric and Action*, 52.
[75] See also Kendall/Nouwen, Representational Practices.

in terms of its own definitions and categories and, in so doing, may exclude or constrain particular subject positions".[76] The effects of these practices that flow from the logic of the criminal trial are directly felt in the reparations process: Through these practices Court actors delineate the groups eligible for reparations and thus construe the beneficiaries of their own reparative actions. As a consequence of these practices few survivors will ever have a chance to receive reparations through the ICC or other international(-ised) criminal courts. Such targeting practices are powerful mechanisms through which courts not only determine inclusion and exclusion regarding reparations, but also assign meaning to reparations.[77] But if not the victims', whose voices are being heard at the ICC?

2.2. From participation to representation

Against the background of these observations, Kendall and Nouwen have convincingly shown that 'participation' is in fact carried out through legal and other representatives who speak, directly or indirectly, on behalf of victims.[78] In order to highlight the working and effects of these 'representational practices' on reparations, I focus on the two groups most involved in such practices of relevance to reparations: the lawyers who represent their clients in Court, and local and international NGOs acting as 'intermediaries' between the ICC and victims.

Intermediaries

Considering the limited resources, both ICC policy and practice have stressed the importance of working with local partners. The 2006 outreach strategy emphasised that the Court relies on partnerships with local actors when reaching out to different populations in the DRC.[79] An ICC outreach officer described the challenge as follows, "if you arrive to a new country, you have no clue about that country. … You need to start by having people who could explain to you who is who."[80] Theoretically, the DRC government could provide such support. In practice, however, the government has been a party to various conflicts in the DRC. The outreach officer found, "if you go to a community and you are perceived to be very close to the government, they will not trust you".[81] As a result, the ICC has predominantly relied on collaboration with civil society to

[76] Garbett, From Passive Objects to Active Agents, 46.
[77] See Dixon, Reparations and the Politics of Recognition, 326-351.
[78] Such practices involve "making present in some sense of something which is nevertheless not present literally or in fact". Kendall and Nouwen quoting from Pitkin, Hanna, 1967, *The Concept of Representation*, Berkeley: University of California Press, 8-9. See Kendall/Nouwen, Representational Practices, 235-241.
[79] ICC Strategic Plan for Outreach 2006, paras. 66-67.
[80] Interview with ICC outreach officer (ICC18), 15 July 2015.
[81] Interview with ICC outreach officer (ICC18), 15 July 2015.

act as an "extended arm of the Court";[82] also referred to as 'intermediaries'. Court documents define an intermediary as "someone who comes between one person and another".[83] The Registry further outlined the rationale for its collaboration with intermediaries:

> The synergies created by working with intermediaries has a number of positive effects which include: 1) it limits victims exposure to danger which might result due to their direct interaction with the Court; 2) intermediaries are often able to access locations that are inaccessible to Court staff; 3) The ICC system would be unable to field the number of staff required to reach out to all the victims and affected communities with which the Court currently communicates.[84]

Thus, it was mainly intermediaries rather than ICC staff facilitating the communication with applicants and victim participants.[85] Most Court staff based in The Hague had little actual contact with survivors in Ituri. While comprising a diverse group of organisations and individuals, most intermediaries in the DRC were local NGOs, often operating as part of networks with international partners.[86] With the DRC being the first situation before the ICC, international NGOs that were at the forefront in Rome were deeply invested in this process. In *Lubanga*, FIDH, Avocats sans Frontières (ASF) and REDRESS, in tandem with their local partners, were leading the submission of the first victim applications in 2005.[87]

With human resources becoming increasingly stretched against a rising number of ICC situations, the Court came to recognise that reliance on intermediaries was not just a temporary fix, but would remain a central feature of its participation and reparations scheme.[88] The collaboration between the ICC and intermediaries became more structured – a process which eventually culminated in

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[82] Human Rights Watch, Courting History, 201. Collaboration with MONUSCO, the stretched UN peace operation in the DRC, has largely been limited to logistical and security matters.
[83] ICC, 2014, 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries', 5.
[84] ICC, *Court Report on Revised Victim Strategy: Past, Present and Future*, 11th Assembly of States Parties, ICC-ASP/11/40, 5 November 2012, para. 17, footnote 19.
[85] The Outreach Unit set up an informal advisory group of local civil society groups that it has used as "gate-openers" or for strategic planning purposes. Interview with ICC outreach officer (ICC18), 15 July 2015.
[86] Clancy, Deirdre, 2015, '"They Told Us We Would Be Part of History": Reflections on the Civil Society Intermediary Experience in the Great Lakes Region', in: De Vos et al., *Contested Justice*, 219-248, 226.
[87] Some of these international NGOs became so intimately involved with victim participation during these early years that they later had to step back to safeguard their ability for critical advocacy. Interview with NGO representative (ICC7), 29 May 2015; and Interview with NGO representative (ICC5), 16 May 2015.
[88] The VPRS noted in 2012 that it "only has five established field staff posts to cover 7 situations and the judicial activities. Were VPRS to reach out to victims via its own staff, the cost to the Court would be substantially greater than it is using intermediaries, who in some instances can do the same job more effectively and without endangering those with whom they are meeting." ICC, *Court Report on Revised Victim Strategy: Past, Present and Future*, 11th Assembly of States Parties, ICC-ASP/11/40, 5 November 2012, para. 39

the adoption of intermediary guidelines.[89] Emily Haslam argues that this semi-institutionalisation and 'professionalisation' of intermediaries, with its technocratic and top-down approach, may have the side-effect of reasserting legal hegemony over diverse civil society voices.[90]

The Victims' Rights Working Group contends that "intermediaries link the ICC to its constituents (victims, witnesses or others), but just as importantly, link the ICC's constituents to the ICC".[91] In this process, intermediaries were not just mere channels of communication, but they acted as important "mediators for, and interpreters of, the work of the Court" with communities and survivors.[92] Intermediaries' decisions about which communities and individuals to engage and how to frame victims' requests and concerns to the Court had a direct impact on reparations. For example, the ICC's application forms were only available in English and French, but not in Swahili, Lingala or other local languages spoken in Ituri. Local NGO representatives needed to translate the questions, often in approximate ways.[93] Language and other technical barriers left intermediaries with discretion over how to communicate the ICC's mandate and its limitations, and how to frame an applicant's reparations requests on the application form.

Clancy argues that through their activities, these intermediaries have actively shaped the narratives emerging from and about the situation.[94] Conversely, Haslam and Edmunds find, "intermediaries are an important channel by which people on the ground may come to shape their perceptions of the Court, measure its effectiveness, and determine if they trust the institution to deliver on its promises".[95] Hence, through their representational practices intermediaries interpret and mediate the voices from conflict-affected communities, but without their crucial involvement few survivors would have ever known about the ICC or accessed its reparations scheme.

Legal representation

When victims made it to the top of the pyramid and were recognised by the ICC, they became represented by lawyers.[96] Such representation is meant to manage trial proceedings and help

[89] ICC, 2014, 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries'. <https://www.icc-cpi.int/iccdocs/lt/GRCI-Eng.pdf (accessed 18 February 2018)
[90] Haslam, Emily, and Rod Edmunds, 2013, 'Managing a New "Partnership": Professionalization, Intermediaries and the International Criminal Court', 24 *Criminal Law Forum*, 49-85.
[91] Victims' Rights Working Group, 2009, 'Comments on the Role and Relationship of "Intermediaries" with the International Criminal Court', 6. <http://www.vrwg.org/VRWG_DOC/2009_Feb_VRWG_intermediaries.pdf> (accessed 18 February 2018)
[92] Clancy, They Told Us We Would Be Part of History, 219.
[93] See Human Rights Watch, Courting History, 194-199.
[94] Clancy, They Told Us We Would Be Part of History, 221.
[95] Haslam/Edmunds, Managing a New Partnership, 52.
[96] Legal representation for victims at ICC is facilitated through the OPCV, and the Court provides a legal aid scheme for victims who cannot afford their own representative. See Massidda, Paolina, and Sarah Pellet,

victim participants to navigate the alien and highly legalistic forum in The Hague. 'Participation' is thus carried out through these legal representatives whose role it is to present in the courtrooms in The Hague the "views and concerns" of victim participants;[97] most of whom live thousands of kilometres away and will never see the Court in person. To what degree these lawyers' practices can represent the views and concerns of their clients is contingent on the nature and extend of the relationship they are able to forge.

While in theory victim participants are "free to choose a legal representative",[98] this right is not absolute. Some of the arrangements for legal representation in the first cases before the ICC had emerged organically from prior engagement of NGO-facilitated lawyers,[99] others resulted from a growing preference at the ICC for common legal representation. In *Lubanga*, the Trial Chamber invited the victims to organise common legal representation. Lawyers chosen by the participating victims formed two legal teams (at Court and hereinafter referred to as V01 and V02), while the OPCV subsequently represented a limited number of victim-witnesses.[100] The process of appointing common legal representation went less smoothly in *Katanga*, where the Chamber – after disagreement among victim participants and counsel –followed a Registry proposal for two legal teams (one for former child soldiers and one for the main group of victims of the Bogoro massacre).

The *Katanga* order stands for a growing trend within the ICC toward prioritising procedural efficiency when determining common legal representation.[101] Haslam and Edmunds have shown how such a managerial approach favours a smaller number of victim groups, which "could flatten out contesting perspectives that might otherwise emerge in the course of victim participation".[102] While Court documents stress the importance of consulting victim participants in the choice of their legal representatives, resource constraints and other circumstances have limited the extent

2009, 'Role and Practice of the Office of Public Counsel for Victims', in: Stahn, Carsten, and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Maritnus Nijhoff Publishers, 691-706; Suprun, Dmytro, 2016, 'Legal Representation of Victims before the ICC: Developments, Challenges, and Perspectives', 16 *International Criminal Law Review*, 972-994; and Killean, Rachel, and Luke Moffett, 2017, 'Victim Legal Representation before the ICC and the ECCC', 15(4) *Journal of International Criminal Justice*, 713-740.

[97] ICC Statute, Art 68(3).

[98] ICC RPE, Rule 90(1).

[99] Many victim lawyers in *Lubanga* and *Katanga* were initially facilitated, and supported, by Avocats Sans Frontières, until the NGO ended direct support to victim lawyers. Interview with victim legal representative (ICC3), 12 May 2015; and Interview with NGO representative (ICC7), 29 May 2015.

[100] Luc Walleyn, one of the counsel, insisted that the majority of former child soldiers did not form a proper group or community. Walleyn, Victims' Participation in ICC Proceedings, 1004.

[101] Haslam, Emily, and Rod Edmunds, 2012, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?', 12(5) *International Criminal Law Review*, 871-903, 884.

[102] Ibid 872, 876.

of consultations.[103] This approach has curtailed the degree to which the ICC can accommodate the plurality of voices among victim participants, including on reparations.[104] An NGO was more blunt, arguing that common legal representation in the Ituri cases often "undermined victims' sense of agency".[105]

Funding, security and logistical constraints further limited direct contact between victim participants and their lawyers. The Registry acknowledged that "some victims feel their lawyers do not adequately communicate with them and that they receive little information".[106] At the same time, victim counsel complained, "field missions must be justified and are not easily approved" by the Court.[107] A survey conducted by UC Berkeley's Human Rights Center among victim participants showed that lawyers were still viewed as an important conduit of victim's concerns to the Court, but that many victims wanted more interaction with their lawyers.[108] The reality is that it is unclear to what extent ICC victim lawyers have been in a position to solicit and genuinely represent their clients' views, especially if they represent larger victim collectives. This challenge has become more pertinent in the reparations phase, when victims' interests supposedly take centre stage.

This situation leaves legal representatives with considerable discretion when representing their clients 'views and concerns' before the Court.[109] As noted by Kendall and Nouwen, when counsel embark on condensing clients' interests for the purposes of a submission, they weigh, filter and select from among possibly diverging views and concerns. In this process, counsel can decide to disclose or conceal differences of opinion or conflicting interests among clients.[110] Nowhere is this better illustrated than in the reparations phase in *Lubanga*, where the Chamber appointed the OPCV to 'represent' the imaginary interests of yet unidentified victims, who never sought to

[103] Victim counsel Walleyn argues that for local victim populations, "it is easier to see counsel as their voice and face, if counsel was chosen by them, share or at least understand their culture, or even are members of their community". Walleyn, Victims' Participation in ICC Proceedings, 1016.
[104] Haslam/Edmunds, Common Legal Representation, 889-903.
[105] International Refugee Rights Initiative/APRODIVI-ASBL 2012, *Steps Towards Justice*, 15.
[106] ICC, *Turning the Lens Victims and Affected Communities on the Court and the Rome Statute System*, Review Conference of the Rome Statute, RC/ST/V/INF.2, 30 May 2010, 8.
[107] Walleyn, Victims' Participation in ICC Proceedings, 1015.
[108] The study also found, "interaction with ICC staff, intermediaries, and especially legal representatives were a key determinant of respondents' satisfaction with the court". HRC 2015, *A Victims' Court*, 4 & 43.
[109] Jo-Anne Wemmers noted that being legally represented alters the nature of victims' participation: By turning victims voices into legal arguments, representational practices limit the expressive value of participation. Wemmers, Jo-Anne, 2010, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate', 23 *Leiden Journal of International Law*, 629-643, 643.
[110] Kendall/Nouwen, Representational Practices, 250-258.

participate at the ICC. Thus, in some instance the ICC does not even need actual victims when performing representational practices.[111]

There are certainly no easy solutions to accommodating the mass participation of victims in legal proceedings. Even if the ICC had more resources, it would still not be in a position to provide a space for each individual victim's voice to be heard or represented in Court. While the word 'participation' at the ICC suggests an active partaking in the proceedings, the actual process of participating at the ICC is a rather intangible affair for victims. Instead various actors, through their practices, 'facilitate' or 'mediate' communication, often through a long chain of different intermediary actors – from victim representatives in communities, local intermediary NGOs and their international partners to legal assistants in the field and victim counsel at the ICC. These chains become longer, if courts are not based in the country where the atrocities occurred. Hence, it takes multiple translations and re-configurations for a victim's voice to travel from Ituri to The Hague. This situation introduces, according to Kendall and Nouwen, "a rhetorical space where claims are made on behalf of absent constituents".[112]

These representational practices are of direct relevance to reparations, as it raises the question of who can legitimately speak for victims on the matter of reparations: a selected number of victim participants, their lawyers, an intermediary or ICC staff? These representational practices in turn have an impact on identifying adequate and meaningful reparations that genuinely reflect the needs and preferences of survivors in situations, such as Ituri. Court actors tried to resolve this dilemma by way of 'consultations' with concerned survivors.

3. Consultation Practices

It is generally agreed that survivors should have a say in the reparations measures that are supposed to benefit them. In the transitional justice literature, this has led to a renewed emphasis on 'consultations' with survivors. Vinck and Pham explain the case for consultations as follows, "ill-conceived international justice efforts not only cost millions of dollars but they also fail to meet survivors' needs and expectations. … The call for increased consultation, participation, and local ownership is an answer to these criticisms."[113] The authors describe consultations "as a participatory process to inform the design of accountability mechanisms that better reflect the

[111] Walleyn, Victims' Participation in ICC Proceedings, 1012.
[112] Kendall/Nouwen, Representational Practices, 236.
[113] Vinck, Patrick, and Phuong Pham, 2014, 'Consulting Survivors: Evidence from Cambodia, Northern Uganda, and Other Countries Affected by Mass Violence', in: Stern, Steve, and Scott Straus (eds.), *The Human Rights Paradox: Universality and its Discontents*, Madison: University of Wisconsin Press, 107-124, 118.

population's needs and expectations".[114] Despite this general consensus about the need to consult survivors, Vinck and Pham conclude that "most survivors remain a silent majority whose experience, needs, and expectations are poorly understood".[115]

What were the consultative practices regarding reparations in *Lubanga* and *Katanga* at the ICC and what were their effects? Due to the state of proceedings at the time of writing, I focus on the pre-reparations order consultations. I show that the construct of 'consultations' through which victims' voices are considered is in fact an amalgamation of the communicative and representational practices described earlier. These practices have limited the degree to which victims had a genuine say in reparations.

Consultations at the ICC

The ICC's first victim strategy recognised the importance of consultations, noting that "[e]very effort must be made to ensure that reparations are meaningful to victims ... This would include conducting consultations with victims ..."[116] Yet, such consultations only extended to those at the top of the pyramid (see Figure 4). The ICC's revised victim strategy describes consultations as a "specific form of inclusive communication" that may occur at the reparations phase "with eligible victims".[117] In *Lubanga* and *Katanga*, the consultations during the pre-reparations order phase were limited to the few hundred victim participants in both cases. Since the final parameters for eligibility were only decided by the reparations order, previously Court-vetted and legally represented victim participants seemed to be a safe bet for initial consultations. This avoided raising expectations among other potentially eligible victims prior to an uncertain judgment. Victim participants got thus a head start in determining reparations compared to other potentially eligible victims post-reparations order.

The applications forms could be considered a first source of information about the preferences of applicants. When the Registry still used two separate forms for participation and reparations, it was noticeable that it received more requests for participation than for reparations.[118] One ICC official confirmed that the Registry was "not actively encouraging people to apply for reparations,

[114] Ibid 108.
[115] Ibid 110.
[116] ICC Strategy in Relation to Victims 2009, para. 51.
[117] ICC, *Court Report on Revised Victim Strategy: Past, Present and Future*, 11th Assembly of States Parties, ICC-ASP/11/40, 5 November 2012, para. 15.
[118] VPRS' statistics for new applications in the DRC situation showed 270 new participation application in 2008, but only 4 new reparation applications; in 2009 the registry received 331 new participation applications, but only 107 reparation applications. See ICC, *Report on Activities and Programme Performance of the International Criminal Court for the Year 2013*, 13th Assembly of States Parties, ICC-ASP/13/19, 27 May 2014, 64.

because we really felt it wasn't the responsible thing to do".[119] The practice of expectation management became visible in the handling of the applications scheme.[120] These observations indicate that the application statistics do not necessarily reflect the preferences of participating victims, but rather pragmatic concerns among those facilitating the process. When the Registry, in 2010, introduced a new combined standard application form for both participation and reparations, the majority of applicants simultaneously applied for reparations.[121]

We also have some insights into the attitudes of participating victims from the Human Rights Center's victim participant study. One of the strongest findings was that a majority of interviewees expected reparations or other forms of assistance as a result of their participation at the ICC. For more than one third of the DRC respondents reparations were the primary motivation to join the proceedings. Although reparations were not the only motivating factor, few said that they would be satisfied without them. Most respondents hoped that reparations would "help them to rebuild their lives", and many former child soldiers expected that it would assist with their reintegration into society.[122] The study's findings show that expectations for reparations among victim participants in the DRC were high and that these demands were more prominent than in some of the other situations before the ICC.

Consultations in the Lubanga case

In preparation for what would turn out to be a rather short reparations phase in *Lubanga*, in 2012, some of the legal teams began consulting their clients. Only the V01 team's submission provides evidence of more systematic consultations.[123] While this legal team had prepared a reparations questionnaire, it managed to consult only 14 of its more than 20 clients. Most of those showed a preference for individual compensation.[124] V01's legal representative had repeatedly argued that child soldiers did not form a proper group, which rendered some collective measures

[119] Interview with ICC officer working on victim-related issues (ICC10), 2 June 2015.
[120] Likewise, for many intermediaries the focus was on getting the participation forms submitted, so as to enable victim participation at an early stage of proceedings and to worry about reparations later. Interview with NGO representative (ICC5), 16 May 2015.
[121] VPRS statistics for new applications in the DRC situation after 2010 show the following picture: the Registry received 1,160 new participation application in 2011, with exactly the same number also applying for reparations; in 2013, the Registry received 1,682 new participation applications, and 1,593 new reparations applications; and in 2014, the numbers actually reversed with the Registry receiving 259 new participation applications, and 296 new reparations applications. See ICC, *Report on Activities and Programme Performance of the International Criminal Court for the Year 2014*, 14th Assembly of States Parties, ICC-ASP/14/8, 4 May 2015, 66.
[122] HRC, A Victims' Court, 45-46.
[123] *Prosecutor v Lubanga*, 'Observations on the Sentence and Reparations', V01 Legal Team, ICC-01/04-01/06-2864-tENG, 18 April 2012. Neither the V02 legal team nor the OPCV submission mention consultations with their clients.
[124] Ibid para. 15.

problematic.[125] The participating victims thought that those who risked participating in the trial should take precedence over other potential beneficiaries; although most were supportive of the idea that other child soldiers could also apply for reparations.[126] The majority of those consulted also saw benefit in collective measures that would facilitate their reintegration into communities.[127] Hence, even with the small sub-set of 129 participating victims in *Lubanga*, there is limited evidence for systematic consultations on reparations. One legal representative noted rather matter-of-factly, "one cannot consult the whole world"; arguing that putting too much efforts into consultations risks turning into an investment of resources that is disproportionate to the reasonably expected reparations outcomes.[128]

According to the ICC's rules, victims harmed by crimes for which an accused was convicted could also claim reparations after a judgment on guilt. Yet, by the time Trial Chamber I had rendered its reparations decision it had not only laid down the principles of reparations, but it had also determined the main parameters of a reparations plan that envisaged only collective reparations. In the words of the NGO representative, "to arrive at a decision that it will only be collective, I don't think there was enough consultation".[129] The NGO worker recounted that many victims had decided not to participate in the trial, but wait for a judgment to then engage with the reparations phase.[130] In its post-verdict implementation plan, the TFV estimated that another 3,000 victims could potentially be eligible for reparations – these now had to accept the parameters laid down in the reparations decision. On the whole, those who were affected by the crimes for which Lubanga was convicted had ultimately little say in the reparations outcomes.

3.1. Global justice encounters the local: The *Katanga* consultations

The *Katanga* case was the first time that the ICC engaged directly in consultations on reparations. In August 2014, with end of the trial phase against Germain Katanga approaching, Trial Chamber II requested the Registry to submit a report setting out information about the victims who requested reparations, including the types and modalities of reparations. In late 2014, the VPRS and the legal representatives organised a joint mission to the region to interview those who had submitted applications for reparations.[131] The VPRS interviewed 305 of the 365 victims who had

[125] Walleyn, Victims' Participation in ICC Proceedings, 1004.
[126] *Prosecutor v Lubanga*, 'Observations on the Sentence and Reparations', V01 Legal Team, ICC-01/04-01/06-2864-tENG, 18 April 2012, para. 24.
[127] Ibid para. 17.
[128] Interview with victim counsel (ICC3), 12 May 2015.
[129] Interview with NGO representative (ICC4), 14 May 2015.
[130] Ibid.
[131] *Prosecutor v Katanga,* 'Registry Report on Applications for Reparations in accordance with Trial Chamber II's Order of 27 August 2014', ICC Registry, ICC-01/04-01/07-3512, 15 December 2014, Annex I (hereinafter 'Katanga Consultation Report').

up till then submitted applications, most of them victim participants.[132] The mission report compiled by the VPRS, in close collaboration with the legal representative of the victims, allows for a closer look at the practices associated with consultations.

The practice of guided consultations

The first challenge was how to consult victims on reparations. Trial Chamber II had its own views about this, stressing that "the Registry should bear in mind, first and foremost, that it is critical that victims' expectations should be managed with extreme care …".[133] The Chamber suggested, "the Registry is to set out and present the victims with examples of measures which might be viable means for reparations. Any such options should be presented to the victims in a neutral manner …".[134] According to one ICC officer involved in the exercise, this approach was meant to avoid open-ended questions of the type 'what do you want?' – a no-go question for those advocating expectation management. "We are of the view that if you asked somebody what they want for reparations, you are better prepared to deliver it."[135] The objective was to show what the Court could offer in light of limited resources. "These are the things we have available, what is your view?"[136] Following communicative practices centred on managing expectations, the mission team engaged in a form of 'guided' consultation directed towards pre-conceived notions of reparations.[137]

This 'guided' consultation exercise put the Registry in a puzzling situation. Where should it draw these examples from, when the overall framework of reparations was still uncertain? The Registry developed a set of five categories of potential reparations for its questionnaire and corresponding examples that it "sourced from international human rights instruments and bodies", specifically

[132] The pool of 365 respondents included 353 victims authorised to participate in the proceedings, and 14 applications for reparations from non-participants. From those, 203 were male and 101 were female. The general approach was to organise group meetings through which the legal representative and/or local intermediaries introduced the process, and then to engage in individual interviews. Katanga Consultation Report 2014, para. 1.
[133] *Prosecutor v Katanga*, 'Order Instructing the Registry to Report on Applications for Reparations', Trial Chamber II, ICC-01/04-01/07-3508, 27 August 2014, para. 9.
[134] Ibid para. 10.
[135] Interview with ICC court officer working on victim issues (ICC16), 13 July 2015
[136] Ibid. The debate over open-ended questions vs. highlighting specific examples was also mentioned in the consultation report: After noting "the need for caution in this context when framing open ended questions on reparations, it was decided, based on the LRV's suggestion, to ask an open ended question followed by a detailed one. It was further decided that the open question would always be introduced by an explanation that what was requested might not be what would be eventually awarded." Katanga Consultation Report 2014, para. 19.
[137] Vinck and Pham similarly distinguish between two general modes of consultations: informative in which respondents are asked to present facts, views, opinions; and deliberative, in which respondents are given information and asked to discuss arguments in favour of, or against, proposed policies. Vinck/Pham, Consulting Surviors, 111-112.

the Basic Principles and Guidelines and the jurisprudence of the Inter-American Court of Human Rights.[138] Rather than drawing on local conceptions of justice and reparations, the Court relied on international examples that were presumably considered 'universal'.

Once the consultation team had identified those categories, the challenge was to make the examples understood in local languages.[139] At the most basic level, the VPRS encountered difficulties in translating the concept of 'reparations' into languages spoken in Ituri – and this more than seven years after the start of outreach activities in the district. The VPRS described the translation challenges as follows,

> [t]he term reparations in the Court's context has a layered legal characteristic that, even in English or French, requires further clarification with the majority of audiences before it is understood … The official ICC term for reparations in Swahili is 'malipo' … However, adjustments had to be made during the mission to ensure that the concept of reparations was conveyed accurately … [I]t was concluded that the best way to proceed was to avoid using one specific term, either 'malipo' or 'kutengeneza' (which literally means to repair in the context of repairing a damaged house or a car) and ensure as far as possible that the concept of reparations be explained in a way that could be best understood by the victims. VPRS thus requested the interpreters to initially introduce reparations by using a phrase that roughly translates as 'repairing the harm that was done to you'.[140]

This example illustrates how the ICC struggled to transfer apparently 'universal' concepts of reparations to a cultural context where these concepts were either not understood, had different meanings, or where people simply could not relate them to their lives. This resonates with anthropologists' observations about the way legal transplants from global frameworks make their ways into new contexts, and how those working at the global-local intersections engage in cultural translations and interpretations.[141]

Unexpected outcomes

The VPRS found that 95 per cent of the respondents, most of whom were displaced as a result of the attack, indicated that the consequences of the 2003 attack continued to affect their economic situation.[142] While 89 per cent reported persistent psychological harm, only 23 per cent said that this was due to the loss of a loved one or witnessing crimes. The report cited one community

[138]These five categories were (1) economic development/ financial measures; (2) memory/ commemoration measures; (3) measures aimed at publishing/ establishing the truth; (4) medial/ psychological care measures; and (5) peace/reconciliation measures. See Katanga Consultation Report 2014, para. 16.
[139] Katanga Consultation Report 2014, para. 23.
[140] Ibid paras. 25-26. At footnote 19, the report noted, "[t]he Registry's outreach unit uses the Kiswahili phrase 'kurudishhsa haki', meaning 'to return/give back a right/justice' in audio and video materials it produces. The VPRS tends to use the French term 'réparations' which in its experience is a term most commonly used and understood in Ituri …"
[141] See for instance Merry, Sally Engle, 2006, *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago/London: Chicago University Press.
[142] Katanga Consultation Report 2014, para. 36.

leader saying, "if you kill one of my family members, it is fate. But if you steal my cow, you steal my identity".[143] In a separate submission, the legal representative for the victims highlighted the importance of cattle as a status symbol in the social relations of the Hema community.[144]

This articulation of harm was reflected in the preferences for reparations measures. The VPRS found that over 99 per cent of respondents had a preference for some form of economic development or financial measure, mostly relating to housing (especially for those being resettled after displacement), farming (re-establishing life as cattle herders) and education for children.[145] Moreover, 58 per cent of the victims stated that they would prefer individual compensation to any of the examples of reparations proposed by the ICC team; and this despite the fact that individual compensation was not an option on the questionnaire.[146] 'Managing expectations' had increasingly equated to avoiding talk about individual monetary compensation. Yet, the restricted 'guided' consultation practice was not able to stop survivors from articulating their real preferences. Even the Registry accepted that "it seems evident that had individual compensation been given as an example under the economic development and financial measure it would have been the most favoured."[147]

While respondents ranked medical and psychological assistance as a somewhat lesser priority, they showed the least interest in measures relating to truth and remembrance.[148] Many victims rejected these measures. The legal representative noted that victims' motivations were closely related to their social-cultural context, including a feeling that some measures would create more trauma (e.g. commemoration events or the dissemination of the judgment), increase insecurity (e.g. the construction of monuments or commemoration events which could provoke more distrust among ethnicities), while other measures were considered useless (e.g. searching for the disappeared).[149] Many of the suggested examples – which were inspired by 'universal' human rights instruments, and IACHR jurisprudence that reflected the cultural experience of Latin America – did not work in the local context of the DRC or did not correspond with cultural preferences.

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[143] Ibid para. 36.
[144] *Prosecutor v Katanga*, 'Observations des victimes sur les réparations', Legal Representative of Victims, ICC-01/04-01/07-3514, 27 January 2015, para. 21.
[145] Katanga Consultation Report 2014, paras. 42-48.
[146] Stressing its efforts in managing victim expectations, the Registry wrote rather apologetically: "The Registry would like to stress that no example of 'compensation' was put to the victims who were consulted, and that Registry staff, with the assistance of the LRV, made every effort to manage expectations in relation to the viability of an individual compensation award ..." Katanga Consultation Report 2014, para. 49.
[147] Ibid para. 49.
[148] Ibid paras. 54-55.
[149] *Prosecutor v Katanga*, 'Observations des victimes sur les réparations', Legal Representative of Victims, ICC-01/04-01/07-3514, 27 January 2015, para. 24.

Not only were respondents overwhelmingly in favour of individual compensation, the majority displayed negative attitudes towards collective measures generally.[150] One ICC officer noted, "the idea of collective reparations had such a negative connotation, because of all of the projects that had been implemented in the area".[151] While many victims acknowledged the need for medical and educational assistance, they remained concerned about their sustainability. The VPRS cited a reaction from one of its group meetings: "You know, building a school or hospital for the community is good but in Congo we have difficulties. If you build a hospital, people will be asked to pay for treatment. What if they cannot pay? Then, the building will be useless."[152] At times, the report reads as if the Court and its officials had encountered this reality well-known in the development assistance field for the first time. Overall, the VPRS concluded:

> Rather than representing a desire to be dependent on foreign aid, such statements seemed to the Registry to represent frustration that the promise of economic recovery and self-sufficiency has remained elusive for the vast majority of victims for the past eleven years. … It was this economic and social status of self-sufficiency that many appeared to be seeking to reclaim and that they identified as being the aim that any award for reparation should achieve.[153]

At the end, the Registry came to the simple conclusion that "victims themselves know best how to reconstruct their lives".[154] One Court officer involved in the exercise said that, when looking at all the past projects implemented in the area, the reaction of the people was "reasonable and understandable", as these projects had left them no agency. The officer summarised the frustration of the people during the interviews as follows: "put me in a position to decide how best to get on my feet … I want to be the one in control of that. I have been out of control for too long."[155] It remains uncertain how representative the consultation in *Katanga*, limited to a small number of participating victims, is with respect to the broader number of similarly affected survivors.[156]

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[150] The VPRS found that "responses of many victims to examples presented of collective reparations were very influenced by their prior experience of aid projects ... Collective ownership projects were most frequently cited as ineffective, in that they resulted in conflict amongst beneficiaries over management decisions, unfair distribution of the award itself amongst the group, or ultimately the death, theft or disappearance of the benefit to the detriment of the entire group." Katanga Consultation Report 2014, para. 30.
[151] Interview with ICC court officer working on victim issues (ICC16), 13 July 2015
[152] Katanga Consultation Report 2014, para. 60.
[153] Ibid para. 65.
[154] Ibid para. 64.
[155] Interview with ICC court officer working on victim issues (ICC16), 13 July 2015.
[156] The 2015 Human Rights Center survey among victim participants seems to confirm a preference for individual compensation. See HRC, A Victims' Court, 45-46. However, interviews conducted by Peter Dixon also found support for collective reparations in Ituri. It is noticeable that the Bogoro community stood out in Dixon's interviews, where respondents expressed the strongest desire for individual reparations. Dixon, Reparations and the Politics of Recognition, 345.

Consultative practices and local realities

The Court-ordered consultation exercise in *Katanga* was a surprising turn-around for the responsible units which had struggled to implement the ICC's two-way communication objective in relation to reparations. This is also visible in the impact the consultation had on the people involved. One ICC officer told me that the exercise "was one of the things I am most proud of since being at the ICC".[157] It seemed as if these individuals encountered survivors for the first time and solicited their preferences.

Reading the consultation report, one can feel how a decade of presumptions at the ICC about what victims want and what is supposedly best for them, unravel in light of the overwhelming responses by victims. Against the background of limited resources and the complexity of local conflict constellations, Court units had frequently advocated for collective measures as the most appropriate form of reparations for communities in Ituri. Informed by communicative practices centred on managing expectations, the team adopted guided or restricted consultation practices to steer the outcomes into desired directions; manifest in the fact that no option for individual compensation was even provided in the consultation. Eventually, the Court had to face the fact that the majority of the supposed beneficiaries rejected the notion of collective measures, and rather wanted to see monetary compensation over any other measure. The example shows how survivors sometimes resist practitioners' practices and how those practitioners then learn and adapt their practices to local realities.

4. The Trust Fund for Victims and the Practice of Assistance

The establishment of a Trust Fund for Victims (TFV), in 2002, with a dual mandate to provide reparations and assistance to victims was one of the novelties of the ICC's reparations regime. The Trust Fund has a five-member Board of Directors with high-profile individuals tasked with overseeing its management and activities.[158] Under the authority of the Board operates the TFV Secretariat, which is funded by the Registry.[159] In the absence of any reparations orders during the first decade of the ICC's existence, the TFV's assistance mandate became central to its

[157] Interview with ICC court officer working on victim issues (ICC16), 13 July 2015.
[158] *Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the Families of such Victims*, 1st Assembly of States Parties, ICC-ASP/1/Res.6, 9 September 2002. The first Board of Directors was composed of Queen Rania Al-Abdullah of Jordan; Archbishop Emeritus Desmond Tutu, former Chairman of the South African TRC; Tadeusz Mazowiecki, former Prime Minister of Poland; Oscar Arias Sanchez, former President of Costa Rica; and Simone Veil, former French minister and former President of the European Parliament.
[159] *Establishment of the Secretariat of the Trust Fund for Victims*, ASP Res 7, 3rd Assembly of States Parties, ICC-ASP/3/Res.7, 10 September 2004.

engagement with survivors.[160] In the following, I examine how the TFV understood the nature of 'assistance' and its interrelationship with the Fund's reparative function. My observations focus on the Ituri district and are limited to the time period from the TFV's formal establishment in 2002 to Trial Chamber I's reparations decision in *Lubanga* in 2012. I show that the TFV engaged in a range of humanitarian practices to mediate between reparations and humanitarian action.[161] These practices adopted in the course of implementing assistance in the context of the Eastern DRC (and Northern Uganda) not only shaped the TFV's identity, but also help explain the positions it would subsequently adopt towards reparations in *Lubanga* and *Katanga*.

Before the TFV engages in assistance activities, it is required to notify the ICC's Pre-Trial Chamber to determine whether such activities are pre-judicial to any matters before the Court.[162] In 2007, the TFV assessed 42 project proposals it had received. The TFV notified the Pre-Trial Chamber of its intention to implement 34 projects in two situation countries, 16 projects in the Eastern DRC and 18 projects in Northern Uganda.[163] The Pre-Trial Chamber allowed the TFV to proceed.[164] Roughly half of the DRC projects launched in 2009 included activities in the Ituri district, with the remainder implemented in North and South Kivu. With no new DRC projects being notified to the Pre-Trial Chamber over the next five years, the TFV simply kept extending projects from its initial approved list. These projects circumscribed the framework for assistance activities up to *Lubanga* reparations decision in 2012. The expansion of the assistance mandate did not keep pace with the ICC's growing number of situation countries. No activities took place in Kenya or Sudan, and new activities in the Central African Republic have been repeatedly delayed. It took ten years before Côte d'Ivoire became, in 2017, the third country in which the TFV launched an assistance program.[165]

Based on the TFV's public reporting until 2012 and practitioner interviews, I examine in the following section how the Fund has translated its assistance mandate into practice.[166] I identify

[160] I note that the term assistance mandate does not appear in the regulations, but rather is the term the Trust Fund itself has used to describe its 'second' mandate when using 'other resources' as provided for in TFV Regulation 50.
[161] The choice of the term 'humanitarian practice' in this section is inspired by Sara Kendall's notion of 'legal humanitarianism'. Kendall conceives of the ICC as a site of humanitarian practice that is constrained by juridical logics that limit its work. See Kendall, Sara, 2015, 'Beyond the Restorative Turn', in: De Vos et al., *Contested Justice*, 354-369.
[162] TFV Regulations, Regulation 50; and ICC RPE, Rule 98.
[163] *Situation Democratic Republic of Congo*, 'Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex', Trust for Victims, ICC-01/04-439, 24 January 2008.
[164] *Situation Democratic Republic of Congo*, 'Decision on the Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund', Pre-Trial Chamber I, ICC-01/04-492, 11 April 2008.
[165] Trust Fund for Victims, 'Trust Fund for Victims Decides to Launch Assistance Programme in Côte d'Ivoire', Press Release, 17 May 2017.
[166] (Bi-)annual progress reports, starting in 2009, are available on the TFV's website.

five main practices that characterise the TFV's approach to its assistance mandate. These practices relate to the TFV's collective approach and the selection of beneficiaries, the preferred types of assistance, the modalities for their implementation, the TFV understanding of the nature of assistance and the Fund's relationship with the ICC.

Providing collective and community-based assistance

The TFV had to make strategic decisions about who would benefit from assistance. Whilst the TFV applied a broad understanding of "victims of crimes within the jurisdiction of the Court and their families",[167] it remains unclear how beneficiaries were chosen from conflict-affected populations in Ituri. The Trust Fund's first notification to the Pre-Trial Chamber spoke of needs assessments, but without providing any specifics.[168] A TFV representative noted that the beneficiaries would be determined by implementing partners in accordance with a victim identification strategy provided by the TFV,[169] but the details of this strategy remain obscure. The TFV's first external evaluation found that there was an uneven selection process of beneficiaries through these partners, as "each partner applies a slightly different set of criteria for identifying victims and for providing support".[170] Similar to the observations made above in relation to victim participation, intermediaries seemed to exert great discretion in identifying beneficiaries.

Aware of the narrow participation scheme that resulted from juridifying victimhood at the ICC, the TFV sought to use its assistance mandate to counter the exclusionary nature of this scheme by giving preference to those "who were not able to participate in the judiciary process directly".[171] The TFV stated that "the main objective relating to TFV-issued reparations and assistance is to ensure that *as many victims as possible* are able to exercise their rights in relation to these provisions" (emphasis added).[172] The Trust Fund initially claimed that the 34 approved assistance projects would reach 380,000 direct and indirect beneficiaries in the first year and a total of almost 1.9 million victims over four years.[173] In order to achieve these goals, the TFV

[167] TFV Regulations, Regulation 42. See also ICC Statute, Art. 79(1).
[168] The TFV informed in its Pre-Trial Chamber notification, "through formal surveys, questionnaires, evaluation of existing assessments, and the simple methods used to collect information such as talking to people, walking through communities and observation, the Trust Fund has collected all information needed for being able to program how the 'other resources' could be used for the benefit of victims". *Situation Democratic Republic of Congo*, 'Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex', Trust for Victims, ICC-01/04-439, 24 January 2008, para. 26.
[169] Interview with TFV official (ICC15), 13 July 2015.
[170] McCleary-Sills, Jennifer, and Stella Mukasa, 2013, 'External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective for Upcoming Interventions', International Center for Research on Women (ICRW), 43.
[171] Trust Fund for Victims, 2009, 'Programme Progress Report', November 2009, 4.
[172] Ibid 9.
[173] Trust Fund for Victims, 'Trust Fund for Victims: Background Summary', August 2008, 4.

stated that it would make available EUR 1.4 million during the first year. Highlighting the cost-effectiveness of its activities, the paper noted that "according to the total budget and number of direct and indirect victims reached – the total cost per victim is EUR 4.40" (sic).[174] While the first TFV Director seemed to appreciate quantitative statistics, these numbers were overly optimistic and based on an expansive definition of indirect beneficiaries. From the initial approval in 2008 to 2012/13, the TFV reported to have provided support to 110,000 victims, with 72,700 in the Eastern DRC alone.[175] While these figures fell short of the ambitious estimates, they were still considerable.

In order to reach such a large number of individuals, the TFV's approach relied on two strategies: it was predominantly collective and community-based. The TFV's collective approach aimed not only at involving the victims of crimes themselves, but also their families and communities. Such a community-based approach, where projects would be designed by involving a broader community audience, was seen as a vital aspect of the TFV's "conflict-sensitive approach" to implementing assistance.[176] In a context of ongoing inter-ethnic and inter-communal tensions, this approach sought to promote inclusivity and avoid causing frictions in communities as a result of the delivery of assistance. The TFV's reporting reflects confidence that its practice was the most appropriate and effective way of delivering assistance to a larger number of beneficiaries, without doing harm to individuals and communities.

In addition to its collective and community-based approach, the TFV simultaneously focused its assistance on vulnerable victims. Two groups stand out: victims of sexual and gender-based violence, and former child soldiers and vulnerable children.[177] Assistance measures for victims of sexual and gender-based violence in particular became a priority for the TFV, as shown by a global call, issued in 2008, that sought earmarked funding for projects targeting this group.[178] Prompted by concerns about avoiding stigmatisation and promoting reintegration into society, the

[174] Ibid 9.
[175] McCleary-Sills/Mukasa, External Evaluation of the Trust Fund, 15, 20. Numbers provided across the TFV's progress reports vary. While the first public report in 2009 stated that 226,000 victims benefitted directly and indirectly from TFV-supported services (of which 39,000 victims directly), and the subsequent spring 2010 progress reported 42,300 direct (26,750 in the DRC) and 182,000 indirect beneficiaries, the practice seemed to have changed since the fall 2010 report with the TFV only reporting the number of direct beneficiaries. See TFV, 2009 Progress Report, 1; Trust Fund for Victims, 2010, 'Spring 2010 Programme Progress Report: Recognizing Victims and Building Communities', 6-7; Trust Fund for Victims, 2010, 'Fall 2010 Programme Progress: Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations', 7-12.
[176] TFV, Fall 2010 Progress Report, 6-7.
[177] Trust Fund for Victims, 2011, 'Summer 2011 Programme Progress Report: Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations', 6-8.
[178] The global appeal managed to raise, until mid-2015, more than EUR 6.7 million in earmarked funding for projects benefitting victims of sexual and gender-based violence. Trust Fund for Victims, 2015, 'Programme Progress Report 2015: Assistance and Reparations', 57.

TFV's assistance to these vulnerable victims remained embedded in a broader community-based approach.[179] Hence, the focus on certain vulnerable groups was informed by the nature of conflict and patterns of victimisation in the Eastern DRC and Northern Uganda, which shaped the way the TFV conceived its assistance mandate and later informed its position on reparations.

Focusing on rehabilitation and reconciliation

Whilst the TFV regulations define three types of assistance – physical rehabilitation, psychological rehabilitation and material support[180] – the Fund emphasised rehabilitation. The 16 projects in the DRC focused on psychological support and material support for victims of sexual violence, former child soldiers or abducted children and for families of murdered victims.[181] In line with its community-based approach, "the Fund's priorities are to engage in holistic and integrated community rehabilitation", [182] rather than limiting assistance to individual rehabilitation services. The focus on rehabilitation manifested in the often interchangeable use of the terms "assistance mandate" and "rehabilitation mandate".[183]

Despite this focus on rehabilitation, the TFV expanded its work into other areas, especially reconciliation – a term nowhere mentioned in the TFV's mandate.[184] Reconciliation did not just develop into another activity area, it appeared throughout the reports as an overriding goal and a crosscutting theme of its assistance measures.[185] In fact, the majority of the 72,700 Congolese beneficiaries mentioned in the TFV's evaluation, approximately three-quarters of all beneficiaries in the DRC, have benefitted from community-level assistance measures that broadly aim at reconciliation and peace. Two projects alone – the "L'Ecole de la Paix", implemented by

[179] Many communities did not necessarily perceive the recruitment of child soldiers as a crime. See Trust Fund for Victims, 2012, 'Programme Progress Report Summer 2012: Empowering Victims and Communities towards Social Change', 30.
[180] TFV Regulations, Regulation 50(a).
[181] The TFV's evaluation noted "that physical rehabilitation was inadvertently left out as a program response for DRC within the TFV's Court filing to the Pre-Trial Chamber. As a result, in all but one project, interventions have been built into the programme response only through referrals by partner organisations to appropriate service providers", and are thus not carried out with funds from the TFV. McCleary-Sills/Mukasa, External Evaluation of the Trust Fund, 20-24.
[182] Trust Fund for Victims, *Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2007 to 30 June 2008*, 7th Assembly of States Parties, ICC-ASP/7/13, 3 September 2008, para. 11.
[183] See for instance TFV, Summer 2012 Progress Report.
[184] The TFV's Fall 2009 progress reports stated that the Fund translates its three legal defined areas of assistance into the following "programming areas": (i) material support; (ii) individual and group counselling; (ii) medial services or referrals; and (iv) community sensitisation and reconciliation. See TFV, 2009 Progress Report, 9-10.
[185] See for instance TFV, 2009 Progress Report, 38. See also 'TFV Program Framework', reprinted in McCleary-Sills/Mukasa, External Evaluation of the Trust Fund, 61. The TFV located this reconciliatory work at three levels: individuals, family and community. See Trust Fund for Victims, 2012, 'Programme Progress Report Summer 2012: Empowering Victims and Communities towards Social Change', 23.

Missionnaires d'Afrique, and "La Caravane de la Paix", implemented by the local civil society network *Réseau Hakana Amani* (RHA) in Ituri – accounted for the majority of those beneficiaries.[186] These community-based activities were able to reach a larger number of victims than individual counselling or support projects.[187] This provides a more differentiated view on the reported beneficiary numbers.

The TFV's practice of assistance reached beyond the level of providing assistance to victims and also targeted the wider communal and societal level. As "an instrument of transitional justice",[188] the TFV saw itself in a position "to promote within community trust about what happened, to acknowledge the sufferings felt by victims, to compensate for past wrong doings, to prevent future abuses and therefore to promote social healing and peaceful inter-community dialogue".[189] This gradual expansion of the TFV's objectives beyond victim-focused support further broadened the TFV's understanding and meaning of assistance.

The TFV's operational practice

Despite this expanding rhetoric, resources and staffing levels limited the TFV's ambitions. Assistance projects were funded by voluntary contributions, mostly from the same few states that also dominate official development assistance (ODA). Ahead of the *Lubanga* reparations decision, in 2012, the TFV reported total contributions since 2004 at almost EUR 10 million.[190] This amount rose to a total of over EUR 22 million by 2015, including EUR 6.7 million earmarked to projects benefitting victims of sexual and gender-based violence.[191] While not negligible, these amounts remain below what the UN Trust Fund for Victims of Torture receives from member states. The torture fund was repeatedly brought up during the establishment of the TFV as its closest institutional counterpart.[192] An ASP report noted that "the minimal resources [the TFV]

[186] RHA facilitated (inter-)community dialogues to discuss locally specific matters of peace and reconciliation and build the capacities of community leaders in conflict resolution. This activity alone accounted for 40,000 community members benefitting from community reconciliation activities from 2008 to 2012/13. See McCleary-Sills/Mukasa, External Evaluation of the Trust Fund, 29 & 52; and Trust Fund for Victims, 2011, 'Programme Progress Report Winter 2011: Earmarked Support at the Trust Fund for Victims', 24-27.
[187] This is also of relevance to reparations. If strategies were chosen that aim at tangible individual benefits to defined groups of recipients, it is unlikely that the TFV's resources would cover a similarly large number. More indicative here are the number of victims who received direct assistance (e.g. SGBV victims and former child soldiers). At the end of 2011, these were 7,700 out of 42,900 in the DRC. See TFV, Winter 2011 Progress Report, 7-8.
[188] In September 2011, the TFV organised a strategic workshop with partners in Goma, DRC, to improve the effectiveness of its actions vis-à-vis transitional justice. See TFV, Winter 2011 Progress Report, 27-28.
[189] Ibid 24.
[190] TFV, Summer 2012 Progress Report, 39.
[191] TFV, 2015 Progress Report, 56-57.
[192] The UN Trust Fund for Victims of Torture receives approximately US$7-12 million in contributions annually. By 2015, the average annual contributions to the TFV had amounted to around EUR 1.8 million

has collected though voluntary contributions come nowhere near meeting the needs of the potential beneficiaries".[193]

Observers concluded, "that the Fund has been able to reach so many victims is not due to an over-abundance of resources or funds. The Trust Fund's secretariat maintains six full-time staff and is guided by five pro bono board members."[194] The first field staff arrived in Bunia only in 2009.[195] Rather, similar to the ICC, the main modality through which the TFV executed its assistance mandate was through intermediary organisations.[196] That is, the TFV itself was not delivering assistance, but instead provided grants and occasional capacity-building to partners who then implemented assistance projects.

It is unclear how the TFV selected the implementing partners for the initial 16 assistance projects in the DRC; the first public tendering process was only issued for the Central African Republic.[197] A review of the partners in the DRC and Ituri during those early years reveals that all of them were NGOs, both local and international. The TFV's evaluation highlighted the involvement of NGOs as a "cost-effective approach" to delivering assistance.[198] While these partners often coordinated their activities with local authorities, there appeared to be no direct engagement by the TFV with the Congolese government. Hence, the ICC and the TFV developed independently from each other similar approaches to engaging with survivors. Driven by resource constraints and security concerns, both institutions had little direct contact with survivors and instead relied mainly on non-governmental intermediaries.[199] Neither the Court nor the TFV forged a closer

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per year since the TFV's establishment; or around EUR 2.4 million per year since the TFV started operations in 2007.

[193] Focal Points (Chile and Finland), *Stocktaking of International Criminal Justice: The Impact of the Rome Statute System on Victims and Affected Communities*, Bureau on the impact of the Rome Statute system on victims and affected communities, 9th Assembly of States Parties, ICC-ASP/9/25, 22 November 2010, Annex II, para. 55.

[194] Stover, Eric, Camille Crittenden, Alexa Koenig, Victor Peskin and Tracey Gurd, *The Impact of the Rome Statute System on Victims and Affected Communities*, Submitted to the Review Conference of The Rome Statute, RC/ST/V/INF.4, 30 May 2010, para. 24.

[195] The Bunia presence comprised at times one international program officer and two local field assistants. The international staff member was relocated to Kampala in 2011, leaving only the field assistants in Bunia. McCleary-Sills/Mukasa, External Evaluation of the Trust Fund, 43. Capacities increased again during the reparations phase of *Lubanga* and *Katanga*.

[196] The TFV noted that security concerns were one reason for keeping a low profile in the DRC and leaving implementation in the hands of partner organisations. See *Situation Democratic Republic of Congo*, 'Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex', Trust for Victims, ICC-01/04-439, 24 January 2008, para. 58.

[197] The TFV noted that intermediaries were chosen "in consideration of their specialisation, experience, local presence and knowledge of local conditions, and their technical expertise". Ibid para. 59.

[198] McCleary-Sills/Mukasa, External Evaluation of the Trust Fund, 43.

[199] A NGO report found that a "majority of victims were not even aware of the existence of the TFV, which was created for their benefit. The paucity of direct interaction by the TFV with the community was cited as one reason for this. … The lack of direct engagement was viewed as preventing meaningful consultation with victims about how scarce resources might be best targeted." International Refugee Rights Initiative

partnership with the DRC government, either because there was limited government reach in the Eastern DRC or because of reputational concerns and mistrust among local populations vis-à-vis the government.

The meaning of assistance

In engaging with assistance, the TFV gradually came to see itself as implementing quasi-reparative measures through its second mandate. Peter Dixon argues that the dual nature of the TFV's mandate "complicates the task of distinguishing assistance measures from reparations awards, as no conceptual guidance is provided in the ICC's legal framework".[200] The legal distinction between the two mandates, judicial reparations and assistance, was highlighted throughout the TFV's reports, but it remained blurred in the use of language. The reports reveal confusion about how to conceive the goals of assistance and how it relates to judicial reparations. At one point, it is noted that "at the foundation of the TFV's rehabilitation assistance is the idea of restorative justice. The focus is on the mending of relationships and building or restoring trust between various groups …"[201] Elsewhere, the TFV stated, "both mandates [of the TFV] include implicitly a reparative justice aspect which aims at creating a true right to victims' reparation".[202] Thus, notions of restorative justice, reparative justice and victim assistance recur throughout the reports without conceptual or operational clarity. These debates appeared to be an expression of a quest within the Fund for the very purpose of the assistance mandate, which remained hidden behind a veil of sophisticated language.

This confusion extended into the field, where partners and beneficiaries of assistance were uncertain about the meaning of the TFV's support and how it differed from the operations of the ICC or humanitarian actors.[203] The Registry found that it is difficult for victims to understand the difference between TFV assistance and ICC reparations.[204] One Congolese NGO worker noted, "even though the TFV does not want to call it reparations, for me and the people these are reparations".[205] The TFV's field-based staff recalled that similar confusion existed in relation to humanitarian assistance: "for many years, the eastern part of the DRC received a massive

and APRODIVI-ASBL, 2012, 'Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri', Discussion paper no. 2, 16.

[200] Dixon, Peter, 2016, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of Congo', 10(1) *International Journal of Transitional Justice*, 88-107, 95.

[201] TFV, Fall 2010 Progress Report, 5.

[202] TFV, Summer 2012 Progress Report, 28.

[203] NGOs reported that "activists and victims rarely distinguish between assistance coming from the TFV and/or other institutions". International Refugee Rights Initiative/APRODIVI-ASBL, Steps Towards Justice, 16.

[204] ICC, *Turning the Lens Victims and Affected Communities on the Court and the Rome Statute System*, Review Conference of the Rome Statute, RC/ST/V/INF.2, 30 May 2010, 6.

[205] Interview with Congolese NGO worker (ICC9), 29 May 2015.

humanitarian presence. In that context, the projects funded through the TFV were perceived as humanitarian projects as well."[206] While field staff acknowledged that the expertise of such actors would be required to implement assistance, it was "important that the projects should not be seen as being (only) a humanitarian action or a development intervention, but rather like an answer to the rights of the victims to obtain a rehabilitation".[207] On the eve of the ICC's first reparations decision, the TFV's Executive Director summarised the state of thinking at the Fund as follows:

> While the assistance mandate of the Trust Fund does not qualify as 'reparations' in the technical sense of the Rome Statute, it does have a clear reparative purpose. … [T]he type of activities prescribed for the TFV assistance mandate – physical and psychosocial rehabilitation, and material support – clearly reflect the dimensions of internationally accepted forms of reparations.[208]

Hence, the TFV believed that it was already engaging in some form of reparative action, although this was seen as distinct from the ICC's judicial reparations mandate.

The relationship between the ICC and the TFV

The ambiguity at the level of the TFV's mandate also translated into a certain ambivalence in its relationship with the ICC.[209] Then Chair of the TFV Board, Elisabeth Rehn, expressed this ambivalence to the ASP in the following way:

> Our link to the International Criminal Court may pose practical problems for reaching out effectively to victims, or for the security and reputation of our partners – local and international. At the end of the day, however, it is precisely because of the restorative and reparative qualities, and its link to the ICC, that Trust Fund for Victims will be able to bring some form of international recognition to the most vulnerable victims and their communities.[210]

On one side, the TFV distanced itself from the ICC due to security and reputational concerns. The ICC's justice interventions in Ituri were contested locally, and many of the Fund's partners had legitimate security fears. The TFV's practice was therefore to maintain a distance from the ICC and to highlight its independence. One TFV representative explained that they help people understand that the Fund was not part of the ICC, but rather "works alongside the Court".[211] This was also evident in the operational practice, where collaboration between the TFV and the

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[206] The staff member further noted, "for the issue related to the reparative value of the rehabilitation process, the implementing partners acknowledge that it was not at first understood by the victims as such." TFV, Summer 2012 Progress Report, 28-29.
[207] Ibid 28.
[208] Ibid 3.
[209] See also Dixon, Reparations, Assistance and the Experience of Justice, 88-107.
[210] *Statement to the Ninth Assembly of State Parties*, Delivered by Elisabeth Rehn, Chair, Board of Directors, Trust Fund for Victims, 6 December 2010.
[211] Interview with TFV official (ICC15), 13 July 2015.

Registry was limited. The TFV's evaluation noted, "multiple challenges with the internal coordination and communication of TFV with other ICC stakeholders" and found that "this affects the extent to which there is a common understanding of the role that the TFV can play in assisting victims and how this differs from the core work of the ICC".[212] On the other side, the TFV's first longitudinal study with victims suggested "that there is a relationship between 'TFV' recognition and 'ICC' recognition", in that "there is evidence that for victims who recognise that they are receiving 'TFV' assistance, they may also view this as a form of 'ICC' recognition."[213] The Fund recognised that its "link to the ICC is one of its core symbolic assets".[214]

With the reparations phase in *Lubanga* approaching, differences between the ICC and the TFV over the interpretation of the Fund's dual mandate became acute. The TFV felt uneasy about the impact of the first reparations decision on its assistance. It reported to the 11th ASP that "increased visibility around reparations may risk the unintended result of local acrimony in the Ituri region, hampering the implementation of activities under the Fund's assistance mandate".[215] Meanwhile, there was concern at the Court that the TFV was prioritising assistance over and above its responsibilities under its reparations mandate.[216] According to an ASP report, the TFV Secretariat believed that "it was financially unwise to set aside funds for a future order of reparations while there were victims in immediate need of physical or psychological rehabilitation or material support".[217] The Registry was adamant about the importance of setting aside funds for reparations.[218] While the TFV created a reparations reserve from its voluntary contributions,[219] tensions with the Registry remained about what constituted an appropriate balance between the TFV's assistance and reparations functions, and how this would be reflected in the management

[212] McCleary-Sills/Mukasa, External Evaluation of the Trust Fund, 43.
[213] TFV, Fall 2010 Progress Report, 11-12.
[214] TFV, Summer 2011 Progress Report, 31. Others have argued that the ICC should equally consider the TFV an asset with respect to its mission to provide justice to victims. See for instance Wemmers, Jo-Anne, 2009, 'Victims and the International Criminal Court: Evaluating the Success of the ICC with Respect to Victims', 16(2) *International Review of Victimology*, 211-227.
[215] Trust Fund for Victims, *Report to the Assembly of State Parties on the Projects and Activities of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2011 to 30 June 2012*, 11th Assembly of States Parties, ICC-ASP/11/12, 7 August 2012, para. 21.
[216] When the Pre-Trial Chamber initially approved of the 16 assistance projects in the DRC, it noted that "the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order". *Situation Democratic Republic of Congo*, 'Decision on the Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund', Pre-Trial Chamber I, ICC-01/04-492, 11 April 2008, 7.
[217] ICC, *Report of the Bureau on the Assessment of the Regulations of the Trust Fund for Victims*, 7th Assembly of States Parties, ICC-ASP/7/32, 12 November 2008, paras. 14 & 16.
[218] Ibid para. 19.
[219] In 2012, at the time of the Trial Chamber reparations decisions in *Lubanga*, this reparations reserve stood at EUR 1.2 million for all cases before the Court. TFV, Winter 2012 Progress Report, 36.

of the limited funds. These tensions would resurface during the adjudication phase, as I will show in Part IV.

The Trust Fund's identity

In implementing its assistance mandate over the first years of its existence, the TFV found itself, in the words of former ICC President Song, "at the crossroads of international justice and humanitarian concern for victims".[220] With no Court-ordered reparations emerging from the ICC, the TFV had built an independent identity – distinct from the Court and grounded in the specific experiences of the situations it worked in. Driven by this context rather than the specifics of the legal cases before the ICC, the TFV adopted a number of humanitarian practices that would henceforth shape its work. This included predominantly collective and community-based project interventions, which – while focusing on rehabilitative measures for vulnerable victim groups – simultaneously aimed at broader community reconciliation in Ituri. There is limited information in the TFV's reports about the impact of these projects. Most reports were merely activity reports, and even the external evaluation remained scant on measuring impact.

In this process the TFV had come to see the assistance mandate as having an inherent reparative function which might represent a more appropriate response to the context, while being free from the constraints of the ICC's narrow judicial reparations regime. The TFV summarised this as follows:

> Because of the unique nature of its mandates, the TFV is well-placed to implement reparations for a large number of victims. These advantages include: the ability to deal with victims beyond those participating in proceedings before the Court; the flexibility in procedures, including the ability to consult with victims without prejudicing a particular case; and the freedom from narrowly-defined legal principles and decision-making.[221]

It is clear from this and other statements that the TFV regarded its assistance as a model for implementing Court-ordered reparations. Bound to few juridical restrictions, the TFV had shaped a new practice of reparative assistance that was informed by the social context of the conflict-affected situations before it. It is not surprising that the TFV's practice would clash not only with the ICC's judicial reparations perspective grounded in individual criminal responsibility, as I will show in Part IV, but also with the plurality of victims' views, as the consultation exercise in *Katanga* and those victims' preference for individual awards showed.

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[220] Quoted from *Statement to the Ninth Assembly of State Parties*, Delivered by Elisabeth Rehn, Chair, Board of Directors, Trust Fund for Victims, 6 December 2010.
[221] TFV, 2009 Progress Report, 7.

5. Conclusion

When the ICC embarked on the challenging task of engaging with survivors on reparations through outreach, participation, consultation and TFV assistance, a practice-based account highlighted the problems associated with making its own vision of victim-oriented justice a reality for affected populations. Policy documents still shared the rights-based rhetoric that had permeated the Rome conference. However, these objectives soon confronted the harsh reality in Ituri and were never matched with adequate resources for their realisation. The resource allocations reflected where survivor engagement on reparations stood on the ICC's priority agenda: a secondary issue subordinated to the primary goal of running a complex and resource-intensive international criminal investigation and litigation process.

Instead, intermediary NGOs have taken on indispensable roles without which the resource-strapped ICC and TFV could not have implemented their mandates. This gave birth to an entire eco-system of actors at the periphery of the Court. It is at this intersection where victim engagement is determined and reparations constructed. With little guidance from the ICC's leadership and litigation in the first cases still ongoing, it was left to these actors to give effect to the ambiguous legal provisions negotiated by member states. The contestations between proponents of criminal law and human rights logics that had dominated the Rome negotiations were pushed into the background by new pressures emerging from the social constraints encountered in Ituri.

ICC and non-Court actors alike developed a range of practices to manage the tensions that emerged when legalistic notions of victimhood and participation came into contact with a complex context and local expectations for reparations in Ituri. These practices involved communicative practices that were dominated by concerns about expectation management and representational practices where voices of victims were filtered through various representatives who talked on behalf of victims. Most survivors on their own would not have had the capacities and resources to fulfil the requirements to access reparations. The dominance of representatives insulated the Court from the multitude of demands originating from survivor populations and, as a practice, helped to constrain these voices to meet the requirements of the legal proceedings.

Communicative and representational practices came together in 'consultations' through which victims' views and requests for reparations were sought. The consultations in *Katanga* showed how demanding consultations can be, even if only held with a small group of victim participants, and how the results can challenge the very communicative and representational practices supposedly adopted to enable engagement on reparations. My interviewees expressed scepticism over the degree to which the *Katanga* consultations could provide a model for inclusive

consultations in future cases before the ICC. One ICC officer noted that the way the consultation was implemented for the 300 or so victims in *Katanga*, including sitting down with each individual for almost two hours, is unlikely to be repeated with the more than 5,000 victim participants in *Bemba*.[222] Lack of resources, combined with security and time constraints will make any meaningful consultations, even with the smaller segment of victim participants, a formidable challenge for any court.

These practices have effects on how reparations are conceived at the ICC. Even before a judicial reparations decision, key parameters of reparations are determined by the way communication, participation and consultations are enacted. Some of these practices are inherent in the legal system, including categorising victims and legal representation; others are responses to local constraints, such as expectation management and assistance practices. As I will further demonstrate in Part IV and V, these practices have a bearing on whether or not ICC or TFV activities and outputs generate a reparative meaning for affected populations. At the same time, these practices have allowed Court actors to maintain a façade of victim-oriented justice, while focusing resources on the criminal trial.

Towards the first reparations decision

With the *Lubanga* trial progressing, the ICC came closer to its first reparations decision. Debates within the Court and at the Assembly of States Parties intensified about the ICC's ambitions in relation to victim redress. Various arguments and contestations crystallised in the lead up to the 2010 ICC review conference in Kampala.[223] States parties had become concerned that the ICC's strategy was "too ambitious and unrealistic"; and "caution was expressed towards the usefulness of having aspirational objectives … which might raise false expectations on the Court's capacity to deliver on them".[224] Particular concern was raised with the way the victim participation and reparation system was handled, and states made a point that "it would not be possible to continue the current way of operation given the continuous rise in the numbers of victims participating and existing resources".[225] They demanded that the "quantity-based approach whereby the successful operations were measured by numbers of victims participating or receiving assistance, needed to

[222] Interview with ICC officer working on victim issues (ICC16), 13 July 2015.
[223] In preparation for the Review Conference, the ICC embarked on a stocktaking exercise with one of the four sub-items being the 'impact of the Rome system on victims and affected communities'. See ICC, *Report of the Bureau on Stocktaking: The Impact of the Rome Statute System on Victims and Affected Communities*, ICC-ASP/8/49, 18 March 2010.
[224] ICC, *Report of the Bureau on Victims and Affected Communities and Trust Fund for Victims*, 10th Assembly of States Parties, ICC-ASP/10/31, 22 November 2011, para. 11.
[225] Ibid para. 22. Up to September 2017, over 12,985 victims were participating in ICC proceedings. See ICC, *Proposed Programme Budget for 2018 of the International Criminal Court*, 16th Assembly of States Parties, ICC-ASP/16/10, 11 September 2017, para. 417.

come to an end …".[226] The wind was clearly blowing from another direction. The post-Rome celebrations of the ICC's regime of victim redress suddenly seemed to be over, with states parties, the Court and NGOs all confronting the harsh reality and difficulties of translating aspirations into practice. Many states parties and NGOs were concerned that the ICC had not used the first years of its existence to further clarify its broad mandate ahead of the first reparations decision.

[226] ICC, *Report of the Bureau on Victims and Affected Communities and Trust Fund for Victims*, 10th Assembly of States Parties, ICC-ASP/10/31, 22 November 2011, para. 11.

CHAPTER 6

Close, but not Close Enough? The ECCC in Cambodia

This chapter leads us away from Ituri to Cambodia. Apart from the fact that the ECCC has been dealing with crimes committed almost 30 years prior to its establishment in a relatively safe environment, one of its distinct features compared to the ICC is its in-country location. Due to its hybrid structure more than half of the ECCC's personnel are Cambodian nationals, who speak the Khmer language and are familiar with local cultures and traditions. One would assume that the ECCC's proximity to the supposed beneficiaries of its justice process and the institutionalisation of local knowledge would provide greater opportunities for engaging with survivor populations and designing more locally appropriate reparations measures than is possible at the ICC.

I highlighted in my account of the negotiations of the ECCC's reparations mandate (Part II) how both local civil society and some Court officials had great hopes for an active involvement of survivors. Many of those involved since the beginnings were motivated by the belief that engaging survivors, through participation and reparations, would enhance the ECCC's contribution to social reconstruction, healing and reconciliation among survivors and the Cambodian society at large. In accordance with the analytical framework applied to Part III, I identify in this chapter the ECCC's practices of engaging with survivors. My observations focus on the time prior to the first judgments in *Case 001* and *Case 002/01*. The purpose is to examine how these practices shaped reparations and the effects they had on the possibilities and meaning of reparations.

What did Cambodians and survivors think about reparations before the ECCC?

As a mechanism politically negotiated between the Cambodian government and the United Nations, the ECCC was a top-down initiative. Not much is known about the pre-ECCC justice preferences of those who were affected by the Khmer Rouge's atrocities, and whether or how reparations figured among those expectations. Yet, there exist a few non-representative studies

conducted in the years before the ECCC was established that provide some insights into the attitudes of Cambodian survivors.[1]

A local NGO, the Documentation Center of Cambodia (DC-Cam), conducted in 2002 a survey among 712 respondents, with the assistance of Suzannah Linton. Linton found an overwhelming consensus among respondents: "the majority of Cambodians do not want to forget",[2] and "accountability (that is, accountability in a court of law …) is viewed as absolutely essential in Cambodia".[3] At the same time, respondents wanted to reconcile with the Khmer Rouge. The simultaneous desire for accountability and reconciliation was not viewed as contradictory, rather "respondents rejected forgiveness as a form of forgetting". Linton noted that the understanding of forgiveness that emerged from this survey was not one of victim-perpetrator forgiveness, but "it was of coming to terms with one's experiences, putting aside negative and destructive feelings, and then moving towards some kind of normal and healthy existence. Respondents did not see forgiveness as forgetting the past or allowing impunity for perpetrators."[4] These observations align with the sentiments I found when I first visited Cambodia a few years later in 2007.

While reparations were not an issue raised in the study, it was also not brought up by the respondents themselves. Linton herself remained sceptical of monetary compensation, but saw some prospect for collective reparations.[5] While confirming the preference for accountability and truth-seeking in Linton's research, another survey conducted by the Khmer Institute for Democracy (KID) two years later also showed some interest in reparations.[6] When asked why they wanted a trial, 78 per cent wanted to have justice, 59 per cent wanted historical facts recovered, and 35 per cent wanted compensation for victims.[7] Interviewers found that rural

[1] In 2000, Laura McGrew conducted a mixed method research project among 180 participants, mainly from various local NGOs. She found strong support for accountability and truth-seeking measures, but little talk about reparations. McGrew, Laura, 2000, 'On the Record: Civil Society and the Tribunal in Cambodia', *The Advocacy Project*, Issue 9.

[2] Linton, Suzannah, 2004, *Reconciliation in Cambodia*, Phnom Penh: Documentation Center of Cambodia, 27. The majority of respondents wanted to talk about the Khmer Rouge (68 per cent), and felt it was important to learn the truth about the Khmer Rouge regime (74 per cent).

[3] Linton found "an overwhelming preference for criminal justice". Ibid 31.

[4] Ibid 21.

[5] Linton wrote: "My personal view is that while some sort of compensation is appropriate, a fixation with monetary compensation is inappropriate as the sorts of losses that arise from gross human rights violations are often not compensable and cannot be reduced to financial terms. No monetary payments, returned property, restored religious sites or apologies can be expected to heal the wounds, make victims whole, or clean the slate." Linton, *Reconciliation in Cambodia*, 92-93, 202. See also Ramji, Jaya, 2005, 'A Collective Response to Mass Violence: Reparations and Healing in Cambodia', in: Ramji, Jaya, and Beth van Schaack (eds.), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Extraordinary Chambers in the Courts of Cambodia*, Lewiston: Edwin Mellen, 359-376, 369-372.

[6] The survey was conducted among 536 respondents in ten provinces. It found that "respondents do not want or cannot forget the past", and 96 per cent wanted to have a Khmer Rouge trial. See Khmer Institute of Democracy, 2004, 'Survey on the Establishment of the Khmer Rouge Tribunal', Phnom Penh, 5-18 (on file with the author).

[7] More than one response was possible to this question.

respondents were more likely to ask for financial compensation in addition to punishment than urban respondents, indicating a certain correlation between a request for reparations and the socio-economic status of respondents.[8]

The few data about survivors' attitudes prior to the ECCC's establishment point to a strong sense for accountability and truth-seeking with comparatively little talk about reparations. Few people in Cambodia seemed to have associated criminal trials with reparations. This led one international observer to speculate, "to some extent the dialogue about the Court was not engineered, but certainly highly influenced by external actors to Cambodia. So, had [the survivors] never known that there was the possibility of reparations, we would have other discussions."[9] We will never know with certainty whether the ECCC reparations mandate created the very expectations it was later struggling to fulfil, because a representative pre-ECCC baseline does not exist. However, once the ECCC came into existence and began informing the population about its mandate, including collective reparations, attitudes among survivors were affected.

1. Communicating Reparations

Although the ECCC was expected to benefit from its in-country location, the mere fact of having the Court based in the capital Phnom Penh was not sufficient for making its proceedings and reparations mandate known to the Cambodian population. In 2006, Tara Urs found that "the concept of a court is foreign to most Cambodians … The ECCC's outreach efforts must provide the Cambodian people with the opportunity to develop a basic notion of what a legal process entails before the people can understand the ECCC's activities and results."[10] Her study reminded that 84 per cent of Cambodians live in rural, often hard-to-reach areas, where there are high illiteracy rates.[11] On the aspect of victimisation, Urs found that "victims of the Khmer Rouge are everywhere in Cambodia; one cannot conduct outreach in any district and not encounter victims of the 1975-78 period".[12] Under these conditions, it was from the outset a challenging task for the ECCC to communicate its reparations mandate to survivors.[13]

[8] See Khmer Institute of Democracy, 2004, 'Survey on the Establishment of the Khmer Rouge Tribunal', Phnom Penh, 5-18.
[9] Interview with international court observer (ECCC3), Phnom Penh, 8 December 2014.
[10] Urs, Tara, 2006, 'Memorandum on Outreach Strategies for the Extraordinary Chambers in the Courts of Cambodia', Open Society Justice Initiative, 4.
[11] Ibid 4 & 30.
[12] Urs, Memorandum on Outreach Strategies, 20.
[13] For an in-depth account of the ECCC's outreach work refer to Balthazard, Mychelle, 2012, 'Cambodians' Knowledge and Attitudes towards the Cambodian Post-Conflict Justice Process', PhD thesis, Tulane University.

Outreach: Making the ECCC's mandate known to survivors

The ECCC's outreach functions are divided between two sections. The Public Affairs Section (PAS) is the "external face of the ECCC" and responsible for outreach to the general population. Contrary to the ICC, no unit exclusively dedicated to outreach exists at the ECCC. PAS's activities have been predominantly based on one-way communication directed towards providing public information about the ECCC to the population.[14] The Victims Unit (VU, later renamed Victims Support Section, VSS) focuses on outreach to survivors, especially those who participate in the ECCC's proceedings. While the ICC drafted impressive outreach and victim policies and strategies, the temporary ECCC rarely laid down in writing its approach to engaging with survivors and instead responded more reactively to its environment.

During the early years, this outreach program was under-prioritised by the ECCC and lacked resources.[15] The Open Society Justice Initiative (OSJI) therefore recommended to the Court to use local NGOs to help with outreach, as these "have already established communication mechanisms", which in turn can "engender more trust with victims and witnesses".[16] Similar to the Ituri situation at the ICC, more than a dozen Cambodian NGOs were at the forefront of ECCC-related outreach to survivors, dominating the field at least until the first trial.[17] These outreach efforts demonstrated initial enthusiasm among Cambodian NGOs about the Khmer Rouge trials, as well as their capacity to design activities and raise funds in support of ECCC-related work. Ciorciari and Heindel consider NGO-supported outreach to be one of the ECCC's "relative successes".[18] Yet, after the end of *Case 001*, donor funding to civil society decreased.

More than five years after the ECCC's establishment, survey data show that a majority of Cambodians knew of the existence of the ECCC.[19] Population-based surveys conducted in 2008 and 2010 by UC Berkeley's Human Rights Center indicate, respectively, that 61 per cent and 75

[14] Ibid.
[15] Pentelovitch noted that PAS started with three staff, a number that grew to six staff in 2007, most working on external relations, which left little capacity for outreach. The ECCC's funding through voluntary contributions was not conducive for long-term outreach planning. Pentelovitch, Norman, 2008, 'Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals', 39(3) *Georgetown Journal of International Law*, 445-494, 465. Some authors even argued that this lack of funding to outreach and leaving the field to NGOs may have been a deliberate decision. See Ciorciari/Heindel, *Hybrid Justice*, 237.
[16] Open Society Justice Initiative, 2004, 'International Standards for the Treatment of Victims and Witnesses in Proceedings before the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea' (on file).
[17] See Buntheng et al., 2006, *National Reconciliation after the Khmer Rouge*, Phnom Penh: Center for Advanced Studies, 7.
[18] Ciorciai/Heindel, *Hybrid Justice*, 247.
[19] The International Republican Institute's survey, conducted in 2009, showed that 82 per cent of respondents were aware of the Court, an increase from 71 per cent in 2008. International Republican Institute, 2009, 'Survey of Cambodian Public Opinion', Phnom Penh, 32-40.

per cent of Cambodian people had some limited knowledge about the Court – more than the same researchers found in the Eastern DRC in relation to the ICC.[20] The expansion of television reporting during the *Case 001* trial also helped Cambodians to access information about the trials.[21]

Communicative practices regarding reparations

During my fieldwork, I interviewed numerous ECCC and NGO outreach workers. Many of the local NGOs stated that the main questions they initially encountered in outreach activities did not relate to reparations, but rather as to why the Khmer Rouge tried to kill them – "why did Khmer kill Khmer?" was a recurrent theme.[22] Village-level NGO outreach activities often turned into broader discussions about the Khmer Rouge past. It was as if these activities had finally provided a platform for survivors to talk about what happened to them.[23] Reparations rarely came up during the early years.[24] One Court observer remembered, "the focus was on participation, representation at trial, being able to have a voice … I don't think reparations was really an issue at that time."[25] With the adoption of the Internal Rules in mid-2007, however, the attention of outreach actors shifted also to collective reparations.

The main challenge identified by almost everyone involved in outreach was how to understand and communicate the ECCC's reparations mandate that was limited to 'collective and moral' measures. As discussed in Part II, Judges had not further defined the terms 'collective and moral' when they drafted the Internal Rules. While legal ambiguity enabled consensus during the negotiations, it now posed challenges to those tasked with communicating reparations. One Cambodian NGO coordinator stated, "victims could only receive collective and moral reparations, and we were left to translate what it means to the victims … My team faced a lot of challenges to explain this."[26] Another local NGO worker similarly noted, "we as NGOs could not clearly

[20] Pham, Phuong, Patrick Vinck, Mychelle Balthazard, and Hean Sokhom, 2011, 'After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia', Human Rights Center, UC Berkeley, 21.
[21] See Sperfeldt, Christoph, 2014, 'Broadcasting Justice: Media Outreach at the Khmer Rouge Trials', 115 *Asia Pacific Issues*, East-West Center. From 2009 to 2014, the ECCC outreach program also facilitated for more than 150,000 people to attend public hearings, and another almost 100,000 to join study visits to the Court. ECCC Public Affairs Section, 2014, 'PAS Outreach Figures 2009-2014', as of 30 June 2014. <http://www.eccc.gov.kh/sites/default/files/Outreach_stats_June_2014.pdf> (accessed 19 February 2018)
[22] Interview with Cambodian NGO outreach coordinator (ECCC24), Phnom Penh, 7 August 2015.
[23] Author's observations from dozens of village-level meetings attended from 2007 to 2009.
[24] Interview with Cambodian ECCC staff working on victim-related issues (ECCC1), Phnom Penh, 6 December 2014.
[25] Interview with Court monitor (ECCC4), Phnom Penh, 12 December 2014.
[26] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.

understand the scope of reparations … We had discussions with the Court and Judges, but never received any clear answers."[27]

According to my interviewees, the complexities about reparations-related outreach arose at multiple levels. First, there was confusion at the level of language. The Khmer word for reparations often used in outreach activities was 'somnong', literally meaning 'pay back' or repairing of what has been damaged.[28] Similar to the languages in Eastern DRC, the Khmer term is associated with monetary compensation and therefore required additional explanation when used in the ECCC context. Second, the scope of 'collective and moral' reparations remained unclear, with outreach staff both at the ECCC and among NGOs being uncertain whether to interpret the mandate in a broader or narrower sense. The ECCC's own outreach materials limited information to what could be distilled from the Internal Rules:

> The judges have decided that individual financial compensation will not be possible in the ECCC. However, the judges may award collective and moral reparations such as an order to publish the judgment in any appropriate news or other media at the convicted person's expense, or an order to fund any non profit activity or service that is intended for the benefit of victims.[29]

Communicative practices thus centred on negative messaging: no individual, financial reparations, without an ability to further articulate what kind of 'collective and moral' reparations would be suitable under the ECCC's mandate. One NGO representative summarised their organisation's approach as follows, "we said 'we don't know what this means collective and moral reparations, but you're not gonna get financial and individual reparations' … that was the message".[30] This communication practice, motivated primarily by risk management, resembled strikingly the discussions during the ECCC Internal Rules drafting and the ICC's practice of expectation management. Most local NGOs shared the ECCC Judges' concerns about managing survivors' expectations.[31] Yet, the inability to address uncertainties in terms of language and scope of

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[27] Interview with Cambodian NGO project coordinator (ECCC10), Phnom Penh, 13 December 2014.
[28] Interview with Cambodian ECCC staff working on victim-related issues (ECCC1), Phnom Penh, 6 December 2014; and Interview with Cambodian NGO project coordinator (ECCC10), Phnom Penh, 13 December 2014.
[29] ECCC Public Affairs Section, 2008, *An Introduction to the Khmer Rouge Trials*, third edition, Phnom Penh: ECCC.
[30] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.
[31] Thomas and Chy found from their experience with outreach that "clear, unequivocal explanation of the unavailability of individual, financial compensation to be crucial in conducting outreach. Given that most Cambodians are very poor, most survivors' hopes are raised at the very mention of reparations ... With clear explanation of the obstacles to individual financial compensation, survivors soon appreciate the difficulties". Thomas, Sarah, and Chy Terith, 2009, 'Including Survivors in the Tribunal Process', in: Ciorciari, John, and Anne Heindel (eds.), *The Khmer Rouge Accountability Process*, Phnom Penh: Documentation Center of Cambodia, 214-293, 248.

reparations sustained communication challenges at the level of expectation management and victim consultation, as I will explain later.

While NGOs were seeking guidance from the ECCC, the Court was unable to fill the vacuum with jointly agreed-upon messages. One ECCC official recalled, "NGOs were really ahead of the Court in trying to see what it meant for them ... and my recollection is a pretty continuous call for direction and information from the Court, and the Court couldn't respond to it."[32] This situation reflected insecurity among ECCC staff regarding a concept that their own Judges had created. One ECCC staff member working on victim-related issues remembered, "the difficult part for me was this 'moral and collective' hadn't been defined … which caused a lot of misunderstanding. … We were all very inarticulate at this phase, what this means."[33] Studies among Judges and other ECCC officials showed no uniform understanding of the reparations mandate; most Judges themselves seemed to be confused about the term 'collective and moral' reparations.[34] These uncertainties were passed on to intermediaries and participating victims. Still, many ECCC officials perceived misunderstandings and 'false' expectations among civil parties to be a matter of misinformation by their lawyers or NGOs, rather than the result of uncertainties shared by ECCC and non-ECCC actors alike.[35]

The result of this state of affairs was the absence of a joint communication strategy from the ECCC and civil society on reparations.[36] While the ICC took the lead in designing messages premised on expectation management, the ECCC was unable to play a leadership role and instead left it to individual outreach actors, NGOs, lawyers and others, to translate vague rules on reparations into plausible messages for mostly elderly survivors. Yet, outreach actors in both situations adopted communicative practices to manage expectations, mainly by avoiding talk about monetary compensation or stressing its unavailability.

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[32] Interview with international officer of the ECCC administration (ECCC11), Phnom Penh, 15 December 2014. Another international ECCC official confirmed that the Court never made an effort to develop key messages on reparations that could have been used in public information activities. Interview with international Court officer (ECCC23), Phnom Penh, 6 August 2015.

[33] Interview with international officer of the ECCC administration (ECCC11), Phnom Penh, 15 December 2014.

[34] Hoven, Elisa, Mareike Feiler, and Saskia Scheibel, 2013, 'Victims in Trials of Mass Crimes: A Multi-Perspective Study of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia', 3 *Cologne Occasional Papers on International Peace and Security Law*, September 2013, 62.

[35] Ibid.

[36] See Bates, Alex, 2010, 'Transitional Justice in Cambodia: Analytical Report', The Atlas Project, Université Paris I, 49.

2. Practices of Participation and Representation

The possibility for victims to join the ECCC as civil parties was an unparalleled experiment in comparison with other international(-ised) criminal tribunals. Civil parties at the ECCC are considered parties to the proceedings and, as such, arguably enjoy more participatory rights than available to victims at the ICC.[37] The topic has attracted broad scholarly attention, but less so in relation to reparations.[38] According to the Internal Rules, participation as a civil party is the only entry point for survivors to claim reparations before the ECCC.[39] This provision gives rise to similar targeting and representational practices as observed in relation to the ICC. Who were the victims who claimed reparations at the ECCC, and how were their voices and preferences regarding reparations being heard?

2.1. Targeting practices: Constructing and litigating victimhood

The Human Rights Center found that 80 per cent of the respondents in its survey regarded themselves as victims of the Khmer Rouge, including 93 per cent of those who lived under the Khmer Rouge regime; but also 51 per cent of those who did not live under the regime.[40] Notions of victimhood are thus widespread in Cambodia and have an intergenerational dimension. This contrasts with the narrow legal category of the 'victim' at the ECCC. Only those recognised as 'civil parties' can claim reparations.[41] Those seeking to become civil parties are subject to similar juridical logics of classification and categorisation as victim participants at the ICC, giving rise to a comparable pyramid of 'juridified victimhood'.[42]

The Internal Rules stipulate that only those victims who can "demonstrate as a direct consequence of at least one of the crimes alleged against the charged person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation

[37] See Jarvis, Helen, 2014, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia', 8(2) *Genocide Studies and Prevention*, 19-27.
[38] See for instance Kroker, Patrick, 2010, 'Transitional Justice Policy in Practice: Victim Participation in the Khmer Rouge Tribunal', 53 *German Yearbook of International Law,* 753-791; McGonigle, Brianne, 2009, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles', 22 *Leiden Journal of International Law* 22, 127-149; Stegmiller, Ignaz, 2014, 'Legal Developments in Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia', 27(2) *Leiden Journal of International Law*, 465-477; Killean, Rachel, 2016, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia', 16 *International Criminal Law Review*, 1-38; and Jasini, Rudina, 2016, 'Victim Participation and Transitional Justice in Cambodia: The Case of the Extraordinary Chambers in the Courts of Cambodia', Research Report, Impunity Watch, April 2016.
[39] ECCC Internal Rules (v9), 16 January 2015, Rule 23*quinquies*.
[40] Around two-thirds of Cambodia's population was born after the end of the Khmer Rouge regime. See Pham et al., So We Will Never Forget, 24-26.
[41] ECCC Internal Rules (v9), 16 January 2015, Rule 23*quinquies*.
[42] See Chapter 5.

might be based" are granted civil party status.[43] The link of an individual's harm to the investigations, charges and convictions sets clear limitations to the number of survivors who can claim reparations before the ECCC. In some ways, the ECCC reparations scheme is more restrictive than at the ICC, in that participation as civil party is a pre-condition for claiming reparations – no avenue exists for survivors to claim reparations without participating at trial and after a verdict on guilt is reached. NGOs who wanted to see an active role for survivors had expressed concern about an individual complaint procedure as a pre-condition for accessing reparations:

> The civil party system, as laid out in the Rules, does not provide a meaningful opportunity for victims to participate in the process. The practical limitations on the vast majority of Cambodian victims make submitting a written application, seeking an attorney, even getting to the court, far out of the range of possibility .... The Rules should allow the court to meet victims on their own terms, by creating procedures that seek out the participation of rural, illiterate Cambodian victims.[44]

Victim participation in Case 001 and Case 002/01

Civil party participation played out quite differently in the first two cases, as these cases were distinct in their nature and the scope of investigations, enabling fundamentally different opportunities for participation and reparations.[45] *Case 001* involved only one defendant with narrow charges centring around one major crime site – the Khmer Rouge's notorious prison and torture centre, S-21. Only a few people were known to have survived S-21. 93 civil parties were admitted on a preliminary basis to participate in *Case 001*, including many family members and relatives of those who were killed at S-21 or the execution site at Choeung Ek. With its narrow charges and limited number of civil parties, *Case 001* resembles the *Lubanga* and *Katanga* cases at the ICC.

The defendants in *Case 002*, on the other hand, were part of the Khmer Rouge senior leadership. They were charged with a criminal plan that involved an extensive list of atrocities, including forced population transfers, genocide and forced marriages; covering dozens of crimes sites across the entire country. While the details were not made public at the pre-trial stage,[46] these charges were much broader than in any case before the ICC. The extent and nature of charges could have potentially provided an opportunity for hundreds of thousands of Cambodians to apply for participation at the ECCC. Yet, outreach and application procedures set clear limitations.

[43] ECCC Internal Rules (v9), 16 January 2015, Rule 23*bis* (1).
[44] Cambodian Human Rights Action Committee, 2006, 'Comments on the ECCC Draft Internal Rules', 7.
[45] Many civil parties in *Case 001* also participated as civil parties in *Case 002*.
[46] Investigations in most civil law jurisdictions are confidential.

Eventually, almost 4,000 survivors applied to become civil parties in *Case 002*; more than in any case concerning the Ituri situation before the ICC.[47]

As a result, *Cases 001* and *002/01* provided very different experiences to the participating civil parties. Of the 93 civil parties admitted on a preliminary basis to participate in *Case 001*, 22 were invited to testify before the Court; almost a quarter of all civil parties participating at trial. Moreover, Kaing Guek Eav, alias Duch, was in charge of S-21, which meant that the defendant knew many of the civil parties or their deceased relatives and at times directly answered their questions at trial. The more limited scope of participation also allowed for comprehensive support from NGOs and the ECCC.

This contrasts with more than 3,800 civil parties admitted to participate in *Case 002*, who were initially represented by a dozen legal teams. The sheer number of participants posed challenges for adequate support from intermediary NGOs and the ECCC. The defendants in *Case 002* were often not known to the civil parties and had little direct contact with the acts that brought suffering upon participating victims. In addition, a proportionally much smaller number of the civil parties, less than one per cent, was able to tell their story in court (see Table 3).

Table 3: Victim participation in Case 001 and Case 002/01 in comparison

Victim Participation from Case 001 to Case 002/01						
	Total estimated direct victims	Civil Party Applications	Initially declared admissible	Declared admissible (on appeal)	Provided *viva voce* testimony	Percentage [48]
Case 001	>12,000	94	66	76	22	29 %
Case 002	1.7—2.2 million	3,988	2,123	3,869	31	<1%

Source: Adapted from Cohen/Hyde/Van Tuyl, A Well-Reasoned Opinion, 27 (reproduced with permission by the authors).

Litigating the boundaries of victimhood and harm in Case 002

Despite limiting reparations to civil parties, the civil party admissibility process in *Case 002* showed that the boundaries of legal categories of victimhood are not static. These boundaries can be subject to interpretations and contestations over the construction of victimhood in international

[47] The VSS received in total around 8,200 victim information forms, including both complainants and civil party applicants.
[48] Comparison between the number of civil parties declared admissible and those who provided testimony at trial.

criminal justice. Following a difficult experience with admissibility in *Case 001*, when numerous civil parties got their status rejected only after the trial was over, rules amendments clarified that the Co-Investigating Judges (CIJ) would vet applications at the pre-trial stage.[49] The French-dominated Office of the CIJ handled the review of these applications more or less in accordance with the traditional civil party system. In their Closing Order, in 2010, the CIJ ruled on the admissibility of 3,988 civil party applications and declared 2,123 applications admissible, for the reason that these applicants suffered harm related to the specific facts in that case.[50] Civil party lawyers embarked on mass admissibility appeals.

When ruling on these appeals, the ECCC Pre-Trial Chamber took a surprising turn.[51] In a majority decision, with the French Judge on the panel dissenting, the Chamber noted that the CIJ had failed to fully consider the nature of victimisation from mass crimes such as genocide and crimes against humanity. Stressing that the threshold for the admissibility of civil parties in proceedings dealing with international crimes differs from domestic proceedings dealing only with national crimes, the majority of the Judges noted, "the very nature of the *societal and cultural context at the time when the alleged crimes occurred* requires wider consideration of the matter of victimisation" (emphasis in original).[52] Hence, the majority of Judges took a broader view of the collective dimension of harm and reconsidered the interpretation of injury, specifically emphasising the mental suffering of survivors.[53] This consideration led the majority to adopt a presumption of 'collective injury':

> By presumption of collective injury, the Pre-Trial Chamber means that as long as a civil party applicant submits that he/she was a *member of the same targeted group or community* (emphasis in original) as the direct victim and such is more likely than not to be true, psychological harm suffered by the indirect victim arises out of the harm suffered by the direct victim ...[54]

Applying this understanding, the Pre-Trial Chamber overturned the rejection of 98 per cent of the appealing civil party applicants and admitted another 1,728 civil parties into the proceedings of

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[49] ECCC Internal Rules (v9), Rule 23*quinquies* (2)-(3).
[50] *Case 002*, 'Closing Order', Co-Investigating Judges, Case File 002/19-09-2007-ECCC-OCJI, D427, 15 September 2010, paras. 10-12 (hereinafter 'ECCC Case 002 Closing Order').
[51] See also Ciorciari/Heindel, *Hybrid Justice*, 212-215.
[52] *Case 002*, 'Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications', Pre-Trial Chamber, D404/2/4, 24 June 2011, para. 86 (hereinafter 'Case 002 PTC Civil Party Admissibility Decision').
[53] Ibid paras. 44-50. The majority of the Pre-Trial Chamber argued, "while the facts investigated are limited to certain areas or crime sites, the legal characterisations of such facts … include crimes which represent mass atrocities allegedly committed by the Charged Persons by acting in a joint criminal enterprise … against the population and *throughout* the country". The Chamber thus ruled that it was not always necessary for applicants to link their injuries to specific crime sites in the Closing Order, as these "serve only as examples in order to demonstrate how all these centres and sites functioned throughout Cambodia". Ibid paras. 42 & 75.
[54] Ibid para. 93.

Case 002; bringing the total number of those eligible to claim reparations to more than 3,860 civil parties.[55] One Judge involved described the motivation behind the decision as follows, "that was a very deliberate consideration … with the view to looking after the interest of victims as much as we could, to be as inclusive as possible … because what are we here for".[56] Thus, the majority of judges pursued a more inclusive approach to recognising victims, even if it meant bending some of the traditional legal logics. The same Judge further explained, "if you have a construct which permits victims to be considered, the construct itself needs to be humanely approached. Otherwise you are further victimising …"[57] A more inclusive approach to recognising victims through civil party status was seen to provide recognition and avoid doing further harm to survivors by excluding them from the trials.

In her separate and partially dissenting opinion, French Judge Marchi-Uhel asserted the juridical logic of the civil party system and noted that a link must be established between the injury suffered by the applicant and at least one of the alleged crimes alleged. She did not agree with the presumption of a collective injury.[58] Many lawyers, including from among the civil party lawyers, agreed in interviews with this view. One former ECCC legal officer called the majority decision "a very bad decision", arguing that it would make many victims believe that their "moment of truth" would come, when in fact their suffering would never be discussed at trial and their reparations would not be linked to the facts of the case.[59] Hence, both sides of the debate – those encouraging a more inclusive approach by granting civil party status to wider survivor populations, and those advocating for a more exclusive approach based on strict admissibility criteria – justified their positions on grounds of representing victims' best interests.

The admissibility process in Case 002 demonstrates that legal categories of victimhood are not fixed, but rather they are constructed and transformed through litigation and different interpretations of harm in the context of mass atrocities. In-country-based ECCC Judges seemed to be more responsive to their environment than their remotely based ICC peers when they

[55] ECCC, 'Pre-Trial Chamber Overturns Previous Rejection of 98 Percent of Appealing Civil Party Applicants in Case 002', Press Release, 24 June 2011. The Trial Chamber noted in its judgment in Case 002/01 that there were 3,869 civil parties at the commencement of trial proceedings and 3,867 civil parties at the time of the judgment. Civil actions of civil parties who passed away during the trial proceedings were continued in several cases by their successors. See Case 002/01 TC Judgment 2014, Annex I, paras. 7-8.
[56] Interview with ECCC Judge (ECCC5), Phnom Penh, 9 December 2014.
[57] Ibid.
[58] Judge Marchi-Uhel agreed that a broader class of applicants than that retained by the Co-Investigating Judges should benefit from a presumption of psychological harm. She further noted that the non-judicial measures foreseen under Rule 12*bis*(3) represent a more appropriate avenue to address the suffering of victims who do not qualify as civil parties. See Separate and Partially Dissenting Opinion of Judge Catherine Marchi-Uhel attached to Case 002 PTC Civil Party Admissibility Decision 2011, para. 5.
[59] This former legal officer was also afraid that the decision could cause re-victimisation, as it might allow defence teams to challenge testimonies of civil parties that have nothing to do with the trial. Interview with former ECCC legal officer (ECCC18), 7 July 2015.

employed practices that went beyond traditional legal views and bent existing rules to allow for a more inclusive approach. These targeting practices can be seen as an attempt to mediate between the requirements of strict legal frameworks and the demands for recognition arising from survivor populations. They have direct effects on the number of people who can claim and receive reparations. In the case of the ECCC these practices almost doubled the number of civil parties.

2.2. Representational practices at the ECCC

The inclusion of victim participation and reparations into the ECCC's procedural framework, in mid-2007, came as a surprise to the Court's administrators, who had not made any budgetary provisions for these additional responsibilities.[60] Whilst the Internal Rules formally established a new Victims Unit (later renamed the Victims Support Section, VSS) to administer victim participation, there were no human resources in place.[61] One Cambodian ECCC official described this situation with the metaphor, "they gave the car without giving the gasoline".[62] A former VSS head found that "administratively, the ECCC was completely unprepared for any role of civil parties".[63] The ECCC administration did not seem to be in a hurry to plug this gap: it took almost two years, until 2009, that earmarked funding from the German Foreign Office allowed the Unit to operate at a more considerable level.[64] Similar to the ICC, the ECCC left engagement with civil parties to a range of representatives, including local NGO intermediaries and external victim lawyers. Their representational practices played a key role in the reparations process.

Local intermediaries: Central messengers between victims and the ECCC

Cambodia has a comparatively diverse local NGO community that the ECCC was able to build upon.[65] Observing the slow start at the Court, many Cambodian NGOs feared that only few

[60] See Open Society Justice Initiative, 2007, 'Progress and Challenges at the Extraordinary Chambers in the Courts of Cambodia', June 2007, 18.
[61] An international Deputy Head arrived in November 2007, and a Cambodian Head of the VU did only start to work in February 2008. Thus, during the first year of operation, the VU, the Court's interface with Cambodian survivors, had only one Khmer-speaking staff. See Bair, James, 2009, 'From the Numbers Who Died to Those Who Survived: Victim Participation at the Extraordinary Chambers in the Courts of Cambodia', 31 *University of Hawai'i Law Review*, 507-552.
[62] Interview with Cambodian ECCC official (ECCC26), Phnom Penh, 19 August 2015.
[63] Jarvis, Helen, 2016, 'Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide', in: Meisenberg, Simon, and Ignaz Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law*, The Hague: T.M.C. Asser Press, 13-44.
[64] ECCC, 'Germany Pledges 1.5 Million Euro to Victim Support Unit', Media Alert, 26 November 2008.
[65] See Sperfeldt, Christoph, 2012, 'Cambodian Civil Society and the Khmer Rouge Tribunal', 6 *International Journal of Transitional Justice*, 149-160.

victims would be able to participate.[66] Local NGOs therefore expanded their outreach activities to include information about victim participation and reparations. One Court official noted, "the NGO sector was faster off the ground, ready to move before the Court was".[67] Similarly to the ICC, local NGOs assumed roles of 'intermediaries' between the ECCC and survivors who sought to participate in its proceedings.[68] Such intermediary functions related first to facilitating the application process.[69] Within only a few months, the Victims Unit had received more than 600 applications, providing an indication about the capacity of civil society networks.[70] Some NGOs had set themselves ambitious goals, with DC-Cam alone aiming to assist more than 10,000 survivors with submitting complaints.[71]

The so-called Victim Information Form is the central pathway for accessing the ECCC's participation and reparations scheme.[72] However, the form proved too complex for the average Cambodian to complete without assistance, as many survivors lacked the requisite literacy and understanding of the Court's process.[73] Assisting survivors to complete the form was a time-intensive task that consumed most intermediaries' capacities throughout the time period from 2007 to 2010. Insufficient guidance about what constituted a complete application required many intermediaries to go back and forth between applicants and the ECCC to obtain supplementary information or proof of identity. One local NGO worker remembered, "at the time there were a lot of things missing: lack of guidance from the Court; lack of information about how participation works; what information shall we collect from the victims; what information shall we tell to the victims … It was all decided internally, nothing from the Court at that stage."[74] Hence, the ability

[66] Interview with Cambodian NGO outreach coordinator (ECCC24), Phnom Penh, 7 August 2015; and Interview with Cambodian NGO project coordinator (ECCC10), Phnom Penh, 13 December 2014.
[67] Interview with international ECCC administrator (ECCC11), Phnom Penh, 15 December 2014.
[68] See more at Sperfeldt, Christoph, 2013, 'The Role of Cambodian Civil Society in the Victim Participation Scheme of the Extraordinary Chambers in the Courts of Cambodia', in: Bonacker, Thorsten, and Christoph Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, The Hague: T.M.C. Asser Press, 345-372.
[69] The first Cambodian NGOs assisting survivors to apply from October 2007 onwards were DC-Cam, ADHOC (Cambodian Human Rights and Development Association) and KID. Other intermediary organisations included the Khmer Kampuchea Krom Human Rights Association (KKKHRA, later succeeded by Minority Rights Organisation, MIRO), CSD (later succeeded by the Center for Justice and Reconciliation), the Cambodian Defenders Project (CDP) and the US-based Applied Social Research Institute of Cambodia (ASRIC).
[70] Cambodian Human Rights Action Committee (CHRAC), 2008, 'CHRAC Workshop on Complaints Procedures: Workshop Report', Workshop held on 22 February 2008 in Phnom Penh.
[71] Kinetz, Erika and Yun Samean, 2008, 'DC-Cam Team Searching for KR Complainants', *Cambodia Daily*, 17 March 2008, 35.
[72] Introduced through the Practice Direction on Victim Participation issued, in October 2007, by the ECCC's Rules and Procedure Committee. See ECCC, 2007, 'Practice Direction 02/2007 on Victim Participation'.
[73] See Thomas/Chy, Including Survivors, 235-237.
[74] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.

of survivors to access the ECCC's reparations scheme was limited by the dedication and assistance of underfunded Court units, local NGOs and external donors funding both actors.

Many local NGOs struggled at first to engage this intermediary role, as expertise on complex legal matters was often not available within these organisations. Nor had these NGOs anticipated that after the application stage, they would be left to deal with numerous follow-up activities, which were expected to be within the ECCC's responsibility. Against the background of ongoing resource constraints at the ECCC, NGOs further expanded their projects: initial outreach projects focused on providing information and assisting victims with applications developed into comprehensive victim support programs involving notifying survivors about the status of their applications, facilitating legal representation and regularly supporting civil parties with travel and other arrangements for their participation at the ECCC.[75] Yet, despite its dependence on NGOs, the ECCC never developed a more structured engagement with intermediaries as pursued by the ICC in form of the intermediary guidelines.[76]

Notwithstanding these challenges, the engagement of Cambodian NGOs and diaspora groups led to considerably larger participation outcomes than many had anticipated. Within a year, between the end of 2007 and the end of 2008, this support enabled the participation of more than 90 civil parties in *Case 001*. In the ECCC's second case, the scope was significantly larger: the VSS received more than 8,200 applications, of which almost 4,000 sought civil party status.[77] Approximately 82 per cent of all applications were submitted through intermediary NGOs.[78] As a result of their deep involvement, these intermediaries became central messengers and information brokers between the ECCC, lawyers and civil parties, as the Court was unable to communicate directly with most civil parties.[79] In this process, NGOs assumed roles of representing victims' views, especially of unrepresented civil parties. Common representational practices included simplifying and condensing often divergent opinions among victims into more coherent position statements, as well as issuing press releases or raising concerns with the ECCC 'on behalf' of civil parties.

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[75] See Hermann, Johanna, 2010, 'Reaching for Justice: The Participation of Victims at the Extraordinary Chambers in the Courts of Cambodia', *Centre on Human Rights in Conflict Policy Paper* No. 5, University of East London.

[76] The lack of a strategic partnership was illustrated by the fact that no venue for a regular exchange of information and coordination existed during the early years. Monthly coordination meetings with PAS did not begin until 2010. Additional irregular meetings took place between the VSS and intermediary NGOs. See International Center for Transitional Justice (ICTJ), 2010, *Outreach Strategies in International and Hybrid Courts*, Report of the ICTJ-ECCC Workshop, Phnom Penh, 3-5 March 2010, 11-18.

[77] Like the VPRS at the ICC, the VU at the ECCC ran into great difficulties when it received these applications, without having adequate structures in place. Many applicants did not hear about their application until two or more years after its submission.

[78] Case 002 Closing Order 2010, para. 11, footnote 73.

[79] See Sperfeldt, The Role of Cambodian Civil Society.

Apart from NGOs, victim representatives also played roles as intermediaries. Given the large number of civil parties and a desire among some NGOs to involve civil parties more actively, the largest intermediary NGO, the Cambodian Human Rights and Development Association (ADHOC), developed for *Case 002* a so-called civil party representative scheme.[80] Leila Ullrich used the term 'victim intermediaries' to describe similar practices at the ICC involving victim participants.[81] The idea behind ADHOC's scheme was to select representatives from among the almost 1,800 civil parties it supported, roughly half of all civil parties, who would receive training and become focal points for communication with other civil parties in their local area.[82] ADHOC's goal with establishing the scheme was "to facilitate and foster civic engagement, and empower the project beneficiaries".[83] Whilst Ullrich was sceptical about degree to which victim intermediaries could alter the representational practices surrounding these tribunals,[84] evaluators of ADHOC's scheme were more upbeat, describing the scheme as "innovative" and an "unprecedented experiment" that could provide guidance for the future involvement of larger numbers of victims in international criminal trials.[85] Despite such positive assessment, the scheme ceased to operate in late 2015 due to funding challenges.

The ECCC's participation and reparations scheme relied to a great extent on intermediaries – without NGOs and other intermediary support the ECCC would have seen only a fraction of the current numbers of civil parties and limited active involvement. Yet, the combination of ambiguous Internal Rules with low capacities at the ECCC in effect "placed considerable discretion in the hands of those responsible for the initiative's implementation".[86] Similar to the representational practices that developed at the ICC, ECCC officials and victim lawyers received most information about civil parties from these intermediaries, who channelled and filtered

[80] ADHOC is one of the largest human rights organisations in Cambodia and able to rely on an extensive provincial office structure. ADHOC increasingly focused its program on victim participation, particularly promoting the civil party mechanism. See Raab, Michaela, and Julian Poluda, 2010, 'Justice for the Survivors and for Future Generations: ADHOC's ECCC/ICC Justice Project, December 2006–March 2010', Evaluation report, Phnom Penh, March 2010 (on file with author).
[81] Ullrich, Leila, 2016, 'Beyond the "Global-Local Divide"', 14 *Journal of International Criminal Justice*, 543-568.
[82] Initially, 122 civil party representatives were elected, or at times selected by ADHOC, on the basis of their geographical location, their status in the community and their interest and capacity to act as voluntary representatives for civil parties. Due to funding challenges, this number was later reduced to 46 representatives. See Sperfeldt et al., Voices for Reconciliation.
[83] Kirchenbauer, Nadine, Mychelle Balthazard, Latt Ky, Patrick Vinck, and Phuong Pham, 2013, 'Victim Participation before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002', Phnom Penh: ADHOC.
[84] Analysing the experience at the ICC, Ullrich noted that "these victims join the class of "victims' experts" and consequently become more similar to the Court's staff and international NGOs". Ullrich, Beyond the Global-Local Divide, 566.
[85] Balthazard, Mychelle, 2013, 'Khmer Rouge Tribunal Justice Project: Evaluation Report, 2010-2012', ADHOC (on file with the author).
[86] Thomas/Chy, Including Survivors, 235.

survivors' inputs and concerns regarding reparations. Intermediary NGOs quickly accepted their role as central interfaces and mediators between civil parties and the Court. NGOs' choices which geographical areas and population groups to target with their activities determined to a considerable degree which victims were able to access the ECCC's reparations scheme.[87] As a result of these arrangements, most participating victims interacted with local NGOs rather than with the ECCC. Yet, a decrease in funding to local NGOs after *Case 001* gradually diminished the role of intermediaries in *Case 002*, which greatly reduced civil parties' possibilities for communication and engagement on reparations.

Legal representatives

At the early stages of the proceedings unrepresented civil parties were able to address the Court directly and speak in person.[88] However, these rights were limited by subsequent rules amendments, which made legal representation mandatory.[89] Legal representation has since constituted the main avenue through which participation of civil parties has been carried out in practice. Despite the great number of civil parties seeking to participate, the ECCC initially announced that it would not provide legal aid to civil parties. In a country where most survivors lacked the means and an appropriate education to follow the trials by themselves, this was seen by local NGOs an obstacle to active participation.[90] Fearing that civil parties would not be able to make use of their rights, intermediary NGOs reached out to local legal aid NGOs,[91] or by making contact with international *pro bono* lawyers who flocked to Cambodia in search for opportunities.

Without much assistance from the ECCC, this collaboration provided legal representation to the more than 90 civil parties in *Case 001*. Even in *Case 002*, a majority of civil parties has been represented by *pro bono* legal teams; unrepresented civil parties were taken on by a limited number of Court-funded lawyers recruited towards the end of the pre-trial stage in *Case 002*. In

[87] For instance, the Cambodian Defenders Project (CDP) focused on victims of sexual and gender-based violence and the Minority Rights Organization (MIRO) on civil parties from the ethnic Vietnamese and Khmer Krom minorities.
[88] See Mohan, Mahdev, 2009, 'The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal', 9 *International Criminal Law Review*, 733-775.
[89] See Wojcik, Mark, 2010, 'False Hope: The Rights of Victims Before International Criminal Tribunals', 28 *L'Observateur des Nations Unies*, 1-31; and Studzinsky, Silke, 2013, 'Participation Rights of Victims as Civil Parties and the Challenges of their Implementation before the Extraordinary Chambers in the Courts of Cambodia', in: Bonacker, Thorsten, and Christoph Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, The Hague: TMC Asser Press, 175-188.
[90] See Thomas/Chy, Including Survivors, 249-250.
[91] The two most prominent local legal aid NGOs were the Cambodian Defenders Project (CDP) and Legal Aid of Cambodia (LAC). Lawyers of these two organisations were the first to represent civil parties before the ECCC, typically in cooperation with international *pro bono* civil party lawyers.

most instances Cambodian lawyers cannot afford to work full-time on a *pro bono* basis,[92] whereas a larger number of international *pro bono* lawyers has sought to represent civil parties by way of regular travels to Cambodia. This imbalance is visible in the numbers: whilst an ECCC list of lawyers in *Case 001* showed four legal team comprised of 6 Cambodian and 11 international lawyers to represent more than 90 civil parties; [93] the proportion further deteriorated in *Case 002*, where 11-12 teams comprised of 8-9 Cambodian lawyers and around 24 international lawyers has represented more than 3,800 civil parties.[94] The result is, in the words of one international lawyer, that there were too many lawyers at the Court, and too few lawyers able to communicate directly with the thousands of clients spread across Cambodia.[95] In fact, the majority of these lawyers had no funds to see their clients on a regular basis and instead relied on intermediary NGOs to facilitate client meetings.[96]

Although this representation scheme was crucial in enabling legal assistance to civil parties, it was not conducive to building a coherent civil party strategy around reparations and other issues at trial. [97] After *Case 001*, the Judges Plenary introduced amendments to the Internal Rules that collectivised participation and representation at the ECCC.[98] The revised Internal Rules now provide that civil parties form "a single, consolidated group" at trial stage, which is represented by two Civil Party Lead Co-Lawyers.[99] The Judges noted that these amendments were designed "to meet the requirements of trials of mass crimes".[100] As these changes came to a vote when the pre-trial investigations in *Case 002* were finished, the Judges decided that the new model would

[92] Cambodian civil party lawyers who have worked full-time in *Cases 001* and *002*, where paid by external donor funding, including from France and Germany.
[93] Referred to as Group 1, 2, 3 and 4. The Trial Chamber's decision to accept four 'groups' of civil parties into the proceedings followed a proposal put forward by the VU, which took into account the different international legal representatives. This came as a surprise to many civil parties, as most were victims in relation to one crime site. One lawyer noted, "the civil parties never really understood why there existed different groups". Interview with international civil party lawyer (ECCC16), 3 June 2015. Also interview with Cambodian NGO worker (ECCC8), Phnom Penh, 11 December 2014.
[94] Numbers drawn from list of lawyers published by the ECCC VSS. These lists seemed to have been compiled during the early stages of Case 002. While Cambodian lawyers can represent civil parties on their own, international lawyers are required to have a Cambodian co-counsel. Due to the lack of Cambodian lawyers, many international lawyers 'share' the same Cambodian co-counsel. Available at < http://vss.eccc.gov.kh/> (accessed 19 February 2018)
[95] Interview with international civil party lawyer (ECCC16), 3 June 2015.
[96] From 2010 onwards, the VSS was able to organise a number of so-called provincial victims forums, which were also used as a platform to facilitate lawyer-client meetings.
[97] See Asian International Justice Initiative, 2009, 'Lessons Learned from the "Duch" Trial: A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia', AIJI KRT Trial Monitoring Group, 45-46.
[98] ECCC Internal Rules (Rev.5), 5 February 2010, Rule 23(4) and (5).
[99] ECCC, '7th Plenary Session of the ECCC Concludes', Press Release, 9 February 2010.
[100] ECCC, 'Sixth ECCC Plenary Session Concludes', Press Release, 11 September 2009.

only apply to the trial stage; creating a peculiar situation where individual participation exists at pre-trial and collective participation at trial stage.[101]

Representing the representatives, the two Lead Co-Lawyers are Court-appointed and draw their powers from the Internal Rules; not from the consent of civil parties who continue to be formally represented by their individual lawyers.[102] These rules changes provoked, at times, considerable opposition from lawyers, civil parties and a few NGOs, centring mostly on the fact that civil parties were not consulted in the choice of a common legal representative and that those who hold the power of attorney (civil party lawyers) ultimately have limited say in their representation.[103] It has been argued that these changes to the rights of parties represent, in effect, a departure from a civil party system as provided under Cambodian law, being instead replaced by a representation of victims' collective interests.[104] While this system increased the effectiveness of in-courtroom representation from the perspective of trial Judges, little is known of civil parties' attitudes regarding the meaningfulness of this representation scheme in which they had no say.

From participation to representation

While many Cambodian ECCC staff and NGO representatives saw themselves as survivors, and to some extent perhaps believed that they acted in the name of the many other victims of the Khmer Rouge, there remained a "startling gap" in the presence of survivors themselves.[105] Victim interests in Cambodia were not organised, and the few existing victim associations were established predominantly in the Cambodian diaspora – new local associations emerged only from the ECCC's participation process. This situation is reflected in my account of how representational practices with civil parties at the ECCC took shape. It draws a picture of a similar multi-layered representational pyramid as existed at the ICC.

From among the millions of survivors of the Khmer Rouge, only those who managed to apply and obtain civil party status were able to claim reparations before the ECCC.[106] Indeed, the

[101] Few people at the Court believed that the ECCC would see any further trials beyond Case 002. The amendments were therefore tailored to respond to the immediate needs for reform in Case 002. Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[102] See Werner, Alain and Daniela Rudy, 2010, 'Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?', 8(3) *Northwestern Journal of International Human Rights,* 301-309; and Studzinsky, Silke, 2011, 'Victim's Participation before the Extraordinary Chambers in the Courts of Cambodia', 10 *Zeitschrift für Internationale Strafrechtsdogmatik*, 887-891.
[103] See O'Toole, James, 2010, 'Victims to Play a Simpler Role at KRT', *Phnom Penh Post*, 10 February 2010.
[104] Diamond, Andrew, 2011, 'Victims Once Again? Civil Party Participation before the Extraordinary Chambers in the Courts of Cambodia', 38 *Rutgers Law Record*, 34-48.
[105] Linton, *Reconciliation in Cambodia*, 35.
[106] Thomas and Chy have criticised this modality, arguing that "in light of the immense number of victims, the authors consider it inappropriate that only those victims recognised by the Court should benefit. Due to

majority of survivors were unable to access this process by themselves. Although the number of more than 3,800 civil parties in both cases is impressive considering the laborious application process, these survivors represent a fraction of those potentially eligible and interested in reparations. One Cambodian NGO worker acknowledged, "I know this participation is symbolic … We cannot say that 4,000 represent one million who died during the Khmer Rouge time, but they are a symbolic participation … and they are the proof of this suffering."[107] Maria Elander has highlighted how the ECCC struggled to acknowledge the complexity of victimisation in Cambodia through its processes of selectively conveying legal recognition of victimhood.[108]

Most of those who became civil parties relied on assistance provided by local intermediaries, who became central go-betweens and gatekeepers between survivors and the Court. Once civil parties were legally represented, lawyers took over from NGOs in representing the interests of civil parties – the Internal Rules simply stipulate that a civil party's "rights are exercised through the lawyer".[109] However, given the resource constraints, it is unclear how most lawyers ascertained what the 'interests' of their clients actually were. With introduction of common legal representation, thousands of civil parties were thrown into an anonymous victim collective that provided little space for negotiating the multitude of views held by different victim populations about reparations.[110] The majority of civil parties had little or no say over who represented them in Court, and those who stood in Court were separated from those they represented by a multi-layered communication and interpretation chain. One international lawyer summarised the effect of these representational practices as follows, "what struck me from day one, a lot of people talk on behalf of victims, but very few of them actually know what the victims want".[111]

3. Practices of Consultation

Once a case moved to the trial stage, civil parties' demands for reparations are put to the Trial Chamber through a reparations request formulated by civil parties' legal representatives. How did lawyers gauge and consider civil parties' views and preferences when formulating these requests? As at the ICC, this was done through 'consultations' that brought together the communicative and representational practices described above. These practices have had a direct impact on civil

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the Court's poor outreach efforts, most victims have not been afforded an opportunity to become civil parties." Thomas/Chy, Including Survivors, 248.

[107] Interview with Cambodian NGO project coordinator (ECCC10), Phnom Penh, 13 December 2014.

[108] Elander, Maria, 2012, 'The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia', 7 *International Journal of Transitional Justice*, 95-115.

[109] ECCC Internal Rules (v9), Rule 23*ter* (2).

[110] See Hughes, Rachel, 2016, 'Victims' Rights, Victim Collectives, and Utopic Disruption at the Extraordinary Chambers in the Courts of Cambodia', 22(2) *Australian Journal of Human Rights*, 143-166.

[111] Interview international civil party lawyer (ECCC19), Phnom Penh, 4 August 2015.

parties' say in formulating requests for reparations, which were often determined by those who framed and re-framed the format and outcomes of consultations. I show that these practices were adopted by practitioners in response to the tension between what forms of reparations civil parties wanted, and the constraints put on the ECCC in delivering only certain forms of reparations.

At the ECCC, there existed two distinct moments at which civil parties' views and preference regarding reparations were solicited: the application process and consultations in preparation of formal reparations requests put forward by legal representatives.

Applying for reparations

If a survivor chose to apply for civil party status which enabled a claim for reparations, the application form contained a question, asking if applicants had any preference as to the form of 'collective and moral reparations' that they would like to obtain, and if yes, to provide details.[112] As observed with communicative practices earlier, this triggered a series of challenges to those tasked with explaining the ECCC's reparations mandate to survivors. One Cambodian NGO coordinator explained the approach as follows, "this is how we do it: based on the Court's documents you cannot receive financial reparations, you can only receive collective and moral reparations. We don't know what it means … So we asked them what they wanted."[113] Hence, outreach staff left it by and large to survivors to express their preferences. The NGO Khmer Institute for Democracy published, in 2008, an assessment of collective reparations requested by civil parties in their applications: most asked for roads, schools, hospitals and other needed infrastructure projects.[114] Considering that most applicants were rather poor and lived in rural areas, their focus on development needs was not surprising. One ECCC officer was therefore critical of the open-ended question, "which is a terrible way to raise expectations … Maybe it should not have been part of the form, when we had no definition. Leave it open like that, it served no real purpose in the end."[115]

Still, the application forms constituted one source of information for formulating civil parties' reparations requests at trial. For *Case 001*, the ECCC Victims Unit prepared an assessment and

[112] The Victim Information Form offered survivors three choices for participation: complainant, witness or civil party.
[113] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.
[114] This report assessed 58 civil party applications submitted by KID from October 2007 to January 2008. See Khmer Institute for Democracy, 2008, 'Reparation Report' (on file with the author). A similar focus on development needs was found in the victim information forms DC-Cam submitted to the Court. See Thomas/Chy, Including Survivors, 249.
[115] Interview with international officer in ECCC administration (ECCC11), Phnom Penh, 15 December 2014.

made it available to the lawyers in the form of a statistical report.[116] Of the three-quarters of civil parties who had indicated a request on their form, 21 per cent requested medical-related services, 15 per cent individual reparations (including money for ceremonies), 14 per cent religious buildings, 12 per cent educational measures, 7 per cent asked for funeral ceremonies, 5 per cent for memorials, and 4 per cent for the publication of Khmer Rouge-related documents.[117] These numbers were similar to those retrieved from an assessment of civil parties' application forms in *Case 002*.[118] Many of these preferences could probably be considered collective and symbolic in nature. Yet, the lack of specificity, the inclusion of many development measures and the fact that many civil parties had completed these forms years before their matter came to trial rendered much of this information of little use to those responsible for soliciting and consolidating civil parties' requests. Thus, despite the significant efforts that went into completing the applications, most of the information contained in the forms was never seriously used in determining the final reparations requests.

Consulting civil parties in Case 001

The smaller number of civil parties in *Case 001* allowed for more intensive consultations. Structured consultations on reparations began during the trial phase and were at times conducted among the individual legal groups of civil parties, at times in larger meetings of civil parties facilitated by NGO intermediaries. These face-to-face meetings provided opportunities for two-way communication and took place almost on a monthly basis.[119] One international lawyer involved remembered, "most of the civil parties were never asked what they wanted or told that they had some rights, and discuss how this could be achieved … but this changed over time".[120] Civil party lawyers compiled these requests in a joint submission on reparations, which I will discuss further in Part IV and Part V.[121] Overall, the regular gatherings in *Case 001* allowed for

[116] See *Case 001*, 'Civil Parties' Co-Lawyers' Joint Submission on Reparations', Civil Parties, E159/3, 14 September 2009, Annex 1.
[117] Ibid.
[118] Of those who had provided a preference regarding reparations in *Case 002*, 22 per cent had asked for medical services (including mental health facilities), 18 per cent for 'justice', 16 per cent for schools, 13 per cent for individual reparations, 11 per cent for documentation of Khmer Rouge crimes, 7 per cent for memorials, 7 per cent for infrastructure projects, and 3 per cent for religious buildings. Applicants could name multiple requests. Cited from *Case 002/02*, 'Civil Party Lead Co-Lawyers' Interim Report on Reparations in Case 002/02 and Related Requests', Civil Party Lead Co-Lawyers, E352, 17 June 2015, para. 5.
[119] With the help of intermediary NGOs, lawyers of Group 2 were most engaged in consulting their clients, often involving civil parties from other groups, and conducting almost monthly meetings with clients during the trial phase of *Case 001*. See *Case 001*, 'Co-Lawyers for Civil Parties (Group 2): Final Submission', Civil Party Group 2, E159/6, 5 October 2009, para. 5.
[120] Interview with international civil party lawyer (ECCC16), 3 June 2015.
[121] *Case 001*, 'Civil Parties' Co-Lawyers' Joint Submission on Reparations', Civil Parties, E159/3, 14 September 2009.

more sustained consultations than was possible in *Case 002* with thousands of participating civil parties. This gave those civil parties regularly participating in these consultations a more genuine say in the formulation of the final reparations request in *Case 001*.

Consulting civil parties in Case 002: Guided consultation practices

Rules amendments enacted before the *Case 002* trial required civil parties to submit to the Trial Chamber 'initial specification' of their reparations at the beginning of the trial. This meant that at least some consultations with civil parties had to be organised *prior* to the start of the trial – a situation different from the ICC, where most consultations with those applying for reparations were held in the reparations phase after a conviction. With the severance order in *Case 002* only being rendered in September 2011, early consultations still covered all crimes charged in *Case 002*, rather than the more limited charges adjudicated in *Case 002/01*. Given the lack of resources at the ECCC, it was decided that each of the legal teams in *Case 002* would be responsible for consulting with their clients. While some of the smaller legal teams representing less than one hundred clients were able to engage in more regular consultations with their clients, larger teams such as those representing more than a thousand clients faced considerable challenges.

Intermediary NGO support was critical for these consultations, which were carried out from October 2010 to May 2011, including among the diaspora.[122] The reliance on NGO funding for consultations meant that some civil parties whose participation was facilitated by more well-resourced NGOs had more opportunities for consultations with their lawyers than others.[123] No reliable data exist to determine how many civil parties had a say in the reparations requests that were put forward in their names.[124] Moreover, victim associations and individual Cambodian NGOs working with civil parties directly submitted proposals for reparations to the VSS, including their own ideas.[125] One victim association, the Association of the Khmer Rouge Victims

[122] ADHOC had been conducting civil party workshops on reparations since 2008/2009. The NGO organised another round of consultations for *Case 002* in 2010, providing a platform for lawyers to meet their clients. Other intermediary NGOs covered specific sub-groups, such as CDP focusing on victims affected by forced marriages and gender-based violence, and MIRO focusing on Khmer Krom and ethnic Vietnamese minority civil parties.

[123] The gradual decrease in funding to NGOs limited subsequent consultations in *Case 002/01* to a few outreach fora organised by the VSS.

[124] In our own 2015 survey conducted among 147 of the better informed civil parties supported by ADHOC, a majority of respondents reported that they were part of consultations on reparations conducted by lawyers and NGOs ahead of *Case 002* (70 per cent of civil parties; 92 per cent of civil party representatives). More than one quarter said they were not asked or that they could not remember. Sperfeldt et al., Voices for Reconciliation, 57-58.

[125] Such submissions were received by three NGOs, namely ADHOC, DC-Cam and CDP, as well as two victim associations, Ksem Ksan and AKRVC. Moreover, DC-Cam sent letters with its own reparations ideas to the ECCC Judges. Wallace, Julia, 2011, 'Slate of "Nonjudicial Measures" Proposed to the Tribunal', *Cambodia Daily*, 7 January 2011, 24.

in Cambodia was particularly creative when it suggested that the ECCC's inventory, including IT equipment and office furniture, be used to establish 24 learning centres in each of Cambodia's provinces after the closure of the Court.[126]

The results of these consultations were uneven, with few legal teams providing evidence of systematic client consultations. Most legal teams simply submitted a list of project ideas. A key challenge during those consultations was, in the words of one civil party lawyer, the great discrepancy between "what we can offer" and "what the clients need".[127] Initial consultations with civil parties often unfolded in similar ways, with civil parties when asked about their preferred forms of 'reparations' in response to their suffering stating that they wanted X and Y. Outreach workers or lawyers then responded that this was not possible, because ECCC reparations were limited to 'collective and moral reparations'. When civil parties then said that they did not understand, lawyers and outreach actors tried to illustrate what in their view would be permissible forms of reparations by suggesting Z. One leading Cambodian legal representative for civil parties summarised this 'guided' consultative practice as follows, "we talk to them, consult with them and then they understand what can be done, and then they speak out … So we can understand what they want through consultations."[128] Similarly, one Cambodian ECCC official observed how lawyers engaged with their clients at fora organised by the VSS: "first they get some ideas from civil parties, then they compile a list and put more ideas into it".[129]

Similar to the *Katanga* consultations at the ICC, such guided consultation practices dominated the consultations in *Case 002*. The sheer number of civil parties in that case never allowed for systematic individual interviewing which eventually let to the described turn-around in *Katanga*. Instead, pre-conceived notions by those conducting consultations at the ECCC of what would be permissible 'collective and moral' reparations re-shaped the outcomes from the initial preferences civil parties had articulated. In engaging this guided consultation practice, NGOs and lawyers relied on international precedents of collective reparations, with discourses focusing on memorialisation, education measures, documentation initiatives and rehabilitation. The result was, in the words of one lawyer, that "it was difficult to get a candid assessment [of what victims want], as most of them were already exposed to what the Court had to offer … So, you never know whether they repeat what the lawyers explained, or whether it's really something they want."[130]

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[126] Association of the Khmer Rouge Victims in Cambodia (AKRVC), 'Civil Party of Orphans Class Demands ECCC Inventory and Provincial Learning Centers', Press Release, 23 July 2010 (on file with the author).
[127] Interview with international civil party lawyer (ECCC14), 15 May 2015.
[128] Interview with Cambodian civil party representative (ECCC27), Phnom Penh, 21 August 2015.
[129] Interview with Cambodia ECCC official working on victim-related issues (ECCC32), Phnom Penh, 9 December 2015.
[130] Interview with international civil party lawyer (ECCC19), Phnom Penh, 4 August 2015.

This is also visible from surveys among civil parties, which indicate that the more civil parties were informed and knew about the ECCC, the more their preferences for reparations aligned with pre-conceived notions of those framing the terms of the debate.[131]

With the assistance of the VSS, the Civil Party Lead Co-Lawyers compiled and consolidated this filtered information from the civil parties' legal teams and local NGOs with the aim to present 'initial specifications' of the reparations requests at an initial hearing for *Case 002*.[132] As I will discuss further in Part IV, the Lead Co-Lawyers ultimately grouped their requests into four broad substantive categories: (1) memorialisation / remembrance; (2) rehabilitation; (3) documentation / education; and (4) other awards – reflecting by and large what representatives thought was permissible and feasible under the ECCC's reparations mandate.[133]

The effects of consultation practices

The account of the initial consultations in *Case 002* confirms the crucial role of intermediaries' and lawyers' consultation practices in shaping civil parties' reparations requests. These practices developed in response to the discrepancy between what these actors perceived was feasible under the ECCC's reparations mandate and what civil parties wanted and needed. In actively mediating this tension, these actors' pre-conceived notions of what were permissible 'collective and moral' reparations led to a list of requests that did not provoke much controversy at the ECCC. One international Judge found that "the requests were by and large very modest".[134] Similar to the ICC, those involved often portrayed these outcomes as a success in expectation management, with requests for development measures (such as hospitals, schools, and other infrastructure) and monetary compensation being pushed out of the consultative space. This allowed aligning civil parties' requests with what was seen to be feasible in the framework of the ECCC's collective reparations mandate.

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[131] A survey conducted by ADHOC in 2011 among 414 civil parties in its support scheme showed the impact of many years of outreach. When asked about the nature of the reparation that should be provided, about half of the civil parties (CPs) and three-quarters of the civil party representatives (CPRs) mentioned that a memorial, stupa or funeral monument should be built in each province to remember the victims (56 per cent CPs and 77 per cent CPRs). Civil parties also suggested a ceremony or public event for the victims or the dead (25 per cent CPs and 17 per cent CPRs), health and mental health services (23 per cent CPs and 39 per cent CPRs) or a museum (15 per cent CPs and 47 per cent CPRs). Kirchenbauer et al., Victim Participation before the ECCC, 39-40.

[132] The original consultations carried out over more than half a year had only covered the more than 2,100 civil parties initially admitted into the proceedings by the Co-Investigating Judges. After the Pre-Trial Chamber Admissibility Decision, the consolidated group of civil parties grew by another 1,700 civil parties who had not taken part in these consultations.

[133] *Case 002*, 'Initial Specifications for Reparations Requests in Case 002', presented at the Initial Hearing on 29 June 2011, Transcript E1/6.1/TR002/20110629 Final EN.

[134] Interview with international ECCC Judge (ECCC5), Phnom Penh, 9 December 2014.

While many civil parties accepted these limitations, others dissented, as I will show in Part V. It also clouded the vision of lawyers and outreach workers about civil parties' genuine preferences by confusing what the Court had to offer with what the civil parties actually desired. As one Cambodian Court observer noted, "we claim that we know what victims want, and we claim that this is what is best for victims … We only claim."[135] The gap between what the ECCC could offer and what civil parties wanted was not always unbridgeable, but outreach and communication resources were never sufficient to fill this space with civil parties' own, at times modest, views and ideas about reparative measures.

4. Conclusion

In moving from the ICC in The Hague to the ECCC at the periphery in Phnom Penh, I found some similarities but also showed how some practices have taken on a different flavour. Access to the ECCC's reparations scheme is still governed by criminal law logics through a civil party system that links victims' harm to the charges of accused persons. This limited access to reparations to a few thousand survivors. Yet, an extensive list of charges in *Case 002* and a re-interpretation of harm through litigation expanded the boundaries of legal victimhood beyond the precedent of the first two cases at the ICC. Such an inclusive approach came at the cost of traditional legalistic notions of justice and was therefore contested among legal professionals. Splits between proponents and opponents of such targeting practices went right through the ECCC's judicial organs, as dissenting opinions in chambers and critical views of civil party lawyers about the *Case 002* appeals admissibility decision attest. The ECCC experience shows that these targeting practices are dynamic and can be reshaped through litigation. The ECCC's temporary nature and in-country location contributed to making its judicial professionals more responsive to their social environment than their peers at the ICC who were located away from the locations where atrocities occurred and were busy building the foundations for a permanent institution.

Perhaps even more than in the Ituri situation at the ICC, an entire ecosystem of different justice actors developed around the ECCC which determined the engagement practices with survivors on reparations. Local Cambodian NGOs dominated this space, while the Cambodian state was largely absent. Although the Cambodian government had co-sponsored the establishment of the ECCC, it never made available its administrative structures at a more significant threshold to support the involvement of survivors. Like the ICC, the ECCC relied on intermediary NGOs to facilitate outreach, victim participation and consultations – with similar communicative and representational practices shaping these processes. While the notion of 'collective and moral'

[135] Interview with Cambodian court observer (ECCC12), Phnom Penh, 16 December 2014.

reparations at the ECCC was more limited than the broader notion of reparations at the ICC, those involved in outreach were unable to build consistent messages around a term that ordinary people could not relate with. One Cambodian NGO worker remembered that "it was hard to explain to [the civil parties] … I personally feel that the concept was given by others."[136] Communicative practices focused on expectation management and representational practices, where lawyers and intermediaries spoke on behalf of civil parties, eventually limited the scope for meaningful consultations on reparations among civil parties.

Yet, how important were reparations to local actors and survivors of the Khmer Rouge? Pre-ECCC surveys and my interviews show that 'participation', and not reparations, was initially at the forefront of concerns among local stakeholders supporting this process. One Cambodian ECCC official noted, "victim participation in the proceedings was very important … reparation was part of it, but there was less talk about it".[137] And a Cambodian NGO coordinator summarised that justice was the first mission, "reparations is second".[138] It is important to note that approximately half of the survivors who completed a victim application form did not choose civil party status – which would have allowed them to seek 'collective and moral' reparations – but rather chose to file a general complaint.[139] These numbers are rather different from *Lubanga* and *Katanga* where most applicants seeking to participate simultaneously also applied for reparations.

Nevertheless, the importance of reparations increased over the course of the ECCC's trials. One Cambodian NGO worker noted, "because we had it, expectation was there … and expectations have been raised at some point".[140] Similarly, an international observer said "it was clear that just saying 'civil parties are entitled to reparations' created expectations", describing the challenge as follows "so, you have to one the hand say you have this right, but on the other hand you have to severely limit its content".[141] While there is some debate about how effectively the Court and NGO outreach dealt with this challenge, the above cited surveys among survivors and civil parties, as well as my own interviews among Cambodian intermediaries indicate that expectations were rather reasonable ahead of the start of trial hearings in the ECCC's first trial, especially when taking into account the general socio-economic conditions in the country.

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[136] Interview with Cambodian NGO worker (ECCC34), Phnom Penh, 15 December 2015.
[137] Interview with Cambodian ECCC official working on victim-related issues (ECCC1), Phnom Penh, 6 December 2014.
[138] Interview with Cambodian NGO outreach coordinator (ECCC24), Phnom Penh, 7 August 2015.
[139] It is difficult to assess whether this can be taken as evidence for the proposition that many survivors in their quest for participation were not motivated by reparations, but rather by notions of accountability and truth-seeking; or whether such choices were influenced by the specific outreach strategies and explanations provided by intermediaries or the Court.
[140] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.
[141] Interview with court monitor (ECCC4), Phnom Penh, 12 December 2014.

PART III: Comparative Discussion

In Part III I have shown how frameworks with competing visions for justice and reparations eventually came into contact with the different social contexts and populations that were the subject of the first cases before the ICC and the ECCC: the district of Ituri in the Democratic Republic of Congo and Cambodia. While this context was absent from the negotiations, it became an important feature in the gradual materialisation of the reparations mandates. System-inherent divides between human rights proponents and criminal lawyers that dominated the negotiations of mandates continued to exist, but they were sidelined by the overwhelming challenges that the two Courts confronted in the post-atrocity low-income situations before them.

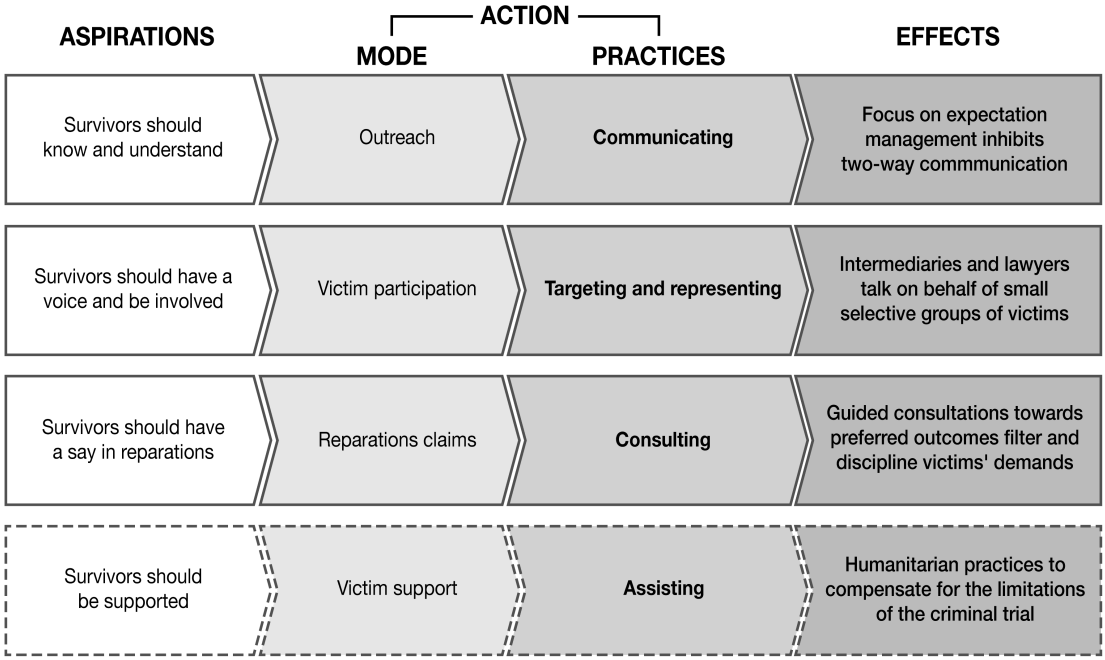

Figure 5: Practices involved with engaging survivors in reparations

Part III examined how the ICC and the ECCC have engaged these contexts and survivor populations in reparations. It showed how ideals for such engagement are enacted through a range of practices. Whilst these practices more than often deviate from the original ideals, they assist those involved with responding to and mediating tensions in the legal frameworks and pressures from the social contexts in which they work (see Figure 5). Some of these practices were inherent to reparations schemes created on the basis of criminal law logics, such as selective consideration of victimhood and representational practices; others were responses to the environment and

uncertainties built into the legal frameworks, such as certain communicative or consultation practices.

Using a practice lens to understand reparations assists with redirecting scholarly attention away from a focus on reparations judgments to the activities through which justice actors at and around international(-ised) criminal courts give effect and meaning to ambiguous legal frameworks in different contexts. Critical parameters for court-ordered reparations are determined long before judges embark on the actual adjudication of reparation requests. I have argued throughout the two chapters that these engagement practices are an integral part of reparations' construction, and that the effects of these practices pre-determine – sometimes more than the actual legal frameworks – the limits and possibilities of reparations in international criminal justice.

I distil some of the effects of these practices on how reparations are conceived. Whilst mass atrocities are characterised by mass victimisation, it is in the nature of the criminal trials at the ICC and the ECCC that only few individuals can access their reparations schemes. Through targeting practices, these Courts create legal categories of victimhood that determine who can benefit from court-ordered reparations. This is not just a technical matter, and sceptics have warned that "by excluding victims of crimes not prosecuted for whatever reasons, the fundamental 'do no harm' principle could be violated by leaving excluded victims with a feeling of being marginalised and a 'victim second class'".[142] The ECCC chapter has shown that judicial actors are aware of these risks and can show flexibility in drawing the boundaries of eligible victims. Yet, they are not able to fundamentally alter the exclusive and restricted nature imposed by a system that adheres to logics of individual criminal responsibility. The reality is that only few survivors will ever benefit from reparations schemes at international(-ised) criminal courts. Tribunals have tried to compensate these exclusions and the non-action of local governments with humanitarian practices that aim to assist broader victim constituencies, such as TFV assistance and ECCC non-judicial measures, but with still uncertain reparative effects.

Making the voices of the few eligible victims heard in reparations proceedings is subject to further engagement practices, of which I highlighted communicative, representational and consultation practices. Although introducing the umbrella term of 'reparations' during the ICC negotiations was hailed as a breakthrough, the ICC's and ECCC's engagement with survivors showed that this abstract term was locally unknown and difficult to communicate. Many participating victims in the DRC and Cambodia were familiar with monetary compensation and the return of property, but the expansive notion of reparations was and is confusing to them. Hence, while ambiguities

[142] Hoven et al., Victims in Trials of Mass Crimes, 70.

in legal provisions can be deal breakers during negotiations, they can create new challenges during the implementation.

Moreover, the complexity of legal matters at the Courts coupled with resource constraints that leave little space for direct contact with victims, shifts power to more informed groups, especially lawyers and intermediary NGOs. Despite the rhetoric at both Courts about the importance of victims and reparations, tasks relating to reparations remained understaffed and underfunded; these tasks were simply not regarded to be core functions of a criminal court. Looking at the actual numbers of staffing levels and budgets makes the discrepancies between ambition and reality visible. Instead, most survivor engagement was carried out through an ecosystem of different non-court actors that work at the Courts' periphery. While in theory states parties and host governments are supposed to play a great role in supporting these Courts, NGOs have dominated this space in the first cases before the ICC and the ECCC. Acting as intermediaries between survivor populations and the Courts, the roles played by these NGOs have evolved far beyond their advocacy role during the negotiations into an indispensable service provider for overwhelmed Court sections – increasingly blurring the boundaries between official Court structures and NGO activities. It is in this in-between space where much of the practices occur through which reparations are produced.

As a consequence of these arrangements, the framing and designing of reparations takes mainly place in internal debates, where competing representatives talk on behalf of 'victims' and where communicative practices have been dominated by concerns about expectation management. Whilst managing expectations follows from concerns around 'do no harm' principles, the dilemma remains how to communicate meaningfully with victims about their preferred forms and modalities of reparations. This is particularly visible in 'consultations' through which the ICC and the ECCC have both considered victims' voices regarding reparations. Wemmers has noted that consultation "implies actively seeking and considering input without the obligation to follow it".[143] I view these practices as a strategy of adaptation by those working at and around these Courts in response to the constraints they encounter in complex conflict-affected situations. These practices help to discipline and translate the multitude of demands originating from survivor communities that do not neatly fit the stringent requirements of legal proceedings. Thus, when judges go about adjudicating reparations request – the subject of Part IV – they do so on the basis

[143] Wemmers, Jo-Anne, 2010, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate', 23 *Leiden Journal of International Law*, 626-643, 637.

of restricted ideas of reparations that often convey more representatives' best intentions, rather than victims' genuine preferences.

PART IV

Adjudicative Practices in Reparations

After the negotiations of the ICC's and ECCC's reparations mandates (Part II) and their communication to local populations in the DRC and Cambodia (Part III), the first cases at both Courts reached the adjudication stage. Part IV seeks to understand how judges, lawyers and administrators at these Courts gave effect to ambiguous legal frameworks when adjudicating reparations in the specific contexts associated with the cases before them. Examining the adjudicative practices regarding reparations at the ICC and the ECCC yields insights into the constraints and driving forces that have shaped and continue to shape an emergent reparations regime in international criminal justice.

Part IV examines the adjudication of reparations in the first two cases before the ICC and the ECCC. These cases at both Courts progressed more or less in parallel, so that they are now at similar stages of proceedings. In 2012, the ICC delivered its first reparations decision in *Lubanga*. The decision was amended and finalised by the ICC Appeals Chamber in 2015, but details concerning the implementation of this order are still being litigated. My account ends with a decision by Trial Chamber II on the liability for reparations (December 2017). The second case to reach the reparations phase is *Katanga*, where a reparations order at first instance was rendered in March 2017. The ECCC has completed its first case (*Case 001*) and issued in August 2014 a judgment, including reparations, in the first sub-trial of its second case (*Case 002/01*). The appeal phase concluded in 2016. Part IV ends with a comparative discussion of the main findings.

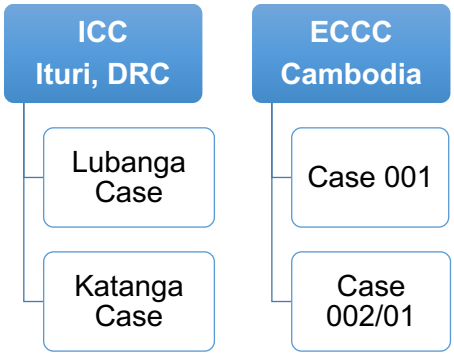

Figure 6: The two case studies

CHAPTER 7

Adjudicating Reparations at the ICC

This chapter studies the practices associated with the adjudication of reparations in the first two cases before the ICC, namely *Lubanga* and *Katanga* relating to the situation in Ituri, DRC. Based on a review of legal submissions and interviews with those involved, this chapter identifies the main adjudicative practices ICC Judges adopted in response to the tensions in the Rome Statute's legal framework on reparations and the context-specific constraints in Ituri. The goal is to understand how reparations were conceived through these practices, and how the practices then shaped the reparations outcomes decided by the Judges. I show that these practices are an attempt by those involved to mediate competing legal and social imperatives when adjudicating reparations.

1. The Failure to Establish Court-Wide Reparations Principles

As one of the pathways towards crafting a workable reparations scheme at the ICC, diplomats in Rome had envisaged that the Judges would establish reparations principles, providing clarification of issues negotiators were unable to resolve.[1] Yet, there was disagreement at the ICC about several aspects regarding this statutory provision, including what purpose these principles would serve, what content and legal standing they would take, and what organ would establish them. One ICC interviewee noted that the rules stipulate that the "Court" shall establish such principles, but who was the "Court"?[2] States had left the determination of these parameters deliberately within the discretion of the ICC and now wanted to see action. After the Kampala review conference in 2010, the so-called The Hague Working Group of states party representatives based at the seat of the ICC became a forum where states parties, ICC officials and NGO representatives debated issues relating to reparations. In light of the progression of the *Lubanga* trial, states parties expressed concern that "the legal framework and principles for

[1] Art. 75(1) of the ICC Statute states that "the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".
[2] Interview with ICC Legal Officer (ICC17), 13 July 2015.

reparations… were missing while the potential reparations phase was approaching", requesting that these should be clarified "before a specific reparations order would be made".[3]

In response, the ICC Presidency informed state parties that Judges had met a number of times in plenary, including in 2005 and 2007, to discuss Court-wide reparations principles.[4] After a series of informal discussions, Judges were unable to come to an agreement. Instead, they decided that reparations principles would be determined on a case-by-case basis. This approach would leave it to each trial chamber to establish principles in respect of individual cases. Similar to negotiators in Rome, ICC Judges struggled with fundamental disagreements over reparations and instead decided to defer problem-solving further into the future.

States parties and NGOs were worried about this approach.[5] Ahead of the 10th Assembly of States Parties, the Victims' Rights Working Group (VRWG) warned that "a process whereby trial chambers decide reparation orders without, at a minimum, a general framework of principles in place could lead to inconsistency."[6] The NGO coalition argued that such principles would provide greater clarity for all organs and foster a coordinated approach to reparations. One VRWG member expressed the frustration felt by many NGOs with what was regarded a lack of advance planning: "there is no operating framework, there no thinking ahead… which means when push comes to show, they just are going to take the very easy option, because nothing is in place to take anything other than that".[7]

States parties were equally unhappy with the Judges' approach, making the point that "establishing comprehensive principles prior to the individual proceedings was legally and practically a correct approach".[8] Similar to NGOs, states parties argued in favour of Court-wide principles in order to "to avoid a fragmented approach and possible conflicts between the Court and states parties in the area of reparations".[9] Both states and NGOs regarded Court-wide reparations principles mainly as having an internal function of securing a degree of coherence and legal certainty in the ICC's decision-making on reparations.[10] The external function of providing

[3] ICC, *Report of the Bureau on the Study Group on Governance*, 10th Assembly of States Parties, ICC-ASP/10/30, 22 November 2011, para. 26.
[4] ICC, *Report of the Bureau on Victims and Affected Communities and Trust Fund for Victims*, 10th Assembly of States Parties, ICC-ASP/10/31, 22 November 2011, para. 33.
[5] See REDRESS, 2011, 'Justice for Victims: The ICC's Reparations Mandate', London: REDRESS Trust. <http://www.refworld.org/pdfid/4def341618.pdf> (accessed 18 February 2018)
[6] Victims' Rights Working Group, 2011, 'Establishing Effective Reparations Procedures and Principles for the International Criminal Court', 3.
[7] Interview with NGO representative (ICC5), 16 May 2015.
[8] ICC, *Report of the Bureau on the Study Group on Governance*, 10th Assembly of States Parties, ICC-ASP/10/30, 22 November 2011, para. 27.
[9] Ibid para. 28.
[10] Interview with former state representative (ICC14), 24 June 2015.

guidance for national reparations proceedings in affected states that had brought reparations principles initially onto the agenda in Rome seemed to have disappeared from these discussions.

With the Judges defending their independence, states parties began contemplating an amendment to the RPE, which would have forced the ICC to establish Court-wide reparations principles. A corresponding draft resolution was only withdrawn after a majority of Judges had indicated their strong opposition to the resolution.[11] Yet, states parties clearly did not feel comfortable with leaving the matter in the Judges' hands alone, instead "concluding that guidance and clarification from States Parties are essential in order to ensure the effective and efficient implementation of the reparations provisions…".[12] The issue remained a point of contention between states parties and the Court.

These observations show a change of tone, with both the ICC and states parties moving away from the aspirational language of the early years. The mood at a time when the ICC approached its first reparations decision was one of concern and fear of the unknown. The debate around Court-wide reparations principles had highlighted that disagreements about reparations – which had already permeated the inter-state negotiations in Rome – continued among the ICC Judges, who came from different legal systems and had practiced in different contexts. Judges were unable to agree on some fundamental parameters for future reparations decisions, which would have clarified the ambiguous reparations rules in the ICC's legal framework. States parties and international NGOs were frustrated with what they perceived as insufficient preparation for the upcoming reparations proceedings in *Lubanga* and *Katanga*.[13] One state representative involved in these debates conveyed the widely shared view that "the Court was in place for ten years, and nothing was done".[14] States, NGOs, but also many ICC officials, wondered whether the Court was prepared enough for its first reparations order.

2. Adjudicating Reparations in the First Cases before the ICC

My examination of the adjudicative practices regarding reparations in the first two cases before the ICC proceeds in two steps. I first provide a brief summary of the adjudication process in *Lubanga* and *Katanga*. I then identify some of the main issues and practices that were at the core

[11] ICC, *Report of the Bureau on the Study Group on Governance*, 10th Assembly of States Parties, ICC-ASP/10/30, 22 November 2011, para. 28.
[12] *Reparations*, ASP Res 3, 10th Assembly of States Parties, ICC-ASP/10/Res.3, 20 December 2011.
[13] The VRWG recommended to the 10th ASP to "carry out as much advance planning as possible before the commencement of the first reparation proceedings in order to foster a common approach across different chambers …". Victims' Rights Working Group, 2011, 'The Implementation of Victims' Rights before the ICC', Issues and concerns presented by the Victims' Rights Working Group on the occasion of the 10th session of the Assembly of States Parties, 4, 11-13.
[14] Interview with former state diplomat (ICC14), 24 June 2015.

of the contested process through which judges, lawyers and administrators conceived reparations for those affected by the crimes of Thomas Lubanga Dyilo and Germain Katanga.

2.1. Adjudicating reparations in the case against Thomas Lubanga

With little guidance about what the reparations proceedings in *Lubanga* would look like, the parties to the proceedings, victim participants, NGOs and states all looked to the Trial Chamber to see how the Judges would adjudicate reparations in the first trial.

De-judicialising reparations: The Lubanga Trial Chamber decision (2012)

Even before a guilty verdict against Thomas Lubanga was reached, Trial Chamber I requested the Registry, represented by the VPRS, and the TFV to submit a joint filing on reparations to inform the Chamber's decision-making.[15] After the Trial Chamber delivered its guilty verdict, on 14 March 2012, it also invited the parties to the proceedings and other interested groups to make submissions on reparations.[16] The subsequent reparations proceedings unfolded rather quickly by ICC standards and culminated, on 7 August 2012, in a decision in which the Chamber established "the principles and procedures to be applied to reparations".[17]

At the heart of the Trial Chamber's decision was a list of rather uncontentious general reparations principles, including relating to fairness, non-discrimination, gender-inclusivity, involving victims and the need to securing reconciliation.[18] Interview respondents confirmed that the Chamber thought that establishing such principles was the main purpose of its decision.[19] According to one ICC legal officer, this resulted from some confusion surrounding the wording of the Statute that the Court *shall* establish reparations principles, but it *may* order reparations.[20]

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[15] *Prosecutor v Lubanga*, 'Second Report of the Registry on Reparations', Registry, ICC-01/04-01/06-2806, 1 September 2011 (initially confidential, reclassified as public on 19 March 2012); and *Prosecutor v Lubanga*, 'Trust Fund for Victims' First Report on Reparations', Trust Fund for Victims, ICC-01/04-01/06-2803-Red, 1 September 2011.

[16] *Prosecutor v Lubanga*, 'Observations on the Sentence and Reparations by Victims', V01 Victim Group, ICC-01/04-01/06-2864-tENG, 18 April 2012; *Prosecutor v Lubanga*, 'Observations of the V02 Group of Victims on Sentencing and Reparations', V02 Victim Group, ICC-01/04-01/06-2869-tENG, 18 April 2012; *Prosecutor v. Lubanga*, 'Observations on Issues Concerning Reparations', OPCV, ICC-01/04-01/06-2863, 18 April 2012; *Prosecutor v Lubanga*, 'Defence Submission on the Principles and the Procedure to Be Applied with regard to Reparations', Defence, ICC-01/04-01/06-2866-tENG, 18 April 2012; *Prosecutor v Lubanga*, 'Prosecutor's Submission on the Principles and Procedures to Be Applied in Reparations', OTP, ICC-01/04-01/06-2867, 18 April 2012.

[17] *Prosecutor v Lubanga*, 'Decision Establishing the Principles and Procedures to Be Applied to Reparations', Trial Chamber I, ICC-01/04-01/06-2904, 7 August 2012 (hereinafter 'Lubanga TC Reparations Decision').

[18] Ibid paras. 187-193.

[19] So at Interview with ICC Legal Officer (ICC17), 13 July 2015.

[20] Interview with ICC Legal Officer (ICC11), 3 June 2015.

As a consequence, the Judges merely provided a number of clarifications on the procedure rather than a detailed reparations order as expected by most trial participants.

Most party submissions, other than the Defence, had concerns over the effects of reparations resulting from the narrow scope of the Prosecutor's charges (see Part III). As I will discuss in more detail, the Chamber ultimately decided against limiting reparations to the small group of victims who applied for reparations and endorsed by and large a draft implementation plan proposed by the TFV with a preference for collective and community-based reparations.[21] The Chamber announced that it would not consider individual applications, but rather delegate to the TFV the task of identifying the beneficiaries and modalities of collective reparations.[22] With Thomas Lubanga having no noteworthy resources at his disposal to satisfy reparations orders, the Judges ordered reparations to be implemented "through" the TFV.[23]

Respondents among the legal professionals inside and outside the ICC had either mixed feelings about the decision or were openly critical. While there was satisfaction with the reparations principles, most respondents felt that the Trial Chamber had not fulfilled the minimum requirements of what would have been expected from a proper reparations order. One ICC officer stated that "it felt a bit as though the Chambers were wiping their hands of the very difficult issues and just passing them over to the Trust Fund to deal with", and further "it might be that they felt the same way we did, that they weren't well enough equipped to grapple with all those difficult issues, but someone eventually will have to grapple with those issues".[24] One NGO representative was equally frank about the outcome stating that "[the decision] is very nice, written out very well… but actually didn't say anything".[25] And further

> They [the Trial Chamber] didn't get into the heart of how this was going to work operationally. They didn't care. It was like a framework at the basic level, which was basically rearticulating, 'the Statute says the victims should get reparations'. It didn't say how.[26]

The reasons for Trial Chamber I's approach may have been more banal than substantive. One ICC legal officer noted that the Chamber was reluctant to address any reparations matters before or during the trial, so as to avoid any impression of doubt regarding the presumed innocence of the accused. "The precondition for a discussion of reparations is a conviction."[27] According to this account of the events, the Judges left most matters relating to reparations until the end, which then

[21] Lubanga TC Reparations Decision, 2012, para. 281.
[22] Ibid paras. 284 & 289(b).
[23] Ibid para. 269.
[24] Interview with former Registry staff (ICC 19), 22 October 2015.
[25] Interview with NGO representative (ICC5), 16 May 2015.
[26] Ibid.
[27] Interview with ICC Legal Officer (ICC17), 13 July 2015.

coincided with the end of their mandates. This constraint was cited by respondents as the main reason for a hurried reparations phase[28] – the entire process took place from March to August 2012, compared to the six years that had passed since Lubanga's transfer to The Hague. An ICC legal officer pointed to the problems resulting from the length of judicial proceedings, "the trials are so long at the ICC that by the time you finish your trial, not only are the Judges exhausted, but they have also exhausted their mandate."[29]

On the whole, the Trial Chamber's decision elevated the TFV to become the principal agency to deal with reparations in *Lubanga*. The decision delegated most tasks with regards to reparations to a non-judicial entity, including an ultimate decision about the beneficiaries, modalities and substance of reparations, within the framework of a very broad set of principles. The complexities involved with conceiving reparations to victims in a far-away still conflict-affected region, where various detrimental consequences would need to be considered when designing reparations, seemed too great. Ultimately, the Judges declined to accept this responsibility and, instead, handed it on to the TFV.[30] However, the Appeals Chamber did not share this view.

Re-judicialising reparations: The appeals reparations judgment in Lubanga (2015)

With much confusion surrounding Trial Chamber I's reparations decision, appeal notices followed soon after its publication. A preliminary point of contention was the nature of the Chamber's 'decision'. While trial Judges had stated that they regarded the decision one on reparations principles, rather than a proper reparations order, they had at the same time given instructions regarding the reparations framework and also declined issuing any further orders to the TFV. This effectively indicated a conclusion of the proceedings before the Trial Chamber, much to the surprise of the parties. Victim lawyers and the Defence contended that this approach deprived them of their right to an appeal. They asked the Appeals Chamber to consider the decision an 'order for reparations', allowing them to submit their appeals.[31] The Appeals Chamber

[28] Interview with ICC Legal Officer (ICC11), 3 June 2015; Interview with NGO representative (ICC4), 14 May 2015; Interview with ICC Legal Officer (ICC2), 29 April 2015; and Interview with ICC Legal Officer (ICC17), 13 July 2015.
[29] Interview with ICC Legal Officer (ICC2), 29 April 2015.
[30] A commentator suggested that this showed "a certain hesitancy within the Court to truly own the judgment". Mia Swart quoted at British Institute of International and Comparative Law, 2012, 'Reparations to Victims: The Recent International Criminal Court Decision and Beyond', Rapid-response seminar report.
[31] *Prosecutor v Lubanga*, 'Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to Be Applied to Reparations of 7 August 2012', OPCV and V02 Team of Legal Representatives, ICC-01/04-01/06-2909-tENG, 24 August 2012; *Prosecutor v Lubanga*, 'Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to Be Applied to Reparation of 7 August 2012', V01 Team of Legal Representatives, ICC-01/04-01/06-2914-tENG, 3 September 2012; *Prosecutor v Lubanga*, 'Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I's Decision Establishing the Principles and Procedures to Be Applied to Reparation rendered on 7 August 2012', Defence, ICC-01/04-01/06-2917-tENG, 6 September 2012.

recognised this dilemma and issued, on 14 December 2012, a decision where it "deemed" the Trial Chamber's decision an 'order for reparations' and allowed the appeals to proceed.[32] The Appeals Chamber also ruled that the appeals on conviction and sentence should first be dealt with. This froze the reparations process by another two and half years, between December 2012 and March 2015, until the reparations order against Thomas Lubanga was finalised.

The victim representatives argued in their appeals that the Trial Chamber should have allowed time for more victims to submit applications for reparations; it should have found the convicted person liable to contribute to reparations; and it should have considered the individual applications for reparations.[33] One of the submissions of the representatives lamented, "there is no statutory provision for a trial chamber to delegate its own reparations responsibilities to another organ of the Court, particularly a non-judicial organ, or to an independent entity without judicial functions".[34]

When the Appeals Chamber issued its judgment, on 3 March 2015, it substantially reconsidered the Trial Chamber's decision. The Appeals Chamber ruled that an order for reparations must be directed against the convicted person and must inform the convicted person of his liability. That is, Thomas Lubanga should know how much he was responsible to pay. As the Trial Chamber did not do this, the Appeals Chamber asked the TFV, on an exceptional basis, to assess the monetary amount necessary to remedy the harms caused by the crimes for which Thomas Lubanga was convicted.[35] Moreover, the Appeals Chamber ruled that any reparations order must define the harm caused to victims and identify the victims eligible to benefit from reparations awards; even in the case of collective reparations.[36] The Judges clarified that only victims of the crimes for which Lubanga was convicted were eligible for reparations, applying a narrower definition than the Trial Chamber had in its original decision.[37] Finally, the Appeals Chamber

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[32] *Prosecutor v Lubanga*, 'Decision on the Admissibility of Appeals against Trial Chamber I's "Decision Establishing the Principles and Procedures to Be Applied to Reparations" and Directions on the Further Conduct of Proceedings', Appeals Chamber, ICC-01/04-01/06-2953, 14 December 2012.
[33] See *Prosecutor v Lubanga*, 'Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to Be Applied to Reparation of 7 August 2012', V01 Team of Legal Representatives, ICC-01/04-01/06-2914-tENG, 3 September 2012. See also *Prosecutor v Lubanga*, 'Document in Support of Appeal', V01 Group of Victims, ICC-01/04-01/06-2973-tENG, 5 February 2013.
[34] *Prosecutor v Lubanga*, 'Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to Be Applied to Reparations of 7 August 2012', OPCV and V02 Team of Legal Representatives, ICC-01/04-01/06-2909-tENG, 24 August 2012, para, 26. See also *Prosecutor v Lubanga*, 'Document in Support of Appeal', OPCV and V02 Team of Legal Representatives, ICC-01/04-01/06-2970-tENG, 5 February 2013.
[35] *Prosecutor v Lubanga*, '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', Appeals Chamber, ICC-01/04-01/06-3129, 3 March 2015, paras. 57-129 (hereinafter 'Lubanga AC Reparations Judgment 2015').
[36] Ibid paras. 169-204.
[37] Ibid paras. 205-228.

held that a reparations order must specify the type of reparations ordered. It clarified that in its reading of the Trial Chamber decision, the Judges had effectively ordered collective reparations, when endorsing the TFV reparations plan.[38] The Appeals Chamber attached an amended reparations order and a redrafted set of reparations principles to its judgment.

The Appeals Chamber's reparations order highlighted the discrepancies in views on Court-ordered reparations held across different chambers. Its effect was a reversal of the Trial Chamber's approach to reparations, especially with regards to the outsourcing of judicial responsibilities to the TFV. In effect, "the Appeals Chamber said no, you do not delegate to anyone, you decide".[39] This re-judicialisation of reparations was viewed positively throughout my interviews with legal professionals, both among ICC officials and NGOs – showing how legal networks and the logics they promote span across institutions. Most lawyers emphasised that the appeals judgment provided much needed clarity as to what an ICC reparations order should entail, and it re-established judicial primacy over reparations. For most of my interviewees among the legal professionals, the fact that Judges were regaining the decision-making over reparations was a positive development. One ICC legal officer argued that it is positive for victims to have a say in front of a judicial body, "because with an administrative body like the Trust Fund, you may end up with things that you don't really like, and you cannot really complain"; pointing to the fact that victim participants can appeal judicial decisions.[40] Few respondents seemed to be concerned about the procedural and logistical challenges that the ICC will face in implementing this more legalistic approach to reparations.[41] The majority was relieved that, after more than a decade of uncertainty, there was some clarity about the ICC's approach to reparations. However, it was not going to be the end of the story.

Stalled reparations process in Lubanga (2015-2017)

One month after the Appeals Chamber rendered its judgment, one interviewee noted that the decision potentially "opened the Champs Elysée", in that it unlocked an avenue for many years of new litigation on reparations after the completion of the criminal trial.[42] Indeed, my respondent's prediction has come true. If victims had hoped to see reparations materialise after

[38] Ibid paras. 130-168. Most of the parties had read the Trial Chamber decision with the understanding that the Judges had ordered both, individual and collective reparations, and as a consequence had not appealed this aspect of the decision. Interview with NGO representative (ICC4), 14 May 2015.
[39] Interview with ICC Legal Officer (ICC2), 29 April 2015.
[40] Ibid.
[41] Carsten Stahn noted that this approach "places significantly more emphasis on detailed legal analysis and judicialisation of reparations than more victim-oriented mass claim proceedings". Stahn, Carsten, 2015, 'Reparative Justice after the Lubanga Appeal Judgment', 13 *Journal of International Criminal Justice*, 801-813, 809.
[42] Interview with ICC Legal Officer (ICC2), 29 April 2015.

the appeals judgment, after almost ten years of proceedings, they were disappointed. What unfolded over the next couple of years – and is still ongoing at the time of writing – is a prolonged and complex litigation process over reparations. This litigation was carried out before a newly composed Trial Chamber II which was concurrently tasked with overseeing the reparations phase in *Katanga*. The new Judges of Trial Chamber II were all from civil law countries. What is more, the Chamber's President, Marc Perrin de Brichambaut, led the French delegation in Rome and negotiated a reparations mandate for the ICC – the circle that began almost twenty years ago in Rome was closing.

Based on the outcomes of consultations with victims and affected communities in Ituri, discussions with victim lawyers and an expert meeting, the Trust Fund presented, in November 2015, a draft implementation plan for collective reparations.[43] The plan proposed a three-year program targeting an estimated 3,000 direct and indirect victims and comprising primarily rehabilitation, livelihood support and symbolic measures. The TFV stated that it would 'complement' the costs of implementation with EUR 1 million from its reparations reserve.[44] In February 2016, Trial Chamber II found that the plan was incomplete and did not comply with its instructions, especially regarding the identification of beneficiaries, assessment of harm and determination of civil liability of the convicted person.[45] The TFV expressed concern with the Judges' approach and unilaterally suspended the victim identification process, which brought the proceedings to a standstill.[46]

In response to the at times fierce struggle between the ICC and the TFV during the 'implementation phase', which I will discuss further below, the Judges have proceeded with a piecemeal approach, including seeking further submissions from parties and external stakeholders. In October 2016, the Trial Chamber approved a first set of symbolic reparations measures, consisting of a number of fixed and mobile memorialisation projects for a total amount of EUR 170,000.[47] This was followed, in April 2017, by the Trial Chamber's endorsement of the TFV's implementation plan for collective reparations, including a range of service-based reparations for

[43] *Prosecutor v Lubanga*, 'Filing on Reparations and Draft Implementation Plan', Trust Fund for Victims, ICC-01/04-01/06-3177-Red, 3 November 2015. The TFV noted that the plan was based, among others, on an expert meeting organised in Belfast, and on consultations held from May to June 2015 in 22 locations in Ituri involving over 1,340 victims, family members and representatives of affected communities.
[44] Ibid.
[45] *Prosecutor v Lubanga*, 'Order Instructing the Trust Fund for Victims to Supplement the Draft Implementation Plan', ICC-01/04-01/06-3198-tENG, Trial Chamber II, 9 February 2016.
[46] *Prosecutor v Lubanga*, 'First Submission of Victim Dossiers', Trust Fund for Victims, ICC-01/04-01/06-3208, 31 May 2016.
[47] *Prosecutor v Lubanga*, 'Order Approving the Proposed Plan of the Trust Fund for Victims in Relation to Symbolic Collective Reparations', Trial Chamber II, ICC-01/04-01/06-3251, 21 October 2016. In response to the TFV's implementation plan for symbolic measures at *Prosecutor v Lubanga*, 'Filing Regarding Symbolic Collective Reparations Projects', Trust Fund for Victims, ICC-01/04-01/06-3223-Red, 19 September 2016.

psychological, physical and socio-economic rehabilitation with a total amount of EUR 730,000 over a three-year period.[48] In December 2017, the Chamber set the amount of Thomas Lubanga's liability for these reparations at USD 10 million.[49] At the time of writing, this process was still ongoing – more than three years after the appeals judgment on reparations.

2.2. Adjudicating reparations in the case against Germain Katanga

In the shadow of *Lubanga*, the trial against Germain Katanga moved towards the reparations stage. On 7 March 2014, Katanga was found guilty, [50] and subsequently sentenced to 12 years imprisonment. On 25 June 2014, both the Prosecutor and the Defence withdrew their appeals against the judgment, making the sentence final and saving participating victims and their legal representatives from a long appeals process. With a final judgment on guilt in their hands, the Judges entered the reparations phase with more certainty. The fact that the Presidency reconstituted Trial Chamber II avoided a situation as seen in *Lubanga*, where Judges at the end of their mandates had to press through with a reparations order in a relatively short time period.[51]

Trial Chamber II approached the reparations phase in a more structured manner, first by seeking information with respect to victims who requested reparations. The outcomes of victim consultations were discussed in Part III, including an overwhelming preference among participating victims for individual reparations. On the basis of these consultations, the Judges then invited parties to the proceedings and other interested stakeholders to submit observations on reparations.[52] These submissions were influenced by the publication, on 3 March 2015, of the appeals reparations judgment in *Lubanga*. The TFV's own submission in *Katanga* highlighted, above all, the significant procedural and operational challenges involved with giving effect to the Appeal Chamber's ruling. It argued that procedural sequencing would be necessary and proposed a two-stage reparations process.[53]

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[48] The endorsement followed a two-stage approval process. A programmatic framework was endorsed in April 2017. This was to be followed by a bidding process by organisations to implement service-based collective reparations. *Prosecutor v Lubanga*, 'Order Approving the Proposed Programmatic Framework for Collective Service-Based Reparations Submitted by the Trust Fund for Victims', Trial Chamber II, ICC-01/04-01/06-3289, 6 April 2017.

[49] *Prosecutor v Lubanga*, 'Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu', Trial Chamber II, ICC-01/04-01/06-3379-Red, 15 December 2017.

[50] *Prosecutor v Katanga*, 'The Prosecutor v. Germain Katanga: Judgment Pursuant to Article 74 of the Statute', Trial Chamber II, ICC-01/04-01/07-3436, 7 March 2014.

[51] Since March 2015, Trial Chamber II comprises Judge Marc Perrin de Brichambaut (France), Judge Olga Herrera Carbuccia (Dominican Republic), and Judge Peter Kovacs (Hungary).

[52] See *Prosecutor v Katanga*, 'Scheduling Order for Interested States or Other Interested Persons to Apply for leave to File Submissions pursuant to Article 75 of the Statute', Trial Chamber II, ICC-01/04-01/07-3516, 21 January 2015.

[53] The TFV proposed a two-step process: First, the Chamber would make a decision on reparations principles and criteria for eligibility, including the assessment of harm. The TFV would then develop an

Trial Chamber II rendered, on 24 March 2017, its reparations order.[54] It considered that the reparations principles established for *Lubanga* could also be applied to this case.[55] After assessing the requests of 341 applicants affected by the attack on the village of Bogoro, the Chamber declared 297 of them eligible for reparations.[56] The Chamber individually assessed the extent of the physical, material and psychological harm at a monetary value of USD 3.75 million. Observing the principle of proportionality, however, it limited the amount of the convicted person's liability to USD 1 million, while at the same time finding Germain Katanga indigent for reparations purposes.[57] In terms of the types of reparations, the Judges paid attention to the preferences expressed by consulted victims and ordered the ICC's first individual reparations in the form of compensation of USD 250 per eligible victim.[58] In addition, the Judges ordered collective reparations relating to support for housing, income-generating activities, education and psychological support.[59] The Trial Chamber instructed the TFV to present an implementation plan for its reparations order and asked the Fund to complement the payment of awards in light of Katanga's indigence. Both the Defence and legal representatives of victims appealed parts of the reparations order.[60] In July 2017, the TFV submitted its draft implementation plan.[61] At the time of writing, the proceedings are ongoing with victims still awaiting the materialisation of reparations.

Many interviewees regarded the *Katanga* reparations phase as a new template for ICC reparations in the aftermath of the appeals reparations order in *Lubanga*. *Katanga* was seen as a proof that the Appeals Chamber's more legalistic approach to reparations was feasible to implement. Yet, *Katanga* only concerned a single attack with a limited number victims, and it still took Trial Chamber II three years after conviction to render a reparations order; not counting subsequent litigation regarding the implementation of that order.

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implementation plan that would determine the number of beneficiaries, extent of harm and nature and size of suggested awards. Taking into consideration comments by parties, the Chamber would then rule on the precise scope of liability of the convicted person. *Prosecutor v Katanga*, 'Observations on Reparations Procedure', Trust Fund for Victims, ICC-01/04-01/07-3548, 13 May 2015, paras. 62-96.

[54] *Prosecutor v Katanga*, 'Order for Reparations Pursuant to Article 75 of the Statute', Trial Chamber II, ICC-01/04-01/07-3728-tENG, 24 March 2017 (hereinafter 'Katanga TC Reparations Order').

[55] Ibid para. 30.

[56] Ibid para. 168.

[57] Ibid paras. 237-239, 264, 328.

[58] Ibid paras. 284-287, 298-300.

[59] Ibid paras. 301-305.

[60] For instance, the Legal Representative of Victims filed a notice of appeal concerning transgenerational harm, which was not recognised by the Trial Chamber. *Prosecutor v Katanga*, 'Notice of Appeal against the "Ordonnance de réparation en vertu de l'article 75 du Statut" and its Annex II"', Legal Representative of Victims, ICC-01/04-01/07-3737-tENG of 25 April 2017.

[61] *Prosecutor v Katanga*, 'Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017', Trust Fund for Victims, ICC-01/04-01/07-3751-Red, 25 July 2017.

3. The Main Issues and Practices during the Adjudication

The adjudication of reparations in the ICC's first two cases have revealed fundamental disagreements about the purpose of Court-ordered reparations and the role of the ICC in conceiving and implementing such reparations. While the Trial Chamber in *Lubanga* proposed an approach that would have de-judicialised reparations but provide more flexibility for engaging with the complexities on the ground, the Appeals Chamber re-judicialised the process by reasserting the decision-making power of judges – an approach that also determined the course of events in *Katanga*. These disagreements indicate the difficulties encountered by legal and professional staff at the ICC and the TFV with reconciling competing legal and social concerns surrounding Court-ordered reparations.[62]

In this section, I explore the issues that have been at the heart of the debates and contestations during the reparations phases in *Lubanga* and *Katanga*. Torn between legal and social imperatives, those working at and around the ICC and the TFV have adopted a range of practices in response to competing rationales for reparations. I argue that these adjudicative practices are key to understanding reparations outcomes at the ICC. I identify the most salient practices and their effects through looking at some of the central issues debated in the submissions and judicial decisions, namely relating to the purpose of reparations, their beneficiaries and modalities, the responsibility for funding reparations and the sources of knowledge that informed the adjudication process. The legal and social dimensions of reparations are embodied in separate institutional frameworks, the ICC and the TFV, making their interrelationship a fruitful field of inquiry.

3.1. Contested purposes of reparations

At the most fundamental level, Judges and other stakeholders have disagreed about the purpose of reparations in international criminal justice. Over the course of the adjudication of reparations in *Lubanga* and *Katanga*, these disagreements boiled down to a contest between those advocating for accountability as the main objective and those promoting broader goals of transitional justice and reconciliation.

Trial Judges in *Lubanga* conceived reparations as a broad and flexible concept able to accommodate multiple justice goals, noting that reparations "oblige those responsible for serious crimes to repair harm they caused to the victims and they enable to Chamber to ensure that offenders account for their acts", and subsequently listing several additional objectives:

[62] I thank Peter Dixon for discussions that focused my analysis on competing legal and social imperatives.

> Reparations in the present case must - to the extent achievable - relieve the suffering caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers. Reparations can assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities…[63]

Trial Chamber I's reparations principles, despite the disclaimer that these were limited to a single case, manifested a broad human rights-inspired conception of reparations within the ICC's jurisprudence, until then at best implicit in the Rome Statute framework.[64] The influence of an understanding of reparations from a restorative justice point of view was also visible, expressed in an emphasis on reconciliation between convicted persons, victims and affected communities.[65]

In so doing, Trial Chamber I followed the TFV, which had repeatedly argued that "reparations should aim at reconciliation".[66] Informed by its previous practice and the identity it had built throughout the implementation of its assistance mandate (see Part III), the TFV became a forceful advocate for an approach to reparations that would consider the broader context in Ituri and aim for societal reconciliation. The TFV argued in *Katanga* that reparations should not only "relieve the suffering" and "afford justice to the victims", but also "assist in promoting reconciliation between the conflicting parties".[67] Underlying the TFV's push for reconciliation as a central objective for reparations was a transformative agenda geared towards sustainable peace and preventing future conflict in Ituri.[68] Yet, the proponents of reconciliation remained vague about what kind of reconciliation they had in mind, interchangeably talking about reconciliation between offender and victims (*Lubanga* Trial Chamber) and broader societal reconciliation among ethnic communities (TFV).

The Appeals Chamber in *Lubanga* did not endorse the Trial Chamber's broad, flexible conception of reparations. Its reparations order settled on individual accountability as the primary objective of reparations at the ICC, treating other considerations, such as reconciliation, peace or social reintegration, as secondary objectives.[69] The principle of accountability was expressed by the fact

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[63] Lubanga TC Reparations Decision 2012, para. 179.
[64] See Shelton, Dinah, 2012, 'Introductory Note to the International Criminal Court: Situation in the Democratic Republic of Congo, Prosecutor v. Thomas Lubanga Dyilo, Decision Establishing the Principles and Procedures to Be Applied to Reparations', 51(5) *International Legal Materials*, 971-1017.
[65] Lubanga TC Reparations Decision 2012, para. 193.
[66] *Prosecutor v Lubanga*, 'Observations on Reparations in Response to the Scheduling Order of 14 March 2012', Trust Fund for Victims, ICC-01/04-01/06-2872, 25 April 2012, paras. 69-71.
[67] *Prosecutor v Katanga*, 'Observations on Reparations Procedure', Trust Fund for Victims, ICC-01/04-01/07-3548, 13 May 2015, para. 143.
[68] Informed by its experience with implementing assistance in Ituri, the TFV argued that "conceptually, as well as in practice, reparations should be understood to be one part of a much larger restorative and transitional justice agenda". *Prosecutor v Lubanga*, 'Trust Fund for Victims' First Report on Reparations', Trust Fund for Victims, ICC-01/04-01/06-2803-Red, 1 September 2011, para. 6.
[69] See Stahn, Reparative Justice after the Lubanga Appeal Judgment, 812.

that the reparations order had to be directed against the convicted person, regardless of a finding of indigence.[70] The Appeals Chamber reasserted the principle of accountability as central to the conception of reparations at the ICC.

Submissions by victims' legal representatives were supportive of the Appeals Chamber's more narrow conception of reparations. The Legal Representative for Victims (LRV) in *Katanga* argued, "the harm done to the victims and their needs must be a matter of primary concern to the Chamber if its order is to be more than a merely symbolic measure and instead one that is aimed at actually giving the victims back their dignity while meeting their needs".[71] The LRV stressed that while victims expressed a desire for peace and reconciliation, they saw this as a measure complementary to their priority requests. Many victims in the consultation thought that this was a responsibility of the Congolese state.[72] The LRV emphasised that the ICC should be cautious if it claimed to engage in resolving the causes of conflict.[73] Instead, the ICC should involve the DRC government in such efforts. "Measures to promote reconciliation between the communities and the questions relating to local security… cannot be contemplated without the involvement of the Congolese State".[74]

The LRV's view was supported by a joint submission of Queen's University and Ulster's Transitional Justice Institute during the *Katanga* reparations phase. The two universities argued that "reparations at the ICC should be viewed as one element of the Court's broader responsibilities to ensure accountability by publicly acknowledging and redressing victims' harm".[75] The submission further elaborated:

> [T]he ICC is a court, not an administrative reparation body…. As such reparation orders seek to deliver justice to those victims before it, rather than trying to achieve more political goals of reconciliation. … Such political aims are best left to more comprehensive state reparations programmes, which can capture a wider scope of victimisation and provide more comprehensive reparations to a greater number of victims.[76]

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[70] Lubanga AC Reparations Judgment 2015, para. 70.
[71] *Prosecutor v Katanga*, 'Observations of the Victims on the Principles and Procedures to be applied to Reparations', ICC-01/04-01/07-3555-tENG, Common Legal Representative of Victims, 15 May 2015, para. 72.
[72] Ibid para. 25.
[73] Ibid para. 42.
[74] Ibid para. 128. The Defence also supported involvement of the government: "[i]t would be in the wider interest that the ICC and the DRC liaise on the issue of reparations. In particular, to liaise in respect of any measures or proposed measures by the DRC, in order to maximize the efficiency of the order. Indeed, the State is usually a key actor in reconciliation ...". *Prosecutor v Katanga*, 'Defence Observations on Reparations', Defence, ICC-01/04-01/07-3549, 14 May 2015, para. 105.
[75] *Prosecutor v Katanga*, 'Submission on Reparations Issues pursuant to Article 75 of the Statute', Queen's University Belfast's Human Rights Centre and University of Ulster's Transitional Justice Institute, ICC-01/04-01/07-3551, 14 May 2015, para. 4.
[76] Ibid para. 6.

The Appeals Chamber's narrower, more legalistic, conception of reparations was in direct opposition to the TFV's broader and more pragmatic conception of reparations. These contestations over the purpose of reparations were not merely philosophical questions, as competing goals had flow-on effects regarding the practices and design of reparations. The question was how individuals at these Courts would deal with these competing goals in their practices regarding reparations.

3.2. Between inclusion and exclusion: Targeting and modalities

Most submissions grappled with the dilemma of how to deliver fair reparations to victims in Ituri based on two cases with such a narrow scope of charges. Whether actors favoured accountability-based conceptions of reparations or pursued broader goals of transitional justice often determined if they advocated for narrower or broader groups of beneficiaries. These debates were an extension of the struggles over the construction of victimhood described in Part III. They show that these struggles continued into the reparations phase, where the contours of the group of victims eligible for reparations was contested and litigated before the chambers.

Three issues relating to the narrow scope of charges and its impact on reparations attracted particular attention during the adjudication. The first relates to the exclusive focus on child soldiers in *Lubanga*. Previous attempts to broaden the definition of victims through an expanded consideration of 'indirect victims' had failed, and excluded from the indirect victim category those harmed by the conduct of child soldiers.[77] Considering that one of the former child soldiers' aspirations has been their (re-) integration into communities, a key question in *Lubanga* was how to provide reparations without stigmatising the beneficiaries and creating problems in communities where other survivors would not receive reparations.[78]

A second issue that affected both cases concerned the exclusion of victims of sexual and gender-based violence from reparations. This topic has received great attention in the scholarly literature.[79] While acts of sexual violence were not among the charges in *Lubanga*, Germain Katanga was acquitted on charges of rape and sexual slavery. Due to the widespread nature of

[77] In 2009, Trial Chamber I clarified that for direct victims a causal link must exist between the crimes charged and their harm, while indirect victims are those who suffer harm as a result of the harm suffered by direct victims, such as the parents of child soldiers. *Prosecutor v Lubanga*, 'Decision on "indirect victims"', Trial Chamber I, ICC-01/04-01/06-1813, 8 April 2009, paras. 44-51.
[78] Dixon, Reparations and the Politics of Recognition, 339.
[79] See for instance Durbach, Andrea and Louise Chappell, 2014, 'Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations', 16(4) *International Feminist Journal of Politics,* 543-562; and De Brouwer, Anne-Marie, 2007, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families', 20(1) *Leiden Journal of International Law*, 207-237.

sexual violence in the conflicts in the Eastern DRC, many parties to the proceedings and submissions by external stakeholders had pressed the Chambers in both cases to consider reparations for victims of sexual violence.

Finally, the combined effects of the Prosecutor's narrow charges – relating to former child soldiers mostly from the Hema group in *Lubanga* and the mainly Hema victims of the Bogoro village attack in *Katanga* – meant that reparations in both cases would predominately go towards members of one ethnic group. This worried those holding reconciliation-based conceptions of reparations, especially the TFV. The Defence in *Katanga* also argued that "a primary objective of reparations in the present case should be pacification of the area and reconciliation between the Hema community and the Ngiti / Lendu. Care should be taken not to appear to be favouring one community over another, which was a causal factor of the conflict in Ituri."[80] In essence, the Defence demanded that reparative measures also benefit Germain Katanga's own ethnic community.

On the whole, the narrow charges in both cases had the effect of excluding several categories of victims from the scope of Court-ordered reparations. Those considering more broadly the societal implication of reparations compensated for these perceived shortcomings through two main adjudicative practices: continuously pushing the boundaries of the group of victims eligible for reparations, and proposing modalities that would benefit broader victim constituencies, especially through collective reparations.

3.2.1. Contested targeting practices in reparations

From the outset, the TFV considered that "the selectivity of charges and the resulting exclusion of certain victim groups from the reparations process could result in further tensions and conflict in Ituri".[81] In order to design a more inclusive reparations program, the TFV initially proposed in *Lubanga* a community-based reparations approach that focused on collective measures relating to rehabilitation and satisfaction; a less legalistic approach that followed the TFV's assistance practice.[82] The TFV contended that this would represent the most effective way of using the limited funds. Trial Chamber I was sympathetic to these arguments and endorsed the proposal.[83] Given that reparations were to be funded from the TFV's other resources and tended to be

[80] *Prosecutor v Katanga*, 'Defence Observations on Reparations', Defence, ICC-01/04-01/07-3549, 14 May 2015, para. 101.
[81] *Prosecutor v Lubanga*, 'Trust Fund for Victims' First Report on Reparations', Trust Fund for Victims, ICC-01/04-01/06-2803-Red, 1 September 2011, para. 170.
[82] The TFV justified its proposal with the fact that no sources from the convicted person were identified; that it represented the most appropriate approach to upholding non-discrimination principles in light of the limited number of applications for reparations; and that individual reparations would undermine reconciliation in Ituri and complicate the reintegration of former child soldiers. Ibid paras. 289 & 344.
[83] Lubanga TC Reparations Decision 2012, para. 281.

collective in nature, the Trial Chamber also deemed appropriate a "wholly flexible" approach to determining factual matters regarding the identification of beneficiaries; essentially leaving the matter in the hands of the TFV.[84]

The main concern of victims' legal representatives, on the other hand, has been to deliver tangible outcomes for the small group of victim participants at trial. As perhaps could be expected, these lawyers regarded their role first and foremost in representing the interests of their clients, and not those of other potentially eligible victims; not to speak of the broader interests of other conflict-affected communities in Ituri. For example, the LRV in *Katanga* argued that the Judges must "refrain from broadening the definition of 'victim' to avoid the risk of acting beyond the scope of its judicial mandate in the instant case and venturing into the realm of providing humanitarian relief and assistance".[85] There seemed to exist similar views between victims and defence lawyers in favour of a narrow group of beneficiaries, understood as those participating at trial or applying for reparations.

Negotiating targeting practices in Lubanga

These arguments resonated with the Appeals Chamber's accountability-based conception of reparations. The Appeals Chamber ruled that only victims of the crimes for which Thomas Lubanga was convicted were eligible for reparations. Moreover, any reparations order must define the harm caused to victims and identify the individual victims eligible to benefit from the reparations awards – even in the case of collective reparations.[86] As a consequence, the Judges excluded victims of sexual and gender-based violence from reparations, since Lubanga was not convicted for these acts.[87] Hence, the Appeals Chamber reaffirmed that criminal law logic governed the ICC reparations regimes, specifically by underlining the nexus between reparations and the conviction of an individual.[88] The Judges rejected Trial Chamber I's "wholly flexible approach" in cases where reparations were to be ordered "through" the Trust Fund and the TFV's own proposal, which had sought a reparations regime more autonomous from the charges.

As a result of the appeals judgment, liability for reparations now had to be established separately in addition to criminal liability. For the Appeals Chamber this meant not only to identify individual beneficiaries as a prerequisite for determining Lubanga's liability, but also for victims

[84] Ibid paras. 254 & 274.
[85] *Prosecutor v Katanga*, 'Observations of the Victims on the Principles and Procedures to be applied to Reparations', ICC-01/04-01/07-3555-tENG, Common Legal Representative of Victims, 15 May 2015, para. 43.
[86] Lubanga AC Reparations Judgment 2015, paras. 169-204
[87] Ibid paras. 192-199.
[88] Ibid para. 65.

to have their identity disclosed to the Defence.[89] The Chamber's more legalistic approach had consequences for the determination of beneficiaries, which the TFV had preliminarily estimated at around 3,000 individuals. Trial Chamber II rejected the TFV's proposal for a simplified administrative screening process that would have safeguarded victims' security concerns and, instead, insisted on a more demanding procedure, including a list of eligible victims, an evaluation of their harm, and the monetary amount of Lubanga's liability.[90]

After the TFV had reluctantly embarked on its first identification mission to Ituri, it pushed back. Based on the experience with hour-long interviews with survivors, the TFV concluded that the "individual eligibility process damages and re-traumatises victims"[91] and "actively inhibits victims' access to reparations".[92] Besides, the TFV informed the Judges that it had spent USD 100,000 from its reparations reserve on this administrative process that, until then, had only led to a few dozen victim dossiers. It argued the whole process "may prove too expensive and administratively disproportionate to the eventual benefit".[93] The TFV requested the Trial Chamber to reconsider its order and provisionally suspended all victim identification activities.[94] This brought the reparations process to a standstill.

Apart from the Defence, most parties as well as scholars and experts took issue with an individual identification procedure for what was in essence a collective reparations program.[95] Victim lawyers reminded the Chamber that the costs of this process could not be justified and were disproportionate to the budget available for collective reparations.[96] A submission by reparations experts argued that

> the current process of individualised and up-front in-depth harm assessment to determine eligibility and design projects will result in: programmatic unsustainability or failure; a process that is

[89] See Brodney, Marissa, 2016, 'Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates', 1 *Journal of the Oxford Centre for Socio-Legal Studies*, 1-35.
[90] *Prosecutor v Lubanga*, 'Order Instructing the Trust Fund for Victims to Supplement the Draft Implementation Plan', ICC-01/04-01/06-3198-tENG, Trial Chamber II, 9 February 2016, para. 9. Trial Chamber II also rejected a request by the TFV to appeal the decision. *Prosecutor v Lubanga*, 'Decision on the Request of the Trust Fund for Victims for Leave to Appeal against Order of 9 February 2016', Trial Chamber II, ICC-01/04-01/06-3202-tENG, 4 March 2016.
[91] *Prosecutor v Lubanga*, 'First Submission of Victim Dossiers', Trust Fund for Victims, ICC-01/04-01/06-3208, 31 May 2016, para. 8.
[92] Ibid para. 66.
[93] Ibid para. 83. The TFV noted that for the identification and harm assessments it had engaged the services of an NGO for an amount of USD 111,380, which expended nearly 10 per cent of the TFV's proposed complement toward collective reparations in *Lubanga*. Ibid paras. 11-16.
[94] Ibid paras. 9 & 20.
[95] See also Brodney, Implementing International Criminal Court-Ordered Collective Reparations, 1-35.
[96] *Prosecutor v Lubanga*, 'Consolidated observations of the V01 Group of Victims on the documents "First submission of victim dossiers" and "Additional Programme Information Filing", filed by the Trust Fund for Victims on 31 May and 1 June respectively', V01 Group of Victims, ICC-01/04-01/06-3213, 1 July 2016, para. 17.

> disrespectful, retraumatising, and marginalising for victims; and a fundamentally flawed understanding of the harms sustained and the forms of reparation that may be appropriate.[97]

The rift extended into Trial Chamber II, where one of the Judges dissented from the majority's approach.[98] Judge Herrera Carbuccia argued that a practical solution must be found "to ensure that reparations are not seen as a mirage".[99] Facing so much head wind, Trial Chamber II eventually refrained from insisting on an in-depth eligibility screening. Instead, the Judges took the 425 victims already identified as a representative sample of the larger number of still unidentified victims for the purposes of their liability calculation, but agreed that this was not the totality of victims eligible for reparations. The Chamber entrusted the TFV with the identification of further eligible victims, which it considered could be in the "hundreds or thousands".[100] Ultimately, the Judges had to recognise that their legalistic procedure of victim identification was not going to work in the case at hand. But rather than ordering reparations for only the few hundreds of identified victims before them, Judges through their adjudicative practices softened the exclusionary effects of the legalistic approach taken in the *Lubanga* appeals reparations judgment. The example shows that Judges are aware of the dilemmas surrounding the targeting of reparations and, through their practices, mediate the tensions that arise from the encounter of judicial requirements and social demands for more inclusive reparations.

3.2.2. Practices surrounding individual vs. collective reparations

As a second practice, proponents for more inclusive reparations advocated for collective reparations. While victim lawyers demanded mainly individual reparations for the small group of victim participants,[101] the Registry and the TFV were sceptical of a purely individual approach to

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[97] *Prosecutor v Lubanga*, 'Observations of Dr. Golden, Mr. Higson-Smith, Professor Ní Aoláin and Dr. Wühler pursuant to Rule 103 of the Rules of Procedure and Evidence', Expert Submission, ICC-01/04-01/06-3240-Anx9, Annex 9, 30 September 2016, para. 51.

[98] The majority found that the TFV had a duty to continue identifying victims and cannot, on its own motion, suspend the execution of a judicial order. It also instructed the OPCV and the Registry to assist with this process. *Prosecutor v Lubanga*, 'Order relating to the Request of Public Counsel for Victims of 16 September 2016', ICC-01/04-01/06-3252-tENG, Trial Chamber II, 21 October 2016.

[99] *Prosecutor v Lubanga*, 'Opinion of Judge Herrera Carbuccia', Annex, ICC-01/04-01/06-3217-Anx-tENG, 15 July 2016, para. 1. In a subsequent dissenting opinion, the Judge further noted, "given the nature of the crimes committed, such an individual identification process would be unfeasible or, at best, more costly (not only budget-wise but also in terms of victim well-being) than the available reparations". *Prosecutor v Lubanga*, 'Opinion of Judge Herrera Carbuccia', Trial Chamber II, Annex, ICC-01/04-01/06-3252-Anx-tENG, 25 October 2016, para. 9.

[100] *Prosecutor v Lubanga*, 'Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu', Trial Chamber II, ICC-01/04-01/06-3379-Red, 15 December 2017, para. 231. Party submissions had provided various estimates of eligible victims, including from V01 (estimating 20,000-25,000 victims), V02 (around 1,000 victims), OPCV (1,500 victims) and the TFV (around 3,000 victims). Ibid paras. 200-212. The Judges were also able to rely on information from the United Nations and NGOs, from which they distilled estimates ranging from 2,451 to 5,938 victims. Ibid paras. 213-230.

[101] Lawyers for both groups in *Lubanga*, V01 and V02, also recommended complementary collective reparations for those eligible victims groups that had not had a chance to participate in the proceedings.

reparations, especially concerning monetary compensation. In *Lubanga*, the TFV argued "preferential treatment of some vis-à-vis others may lead to the stigmatization of victims receiving compensation".[102] Trial Chamber I shared these concerns, noting "given the uncertainty as to the number of victims of the crimes in this case – save that a considerable number of people were affected – and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach…".[103] The Appeal Chamber confirmed this collective approach, but limited it to eligible victims.

For years, TFV and ICC outreach staff had tried to manage victim expectations in the field, mainly by excluding discussions about individual monetary compensation. The adjudication in *Lubanga* seemed initially to confirm a practice that regarded collective reparations as the most appropriate and feasible answer to the reparations conundrum in international criminal justice. Yet, these dreams faded away in view of the consultation outcomes in *Katanga*, where reparations applicants unambiguously endorsed individual reparations.

Mediating between victim demands and context: Symbolic compensation in the Katanga case

Despite the unequivocal consultation outcomes in *Katanga*, the VPRS stressed that consultations were held with a selected group of people and that Court-ordered reparations could exacerbate ethnic tensions in Ituri.[104] The TFV similarly did not feel bound by the preferences expressed by victim participants, which the Fund regarded as unrepresentative. Instead, it advocated for other victim populations to access reparations through a range of proposed collective measures, even some explicitly rejected in the consultations.[105] Moreover, the TFV argued that, according to its reading of the regulations, its 'other resources' were not meant to be used for individual monetary compensation.[106] Such an interpretation would effectively exclude individual compensation as a means of reparations from any case where the convicted person was found indigent.

Both the Legal Representative of Victims and, interestingly, the Defence in *Katanga* opposed the TFV's propositions. The LRV criticised that the TFV, despite victims' clear preferences, promoted a collective approach under its own control, and he worried about the TFV's position

[102] *Prosecutor v Lubanga*, 'Trust Fund for Victims' First Report on Reparations', Trust Fund for Victims, ICC-01/04-01/06-2803-Red, 1 September 2011, para. 19. See *Prosecutor v Lubanga*, 'Second Report of the Registry on Reparations', Registry, ICC-01/04-01/06-2806, 1 September 2011, para. 87.
[103] Lubanga TC Reparations Decision 2012, para. 219.
[104] Katanga Consultation Report 2014, paras. 77-78.
[105] *Prosecutor v Katanga*, 'Observations on Reparations Procedure', Trust Fund for Victims, ICC-01/04-01/07-3548, 13 May 2015, paras. 135-137.
[106] Ibid para. 139.

that its 'other resources' could not be used for individual reparations [107] Even the Defence – perhaps confident that Katanga, due to his indigence, would not contribute to reparations – requested the Chamber to dismiss the TFV's interpretation of the regulations arguing that reparations should be paid directly to the victims: "There should not be any element of patronising the victim by 'managing' the reward. The victims are best placed to make appropriate choices as to how they manage their awards."[108]

Torn between the preferences of the small group of reparations applicants and the constraints of the wider context, the trial Judges' practices sought a middle ground. Trial Chamber II recognised that the reparations order "would, for the most part, be missing its mark – delivery of justice to and reparations of the harm done to victims… were it to disregard their almost unanimous preference, by awarding only collective reparations".[109] The Chamber also noted that the number of 297 eligible victims makes individual awards feasible.[110]

The LRV and the Defence had both suggested a symbolic amount of one Euro to each eligible victim. Consulted victims themselves had raised the value of 'symbolic compensation', stating that "even if the ICC would provide victims with $100 each we would be more satisfied than receiving collective reparation in any form".[111] The Trial Chamber eventually ordered a symbolic award of USD 250 compensation for each victim.[112] In going beyond the LRV's request, the Chamber considered it appropriate "to award a more substantial symbolic award as compensation so that it is meaningful to the victims, but not the source of tension within the community."[113] The statement highlights the competing rationales the Judges were trying to balance when setting a precedent for symbolic compensation at the ICC. This practice has since been adopted in the *Al Mahdi* case, concerning the situation in Mali, where Judges also ordered USD 250 as compensation.[114] After the Trial Chamber had invited the TFV to reconsider its stance on financial compensation,[115] the TFV agreed that it would make available USD 1 million for the reparations

[107] *Prosecutor v Katanga*, 'Réponse Consolidée des Victimes aux Observations Déposée par la Défense, les Participants et les Organisations Invitées à Déposer leur Observations sur les Principes et la Procédure des Réparations', Common Legal Representative of Victims, ICC-01/04-01/07-3565, 16 June 2015, paras. 67-68.
[108] *Prosecutor v Katanga,* 'Consolidated Response to the Parties, Participants and Other Interested Persons' Observations on Reparation', Defence, ICC-01/04-01/07-3564, 16 June 2015, para. 126.
[109] Katanga TC Reparations Order 2017, para 339.
[110] Ibid para 287.
[111] So quoted at Katanga Consultation Report 2014, 25, footnote 75.
[112] The Trial Chamber also noted that "the award of individual reparations should not hinge on the indigence of the convicted person". Katanga TC Reparations Order 2017, para. 335.
[113] Ibid paras. 299-300.
[114] *Prosecutor v Al Mahdi*, 'Reparations Order', Trial Chamber VIII, ICC-01/12-01/15-236, 17 August 2017.
[115] The Judges highlighted that the amount for individual awards would only be seven per cent of the total reparations sum awarded in the case. Katanga TC Reparations Order 2017, paras. 326-342.

awards, of which a voluntary donation from the Dutch government was earmarked to cover the USD 74,250 required for individual compensation.[116]

Apart from symbolic compensation, the Judges ordered a range of collective reparations measures relating to support for housing, income-generating activities, education and psychological support.[117] These collective measures still make up the bulk of the reparations ordered in *Katanga*.[118] However, the Trial Chamber stressed that "collective reparations must, to the utmost, address the victims as individuals".[119] The Judges thereby addressed concerns by the LRV over the TFV's community-based approach, noting that eligible victims should benefit individually from collective reparations.[120] Again, the Judges balanced in their practice victims' preference for individual benefits with more context and operationally driven demands for collective reparations. The TFV presented a draft implementation plan that put service-based collective reparations at the core of the reparations program in *Katanga*, as opposed to broader community-based reparations.[121]

The ICC's first two reparations cases show how Judges and others working around the Court struggled with the effects of the narrow scope of charges brought against the accused. On the one hand, those sharing more accountability-based conceptions of reparations were driven by the case at hand and promoted more individualised and tangible benefits for the individual victims before Court. Proponents of such an approach pursued notions of reparations that framed harm and redress in individualised and quantifiable terms. On the other hand, those sharing more reconciliation-oriented conceptions of reparations were driven by the complexities of the social context and promoted more symbolic or transformative benefits for broader collectives. These contestations over inclusion and exclusion in the ICC's reparations scheme were fought out before the Chambers. Judges from diverse backgrounds were torn in different directions. Despite the fact that the Appeals Chamber reparations order in *Lubanga* settled on an accountability model to reparations at the ICC, it did not make the intricate challenges associated with reparations go

[116] Through this earmarked donation the TFV only partially compromised its stance on the use of its 'other resources'. The TFV stressed that it would continue to prioritise collective awards. *Prosecutor v Katanga*, 'Notification Pursuant to Regulation 56 of the TFV Regulations Regarding the Trust Fund Board of Director's Decision Relevant to Complementing the Payment of the Individual and Collective Reparations Awards as Requested by Trial Chamber II in its 24 March 2017 Order for Reparations', Trust Fund for Victims, ICC-01/04-01/07-3740, 17 May 2017.
[117] Katanga TC Reparations Order 2017, paras. 301-305.
[118] The total monetary value of these collective measures comes to USD 925,750 of the USD 1 million ordered by the Trial Chamber.
[119] Katanga TC Reparations Order 2017, paras. 294 & 303.
[120] Ibid paras. 294-295. See also *Prosecutor v Katanga*, 'Observations of the Victims on the Principles and Procedures to Be Applied to Reparations', Common Legal Representative of Victims, ICC-01/04-01/07-3555-tENG, 16 November 2015, paras. 94-98.
[121] *Prosecutor v Katanga*, 'Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017', Trust Fund for Victims, ICC-01/04-01/07-3751-Red, 25 July 2017.

away. Ultimately, Judges developed adjudicative practices to mediate between competing legal and social imperatives. These practices included more inclusive targeting of reparations, service-based collective reparations for narrower group of beneficiaries and symbolic compensation.

3.3. The responsibility for reparations and funding

A central tenet of accountability-based conceptions of reparations is the responsibility and liability of convicted persons for reparations. Here also lies one of its dilemmas: Not only are convicted persons' assets never enough to afford relief for the harm caused by mass atrocities, but what happens with the notion of accountability when convicted persons are found to be indigent?

The role of convicted persons

The primacy of convicted-borne reparations was essential to the states parties in Rome. States were therefore concerned when the ICC was unable to locate any assets of the accused persons in its first two cases; there was little hope that Thomas Lubanga and Germain Katanga actually held any major assets that could be used for reparations purposes. The ICC stated that it had limited investigative capacities, which it mainly used to verify the indigence of defendants requesting legal aid.[122] In this process, the Court relied on the cooperation of states, but "had only limited success so far and that a number of requests to the states was still pending".[123] States parties on the other hand stressed that identifying and freezing assets of the convicted person "is of paramount importance" and that the ICC should seek all measures to that end, "irrespective of the declaration of indigence for the purpose of legal aid which bears no relevance to the ability of the accused to provide reparations".[124]

Lubanga and Katanga were both found indigent for reparations purposes. In *Lubanga*, Trial Chamber I noted that the convicted person was only able to contribute non-monetary reparations.[125] Despite the convicted persons' indigence, several parties in both cases argued that reparations still needed to be ordered against the convicted person, without regard to where the

[122] ICC, *Report of the Bureau on Victims and Affected Communities and Trust Fund for Victims*, 10th Assembly of States Parties, ICC-ASP/10/31, 22 November 2011, paras. 37-38.
[123] Ibid para. 39. See also Galvis Martinez, Manuel, 2014, 'Forfeiture of Assets at the International Criminal Court: The Short Arm of International Criminal Justice', 12(2) *Journal of International Criminal Justice*, 193-217.
[124] *Reparations*, ASP Res 3, 10th Assembly of States Parties, ICC-ASP/10/Res.3, 20 December 2011, para. 3.
[125] Lubanga TC Reparations Decision 2012, para. 269.

funds may eventually originate.[126] The Appeals Chamber in *Lubanga* shared this view, finding that the principle of accountability "is expressed by the order for reparations being directed against the convicted person",[127] and that indigence "is not an obstacle to imposing liability".[128] This meant that convicted persons must be informed of their liability, regardless of indigence. In accordance with the Appeals Chamber's ruling, the Judges in both cases set the monetary liability for reparations at USD 10 million for Thomas Lubanga, and USD 1 million for Germain Katanga.[129] The Registry was asked to monitor their financial situation in the event that they obtain funds that could be used to pay for reparations in future.

Other than an order against a convicted person, Judges hoped to bring in notions of accountability by way of an apology of the convicted person to victims and affected communities. Whilst some parties to in *Lubanga* argued that he could be ordered to make an apology to victims, Trial Chamber I acknowledged that apologies were only appropriate with the convicted person's agreement.[130] The issue was further debated in *Katanga*.[131] I will discuss in Part V the challenges associated with apologies from convicted persons emanating from a context of Court-ordered reparations at the ECCC. Despite these symbolic measures to reassert accountability-based conceptions of reparations, more practically, where should the funding for reparations come from in cases where convicted persons are indigent?

State responsibility out of reach

States parties began to realise that the system of predominantly convicted-borne reparations – that they themselves had created in Rome – did not work in practice, at least not with respect to the first cases before the ICC. Concerned about their own role in reparations, compounded by the absence of Court-wide reparations principles that would have clarified the boundaries of the ICC's

[126] See submissions by both victim groups in that case, but also *Prosecutor v Lubanga*, 'Trust Fund for Victims' First Report on Reparations', Trust Fund for Victims, ICC-01/04-01/06-2803-Red, 1 September 2011, paras. 85-87.
[127] Lubanga AC Reparations Judgment 2015, para. 70.
[128] Ibid para. 104.
[129] Trial Chamber II determined Lubanga's monetary liability to be USD 3.4 million for the harm of the 425 identified victims and another USD 6.6 million for the harm of yet-unidentified victims. *Prosecutor v Lubanga*, 'Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu', Trial Chamber II, ICC-01/04-01/06-3379-Red, 15 December 2017, paras. 268-281. In *Katanga*, the Trial Chamber found the defendant only liable for a proportion of the total harm suffered by victims, which was determined to be USD 3.7 million. Katanga TC Reparations Order 2017, paras. 237-239, 264, 328.
[130] Lubanga TC Reparations Decision 2012, para. 269.
[131] Katanga TC Reparations Order 2017, paras. 315-318. The TFV was doubtful whether such actions were desired from victims. See *Prosecutor v Katanga*, 'Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017', Trust Fund for Victims, ICC-01/04-01/07-3751-Red, 25 July 2017, para. 133

reparations framework, states parties redrew the same defensive line that had dominated the Rome negotiations. Prior to *Lubanga* reaching the reparations stage, at the 10th ASP, they stressed that

> … liability for reparations is exclusively based on the individual criminal responsibility of a convicted person, under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparations awards, including in situations where an individual holds, or has held, any official position.[132]

Despite states parties' resistance to any transgression onto the domain of state responsibility, for those holding broader societal conceptions of reparations the involvement of the DRC government in reparations was imperative. Such views were also shared by the Congolese population: A population-based survey found in 2008 that 60 per cent of respondents wanted reparations be paid by the government, 21 per cent thought reparations should be paid by those who committed the crimes, and only 11 per cent saw it as a duty of the international community to fund reparations.[133]

While the involvement of the DRC government had received little attention in the rushed reparations phase in *Lubanga*, parties in *Katanga* were more adamant about seeking government cooperation in support of Court-ordered reparations.[134] After Trial Chamber II had directed the TFV to contact the DRC government,[135] the TFV proposed in its implementation plan a range of requests to the DRC authorities for which it sought the government's observations. The requests included improving the security situation around Bogoro, waiving school fees, allocating land free of charge for housing and releasing outstanding back salary due to Katanga for reparations purposes.[136] At the time of writing, the DRC government had merely offered to study some of the assistance requested, but otherwise stressed the lack of funds for more substantive assistance.[137]

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[132] *Reparations*, ASP Res 3, 10th Assembly of States Parties, ICC-ASP/10/Res.3, 20 December 2011, para. 2. Similarly in subsequent ASP resolutions in 2012 and 2013.

[133] Whilst respondents indicated an expectation of the international community to provide development assistance more broadly, respondents did not hold the international community accountable for paying reparations for suffering caused by local actors. Vinck et al., Living with Fear, 51.

[134] Most notably the Legal Representative for Victims, see *Prosecutor v Katanga*, 'Requête des Victimes Sollicitant par l'Entremise de la Chambre l'Intervention de la République Démocratique du Congo au Processus des Réparations', Legal Representative of Victims, ICC-01/04-01/07-3674, 24 March 2016.

[135] Katanga TC Reparations Order 2017, para 325.

[136] *Prosecutor v Katanga*, 'Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017', Trust Fund for Victims, ICC-01/04-01/07-3751-Red, 25 July 2017, paras. 68-72.

[137] See for instance the DRC authorities' response in *Lubgana* at *Prosecutor v Lubanga*, 'Observation du Gouvernement de la République Démocratique du Congo en Réponse a l'Ordonnance No ICC-01/04-01/06 du 15 Juillet 2016 de la Chambre de Première Instance II de la Cour Pénale Internationale', Ministère de la Justice, ICC-01/04-01/06-3253-Anx2, 11 October 2016.

The practice of relying on voluntary, external funding for reparations

With convicted persons indigent and state responsibility out of reach, Judges and others involved developed the practice of relying on the resources of the Trust Fund for Victims to fund reparations. Struggles about the TFV's discretion over the use of its 'other resources' had already existed before and during the reparations phases in both cases. The ICC Registry and states parties had expressed concern that the TFV maintain an adequate reserve from its voluntary contributions for reparations, rather than using most of it for assistance.[138] The Registry even argued that the Court could compel the TFV to fund reparations;[139] a suggestion the TFV vehemently dismissed.[140] The Appeals Chamber in *Lubanga* confirmed the TFV's sole discretion over its 'other resources'.[141] Yet, in another balancing act, the Judges also considered that the TFV may "advance" funds for reparations, with the convicted person remaining liable for "reimbursing" the TFV at a later stage.[142]

Prior to the first reparations order, the TFV had established a reparations reserve from among its voluntary contributions.[143] In *Lubanga* and *Katanga*, the TFV has so far agreed to contribute EUR 1 million each from this reserve to fund reparations. Whilst this was sufficient to fund the costs for reparations in *Katanga*, the TFV has not yet indicated whether it will increase its contribution to the much larger reparations order in *Lubanga*. At the end of 2016, there were only around EUR 5 million in the reparations reserve for all cases before the ICC,[144] and NGOs in the Victims' Rights Working Group looked with worry at the decrease in voluntary contributions to the TFV.[145] On the whole, the funds currently available at the TFV cannot meet the needs of reparations at the ICC; and this does not even consider the reparations phase in *Bemba* with over 5,000 participating victims.[146]

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[138] See *Victims and Reparations*, ASP Res 7, 11th Assembly of States Parties, ICC-ASP/11/Res.7, 21 November 2012, para. 15.
[139] *Prosecutor v Lubanga*, 'Second Report of the Registry on Reparations', Registry, ICC-01/04-01/06-2806, 1 September 2011, paras. 123-147.
[140] The matter was strongly contested between the Registry and the TFV ahead of the *Lubanga* reparations decision and, among others, hindered a joint approach to reparations. Ibid paras. 2-3. Also confirmed in interview with former ICC officer (ICC 19), 22 October 2015.
[141] The Appeals Chamber rejected Trial Chamber I's attempt to assume control over the TFV's 'other resources'. See Lubanga AC Reparations Judgment 2015, paras. 106-117.
[142] Ibid paras. 115.
[143] Only few states made earmarked contributions to the reparations reserve. See Trust Fund for Victims, 2016, 'Annual Report 2016', 28-31.
[144] Ibid 28-31.
[145] Victims' Rights Working Group, 2017, 'Recommendations to the 16th Session of the Assembly of States Parties of the International Criminal Court', New York, 8.
[146] The TFV had already stressed in its first implementation plan in *Lubanga* the "inherent limitations" of the reparations reserve compared to the costs required to redress the harm of victims before the Court, and that this same dilemma may hold true for the majority of future cases at the ICC. See *Prosecutor v Lubanga*,

Since the Rome negotiations the mantra with reparations in international criminal justice has been that the liability rests with convicted persons. This rhetoric has been affirmed in the accountability-based conception of reparations promoted in the Appeals Chamber reparations order in *Lubanga*. In practice, however, limited capacities are devoted to investigating the assets of defendants, and many, if not most, accused persons before the ICC will be found indigent. Even in cases where defendants possess some assets, those may largely go towards covering the substantial costs for legal representation, rather than contributing to reparations awards.[147]

Still, the mantra of convicted persons' liability continues – most visibly in time and resource-intensive liability calculations, even when individuals are found indigent. This mantra is at danger of becoming an empty ritual. Where offenders cannot pay for reparations, the accountability principle is limited to a symbolic order against the convicted person and an encouragement for an apology. On the other hand, proponents of broader societal goals for reparations are frustrated with the limited cooperation they receive from the national government. All they have is a statement in the judgment that Court-ordered reparations do not absolve states of their primary responsibility for reparations under international law. Torn between legal imperatives (accountability and liability of the convicted person) and social imperatives (state responsibility) – and both equally out of reach – adjudicative practices have focused on the TFV's resources, which consist of voluntary contributions from third parties, predominantly from a handful of development assistance donors among the states parties.

3.4. Knowledge and practices: Between expertise and legitimacy

ICC Judges confronted a novel area of international law with little precedent. On what sources of knowledge and expertise did these Judges draw in their adjudicative practices regarding reparations? My review of the first two cases at the ICC shows that Judges relied extensively on external knowledge to determine their response to the reparations conundrum. They did so for two primary and overlapping reasons: to fill a gap of expertise not available at the Court, and to seek legitimacy for judicial decisions that were breaking new ground in international criminal law.

Trial Judges in *Lubanga* were the first to adjudicate reparations at the ICC. With only a generally worded mandate in their hands and no Court-wide principles guiding their actions, the Judges had room when engaging with reparations. Even before a guilty verdict, Trial Chamber I requested the Registry and the TFV to submit a filing on reparations to inform the Judges' decision-making. Both institutions submitted extensive reports covering a range of issues regarding the substance,

'Filing on Reparations and Draft Implementation Plan', Trust Fund for Victims, ICC-01/04-01/06-3177-Red, 3 November 2015, para. 115.

[147] For example, this is happening in *Bemba*.

modes and procedures for reparations in *Lubanga*.[148] These reports highlighted the context-dependant challenges associated with implementing reparations in Ituri and framed to a considerable degree parties' submissions on reparations. The Registry and the TFV, both with on-the-ground presences in many situation countries, have remained the two most important Court-associated sources of information for ICC Judges adjudicating reparations.[149] Yet, both have different mandates and rarely agree on a common position.[150]

Seeking legitimacy: Opening the reparations phase for external input

After its guilty verdict against Thomas Lubanga, Trial Chamber I invited not only the parties to the trial, but also other 'interested parties' to make submissions on reparations. This set a precedent followed by other chambers in subsequent reparations proceedings. In *Lubanga*, the Trial Chamber invited observations from four NGOs and one UN agency from which the Judges hoped to receive information that was not available at the Court.[151] International NGOs and UN agencies were joined in *Katanga* by legal academic institutions.[152] Remarkable was the token presence of local organisations – DRC authorities only made submissions, if explicitly encouraged by the ICC.

While the Judges needed to tap into expertise on reparations not available at the ICC, the modalities for seeking external input on reparations and its composition sheds light on what Nora Stappert refers to as the Court's "legitimacy audiences".[153] The way Judges framed their decisions and referred to these external sources reveals who they seek legitimacy from. In the case of ICC reparations, these are mainly international human rights and justice NGOs, legal scholars, and

[148] *Prosecutor v Lubanga*, 'Second Report of the Registry on Reparations', Registry, ICC-01/04-01/06-2806, 1 September 2011; and *Prosecutor v Lubanga*, 'Trust Fund for Victims' First Report on Reparations', Trust Fund for Victims, ICC-01/04-01/06-2803-Red, 1 September 2011.
[149] The OPCV has frequently made submissions on reparations but plays more of a hybrid role, varyingly providing information as a legal expert organ of the Court or as legal representative of victim participants or reparations applicants.
[150] In *Lubanga*, for instance, the VPRS and TFV disagreed to such an extent that they were unable to follow the Trial Chambers request for submitting a joint reparations submission and, instead, made separate submissions to the Trial Chamber.
[151] *Prosecutor v Lubanga*, 'Decision Granting Leave to Make Representations in the Reparations Proceedings', Trial Chamber I, ICC-01/04-01/06-2870, 20 April 2012, para. 19. The Trial Chamber received submissions from selected organisations with experience of working on reparations or in the DRC, including UNICEF, Avocats sans Frontières (ASF), the International Center for Transitional Justice (ICTJ), the Women's Initiative for Gender Justice, and a Congolese NGO group.
[152] External submissions on reparations in *Katanga* included REDRESS, the UN presence in the DRC, Queen's University Belfast's Human Rights Center & University of Ulster's Transitional Justice Institute, as well as the local NGO Ligue pour la Paix, les Droits de l'Homme and la Justice (LIPADHOJ). See Katanga TC Reparations Judgment 2017, para. 3.
[153] The following observations are inspired by Nora Stappert's work on legitimacy audiences in international criminal justice. See Stappert, Nora, 'The Construction of Legal Authority and the Boundaries of Communities of Practice in International Criminal Law', Paper presented at the 11th Pan-European Conference on International Relations, Barcelona, 13-16 September 2017 (on file with the author).

UN agencies. In *Lubanga*, trial Judges tread carefully and devoted an unusual amount of attention to these submissions, with the summaries of these submissions making up almost two-thirds of the Judges' reparations decision. Citing legal academics or NGO reports can be seen as a way to gain legitimacy by including specific legitimacy audiences. These audiences can also be activated in cases where Judges struggle to reconcile competing views. For instance, Trial Chamber II in overseeing the post-appeals reparations phase in *Lubanga* resorted to external submissions when disagreements with the TFV brought the proceedings to a halt.[154]

The role of experts

When de-judicialising reparations in *Lubanga*, Trial Chamber I initially delegated the task of dealing with the complexities surrounding reparations to the supposedly more technical expertise of the TFV. However, the Appeals Chamber brought the matter back before the Judges, who now themselves had to tackle many of the intricate problems associated with conceiving reparations in mass atrocity settings. Carsten Stahn has pointed out that this re-judicialisation of reparations has institutional implications, in that "it requires expertise and skills that differ in some ways from criminal adjudication", noting "the need for targeted expertise in this field at the Court, or even the establishment of a specialised 'reparations chamber'".[155] As a result of the more legalistic approach pursued in the aftermath of the Appeals Chamber order, harm and liability assessments were highlighted in my interviews as areas were judges required more technical expertise.[156] Various submissions and judges' responses showed that the bench did not feel equipped to address these issues by relying on in-house capacities.

As already anticipated by the drafters of the RPE, outsourcing this responsibility to external 'experts' has been regarded one solution to those problems. The reparations phases in *Lubanga* and *Katanga* showed that Chambers and the TFV resort to external expertise, often individual consultants or organisations with specific know-how, to fill capacity and knowledge gaps regarding reparations.[157] These external experts play an important role in giving effect to a mandate for which the ICC is ill equipped. Yet, such an approach comes with its own dangers, as it could potentially lead to further appropriating reparations from those who are supposed to

[154] *Prosecutor v Lubanga*, 'Order Pursuant to Rule 103 of the Rules of Procedure and Evidence', Trial Chamber II, ICC-01/04-01/06-3217-tENG, 15 July 2016, paras. 5-8.

[155] Stahn, Reparative Justice after the Lubanga Appeal Judgment, 810-811.

[156] In *Lubanga*, for instance, an ICC legal officer described the assessment of harm of individual applicants as one central reason for delegating these matters to the TFV. "The issue was that the Judges could not decide this alone". Interview with ICC Legal Officer (ICC17), 13 July 2015.

[157] An expert meeting in Belfast, in 2015, was among the TFV's first steps to give effect to the Appeals Chamber reparations order.

benefit from them, by giving the power of framing key aspects of judicial decisions into the hands of supposedly 'technical' expertise with limited legitimacy.

Mediating between competing claims of authority and knowledge

Other than who Judges seek information from, what kind of information is sought and how Judges mediate in their adjudicative practices between competing claims for authority is equally revealing. I highlight this by way of two examples: the contest between rights-based and needs-based approaches; and between legal and managerial logics and sources of knowledge.

Submissions in *Lubanga* by different Court units and the TFV as well as external submissions from NGOs agreed that international law, and especially international human rights law, enshrined a set of international standards regarding reparations.[158] Trial Chamber I was asked to consider these standards and the jurisprudence of regional human rights courts and other human rights bodies as sources of law or inspiration to rely upon. When establishing the reparations principles for the case at hand, the Chamber conceded that it was guided by these international instruments.[159] Overlapping concerns over the legality and legitimacy of its decision-making let the Judges adopt human rights-inspired reparations principles, with the influence of the Basic Principles and Guidelines as an underlying conceptual framework visible throughout the decision. This rights-based approach determined to a significant extent how reparations were conceived in *Lubanga*. Many submissions derived from human rights what they considered to be the most appropriate forms of reparations for victims in the case at hand; reading often like the following: 'victims have a rights to this and that, and therefore the Chamber should consider the following types of reparations …'.

If there was one missing source of knowledge that could have guided the Judges' decision, it was the views of the victims themselves. Many submissions made rather concrete proposals for what they considered to be appropriate forms of reparations, for instance whether they should be individual or collective in nature, without considering the preferences of those most concerned with the outcomes. While most submissions agreed that victims should be 'consulted', this information was sidelined during the adjudication.[160] The TFV argued that it was too early to engage in consultations because the guilty judgment was not final; and that the Judges should first determine the parameters of reparations, since without a "clear message" there would be a danger

[158] See in particular the submissions by the Registry, the TFV, the OPCV, and the Women's Initiatives for Gender Justice.
[159] Lubanga TC Reparations Decision 2012, paras. 185-186.
[160] See more at Part III.

of raising expectations.[161] By the time Trial Chamber I had rendered its decision, it had not just laid down the principles of reparations – including that victims should participate and be consulted in reparations – but it had also endorsed a basic framework for reparations that envisaged collective reparations. Luke Moffett described this approach as "paternalistic", where "judges supplemented their reasoning for what they thought was best for the victims".[162]

The example shows how those guided by legal imperatives frequently resort to a rights-based approach to reparations that, rather than empowering potential beneficiaries of reparations, often sidelines their actual needs and preferences. This highlights some of the problems that arise when proponents of rights-based approaches presume that reparations are above all about (universal) rights fulfilment, without considering the views of affected populations. The *Katanga* reparations phase, on the other hand, started with seeking victims' views, which had a great impact on subsequent litigation. Judges were unable to disregard the clear preferences among consulted victims for individual awards and by granting symbolic compensation made an attempt to reconcile competing claims to authority – the Bogoro attack victims' demands for reparations and the TFV's claim to technical expertise on conflict transformation.

Furthermore, the deeper Judges got involved in the implementation of reparations, the more the TFV's operational logic based on project management and the ICC's judicial logic grounded in the requirements of the criminal trial were at odds. Early on, the TFV had argued that "the implementation of reparations is not a legal proceeding taking place in a courtroom",[163] but is instead a set of activities governed by the Fund's operational framework. What was for the Judges a reparations award based on a legal determination of facts and harms, became for the TFV a "collective reparations programmatic framework".[164] Drawing on managerial knowledge, a reparations award was turned into a 'project' ready to be contracted out to an 'implementer' subject to the requirements of a project management cycle.

At times, TFV submissions to the Chambers read like introductory lectures on procurement processes, logical frameworks and project evaluations, drawing Judges further onto unfamiliar terrain.[165] Yet, the TFV's polished project documents cannot hide the discrepancies between the

[161] *Prosecutor v Lubanga*, 'Trust Fund for Victims' First Report on Reparations', Trust Fund for Victims, ICC-01/04-01/06-2803-Red, 1 September 2011, paras. 358-359.
[162] Moffett, Luke, 2015, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court', 26 *Criminal Law Forum*, 255-289, 281.
[163] *Prosecutor v Lubanga*, 'Filing on Reparations and Draft Implementation Plan', Trust Fund for Victims, ICC-01/04-01/06-3177-Red, 3 November 2015, para. 15
[164] *Prosecutor v Lubanga*, 'Additional Programme Information Filing', Trust Fund for Victims, ICC-01/04-01/06-3209, 7 June 2016, para. 39.
[165] Here a typical example from one of the submissions: "A programme is defined as a set of related projects with a shared long term results framework. A project is defined as an individual or collaborative initiative

legally-principled logics of lawyers and Judges, and the Fund's managerial approach to reparations based on operational standards. On the whole, decision-making during the reparations phase over key factors regarding reparations shifted from the bench to managers and administrators. While Judges mediated between legal principles and managerial logics through their adjudicative practices, they were ultimately not able to alter the fundamental project rationales governing reparations after a judgment.[166]

In interpreting their mandate, ICC Judges have adopted adjudicative practices that relied on a broad set of knowledge and authority with the dual objective of plugging capability gaps and augmenting the legality and legitimacy of their decisions. This included enabling stakeholders, such as NGOs, legal scholars and UN agencies, to contribute to the reparations phase and relying on experts and project implementers to provide technical knowledge not available at the ICC. The re-judicialisation of reparations in the aftermath of the appeals reparations order in *Lubanga* and its stringent legal requirements have only increased the need for such expertise. While these practices have assisted the Judges to make more informed decisions, the effect has been that decision-making over reparations, especially during the implementation phase, has gradually shifted from judges to experts and managers.

3.5. Institutionalised divides: The ICC and the TFV

The divergence between legal and social imperatives is institutionally manifested in the Rome Statute framework in the ICC and the TFV. The two institutions have different mandates and competencies that give rise to different visions regarding reparations, most notably expressed in the ICC's judicial reparations and the TFV's assistance mandates. The struggle between the ICC and the TFV over what makes reparations effective is illustrative of the tensions underlying the ICC's reparations framework. In order to mediate between competing goals, adjudicative practices at the Court have aimed at blurring the lines between reparations and assistance.

Nowhere was this struggle more prominent than in *Lubanga*. In 2012, Trial Chamber I approved in its reparations decision an approach that looked very similar to the TFV's assistance mandate. Many of the projects contained in the TFV's proposal were designed on the basis of its experience with delivering assistance in Ituri; in fact, many projects would have probably been implemented

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that is carefully planned (inputs) to deliver particular results (outputs) that contribute to the programme's outcomes and objectives." Ibid para. 33.

[166] Moffett argues that "[t]he current Lubanga reparations scheme places the TFV in the driver's seat, with the judges as passengers watching the Trust Fund's advance of its peacebuilding and assistance mandate, and victims left behind on the side of the road, no better off". Moffett, Luke, 2017, 'Reparations for Victims at the International Criminal Court: A New Way Forward?', 21(9) *International Journal of Human Rights*, 1204-1222, 1213.

by the same organisations and paid for from the same funding sources. This approach blurred the line between the TFV's two mandates by implicitly suggesting the de-judicialisation of reparations in cases where convicted persons are indigent. As one ICC legal officer put it in an interview:

> [w]here the convicted person is indigent, you essentially combine the assistance mandate with the reparations mandate, and to some extent order the trust fund to do its assistance mandate … and if you look at it from that perspective, you can actually broaden the reparations ...[167]

However, the re-judicialisation of reparations following the *Lubanga* appeals reparations order drew a sharper distinction between the TFV's reparations function and its assistance mandate, but not without seeking to assert the primacy of Court-ordered reparations. This moved the relationship between the ICC and the TFV to the centre of litigation, especially in *Lubanga*. While Trial Chamber II insisted that the TFV execute judicial orders, the Fund rigorously guarded its independence and defended its less legalistic approach to reparations, especially during the 'implementation stage': "While trial proceedings up until the reparations order are within the judicial control of the Court, the implementation of reparations is clearly designed as an administrative exercise."[168] In essence, during the implementation stage the TFV claimed for itself "a shaping and defining role with regards to the precise nature of the modalities of the reparations and the methods of their implementation".[169] Clearly, the Judges did not share this view.

The contest became visible in debates about the relationship between the TFV's reparations function and its assistance mandate.[170] Judges in both *Lubanga* and *Katanga* had asked the TFV to use the assistance mandate to complement reparations and to include groups that were excluded from reparations, such as victims of sexual violence.[171] This approach suggests a different kind of blurring between reparations and assistance, namely one in which assistance takes on a subsidiary function to reparations by filling gaps left by limited reparations orders. Peter Dixon referred to this as the "Swiss cheese model".[172]

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[167] Interview with ICC Legal Officer (ICC11), 3 June 2015.
[168] *Prosecutor v Lubanga*, 'Request for Leave to Appeal against the "Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en oeuvre" (9 February 2016)', Trust Fund for Victims, ICC-01/04-01/06-3200, 15 February 2016, para. 28.
[169] *Prosecutor v Lubanga*, 'Filing on Reparations and Draft Implementation Plan', Trust Fund for Victims, ICC-01/04-01/06-3177-Red, 3 November 2015, para. 110.
[170] See in particular Peter Dixon's work at Dixon, Peter, 2016, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of Congo', 10(1) *International Journal of Transitional Justice*, 88-107.
[171] See for instance Lubanga AC Reparations Judgment 2015, paras. 199 & 215.
[172] Dixon, Reparations, Assistance and the Experience of Justice, 102-105.

The TFV regarded this as an infringement on its prerogatives and was concerned that the assistance mandate be used "to redress gaps in the eligibility for reparations that stem from the Prosecution's strategic choices and narrow charging. … the assistance mandate should not be instrumentalised by the reparations mandate."[173] The TFV worried that the assistance mandate, where the Fund was free to set its own parameters, might be perceived as secondary to ICC's reparations, noting the "two mandates each have their own intrinsic value. Neither is the assistance mandate subservient to the reparations mandate nor is the reparations mandate subservient to the assistance mandate."[174] The TFV suggested that assistance should not, as a matter of policy, relate to any case at the post-conviction stage.[175]

Ultimately, both institutions had to compromise. Although practitioners at the ICC and the TFV argued differently, both appeared to recognise the restricted nature of Court-ordered reparations. In response to the effects of the ICC's more legalistic and exclusionary approach to reparations, they resorted to practices that blurred the lines between reparations and assistance. For ICC Judges who were tasked to deal with judicial reparations, this meant to prioritise reparations and regard assistance as complementing limited reparations orders. The TFV dismissed this hierarchical understanding of the relationship between reparations and assistance, but proposed its own version of blurring by making reparations more look like assistance.[176]

The example shows that practitioners at these institutions are aware of the limitations in their mandates and show flexibility in their practices. Yet, the effects of these practices remain uncertain, due to the early stage of implementation. Peter Dixon argues that reparations and assistance "can look similar in form, have similar impacts, be distributed through similar processes and… impart similar notions of responsibility and recognition to victims of grave crimes and gross violations of human rights". He further notes "depending on how they are used and communicated to victims, assistance measures can both detract from the significance of

[173] *Prosecutor v Lubanga*, 'Filing on Reparations and Draft Implementation Plan', Trust Fund for Victims, ICC-01/04-01/06-3177-Red, 3 November 2015, para. 157.
[174] Ibid para. 156. The TFV elsewhere appealed to the Court "to refrain from any attempts to suggest that the Trust Fund's assistance mandate may be used as an avenue to remedy gaps that may arise from the inherent limitations of the Court-ordered reparations regime in this and/or in any other cases. … reconstructing the Trust Fund's assistance mandate to be a second-tier reparations alternative, compromises the systemic integrity of both, not only the reparations mandate of the Court and the Trust Fund, but also the Trust Fund's assistance mandate." *Prosecutor v Lubanga*, 'Additional Programme Information Filing', Trust Fund for Victims, ICC-01/04-01/06-3209, 7 June 2016, para. 90.
[175] *Prosecutor v Lubanga*, 'Additional Programme Information Filing', Trust Fund for Victims, ICC-01/04-01/06-3209, 7 June 2016, para. 75. It is unclear whether the TFV's limited oversight over implementing organisations would actually guarantee such a practice, as victim participants or reparations recipients could have been included unintentionally.
[176] As discussed in Part III, this is also based on a belief that the TFV's assistance projects hold a certain reparative value and are better suited to addressing the complex realities of conflict-affected situations before the ICC.

reparations and increase their reach and impact".[177] So far, these debates between the ICC and the TFV have been limited to the corridors in The Hague and have not taken into account the attitudes of the affected populations in Ituri or elsewhere. This will be the true litmus test for the ICC's reparations regime.

4. Conclusion

The account of the adjudication of reparations in the first two cases at the ICC has revealed judicialised and de-judicialised ways of conceiving reparations that manoeuvre the space between abstract legal principles and the concrete realities of the contexts before the Judges. I have shown how Judges, lawyers and administrators at the ICC were torn between these different rationales, exemplified in competing purposes of reparations and struggles over different views of what makes Court-ordered reparations effective. Those contestations were rather different from the ones that dominated the Rome negotiations, where consideration of the realities of mass atrocity settings was largely absent.

In response to these dilemmas, practitioners at the ICC and the TFV have drawn on different sources of knowledge and adopted a range of practices during the adjudication to mediate the competing legal and social concerns surrounding Court-ordered reparations. Rather than examining Judges' reparations decisions against legal precedent, an approach that dominates the legal literature on the ICC, I put these practices at the forefront of my observations. These practices have shaped the outcomes of the ICC's first two reparations orders, expressed for instance in collective reparations orders to narrower victim groups, the use of symbolic compensation and largely void orders against indigent defendants. While these practices could be interpreted as an ability of ICC professionals to juggle creatively the inherent tensions of their legal frameworks, they also come at a cost. The associated struggles have had the effect of both lengthening the proceedings and sidelining victims' views on reparations.

The yearlong reparations proceedings have been disproportionate to the reparations amounts currently discussed. In one interview a frustrated victim lawyer lamented the overall costs of the legal process compared to the actual reparations awards for clients. The lawyer argued for drastically simplifying and accelerating the reparations phase, if it concerned only small amounts of reparations.[178] A submission by reparations experts felt it necessary to remind the Court that "reparations are not abstract legal principles but rather constitute specific, deliverable, and

[177] Dixon, Reparations, Assistance and the Experience of Justice, 89.
[178] Interview with victim lawyer (ICC3), 12 May 2015.

practical remedies delivered to persons who have suffered".[179] And the TFV warned in 2017 that "the workload arising from the reparations mandate is completely out of control", estimating that it needed to raise at least EUR 30 million in the next four years to keep pace with the Court.[180] The challenges will only grow in *Bemba* concerning the Central African Republic, where the situation is more volatile, and where the TFV cannot not rely on an in-country presence and many years of prior experience with implementing assistance. While the first two cases have shown the ICC and the TFV the challenges involved with delivering reparations, effective solutions are still a work in progress. Marissa Brodney summarised the dilemma as follows:

> As the Court navigates legal challenges inherent to implementing collective reparation awards, it must work to ensure that legal debates and conceptual advancements with respect to reparations in international criminal law do not become too disembodied from the social worlds that propel those debates into being – where real victims of serious crimes seek justice with real meaning, to them.[181]

When entering the reparations stage, the ICC moved deeper and deeper into the social complexities of the DRC, but struggled to consider victims' lived realities in its legal processes – Ituri felt further away from The Hague than ever. In the contestations between lawyers, experts and project managers, survivors of violence remained at the sidelines. Their increasing frustrations re-appeared and disappeared in the voluminous amount of legal submissions. Motoo Noguchi, the President of the TFV's Board of Directors put to the Assembly of States Parties in 2016 that "prolonged reparations proceedings are simply unacceptable to them [the victims]. They are tired and disappointed as nothing ever happens except different Court organs come to them to pose similar questions every few years."[182] Victim legal representatives noted that victims have been awaiting reparations for almost ten years, "leading some of them to feel discouraged and to lose confidence in the Court".[183] At the time of writing, reparations for the victims of Lubanga and Katanga have still not materialised.

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[179] *Prosecutor v Lubanga*, 'Observations of Dr. Golden, Mr. Higson-Smith, Professor Ní Aoláin and Dr. Wühler pursuant to Rule 103 of the Rules of Procedure and Evidence', Expert Submission, ICC-01/04-01/06-3240-Anx9, Annex 9, 30 September 2016, para. 5.
[180] Noguchi, Motoo, 'Report of the Board of Directors of the Trust Fund for Victims', 16th Assembly of States Parties, New York, 4 December 2017.
[181] Brodney, Implementing International Criminal Court-Ordered Collective Reparations, 35.
[182] Noguchi, Motoo, 'Report of the Board of Directors of the Trust Fund for Victims', 15th Assembly of States Parties, The Hague, 16 November 2016.
[183] *Prosecutor v Lubanga*, 'Observations of V01 Group of Victims on the "Filing on Reparations and Draft Implementation Plan" filed by the Trust Fund', V01 Victim Group, ICC-01/04-01/06-3194-tENG, 1 February 2016, para. 17.

CHAPTER 8

Adjudicating Reparations at the ECCC

Almost 10,000 km further east from The Hague, Judges in Phnom Penh were debating some of the same issues. I study in this chapter how ECCC Judges went about adjudicating reparations in their first two cases. It is a distinct feature of the ECCC that its Judges appear both as lawmakers, at least in relation to their procedural rules, and adjudicators of these laws. This dual role has given ECCC Judges the ability to tweak the rules in response to challenges they encountered when applying their reparations framework. The purpose of this chapter is to examine these adjudicative practices and to explore how the ECCC's in-country location and the Judges' rule-making powers influenced these practices.

This chapter provides first an overview of the adjudication of reparations in *Cases 001* and *002/01*, before examining the main tensions and practices regarding reparations. After observing that their original framework did not deliver any tangible reparations to civil parties in *Case 001*, Judges amended the Internal Rules on reparations. My examination of the experience in *Case 002/01* provides an account of how this experiment worked out in practice. Throughout the analysis, I pay attention to the adjudicative practices adopted by legal professionals to manoeuvre competing rationales for reparations while balancing legal principles with social demands from the context. I argue that ECCC Judges were ultimately more socially responsive in their decision-making on reparations than their colleagues at the ICC. Yet, and as I will further show in Part V, the practices they adopted eventually put into question the remedial nature of reparations awards.

1. Before the First Trial: "Kicking the Can Down the Road"

As discussed in Part III, facilitating and managing the participation of civil parties consumed much of the ECCC's and NGOs' energy during the early years. Reparations moved slowly onto the agenda with the trial in *Case 001* approaching. It was widely assumed that the accused in *Case 001* had no noteworthy assets for satisfying reparations claims. Victim advocates within and outside the Court understood that the avenue of solely convicted-borne reparations under the Internal Rules was at danger of becoming a dead end.

The first time that reparations was discussed among a broader set of stakeholders was at a conference jointly convened in November 2008 by Cambodia's largest human rights NGO coalition, the Cambodian Human Rights Action Committee (CHRAC) and the ECCC Victims Unit (VU).[1] Two initiatives emerged from the conference: The VU announced that it would recommend to the judges plenary an amendment of the Internal Rules, which would permit the use of alternative sources of funding for reparations in cases where the accused person is declared indigent.[2] And, Thun Saray, head of ADHOC and chairman of CHRAC, proposed the establishment of a working group on reparations to consider issues surrounding implementation, including the possible establishment of a trust fund.[3]

None of these initiatives came to fruition.[4] In an open letter to the ECCC Judges Plenary, in 2009, CHARC reminded the Judges "that 'collective and moral reparations' will also need to be paid for" and that "even a limited reparations award, such as an order to publish the judgment of the court … would be rendered unenforceable given the defendants lack of funds".[5] The NGO coalition requested the Plenary to amend the rules to allow for voluntary contributions to reparations. Some civil party lawyers asked more specifically for the establishment of a trust fund.[6] Yet, no rules amendments on reparations took place prior to the start of the *Case 001* trial. ECCC Judges confirmed that there was little discussion among them about amending the rules regarding reparations, noting that there were too many other issues they had to deal with.[7] An ECCC officer described this attitude as "kicking the can down the road", noting that this behaviour was "reflective of a lack of vision and a lack of any planning for giving meaning in practice to what they legislated in the rules".[8] The adjudication in *Case 001* reflects thus the experience of bringing forward reparations claims under the framework originally adopted by the ECCC's Judges, where only the convicted person could pay for reparations.

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[1] The conference brought together NGO representatives, Court staff, civil parties, lawyers and international experts. See Cambodian Human Rights Action Committee (CHRAC) and ECCC Victims Unit, 2009, 'Reparations for Victims of the Khmer Rouge Regime', Report of a conference held in Phnom Penh from 26-27 November 2008.

[2] Presentation of Keat Bophal, former Head of the ECCC VU, 26 November 2008. See CHRAC/VU, Reparations for Victims, 22-23.

[3] Speech and Closing Remarks of Thun Saray, President of the Cambodian Human Rights and Development Association (ADHOC), 27 November 2006. See CHRAC/VU, Reparations for Victims, 38-39.

[4] The VU submitted a proposal to the Plenary, which was not taken up by the Judges. Interview with former ECCC official (ECCC1), Phnom Penh, 6 December 2014.

[5] Cambodian Human Rights Action Committee, 'Open Letter to the Members of the ECCC Plenary and the Rules Committee', 3 June 2009 (on file with the author).

[6] See Gillison, Douglas, 2009, 'Lawyers Renew Call for KR Victim Trust Fund', *Cambodia Daily*, 4 June 2009, 27; and Gee, Stephanie, 2009, 'A Khmer Rouge Tribunal with Civil Parties But No Guarantees of Implementation of Reparations', *Ka-Set*, 3 June 2009.

[7] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.

[8] Interview with international ECCC administration official (ECCC23), Phnom Penh, 6 August 2015.

2. Adjudicating Reparations in the First Cases before the ECCC

My examination of the adjudication of reparations at the ECCC proceeds in two steps: I first provide a brief summary of the main stages in adjudicating reparations in *Case 001* and *Case 002/01*. I then identify some of the main tensions and practices through which judges, lawyers and the administrators conceived reparations for civil parties.

2.1. Adjudicating reparations in Case 001: A "mere formality"[9]

Reparations were only discussed towards the end of the trial in *Case 001*.[10] In September 2009, the four legal groups representing the 93 victims at trial produced a joint submission on reparations.[11] The lawyers requested five forms of reparations for civil parties, namely (a) a compilation and dissemination of apologetic statements made by Duch throughout the trial; (b) access to free psychological and physical health care; (c) funding of educational programs to inform Cambodians of the crimes at S-21; (d) the erection of memorials and pagodas at S-21 and in civil parties' local communities; and (e) inclusion of civil parties' names in any final judgment.[12] Three of the groups provided further information on their claims in their final submissions.[13] The Defence did not oppose these reparations requests, but merely noted that the defendant appeared to be indigent.[14]

[9] Some information contained in this section is adapted from Sperfeldt, Christoph, 2012, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia', 12 *International Criminal Law Review*, 457-489.

[10] During a total of 22 weeks of trial hearings, from March to November 2009, the Chamber heard 47 witnesses and 22 civil parties. See Asian International Justice Initiative, 2009, 'Lessons from the "Duch Trial": A Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia', AIJI KRT Trial Monitoring Group, December 2009.

[11] *Case 001*, 'Civil Parties' Co-Lawyers' Joint Submission on Reparations', Civil Parties, E159/3, 14 September 2009.

[12] Ibid para. 45-47.

[13] Among others, lawyers asked the Trial Chamber for a recognition in the final judgment of the right to reparations (Group 1), further educational and medial measures and memorialisation at S-21 and Choeung Ek (Group 1, 2, 3), a national commemoration day (Group 1), and an order against the defendant to write a letter to the Cambodian government asking for a state apology and involvement in funding reparations for victims of S-21 (Group 2). See *Case 001*, 'Civil Party Group 1: Final Submission', Civil Party Group 1, E159/7, 10 November 2009, paras. 119-124; *Case 001*, 'Co-Lawyers for Civil Parties (Group 2): Final Submission', Civil Party Group 2, E159/6, 5 October 2009; and *Case 001*, 'Co-Lawyers for Civil Parties (Group 3): Final Submission', Civil Party Group 3, E159/5, 11 November 2009, paras. 144-166.

[14] *Case 001*, 'Final Defence Written Submissions', Defence, E159/8, 11 November 2009, paras. 49-50.

The Case 001 trial judgment (2010): "Cutting the head to fit the hat"

The Trial Chamber issued its verdict in July 2010 and found the defendant guilty.[15] The Chamber also noted that the victims participating at trial had only been admitted on a preliminary basis and, after re-assessing their claims, recognised only 66 of them; effectively denying civil party status to 24 victims who had participated throughout the entire trial.[16] The Judges' assessment of the reparations claims was extraordinarily brief. While acknowledging international jurisprudence regarding victims' rights, the Chamber stressed that it was constrained by limitations of its mandate. Relying on a self-declaration provided by the accused, the Chamber merely noted that the accused "appears to be indigent".[17] In such situation, the Judges considered, there was no mechanism allowing the ECCC to substitute awards with funds provided by third parties.[18] In short, there were no funds for reparations.

Beyond funding constraints, however, most of the requests were rejected on grounds of lack of specificity, because they were considered beyond the scope of available reparations, or fell outside the ECCC's competence. The Chamber reiterated its view of the requirements for a civil claim, when arguing that it was

> unable to issue orders where the object of the claim is uncertain or unascertainable, and which are incapable of enforcement. Accordingly, a prerequisite to the grant of an award is the clear specification of the nature of the relief sought, its link to the harm caused by the Accused that it seeks to remedy, and the quantum of the indemnity or amount of reparation sought from the Accused to give effect to it. Placing the burden on the Chamber to substitute its own decision in these areas is inconsistent with a mechanism that is claimant-driven ...[19]

Following this reasoning, the Chamber did not order any reparations against the defendant, but granted instead two symbolic reparations: to include in its judgment the names of civil parties and their relatives who died at S-21, and to publish statements of apology by the convicted person.

Civil parties, their lawyers, and the public at large, were critical about the reparations aspects of the judgment. An international observer noted regarding reparations, "when you read the Duch

[15] The Chamber sentenced Duch to 35 years imprisonment, with an effective 19 years still to be served. *Case 001*, 'Judgment', Trial Chamber, Case File 001/18-07-2007/ECCC/TC, E188, 26 July 2010 (hereinafter 'Case 001 TC Judgment 2010').
[16] The Trial Chamber was not satisfied that these civil parties had provided sufficient proof of their harm or their kin relationship to victims who were killed at S-21. Case 001 TC Judgment 2010, paras. 639-650.
[17] Ibid para. 666, in a footnote noting that "according to the 'Déclaration des revenus et biens' (Declaration of Means) completed by the Accused at the request of the Chamber in October 2009, Kaing Guek Eav has no bank account, owns no property and has no income; see 'Déclaration des revenus et biens de l'Accusé', E175/1.1, 16 October 2009".
[18] Case 001 TC Judgment 2010, para. 670.
[19] Ibid para. 665.

judgment, the sense is that it's not something the Court put a lot of efforts or even thought into".[20] John Ciorciari wrote that "civil parties had good grounds for disappointment", arguing that "[t]he Trial Chamber should have been much more creative on the issue of reparations".[21] An international civil party lawyer said that the reparations ruling was "really the most minimal, most conservative, and perhaps it's fair to say unimaginative that could have been ordered".[22] One Cambodian observer pointed to the failure of adapting the existing system to the circumstances at hand and argued, "the Judges cut the head to fit the hat, and did not cut the hat to fit the head".[23]

The Case 001 appeals judgment (2012)

Two civil party groups appealed the reparations order,[24] with the most extensive appeal being submitted by Group 2. The civil party lawyers lamented the vagueness of the decision, which, according to them, came short of a reasoned decision. Among other things, the lawyers found the requirement for a high level of specificity for reparations requests unwarranted in that the Trial Chamber "is silent about what exactly it requires, and, much less, it did not inform Civil Parties about the Trial Chamber's criteria and requirements in advance".[25] The lawyers argued, "the burden cannot be solely on Civil Parties, as private parties, to obtain such detailed information at their own cost in relation to the planning, costs, and implementation of prospective reparations measures".[26] They further contended that the Judges should differentiate the threshold for collective and moral reparations from the one applied in relation to domestic civil claims for monetary damages.

In their final judgment, issued on 3 February 2012, the Supreme Court Chamber (SCC) re-admitted another ten civil parties, but largely affirmed the Trial Chamber's reparations ruling.[27] Although the Judges believed that the civil parties had "advanced numerous requests that represent, in general terms, appropriate forms of reparation for the harm suffered", they were of the view that "due to the constraints stemming from the ECCC reparation framework … these

[20] Interview with international Court observer (ECCC4), 8 December 2014.
[21] Ciorciari, John, 'The Duch Verdict' on *Cambodia Tribunal Monitor*, 28 July 2010. <http://www.cambodiatribunal.org/sites/default/files/resources/the_duch_verdict.pdf> (15 February 2018)
[22] Quoted from O'Toole, James, 'Reparations Remain a Key Issue', *Phnom Penh Post*, 27 July 2010.
[23] Interview with Cambodian observer (ECCC12), Phnom Penh, 16 December 2014.
[24] *Case 001*, 'Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties Group 2', Civil Party Group 2, F13, 2 November 2010; and *Case 001*, 'Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010', Civil Party Group 3, F9, 5 October 2010.
[25] *Case 001*, 'Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties Group 2', Civil Party Group 2, F13, 2 November 2010, para. 67.
[26] Ibid para. 71.
[27] *Case 001*, 'Appeal Judgment', Supreme Court Chamber, Case File 001/18-07-2007-ECCC/SC, F28, 3 February 2012 (hereinafter 'Case 001 SCC Appeal Judgment').

specific requests cannot be granted".[28] Nevertheless, the SCC Judges agreed with the appellants that the Trial Chamber had failed to provide a reasoned reparations decision and therefore delivered a more articulate judgment. The SCC found that the ECCC rules delineate a *sui generis* reparations regime.[29] As such, the ECCC could neither just draw on analogies in Cambodian national law, nor could it as a criminal court simply rely on international (human rights) law. With Kaing Guek Eav found to be indigent, the SCC upheld the Trial Chamber's approach not to make a reparations order against the convicted person. In the same vein, the SCC upheld the specificity requirement in "claimant-driven" evidentiary proceedings on reparations, arguing civil parties need to provide enough information to make reparations awards "self-executing".[30] Shortly after the pronouncement of the appeals judgment, the ECCC posted on its website a compilation of statements of remorse and apology made by Kaing Guek Eav during the trial.[31]

Case 001 provides an example for how Judges dealt with a traditional civil party reparations claim, which solely relied on assets of convicted persons, in the context of a mass atrocity trial. What stands out from this experience is that Judges themselves had created Internal Rules that would not allow for more tangible collective reparations. Former Japanese diplomat Kodama had already noted, at the time when the Internal Rules were drafted, that the scheme was at danger of becoming a "mere formality given the virtual insolvency of the prospective accused".[32] Indeed, in the eyes of most Judges the outcome had been predictable, with one Judge stating, "it wasn't a system fit to deliver half way meaningful reparations".[33] However, a general state of uncertainty created mixed expectations among lawyers, civil parties and NGOs. As suggested in Part III, even the ECCC's own outreach staff had not been equipped with appropriate messages to prepare the ground for what later was presented as an inevitable outcome. One outreach officer recalled, "we just had to keep saying that Judges will work out how to apply it", and then concluded, "I don't know if anybody really thought the judgment in Case 001 was acceptable".[34]

Case 001 showed those involved the deficiencies of the system in place.[35] One Court observer noted, "what is ironic about that is that the Judges wrote the rules. So, they tied their own hands behind their back, and blamed the fact that their hands were tied … for issuing a pretty empty

[28] Ibid para. 717.
[29] Ibid paras. 639 & 641.
[30] Ibid paras. 685-688.
[31] *Case 001*, 'Compilation of Statements of Apology made by Kaing Guek Eav alias Duch during Proceedings', Supreme Court Chamber, F28.1, 16 February 2012.
[32] Kodama, For Judicial Justice and Reconciliation in Cambodia, 89.
[33] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[34] Interview with former ECCC official (ECCC7), Phnom Penh, 10 December 2014.
[35] The NGO REDRESS reported that the reparations awards granted by the Trial Chamber "were unable to meet the vast majority of victims' requests, due to the inadequacy of the applicable internal rules that the judges had established". REDRESS, 2011, 'Justice for Victims: The ICC's Reparations Mandate', London: REDRESS, 22.

reparations award."[36] This irony was perhaps not hidden from the Judges, who worried about how the system they had created would be applied to *Case 002* with its larger number of civil parties.

2.2. Amending the ECCC's reparations framework

The process for amending the Internal Rules began in 2009 and was driven by trial Judges, who feared that the system in place would derail the *Case 002* trial.[37] The Judges Plenary was more open to changes to the victim participation scheme, than it was on reparations. One Judge confirmed, "it was kind of a side issue" due to its more limited impact on the organisation of the trial.[38] Consequently, the amendments took place in two consecutive steps: first victim participation and legal representation, and then reparations. The Plenary delegated the task of preparing a set of rule amendments to a sub-committee composed of a handful of judges and legal officers.

After the Seventh Plenary Session, in February 2010, had introduced changes that essentially collectivised civil party participation and legal representation at trial (see Part III),[39] the Judges moved to the ECCC's reparative functions. Even before amending the reparations mandate, the Judges adopted provisions that expanded the mandate of the Victims Support Section (VSS) to implement so-called 'non-judicial measures'.[40] An ECCC press release noted that the plenary empowered the VSS

> to develop and implement new programs and measures occurring outside of formalised court proceedings. Such measures may encompass a broader range of services, as well as a more inclusive cross-section of victims than those who are admitted as Civil Parties in cases before the ECCC.[41]

Hence, the VSS was given a mandate to implement other measures outside of the judicial process. The rules set out that these measures were to benefit the "broader interests of victims", and not only civil parties, substantively broadening VSS' mandate. NGOs were rather supportive of these changes.[42]

This first round of amendments laid the ground for the amendment of the reparations mandate at the Eighth ECCC Plenary Session in September 2010. The new rules allow the Civil Party Lead Co-Lawyers to request the Trial Chamber, in a single submission, "a limited number" of

[36] Interview with international Court observer (ECCC4), Phnom Penh, 8 December 2014.
[37] ECCC, 'Sixth ECCC Plenary Session Concludes', Press Release, 11 September 2009.
[38] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[39] ECCC Internal Rules (v5), 5 February 2010, Rule 23(4) and (5).
[40] ECCC Internal Rules (v5), 5 February 2010, Rule 12*bis*(2). In Revision 6 moved to Rule 12*bis*(3).
[41] ECCC, 'Seventh Plenary Session of the ECCC Concludes', Press Release, 9 February 2010.
[42] Cambodian Human Rights Action Committee (CHRAC), 'New Directions for Victim Participation at the ECCC', Press Release, 26 February 2010.

reparations measures, which have been designed in coordination with the VSS. The main question for the Judges was how to establish a mechanism that would allow for outside financing of reparations. Since the Judges felt that they had no mandate to establish a trust fund, as this was mentioned neither in the ECCC Agreement nor the ECCC Law, they decided to broaden the VSS mandate to seek donor funding and engage in project work in collaboration with external actors. The Judges would then "recognise" that a specific project gives effect to the award sought by the civil parties.[43] This new modality separates the award from the liability of the defendant, when it comes to paying the costs for reparations, although one ECCC official stressed that the underlying facts would still inform the system.[44]

This new avenue was introduced in addition to the traditional civil party claim, which was maintained in the rules, but not further operationalised. Most Judges believed that the convicted-borne avenue of reparations was surrounded by too many uncertainties and would never work.[45] The amendments therefore forced civil parties to make a choice: either direct a claim against the accused – and be subject to high standards of proof and in most likelihood get nothing – "or" propose an externally pre-financed reparations project under the new, less legalistic avenue.[46] This exclusionary approach was the most contested aspect of the new two-pillar reparations regime, as many civil party lawyers and NGOs wanted to preserve the symbolic value of ordering reparations against a convicted person, regardless of indigence.[47] Yet, according to the Judges, this approach freed reparations not funded by convicted persons from the constraints of the criminal trial.[48]

Hence, the VSS is now vested with two mandates relating to reparative measures for victims: (1) identifying, designing and implementing judicial reparations projects for civil parties, in collaboration with the Civil Party Lead Co-Lawyers; and (2) implementing non-judicial measures projects for 'victims'. These rules amendments occurred in the midst of proceedings and could not be applied retroactively. This left *Case 001* civil parties deprived of such reparations.

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[43] ECCC Internal Rules (v6), 17 September 2010, Rules 23*quinquies* (1)-(3).
[44] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[45] Barriers cited in my interviews included statute of limitations for civil claims, unclear procedures under domestic law, uncertainties as how a collective claim (moral and collective in nature) could have been carried out against a convicted person, high burden of proof (including medical examinations of harm, challenges by defence teams etc.), and uncertain enforcement through the domestic judiciaries. Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014; and Interview with international ECCC Judge (ECCC29), Phnom Penh, 26 August 2015.
[46] ECCC Internal Rules (v6), 17 September 2010, Rules 23*quinquies* (3).
[47] Interview with international civil party lawyer (ECCC16), 3 June 2015.
[48] This is nowadays viewed positively among some scholars and even held up as an example for the ICC, see for instance Balta, Alina, and Manon Bax, 2017, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System, paper presented at the European International Studies Association conference, Barcelona, 13-16 September 2017.

2.3. Adjudicating reparations in Case 002/01

Case 002 against the Khmer Rouge senior leaders still alive is the ECCC's most important trial. Two preliminary issues occurred prior to the start of substantive trial hearings that have affected the reparations process. The first concerned the redrawing of the boundary of eligible victims as a result of the 2011 Pre-Trial Chamber admissibility decision discussed in Part III. The second matter related to how Judges dealt with the extensive Closing Order in *Case 002* that contained numerous charges and crime sites against elderly accused persons. The trial Judges estimated that it would take years to adjudicate all crimes. In order to increase the likelihood that the ECCC would issue at least one judgment before the defendants would pass away, the Trial Chamber severed the charges into a series of sub-trials related to different parts of the indictment.[49] The first of these sub-trials, also referred to as *Case 002/01*, addressed primarily policies relating to forced population movements and is at the core of my observations here.[50] The Trial Chamber considered the severance to be in the interest of an expeditious trial. Yet, it took two years of trial hearings from November 2011 to October 2013, another year before a trial judgment was pronounced in August 2014, and two more years before the Supreme Court Chamber issued an appeal judgment in November 2016.[51]

During an initial hearing in June 2011, the Civil Party Lead Co-Lawyers grouped their reparations requests into four categories: (1) memorialisation/ remembrance; (2) rehabilitation; (3) documentation/education; and (4) other awards.[52] In light of the Pre-Trial Chamber's admissibility decision that expanded the civil party group, the Trial Chamber allowed the Lead Co-Lawyers to supplement their initial specifications at a second hearing on reparations held in October 2011.[53] With the severance order only being issued a few weeks before this hearing, these specifications still covered all civil parties and crimes charged against the accused in *Case 002*:[54]

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[49] *Case 002*, 'Severance Order pursuant to Rule 89ter', Trial Chamber, E124, 22 September 2011.
[50] In October 2012, the Trial Chamber partially granted a request from the Co-Prosecutors to expand the scope of *Case 002/01* to include charges related to the execution of Khmer Republic soldiers at Toul Po Chrey execution site. On 8 February 2013, the Supreme Court Chamber annulled the Trial Chamber's severance decisions. The Trial Chamber issued a new severance decision, re-affirming the scope of charges in *Case 002/01*, but providing further detail regarding the charges in subsequent sub-trials. *Case 002*, 'Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013', Trial Chamber, E284, 26 April 2013.
[51] See Williams, Sarah, 2015, 'The Severance of Case 002 at the ECCC: A Radical Trial Management Technique or a Step too Far?', 13(4) *Journal of International Criminal Justice*, 815-843.
[52] *Initial Specifications for Reparations Requests in Case 002*, presented at the Initial Hearing on 29 June 2011, Transcript E1/6.1/TR002/20110629 Final EN.
[53] *Case 002*, 'Transcript of Hearing on Specification of Civil Party Reparations Awards and Accused Ieng Thirith's Fitness to Stand Trial', E1/11.1, 19 October 2011. These specifications were finalised in a written submission that the Civil Party Lead Co-Lawyers filed in March 2012.
[54] The following is a summary drawn from *Case 002*, 'Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek – Hearing of 19 October 2011', Civil Party Lead Co-Lawyers, E125/2, 12 March 2012.

- *Memorialisation / remembrance*: a national memorial day, building stupas/memorials, organising ceremonies, preserving and memorialising crimes sites;
- *Rehabilitation*: psychological and physical health services (including the establishment of health centres), creating self-help groups among civil parties;
- *Documentation / education*: educational programs (including a school curriculum on Khmer Rouge history), establishment of museums or learning centres; creating a victim register; publishing the names of civil parties in the judgment;
- *Other requests*: establishing a trust fund to fund reparations; support in facilitating access to Cambodian citizenship (Vietnamese minority civil parties);[55] projects for victims of gender-based crimes; vocational training.

Over the next two years, the Civil Party Lead Co-Lawyers and the VSS worked with various organisations, especially from the non-governmental sector, to design reparations projects and fundraise for their implementation – a process that I describe in more detail below. On 8 October 2013, the Lead Co-Lawyers submitted their final written reparations claim, a summary of which was orally presented during the Closing Statements in Case 002/01.[56] Ultimately, the Lead Co-Lawyers proposed 13 reparations projects to the Trial Chamber for which they sought the Judges' 'recognition' pursuant to Rule 23*quinquies*(3)(b) (see Table 4).[57] OSJI described these measures as "extremely reasonable and modest proposals".[58]

In its judgment, issued on 7 August 2014, the Trial Chamber recognised 11 of the 13 reparations projects proposed by the civil parties.[59] It rejected two of the projects, mainly on the grounds that they had not secured sufficient funding. One of the lawyers described the final outcome as a "catalogue of projects" and noted "everyone was very happy to have some projects and just put some stamps on it".[60] The civil parties did not appeal the reparations aspects of the judgment.

[55] Regarding this specific request see Nguyen, Lyma and Christoph Sperfeldt, 2014, 'Victim Participation and Minorities in Internationalised Criminal Trials: Ethnic Vietnamese Civil Parties at the Extraordinary Chambers in the Courts of Cambodia', 14 *Macquarie Law Journal*, 97-126.
[56] *Case 002/01*, 'Demande Définitive de Réparations des Co-Avocats Principaux pour les Parties Civiles en Application de la Règle 80bis du Règlement Intérieur et Annexes Confidentielles', Civil Party Lead Co-Lawyers, E218/7/6, 8 October 2013.
[57] Although the submission was entitled 'definitive claim', two supplementary submissions added further information to the final claim until March 2014. See *Case 002/01*, 'Complément d'Informations a la Demande Définitive de Réparations des Co-Avocats Principaux pour les Parties Civiles en Application de la Règle 80bis du Règlement Intérieur', Civil Party Lead Co-Lawyers, E218/7/6/1, 2 December 2013; and *Case 002/01*, 'Deuxième Complément d'Informations a la Demande Définitive de Réparations des Co-Avocats Principaux pour les Parties Civiles en Application de la Règle 80bis du Règlement Intérieur', Civil Party Lead Co-Lawyers, E218/7/8, 31 March 2014.
[58] Open Society Justice Initiative, 2013, 'Reparations for Khmer Rouge Crimes', Position Paper.
[59] *Case 002/01*, 'Judgment', Trial Chamber, Case File No 002/19-09-2007/ECCC/TC, E313, 7 August 2014, paras. 1151-1160 (hereinafter 'Case 002/01 TC Judgment').
[60] Interview with victim representative (ECCC19), Phnom Penh, 4 August 2015.

Table 4: Proposed reparations projects in Case 002/01

Proposed Reparation Projects

	Project	Project partner	Description
1	**National Day of Remembrance**	Royal Government of Cambodia (RGC)	Creating and official national day of remembrance honoring victims and survivors of the Khmer Rouge in Cambodia.
2	**Public Memorials Initiative**	Kdei Karuna (KdK) and Youth for Peace (YfP)	Developing a small number of public memorial sites (approx. 6) with related truth-telling and educational activities throughout Cambodia.
3	**Memorial for Khmer Rouge Victims: "For Those Who Are No Longer Here"**	Séra ING, ANVAYA Association ,Embassy of France, OUBA SAS, ACYC SARL	Producing and staging a group of sculptural monuments, evoking the forced evacuation of Phnom Penh, on a raised triangular platform adjacent to the French Embassy in Phnom Penh.
4	**Monument for Khmer Rouge Victims in France**	International Federation for Human Rights (FIDH) and two victims associations	Constructing a monument for victims living in France at the Pagoda of Vincennes in Paris in order to provide a space where survivors and relatives of the victims can hold ceremonies.
5	**Testimonial Therapy**	Transcultural Psychosocial Organisation (TPO)	Providing approximately 200 civil parties the opportunity to participate in testimonial therapy, during which they are invited to talk about their traumatic experiences with the support of a mental health professional.
6	**Self-Help Groups for Rehabilitation**	Transcultural Psychosocial Organisation (TPO)	Creating locally-based and professionally facilitated self-help groups (voluntary associations of people that meet to help themselves and each other overcome traumatic suffering).
7	**Permanent Exhibition on Forced Transfer & Tuol Po Chrey**	Documentation Center of Cambodia (DC-Cam)	Establishing the permanent exhibitions on forced transfer and the executions at Tuol Po Chrey in five Cambodian provincial museums. Topics may change to reflect other aspects of civil parties' and victims' experiences.
8	**Mobile Exhibition on Forced Transfer & Tuol Po Chrey**	Kdei Karuna (KdK) and Youth for Peace (YfP)	Creating a multimedia exhibition combining film and other audiovisual material with participatory activities that encourage visitors to reflect on the issues presented, relating them to their personal lives.
9	**New Chapter on Forced Transfer & Tuol Po Chrey in Teacher's Guidebook**	Documentation Center of Cambodia (DC-Cam)	Including an additional chapter on forced transfer and the Tuol Po Chrey execution site in the *Teacher's Guidebook: The Teaching of A History of Democratic Kampuchea (1975-1979).*
10	**Community Peace Learning Center in Samrong Khnong**	Youth for Peace (YfP)	Constructing a learning center (composed of an information center, a museum and a dialogue room) in a historical sight where mass killings of the Khmer Rouge regime occurred.
11	**Illustrated Civil Party Storybook**	Cambodian Human Rights Action Committee	Producing books in which civil parties tell their stories through both written narratives and illustrative artworks.
12	**Publication & Distribution of Case 002/01 Judgment**	ECCC (Sections of Civil Party Lead Co-Lawyers, Victims Support and Public Affairs)	Providing civil parties with the Case 002/01 judgment both in its full text as well as a summary version.
13	**Publication of Civil Party Names on ECCC Website**	ECCC (Sections of Civil Party Lead Co-Lawyers, Victims Support and Public Affairs)	Publishing civil party names in the judgment in Case 002/01 and on the ECCC website as a recognition of the harm suffered by civil parties and acknowledgment of their participation in the proceedings.

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3. The Main Tensions and Practices during the Adjudication

Considering the non-tangible reparations outcomes in *Case 001*, the main focus in this section is on the adjudicative practices regarding reparations in *Case 002/01*. The ECCC's less judicial approach to reparations in that case stands in contrast to the more judicialised approach eventually adopted at the ICC. As a consequence of the de-judicialisation of reparations at the ECCC, few matters relating to reparations were adjudicated before the Judges. Most issues were of an

operational nature and dealt with outside the courtrooms. In following, I first reconstruct the ECCC Judges' reasoning for taking a less legalistic path than their peers at the ICC. I then identify the main adjudicative practices ECCC Judges and lawyers adopted and how these became dominated by managerial concerns. This had an impact on the actors involved in this process and the responsibility for reparations.

3.1. The ECCC's approach: Against the 'fictitious award'

What were the ECCC Judges' motivations for redesigning the reparations scheme and moving it into a non-judicial direction? And what was the main rationale of the system they replaced it with? These debates crystallised after the *Case 001* judgment, when Judges embarked on amending the ECCC's Internal Rules on reparations.

Moving away from the civil party claim: De-judicialising reparations

Case 001 had shown to Court officials the inadequacy of the reparations regime in place. Judges had two options: leave the Internal Rules untouched and repeat the unsatisfactory experience of *Case 001* with a much larger group of civil parties in *Case 002*, or to change the regime by using the Judges' rule-making powers. With pressure for change mounting in the aftermath of the *Case 001* judgment, the Judges chose the latter course. In a rare act of transparency, the Sub-Committee tasked with amending the rules invited input from civil party lawyers and NGO representatives, which allowed these two groups to comment on the proposed language of the rule amendments.[61] Hence, lawyers and NGOs were the audiences from which the Sub-Committee sought legitimacy for its proposals.

After the Eighth Plenary Session, the Judges explained their reasons for the rules changes regarding reparations:

> Experience has also shown that where convicted persons are indigent, reparations awards under the classic Civil Party model are unlikely to yield significant tangible results for Civil Parties. A traditional Civil Party claim must also satisfy stringent admissibility and pleading requirements. ... in cases where the convicted person does not voluntarily comply with a reparations award against him or her, enforcement must be sought before Cambodian national courts. The Rules and Procedure Committee sought to address these limitations by proposing additional reparations avenues ...[62]

[61] The NGO coalition CHRAC coordinated the NGO input into these discussions, including the involvement of international experts from REDRESS, the International Organisation for Migration and the International Center for Transitional Justice in support of the deliberations at the Sub-Committee. See Cambodian Human Rights Action Committee and REDRESS, 'Considering Reparations for Victims of the Khmer Rouge Regime', Phnom Penh. <http://www.refworld.org/pdfid/4b388dcd2.pdf> (accessed 20 February 2018)

[62] ECCC, 'Eighth ECCC Plenary Session Concludes', Press Release, 17 September 2010.

Judges were adamant that the traditional civil party claim would simply not work when convicted persons were indigent. The goal of these amendments was thus to move the reparations scheme away from the civil party model, both by introducing 'non-judicial measures' and an additional reparations avenue that would free reparations from juridical constraints.[63] At a time when amendments to the reparations mandate were viewed critically within the ECCC Plenary, one ECCC official noted that the VSS non-judicial mandate was vague enough to gain support, but strategically "designed from the beginning as a door-opener for reparations".[64] This introduced the idea of separating reparations from the defendant, with the non-judicial measures completely severing the ties to the facts of the criminal case – "so you are getting further and further away from the original civil party informed reparations system".[65]

The changes to the procedural and substantive rights of parties represented, in effect, a departure from the traditional civil party system, which was to be replaced by a representation of victims' collective interests with a collective reparations claim. An ECCC Judge agreed that the amendments represented a "complete change of the concept". But the Judge also noted resistance, both from civil party lawyers and from Cambodian Judges to eliminate the word "civil party" from the rules.[66] The result is a certain "symbolism" in the rules that no longer corresponds with the effective rights of parties.[67]

Delivering more symbolic reparations to wider constituencies

What was the purpose of the ECCC's reparations scheme according to the Judges? The Supreme Court Chamber shared its view in the *Case 001* appeals judgment:

> [I]t should be emphasised that ECCC criminal proceedings ought to be considered as a contribution to the process of national reconciliation, possibly a starting point for the reparation scheme, and not the ultimate remedy for nation-wide consequences of the tragedies during the DK. As such, the ECCC cannot be overloaded with utopian expectations that would ultimately exceed the attainable goals of transitional justice. Therefore, while the ECCC did assume the competence to grant 'collective and moral' reparations, this competence must be interpreted in view of a narrow mandate and purpose.[68]

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[63] The new avenue was introduced in addition to the traditional civil party claim, which was maintained under Internal Rule 23*quinquies* 3(a), but not further operationalised.
[64] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[65] Ibid.
[66] Ibid.
[67] Diamond critically assessed these changes as "beyond symbolism". Writing about the changes to victim participation, the author argued, "what is left is a façade that the Chambers continue to present to the public in the hope that the world, and particularly the survivors themselves, will not realise how hollow the original promise has become". Diamond, Andrew, 2011, 'Victims Once Again? Civil Party Participation before the Extraordinary Chambers in the Courts of Cambodia', 38 *Rutgers Law Record*, 34-48.
[68] Case 001 SCC Appeal Judgment 2012, para. 655.

In the SCC Judges' view, a contribution to *national* reconciliation could be a starting point for a reparations order, although the Judges did not articulate what this meant and how it could be achieved. With this broader purpose of reparations at the societal level in mind, the Judges interpreted the term 'collective' reparations as meaning "to favour those measures that benefit as many victims as possible", and that therefore "the most inclusive measures of reparation should be privileged".[69] Hence, the judgment softened the exclusive targeting of civil parties through Court-ordered reparations and opened the door for collective measures that could benefit broader 'victims' collectives, in addition to civil parties.

This intentional blurring of the boundaries of legal victimhood in the Judges' targeting practices regarding reparations created confusion among those who still viewed the new scheme through the more legalistic lens of the civil party mechanism.[70] Uncertainty resulted from the combined impact of the rules amendments, the Pre-Trial Chamber's civil party admissibility decision and the severance order: Whilst according to the rules a 'consolidated group' of more than 3,800 civil parties now participated at trial, only approximately 750 of those were admitted due to harm related to forced population movements; the main subject of *Case 002/01*.[71] Noting the requirement of a nexus between the harm suffered by civil parties and the charged crimes, as well as the age of the accused, the Civil Party Lead Co-Lawyers feared that the severance would affect adversely civil parties' reparations claims and that "more than 3,000 civil parties could end up being denied their right to effective remedy".[72] These uncertainties led to numerous exchanges between the Lead Co-Lawyers and the Chamber throughout the trial to clarify the effect of the severance order.[73]

The Trial Chamber brushed aside these concerns, noting that "civil parties no longer participate individually on the basis of their particular harm suffered" and thus "limiting the scope of facts to be tried during the first trial … has no impact on the nature of civil party participation at trial".[74] For ECCC trial Judges the individual claim ceased to exist and was instead replaced by an

[69] Ibid para. 659.
[70] The combined effect of prosecutorial selectivity, the struggle to find a coherent system across the different judicial organs to manage civil party participation, and the severance order ultimately increased complexity and made the system much harder to understand, not just for participating survivors but even for many lawyers involved.
[71] *Case 002*, 'Lead Co-Lawyers Urgent Request on the 19 October 2011 Hearing Following the Chambers Memorandum E125', Civil Party Lead Co-Lawyers, E215/1, 7 October 2011, para. 13.
[72] *Case 002*, 'Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek – Hearing of 19 October 2011', Civil Party Lead Co-Lawyers, E125/2, 12 March 2012, para. 31.
[73] See Heindel, Anne, 2013, 'Impact of Severance on Individual Civil Parties' Legal Status and Right to Reparation', *Cambodia Tribunal Monitor*, 22 February 2013.
[74] *Case 002*, 'Severance Order pursuant to Rule 89ter', Trial Chamber, E124, 22 September 2011, para. 8.

anonymous victim collective. Conveniently, this solution allowed the Judges to disregard individual reparations requests, including the laborious assessment of individual claims, and instead leave it to the Civil Party Lead Co-Lawyers to aggregate the multitude of different interests into a single claim for reparations. In conceiving reparations at the ECCC to provide collective benefits to broader victim collectives with the goal to contributing to national reconciliation, the Judges agreed that "reparations before the ECCC are intended to be essentially symbolic".[75]

Feasibility as the overriding principle to guide adjudicative practices

Despite viewing reparations to be symbolic in nature, the ECCC Judges were simultaneously adamant about avoiding a repetition of the kind of empty reparations order delivered in *Case 001*. Civil party lawyers in that case had argued that indigence of an accused should not affect the issuance of the reparations order, as "it is possible that the accused may not be indigent in the future".[76] The lawyers put this argument forward more than four years before ICC Judges in the *Lubanga* appeals reparations order recognising the validity of the argument. Yet, the ECCC Supreme Court Chamber did not share this view[77] and held "that an award that, in all probability, can never be enforced, i.e., is de facto fictitious, would belie the objective of effective reparation …".[78] ECCC Judges resisted issuing such 'fictitious awards'; awards that, even if symbolically important, would be substantively void with little prospect for implementation. The SCC Judges justified their practice as follows, "it is of primary importance to limit reparations to such awards that can realistically be implemented so as to avoid the issuance of orders that, in all probability, will never be enforced and would be confusing and frustrating for the victims".[79] Thus, Judges felt they were acting in a victim-oriented manner, mainly by applying notions of expectation management to the trial.

Concurrently, emphasis would be placed on the effectiveness of the award, expressed in a high degree of required specificity and the availability of funding that would allow for self-execution following a reparations order. I refer to this as the 'feasibility requirement'; that is, judges only order reparations that are feasible to implement. Not rights, harm or entitlements ultimately guide decision-making, but the feasibility of the award. From *Case 001* onwards, an approach focused

[75] Case 001 SCC Appeal Judgment 2012, para. 644.
[76] *Case 001*, 'Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties Group 2', Civil Party Group 2, F13, 2 November 2010, para. 26.
[77] The SCC Judges recognised that under domestic civil action, indigence of a convicted person would not preclude granting compensation, but the Judges did not think that this was applicable to the *sui generis* regime at the ECCC. Case 001 SCC Appeal Judgment 2012, para. 666.
[78] Ibid para. 667.
[79] Ibid para. 668.

on the feasibility and effectiveness of reparations awards would dominate the ECCC's adjudicative practices regarding reparations.[80]

Blurring the line between judicial reparations and non-judicial measures

The feasibility requirement had consequences for adjudicative practices regarding reparations at trial. The amended rules now stipulate that the Civil Party Lead Co-Lawyers have to present their final reparations claim at the end of trial hearings; all projects presented at that stage would need to demonstrate that they "have secured sufficient external funding".[81] The Supreme Court Chamber confirmed, "even though the Internal Rules have been recently amended so as to expand the reparation measures available to the ECCC, they still confirm the same rationale that takes into consideration the availability of funds".[82] What this meant operationally was that preparations for consulting, designing and fundraising reparations had to start at an early stage; long before a finding of guilt. In recognition of this fact, the new rules stipulate for the Civil Party Lead Co-Lawyers to provide 'initial specifications' of their reparations requests *at the beginning* of the trial.[83]

As a consequence, the ECCC moved many tasks relating to collective reparations into the pre-verdict phase, whilst the ICC only tackled reparations after a judgment on guilt. Although reparations claims against the accused according to Rule 23*quinquies* (3)(a) still had to consider harm resulting from crimes for which an accused is convicted, Judges were much more flexible regarding measures developed under the amended reparations framework:

> Concerning the new form of reparations envisaged by Rule 23*quinquies* (3)(b) (whose costs are not borne by the convicted person), the Severance Order does not debar the elaboration of specific projects which give appropriate effect to the awards sought by the Lead Co-Lawyers. Initiatives sought in relation to this new form of reparation … may be conducted in parallel with the entire trial in Case 002.[84]

At a time when many victim lawyers struggled to accept a departure from the civil party model, this statement highlighted how far the trial Judges viewed the new avenue being removed from a notion of reparations associated with a criminal trial. This was visible in practices that redrew the

[80] The ECCC and ICC had both in common that they refused to issue 'fictitious awards', until the *Lubanga* appeals reparations judgment blurred this approach at the ICC. However, this is essentially what the Extraordinary African Chamber did when ordering almost USD 140 million against Hissène Habré. See Sperfeldt, Christoph, 2017, 'The Trial against Hissène Habré: Networked Justice and Reparations at the Extraordinary African Chambers', 21(9) *International Journal of Human Rights*, 1243-1260.
[81] ECCC Internal Rules (v9), 16 January 2015, Rule 23*quinquies* (3)(b).
[82] Case 001 SCC Appeal Judgment 2012, footnote 1343.
[83] ECCC Internal Rules (v9), 16 January 2015, Rule 80*bis* (4).
[84] *Case 002/01*, 'Notice of Trial Chamber's Disposition of Remaining Pre-Trial Motions and Further Guidance to the Civil Party Lead Co-Lawyers', Trial Chamber, E145, 29 November 2011.

boundaries of victims who could benefit from reparations and allowed for implementation to begin even prior to a verdict.[85] Similar to the ICC, the ECCC Judges' practices blurred the boundaries between 'reparations' and 'non-judicial measures'. According to the rules, the main difference is a mere 'recognition' by the Trial Chamber.[86]

3.2. Lawyers and judges as project managers

The gradual de-judicialisation of reparations at the ECCC and an emphasis on feasibility further shaped the Judges' adjudicative practices. I show in the following how this approach shifted Judges and lawyers' practices to more managerial questions relating to development of projects and the capacities available for their realisation.

Capacities for reparations

The ECCC's amended reparations regime and the central role assigned to the VSS has some similarities with the ICC's reparations scheme, where the TFV can be involved in implementing court-ordered reparations, but also has a mandate to implement assistance measures. However, whereas the TFV is required to notify the judges before it can implement assistance, the VSS is completely free in its determination to implement non-judicial measures. That said, the Rome Statute provided, through the TFV, an institutional infrastructure, which could engage in implementing reparations. The ECCC Internal Rules do not clarify the modalities and structures for implementing and funding reparations or non-judicial measures; other than delegating these tasks to the VSS. The vagueness in the framework provides the VSS with wide discretion in implementing its new mandates.

Since 2008, Germany had funded the VSS almost entirely through an earmarked contribution to the national component of the ECCC.[87] This bilateral support enabled a surge in staff capacity, which peaked at 23 national staff in the 2010-2011 budget, and then gradually declined to around

[85] The Trial Chamber noted in relation to the new reparations avenue that "implementation of these measures may begin prior to the verdict in *Case 002/01*. This is in keeping with the purposes for which Internal Rule 23*quinquies* (3)(b) was adopted, which were to enable, with donor assistance and that of external collaborators, the realization of meaningful reparations within a reasonable time." *Case 002/01*, 'Indication of Priority Projects for Implementation as Reparation', Trial Chamber, Memorandum, E218/7, 3 December 2012.

[86] This matter will be further discussed in Part V.

[87] This contribution came initially from the German Foreign Office and amounted, from late 2008 to 2011, to EUR 1.9 million. Another EUR 1.2 million was provided in February 2012 covering the time period from 2012 to 2013. Subsequent funding at a somewhat lower threshold was continued by the German Ministry of Economic Cooperation and Development. ECCC, 'Germany Provides Euro 1.2 Million to Victims Support Section of the Extraordinary Chambers in the Courts of Cambodia', Press Release, 8 February 2012.

10 national staff in the 2014-17 budgets.[88] Victim support staff, excluding legal representation for civil parties, constituted on average 3 to 5 per cent of the total ECCC staff. Within these limited resources, the VSS hired one Cambodian project manager tasked with developing both reparations and non-judicial measures.[89] After years of debates over reforming the reparations scheme, its success ultimately came to hang on a single person. The VSS also asked the German *Gesellschaft für Internationale Zusammenarbeit* (GIZ) for the deployment of an international advisor.[90]

These staffing levels never reflected the VSS' expanded responsibilities after 2010, but rather correlated with the level of external support provided to the Section. This trend was reinforced by UNAKRT's decision, taken *after* the new reparations framework was put in place, to withdraw its only international staff member from VSS.[91] This "nationalisation of victim participation" and the decreasing staff levels indicate the low priority that both the Office of Administration and the UN assigned to reparations.[92] Whilst the ECCC administration continued to fund the criminal justice aspects, it never fully got behind the reparations mandate, unless someone else funded it. This reluctance of the ECCC administration may relate, at least in part, to a perception of reparations as a potentially competing fundraising endeavour for a Court that, as a whole, survived on voluntary contributions. Court monitors criticised that "the Court is negligent in inadequately supporting the Co-Lead Lawyers and the VSS with staff and high-level institutional leverage to secure funds and political support for reparations".[93] Many interviewees felt that the Judges "outsourced" an important element of the trial, collective reparations, to an underfunded and understaffed unit within the Court.[94]

Because of these capacity challenges, the VSS reached out to local NGOs to leverage existing projects with survivors for the purposes of reparations. The Section engaged in a series of discussions with NGOs with the aim of turning ideas into concrete project proposals. In early 2013, the VSS formally launched an 'ECCC Reparations Program 2013-2017', a centrepiece of which was the proposed creation of a Victim Foundation as the program's main funding and

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[88] Numbers exclude legal representation for civil parties, drawn from ECCC, 'ECCC Revised Budget Requirement 2010-2011', 24 January 2011, paras. 40-41; ECCC, 'ECCC Proposed Budget for 2014-2015', 5 February 2014, para. 81; ECCC, 'Proposed Budget for 2016-2017', 7 October 2015, paras. 88-89.
[89] Another Cambodian program assistant later joined the program manager. See ECCC, 'Proposed Budget for 2016-2017', 7 October 2015, para. 91.
[90] I was the first GIZ Advisor in this position from 2010-2011.
[91] The ECCC budget noted about the withdrawal of the international VSS Deputy Head: "the Victims Unit is staffed predominantly under the National Component, and has adequate human resources to support its program of work, a full time position for Deputy Chief, Victims Unit, is no longer warranted". ECCC, 'ECCC Revised Budget Requirement 2010-2011', 24 January 2011, para. 18.
[92] See Ciorciari/Heindel, *Hybrid Justice*, 207-210.
[93] Open Society Justice Initiative, 2013, 'Reparations for Khmer Rouge Crimes', Position Paper, 2.
[94] Interview with former NGO coordinator (ECCC13), Melbourne, 9 February 2015.

implementing instrument.[95] The VSS included initially 16 projects in its reparation program, comprising both judicial reparation and non-judicial measures, and estimated that around USD 7 million over five years would be needed to implement these projects.[96] Yet, no funds had been secured by then.[97]

Adjudicative practices between legal and managerial expertise

Despite the de-judicialisation of reparations, trial Judges intended to play an active role in the reparations process. The Judges explained that requiring the Civil Party Lead Co-Lawyers to submit initial specification of their reparations claim would "permit the Chamber oversight as to the conformity or otherwise of the reparations sought" and "enable early guidance".[98] Initial specifications and requirements for regular updates became the Judges' primary tools to oversee and intervene in the reparations process. The Judges noted, "the purpose of these initial specifications is to encourage sufficient specificity and advance planning so as to ensure that meaningful reparation can result to Civil Parties *within the ECCC's lifespan*" (emphasis added).[99] Hence, the Chamber envisaged reparations to be implemented during the ECCC's existence and further explained the intended functioning of the new reparations avenue as follows:

> The idea was to ensure that tangible, externally funded awards acknowledging the suffering of Civil Parties could be realised soon after a verdict becomes final. This presupposes the development of awards (technically through program management) in parallel with the ongoing trial. … A program manager tasked with the development of these awards was installed in the Victims Support Section. S/he is expected to design the award(s) identified by the Co-Lead Lawyers, and ensure their funding and readiness for implementation at the verdict stage.[100]

These statements highlight how deeply Judges' instructions reached into the realm of managing reparations project; a task normally left to administrators. Similar to the ICC, the debate on reparations became dominated by talk about 'projects' – a word already used during the rules amendments.[101] Judges and lawyers suddenly found themselves in the unknown terrain of project

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[95] VSS staff was inspired by a visit to the German Foundation EVZ, which was established as part of Germany's compensation program for victims of forced labour during the Nazi regime. See ECCC Victims Support Section, 'ECCC Reparation Program 2013-2017', 14 January 2013. <http://vss.eccc.gov.kh/images/stories/2014/Reparation.pdf> (accessed 20 February 2018)
[96] Ibid.
[97] While the VSS had compiled a list of 96 potential donors, no funding commitments had materialised by early 2013. *Case 002/01*, 'Lead Co-Lawyers' Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations', Civil Party Lead Co-Lawyers, E218/7/1, 12 February 2013, paras. 32-34.
[98] *Case 002*, 'Initial Specification of the Substance of Reparations Awards Sought by the Civil Party Lead Co-Lawyers Pursuant to Internal Rule 23quinquies(3)', Trial Chamber, Memorandum, E125, 23 September 2011.
[99] Ibid.
[100] Ibid.
[101] ECCC Internal Rules (v9), 16 January 2015, Rule 23*quinquies* (3)(b).

management. The Civil Party Lead Co-Lawyers acknowledged the tasks assigned to them as "not only daunting but also unprecedented in the context of an international tribunal. Such tasks are normally performed by specialised entities which are afforded a large staff, funding, time and experience."[102] Most irritation related to the fact that external funding for reparations would need to be secured *prior* to a reparations decision. The International Civil Party Lead Co-Lawyer, Elisabeth Simmoneau-Fort, stated that although fundraising was not in her job description, it took up a lot of her time.[103] She lamented in an op-ed:

> The law, as written, imposes upon the civil parties a heavy and unjust burden with regards to reparations. In effect, the civil parties have the obligation to find the funding for these reparations … [T]he question to ask is whether it is fair that conditions be placed on the awarding of reparations in a criminal trial at the end of the proceedings due to some questions of funding, with the remainder left to the responsibility of the victims themselves. The answer should obviously be 'no'.[104]

As responsibilities for reparations were split between the VSS and the Civil Party Lead Co-Lawyers, regular frictions emerged between the two. Some of these challenges arose when lawyers and project managers tried to collaborate on reparations. One ECCC administrative officer noted about the collaboration across different fields of expertise, "they have a legal background, and don't really understand project management processes"; but also acknowledged, "we don't have the legal skills".[105] Similar to the situation of the ICC and TFV, bringing legal and managerial logics and cultures together proved to be difficult.

From the beginning, civil party lawyers and the VSS found themselves on a tight schedule, if tangible projects were to emerge before the close of the trial. The Trial Chamber grew concerned about the long list of project ideas and lack of funding. In 2012, the Judges encouraged the civil parties to narrow down their requests, suggesting "that the Lead Co-Lawyers prioritise for development a small number of reparations awards out of the totality currently contemplated …".[106] One Judge explained in a managerial tone that these regular updates were

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[102] *Case 002*, 'Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek – Hearing of 19 October 2011', Civil Party Lead Co-Lawyers, E125/2, 12 March 2012, para. 40.
[103] White, Stuart, 2013, 'Little time for reparations at KRT', *Phnom Penh Post*, 7 August 2013.
[104] Simmoneau-Fort, Elisabeth, 2013, 'Reparations a Major Issue', *Phnom Penh Post*, 8 August 2013.
[105] Interview with Cambodian ECCC officer working on victim issues (ECCC32), Phnom Penh, 9 December 2015. The Lead Co-Lawyers similarly noted, "we have neither the expertise nor the mandate to be directly responsible for fundraising". *Case 002/01*, 'Lead Co-Lawyers' Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations', Civil Party Lead Co-Lawyers, E218/7/1, 12 February 2013, para. 30.
[106] *Case 002/01*, 'Scheduling of Trial Management Meeting', Trial Chamber, E218, 3 August 2012, para. 19.

meant "to ensure that things are happening"; to put pressure on the VSS and Lead Co-Lawyers to do something – "the power of deadlines".[107]

In February 2013, the Civil Party Lead Co-Lawyers presented seven priority projects that were at a more advanced stage, while another six projects were still being considered.[108] The Trial Chamber acknowledged "in principle" that these proposed projects "appropriately acknowledge the harm suffered as a result of the commission of crimes at issue in Case 002/01", but required further information.[109] The Judges provided detailed guidance as to how they wanted the feasibility requirement under the new reparations avenue to be operationalised, including detailed descriptions, budget plans and confirmation of funding.[110] The Chamber stressed that it would not endorse proposals that do not comply with these conditions.

Ultimately, it was a lack of sufficient funding, not specific legal requirements, that led the Trial Chamber to reject two of the 13 proposed reparations projects in *Case 002/01*. In the case of one of the rejected initiatives proposed by civil parties in France aimed at building a stupa in Paris, civil parties themselves had undertaken last-minute efforts by organising a fundraising day. One lawyer in Paris noted, "this means that Cambodian victims, who are usually not very rich, had given money to their reparations".[111]

The zeal with which the Trial Chamber pushed the *Case 002/01* reparations projects forward contrasted with the fact that most of these projects were rather non-judicial in nature and that their reparative value would merely be 'recognised' by the Judges. Few legal issues regarding reparations were ever debated before the bench. As a result of a feasibility-driven approach to reparations, Judges' adjudicative practices became more managerial over time.

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[107] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[108] *Case 002/01*, 'Lead Co-Lawyers' Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations', Civil Party Lead Co-Lawyers, E218/7/1, 12 February 2013.
[109] *Case 002/01*, 'Trial Chamber's Response to the Lead Co-Lawyers' Initial Specification of Civil Party Priority Projects as Reparations pursuant to Rule 80bis (4)', Trial Chamber, E218/7/2, 1 August 2013, para. 6.
[110] The Chamber required from the Lead Co-Lawyers the following information: "(1) Proof of consent and cooperation of any involved third party has to be demonstrated; (2) Funding has to be fully secured, as the Chamber cannot endorse a reparation project that has secured partial funding only; (3) Any necessary additional information shall be provided to the Chamber, such as detailed descriptions (including sketches and/or pictures) and budget plans of proposals." *Case 002/01*, 'Trial Chamber's Subsequent and Final Order on the Updated Specification of Civil Party Priority Projects as Reparations Pursuant to Rule 81bis(4)', Trial Chamber, E218/7/4, 6 September 2013, para. 3.
[111] Interview with former ECCC legal officer (ECCC18), 7 July 2015.

3.3. Responsibility for and funding reparations at the ECCC

When the Judges initially drafted their procedural rules, convicted persons' responsibility for reparations was at the core of the ECCC's reparations scheme. However, the amended framework shifted adjudicative practices towards the involvement of external entities, especially the Cambodian government, donors and NGOs – in effect weakening accountability-based conceptions of reparations.

The role of convicted persons

The ECCC's original reparations regime envisaged that all costs for reparations would be borne by convicted persons, and this has remained a valid avenue for reparations under the amended Internal Rules.[112] If a convicted individual was deemed indigent, civil party lawyers in *Case 001* considered that the Judges could order the Victims Unit to set up a trust fund and recommend, in its judgment, that the Cambodian state be involved in reparations.[113] The lawyers argued that if the Judges understood the rules to mean that no other funding could be used in cases where defendants were indigent, "the promise of providing justice through reparations to the victims of S-21 would be meaningless".[114] Yet, in its judgment in *Case 001*, the Trial Chamber interpreted the rules to mean that costs for reparations were to be borne "exclusively" by the accused.[115]

Following this upsetting experience, civil party lawyers considered it essential that the assets of defendants in *Case 002* be investigated for the purposes of reparations. Already in *Case 001*, lawyers had raised concerns that there was "no concrete evidence of a proper assessment of the defendant's assets in the case file".[116] Similarly, all charged persons in *Case 002* were determined to be indigent for legal aid purposes, solely on the basis of declarations of the accused persons.[117] In *Case 001*, such a declaration was sufficient for the Judges to conclude that the defendant "appears to be indigent" also for reparations purposes.[118] Even though it was widely assumed that Kaing Guek Eav did not own much property, Cambodians and observers speculated that some of

[112] ECCC Internal Rules (v9), 16 January 2015, Rule 23*quinquies* 3(a).
[113] See *Case 001*, 'Civil Parties' Co-Lawyers' Joint Submission on Reparations', Civil Parties, E159/3, 14 September 2009, paras. 34-39.
[114] Ibid paras. 31-32.
[115] Case 001 TC Judgment 2010, para. 661.
[116] *Case 001*, 'Civil Parties' Co-Lawyers' Joint Submission on Reparations', Civil Parties, E159/3, 14 September 2009, para. 32.
[117] The Trial Chamber judgment in *Case 002/01* referred to the following declarations, which are not publically available: "Nuon Chea: Determination of means, A49, 17 October 2007; and Khieu Samphan: Determination of indigence, A151, 30 January 2008". Case 002/01 TC Judgment 2014, para. 1108.
[118] Case 001 TC Judgment 2010, para. 666.

the accused in *Case 002* possessed assets.[119] Surveys among civil parties also indicated that survivors wanted perpetrators to pay for reparations.[120]

Civil party lawyers, supported by local NGOs,[121] filed multiple submissions requesting full investigations into the properties owned by charged persons, and measures to preserve any assets for reparations. The Co-Investigating Judges denied these requests, and civil party lawyers appealed the decision. In August 2010, the Pre-Trial Chamber found that such investigations were outside the scope of investigations with which the Investigating Judges were seized. Although the Chamber noted that the ICC had statutory provisions permitting pre-trial freezing of assets of accused persons, the Judges found that no such legal authorisation existed at the ECCC.[122]

While the Pre-Trial Chamber recognised that trial Judges could take additional measures at the trial stage, it emphasised that the "ECCC legal framework does not grant any organ of the Court jurisdiction to enforce a reparation award".[123] The amended Internal Rules further codified this interpretation.[124] In the absence of adequate procedures and relevant practice in Cambodian courts, it is unclear how civil parties could pursue the implementation of reparations awarded against convicted persons at the ECCC. Four years after the Judges had designed a framework for reparations that initially relied solely on the assets of convicted persons, the Pre-Trial Chamber confirmed that the procedural logic of this avenue was hollow. One observer noted with frustration,

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[119] Rumours existed about Ieng Sary's presumed assets, as he oversaw the Khmer Rouges' finances. See Fawthrop, Tom, 'Khmer Rouge Leader Ieng Sary Had US$20m in Hong Kong Account', *South China Morning Post*, 31 March 2013; Phorn Bopha and Simon Lewis, 'Victims Call for Ieng Sary's Assets to Be Seized', *Cambodia Daily*, 20 March 2013, 1-2.

[120] In a 2010 survey by the Berlin Center for Torture Victims, roughly 60 per cent of the civil party respondents wanted the perpetrators to pay for reparations, only 14 per cent believed that the government and 17 per cent that the international community should pay for reparations. See Stammel, Nadine et al., 2010, 'The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation', Berlin: Berlin Center for Torture Victims, 35-36. Similarly, in the 2013 ADHOC survey more civil parties (CPs) and civil party representatives (CPRs) asserted that the perpetrators should pay for reparations (41 per cent CPs, 50 per cent CPRs), rather than the international community (30 per cent CPs, 43 per cent CPRs), the Cambodian government (22 per cent CPs, 35 per cent CPRs), or the ECCC (15 per cent CPs, 27 per cent CPRs). Kirchenbauer et al., Victim Participation before the ECCC, 40.

[121] See Cambodian Human Rights Action Committee, 'Open Letter to the Members of the ECCC Plenary and the Rules Committee', 3 June 2009 (on file with the author).

[122] *Case 002*, 'Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties' Request for Investigative Actions Concerning All Properties Owned by the Charged Persons', Pre-Trial Chamber, D193/5/5, 4 August 2010, paras. 23-25.

[123] Ibid para. 25. I note that Article 39new of the ECCC Law provides that the Court may "order the confiscation of personal property, money and real property acquired unlawfully or by criminal conduct." The Pre-Trial Chamber stressed that these provisions relate to penal measures and are thus not linked to reparations. Ibid paras. 35-37.

[124] Rule 113(1) now states that "enforcement of reparations granted under Rule 23*quinquies* (3)(a) shall be done by appropriate national authorities in accordance with Cambodian law ...". ECCC Internal Rules (v9), 16 January 2015, Rule 113(1). Similarly at Case 001 TC Judgment 2010, para. 661.

> in the Duch case, [judges] essentially said they couldn't offer many reparations because ... they lack authority to get funds from anyone but the accused, and now they're saying, 'we can't look in advance to see whether these accused in Case 002 have any assets'.[125]

Hence, despite the mantra that convicted persons were responsible for reparations, ECCC officials never seriously pursued reparations awards against the accused. There was a widespread belief that this would create unjustifiable burdens on the judicial sections involved and would yield minimal benefits for civil parties.[126] One observer affirmed, "many people inside the Court thought, if they have assets, they do not have many assets, so it's just not worth to do it. We have so many other things to do".[127] Hence, indigence for legal aid purposes was never challenged and was then taken as a judicial fact when considering reparations.

In accordance with their feasibility-driven practice, ECCC Judges were resolute that there would be no reparations ordered against an indigent convicted person.[128] Essentially differing in view with the ICC *Lubanga* appeals reparations order, one Judge said, "we could have put the liability of Duch on a nice piece of paper, but this doesn't help the victims."[129] This approach avoided the complex harm identification and liability calculations that resulted from the ICC's more legalistic approach. Yet, many civil party lawyers never really accepted the de-judicialisation of reparations, and instead wanted to see some link to the accused – an accountability perspective on reparations that prevailed at the ICC remained alive among ECCC legal professionals.[130] In their final reparations claim, the Civil Party Lead Co-Lawyers demanded that reparations be ordered against convicted persons and that, only if indigence was confirmed, external funding would be used to finance reparations.[131] The Trial Chamber found the request legally impermissible, stressing that

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[125] Quoted from Wallace, Julia, 2010, 'No Investigation of Assets of Detained KR Leader, Court Says', *Cambodia Daily*, 6 August 2010, 23.
[126] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014; and interview with ECCC Judge (ECCC29), Phnom Penh, 26 August 2015.
[127] Interview with international Court observer (ECCC4), Phnom Penh, 8 December 2014. One former ECCC legal officer observed that "there was an absolute taboo about assets and indigence". Interview with former ECCC Legal Officer (ECCC18), 7 July 2015.
[128] The Supreme Court Chamber noted in Case 001 that "it is of primary importance to limit the remedy afforded to such awards that can realistically be implemented, in consideration of the actual financial standing of the convicted person. In purely abstract terms it is imaginable that KAING Guek Eav may enrich himself in the future ... Such possibilities are nevertheless so remote that they can practically be excluded, and, as such, cannot constitute a basis for ordering reparations." Case 001 SCC Appeal Judgment 2012, para. 688.
[129] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[130] Many lawyers stressed in interviews the symbolic value of ordering reparations against convicted persons. Interview with former ECCC Legal Officer (ECCC18), 7 July 2015.
[131] *Case 002/01*, 'Demande Définitive de Réparations des Co-Avocats Principaux pour les Parties Civiles en Application de la Règle 80bis du Règlement Intérieur et Annexes Confidentielles', Civil Party Lead Co-Lawyers, E218/7/6, 8 October 2013, para. 238.

the two reparations avenues were mutually exclusive.[132] On the whole, the ECCC Judges' adjudicative practice regarding convicted persons' assets shifted attention towards the new reparations project avenue.

The Cambodian government: Not our responsibility

Beyond the convicted persons, there was hope that the ECCC's in-country location and the Cambodian government's involvement in the creation and operation of the Court would have a catalytic effect on the state's involvement in collective reparations. Many Cambodians agreed with this proposition: UC Berkeley's Human Rights Center found in its 2010 population-based survey that 75 per cent of respondents wanted to see government financial support for any reparations program; only 17 per cent mentioned the international community.[133] Likewise, international donors regarded reparations to be primarily the responsibility of the Cambodian government. For instance, the German Ambassador had expressed his "sincere hope that the Royal Government of Cambodia will demonstrate its own primary and crucial role vis-á-vis the victims by its continued and substantial contribution to the reparations program".[134] Yet, the Cambodian government's actions never matched these expectations.

Using the ECCC trials to encourage more government involvement proved futile. The Trial Chamber in *Case 001* was clear that it would not infringe on areas of state responsibility. The Chamber noted that "[it] has no jurisdiction over Cambodian or other national authorities or international bodies. Nor can it properly impose obligations on ... persons or entities that were not parties to the proceedings."[135] When the Judges amended the Internal Rules, many advocates had hoped that some reference to the responsibility of the Cambodian state could be included. However, proposed language in the rules that would have allowed the Judges to make recommendations to the government was opposed by the Cambodian members of the ECCC Judges Plenary.[136] Rather creatively, lawyers of Civil Party Group 2 in *Case 001* proposed that

[132] The Trial Chamber also noted that civil parties had never challenged the determination of indigence at the trial stage. Case 002/01 TC Judgment 2014, paras. 1123-1124.
[133] Pham, Phuong, Patrick Vinck, Mychelle Balthazard, and Hean Sokhom, 2011, 'After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia', Human Rights Center, Berkeley, 36.
[134] Baron von Marschall, Joachim, 'Speech of the German Ambassador', held on the occasion of the signing of a Memorandum of Understanding between the Ministry of Culture of the Royal Government of Cambodia and the Extraordinary Chambers in the Courts of Cambodia, Tuol Sleng Genocide Museum, 10 July 2014.
[135] Case 001 TC Judgment 2010, para. 663.
[136] Interview with ECCC Judge (ECCC29), Phnom Penh, 26 August 2015. The official press release merely stated, "the Sub-Committee also proposed to empower the Trial Chamber to make non-binding recommendations to the Royal Government of Cambodia. These proposed amendments were not adopted by the Plenary, as they were considered to be beyond the scope of the ECCC's powers." ECCC, 'Eighth ECCC Plenary Session Concludes', Press Release, 17 September 2010.

the state use one third of the income generated from the entrance fees of the memorial sites at S-21 and Choeung Ek to fund reparations awards.[137] These suggestions were never taken up, however.

The Cambodian government remained reluctant to engage in any substantial way with the ECCC reparations program. One national ECCC staff noted, "the government always feels threatened that any projects might involve them financially".[138] Cambodian government officials stated that they had already done a lot during the twenty years prior to the ECCC's establishment, for instance by way of establishing memorials. There was also a sense that everyone in Cambodia was a victim of the Khmer Rouge; so there was little appetite for supporting a few projects that were supposed to benefit only a small number of civil parties.[139] One representative from Cambodia's justice ministry noted that the ECCC's collective and moral reparations would simply be another "symbolic gesture".[140] Finally, there existed a widespread perception among government officials that it was time for the UN and the international community at large to make up for their previous support to the Khmer Rouge.[141] One Cambodian NGO worker observed, "the government's perception is that it is not their responsibility … they really think the international community should shoulder this responsibility, as they have always been paying".[142]

Nevertheless, non-financial Cambodian government support remained relevant for reparations in *Case 002/01*. The Trial Chamber had said that it would endorse reparations that infringe on government prerogatives only "where it is clear that such measures have been approved or implemented by the Royal Government of Cambodia".[143] Such support was important for at least two of the requested reparations measures, namely the national day of remembrance and the inclusion of a component on forced population movements in the Cambodian school curriculum. In March 2013, the Civil Party Lead Co-Lawyers wrote a letter to the Cambodian government to solicit consent to these measures. The government agreed 'in principle' to collaborate in the

[137] *Case 001*, 'Co-Lawyers for Civil Parties (Group 2): Final Submission', Civil Party Group 2, E159/6, 5 October 2009, para. 21. The memorial sites at S-21 and Choeung Ek attract a large number of tourists every year and are assumed to generate a substantial income for the institutions operating both sites. See also Hughes, Rachel, 2008, 'Dutiful Tourism: Encountering the Cambodian Genocide', 49(3) *Asia Pacific Viewpoint*, 318-330.
[138] Interview with Cambodian ECCC official working on victim issues (ECCC26), Phnom Penh, 19 August 2015.
[139] Interview with international ECCC administration official (ECCC23), Phnom Penh, 6 August 2015.
[140] Conference speech of Bun Honn, Under-Secretary of State, Ministry of Justice, Phnom Penh, 26 November 2008. CHRAC/VU, Reparations for Victims, 11-12.
[141] Author's observations.
[142] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.
[143] *Case 002*, 'Initial Specification of the Substance of Reparations Awards Sought by the Civil Party Lead Co-Lawyers Pursuant to Internal Rule 23quinquies(3)', Trial Chamber, Memorandum, E125, 23 September 2011.

implementation of these measures,[144] and subsequently nominated 20 May as the date for a National Day of Remembrance for the Victims of the Khmer Rouge[145] and supported the inclusion of Khmer Rouge history in the school curriculum.[146]

Despite the fact that many Cambodian ECCC officials were also senior public servants, the ECCC was not able to leverage this arrangement for encouraging more far-reaching government support. The government's agreement to turn an already existing commemoration day into a remembrance day and to expand an existing curriculum project with the Ministry of Education did amount to no more than token support. In particular, the government did not commit any funding to these rather modest reparations projects. Many of my respondents saw the lack of noteworthy government backing for reparations as a missed opportunity to broaden the justice process initiated by the ECCC. The lack of Cambodian government involvement was also a barrier to unlocking greater funding to reparations measures in *Case 002/01*. As one local NGO leader remarked, "when government doesn't play its role and when donors don't see any political will from the government, they also don't like to support".[147] Yet, this prognosis proved only half true.

International donors: Hesitation and attraction regarding reparations

With convicted persons' assets not available or out of reach and Cambodian government support negligible, ECCC actors followed the same practice as their colleagues at the ICC: they turned to external voluntary funding. Initially, few believed that international donors would be willing to pick up the bill for reparations, when the ECCC in general found it difficult to obtain enough funding for its operations. Most donors showed a certain fatigue and were hesitant to take on yet another funding commitment.[148] One VSS representative recalled, "when we approached them [the donors] and we sent the Emails to request some funds for reparations, some of them did not reply; or when they responded, they said that they didn't have money, because they are already

[144] The response from the Office of the Council of Ministers was dated 11 June 2013. See ECCC, 'The Court Report', Issue 62, July 2013, 6.
[145] Various days had been proposed for a remembrance day following consultations with civil parties, including 17 April, 20 May and 30 March. The government eventually agreed to turn with 20 May an already existing commemoration day into the national remembrance day, but the relevant sub-decree had not yet been passed at the time of writing. See *Case 002/01*, 'Demande Définitive de Réparations des Co-Avocats Principaux pour les Parties Civiles en Application de la Règle 80bis du Règlement Intérieur et Annexes Confidentielles', Civil Party Lead Co-Lawyers, E218/7/6, 8 October 2013, paras. 82-90.
[146] The Cambodian school curriculum project is based on a project by the NGO DC-Cam, in collaboration with the Ministry of Education, which preceded the reparations process. The ECCC reparations project sought to draft a chapter on forced population movements and the execution site at Tuol Po Chrey for inclusion into the existing teachers' manual used for teaching Khmer Rouge history in schools. See McCaffrie, Caitlin et al, 2018, '"So We Can Know What Happened": The Educational Potential of the ECCC', WSD Handa Center for Human Rights and International Justice.
[147] Interview with Cambodian NGO leader (ECCC25), Phnom Penh, 7 August 2015.
[148] Author's own observations at the time.

supporting the ECCC".[149] Moreover, state donors showed hesitation when the legal term 'reparations' came up in discussions. The Civil Party Lead Co-Lawyers stated that they had "to allay reported donor concerns about the legitimacy and legal viability of reparations".[150] Many donors were reluctant to engage with a concept that usually entailed legal obligations, or they regarded reparations to be the responsibility of the Cambodian state.[151]Against this bleak outlook, OSJI urged donors to fund reparations: "[S]uch funding is a tiny portion of the overall costs of the ECCC, yet its absence would disproportionately diminish the legacy of the court".[152]

As often the case with novel mechanisms, it needed a 'champion' to make the first step.[153] The break-through occurred in July 2013, when the German Federal Ministry of Economic Cooperation and Development (BMZ) committed almost EUR 500,000 to fund several of the proposed reparations projects and non-judicial measures.[154] German government-related support funded roughly half of all reparations approved by the judges in *Case 002/01*, while providing around two-thirds of the total amount raised in that case. The German Ambassador justified his country's leading support to ECCC reparations on the grounds that "it is an important cornerstone of the Tribunal's meaningful activities to compensate the victims of the Khmer Rouge regime …".[155] Not only did the BMZ fund reparations, but it also took over the responsibility for funding the VSS's operations, after the German Federal Foreign Office ended its support. Many interviewees believed that Germany's own past was a motivating factor for funding reparations.[156] The German Ambassador confirmed that this was done out of "a sense of shared history".[157]

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[149] Interview with Cambodian ECCC official working on victim issues (ECCC26), Phnom Penh, 19 August 2015.

[150] *Case 002/01*, 'Lead Co-Lawyers' Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations', Civil Party Lead Co-Lawyers, E218/7/1, 12 February 2013, para. 30.

[151] One Cambodian ECCC official noted, "reparations is about responsibility; and the governments were afraid that they were brought to take responsibility for harm they did not cause … but now the positions have gradually changed". Interview with Cambodian ECCC official working on victim issues (ECCC26), Phnom Penh, 19 August 2015.

[152] Open Society Justice Initiative (OSJI), 2013, 'Reparations for Khmer Rouge Crimes', Position Paper, September 2013, 2.

[153] So described in one of my interviews. Interview with Cambodian ECCC official working on victim issues (ECCC26), Phnom Penh, 19 August 2015.

[154] The ECCC Court Report noted that the BMZ committed a total of EUR 400,000 for three reparations projects, and nearly EUR 100,000 for two non-judicial measures projects. See ECCC, 'The Court Report', Issue 63, August 2013, 8. Additional funding was later provided through the German GIZ for another two reparations projects. See ECCC, 'The Court Report', December 2013, 6.

[155] Baron von Marschall, Joachim, 'Speech of the German Ambassador', held on the occasion of the signing of a Memorandum of Understanding between the Ministry of Culture of the Royal Government of Cambodia and the Extraordinary Chambers in the Courts of Cambodia, Tuol Sleng Genocide Museum, 10 July 2014.

[156] One Cambodian ECCC official noted, "Cambodia has the same experience that Germany has, and Germany is willing to help Cambodia to solve the issues that remain from the past". Interview with Cambodian ECCC officer working on victim issues (ECCC32), Phnom Penh, 9 December 2015.

[157] The Ambassador also said "…it is by no means a coincidence that my Government has decided not only to support the ECCC but also the Victims Support Section of the Court. To us, these are two sides of the

Passing the torch from the German Foreign Office to the BMZ was not just a formality; it signalled a switch from foreign policy to development funding. While voluntary contributions to the ECCC's operations came by and large from the foreign ministries of governments, the development branches of these governments were more amendable to seeing a benefit in funding reparations and victim assistance.[158] To confirm this point, the Swiss Agency for Development and Cooperation also committed to fund a community peace-learning centre.[159] Switzerland, which had not been a major donor to the ECCC, became the second largest donor to reparations in *Case 002/01*. The Australian and French governments also provided smaller contributions to selected projects. However, many of the other large ECCC donors, most notably Japan and the United States, did not contribute any funding to reparations in *Case 002/01*; pointing to divergent views among larger international development donors regarding reparations.

Expectations among interviewees were at first rather low about seeing any reparations projects come to fruition. One observer acknowledged, "frankly, I didn't think the civil society actors and the VSS would be able to raise money for reparations awards".[160] And one local NGO worker added, "I never expected … it was a surprise that they could fund reparations projects, albeit very small …".[161] While many actors in Cambodia were positively surprised by the amount eventually received, funding for reparations still represented a fraction of the money international donors and the Cambodian government had put into the ECCC's criminal justice process. Overall, external donors contributed more than USD 770,000 to reparations in *Case 002/01*, roughly USD 1.6 million short of the funding sought to fully finance all of the 13 projects initially presented to the Trial Chamber.[162] By the time the Judges handed down their judgment, donors had contributed more than USD 230 million to fund the ECCC's core operations – in comparison reparations attracted a mere 0.3 per cent of that amount.[163] One ECCC Judge argued, "I don't think that the

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same coin. It is the role of the Court to establish the facts and the responsibility of individual perpetrators. … The Victims Support Section, the other side of the medal, addresses the need to compensate the victims for the suffering which injustice has inflicted upon them." Baron von Marschall, Joachim, 'Speech by the German Ambassador' on the occasion of the Inauguration Ceremony of the Memorial Stupa for the Victims of the Khmer Rouge Regime, Tuol Sleng Genocide Memorial, 26 March 2015.

[158] Other German government-related donors followed the BMZ' lead and contributed to funding reparations and non-judicial measures, including the German Institute for Foreign Cultural Relations (IFA) and the GIZ. ECCC, 'The Court Report', Issue 71, April 2014, 6.

[159] The SDC committed USD 126,000 for a two-year period to a project implemented by the local NGO Youth for Peace. Case 002/01 TC Judgment 2014, para. 1137.

[160] Interview with international Court observer (ECCC4), Phnom Penh, 8 December 2014.

[161] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.

[162] ECCC, 'Information for Media: Case 002/01 Judgment 7 August 2014', Press Kit, 7 August 2014. See also Zsombor, Peter, 'More Money Sought for KR Tribunal Reparations', *Cambodia Daily*, 26 February 2014.

[163] By the end of 2015, ECCC total expenditures had risen to more than USD 260 million. See ECCC, 'ECCC Financial Outlook', 31 March 2016.

donors have thought very much about the needs of victims".[164] Most of the reparations funding was channelled through Cambodian NGOs.

Local NGO involvement in reparations: Altruism or instrumentalism?

In light of the Cambodian government's reluctance to engage with reparations and the limited capacities available at the VSS, Cambodian NGOs emerged as central actors in conceiving and implementing ECCC reparations.[165] Given the initial lack of funding, it was not obvious that local NGOs continued working with the Civil Party Lead Co-Lawyers and the VSS to design reparations projects. One international Judge confirmed, "the NGOs made sure that this didn't die a silent death".[166] From the 13 reparations projects proposed in *Case 002/01*, ten projects were proposed by NGOs, mostly Cambodian; two projects were associated with the Cambodian diaspora community. Of those NGO projects, roughly half were projects that NGOs had previously been doing outside of the ECCC and that were then proposed to the Court for recognition as 'reparations'. Another half were projects that had a more specific link to the facts adjudicated in *Case 002/01*, especially the forced transfer of populations. Almost all of these NGOs had been involved in Khmer Rouge-related work, often with survivors, prior to *Case 002/01*.

While NGOs themselves regarded their involvement as a contribution to survivors' recovery, many people at the Court believed the primary motivation for NGOs to engage with reparations was of an instrumental nature.[167] One lawyer noted, "the NGOs have very clearly understood the game; they only need to go through the reparations scheme to get money, because donors feel somewhat compelled to help us", but at same time conceded, "either it's that or nothing really would have happened".[168] The outcomes resemble the intentioned functioning of the new reparations avenue. One ECCC official confirmed that the amendments were driven by the assumption that it would be easier to get funding if projects were tied to the Court.[169] One observer noted, "it gives civil parties and those working with them a fundraising tool".[170] Whilst this assumption was eventually confirmed in *Case 002/01*, increased donor support to reparations in

[164] Interview with ECCC Judge (ECCC5), Phnom Penh, 9 December 2014.
[165] See Sperfeldt, Christoph, 2013, 'The Role of Cambodian Civil Society in the Victim Participation Scheme of the Extraordinary Chambers in the Courts of Cambodia', in: Bonacker, Thorsten, and Christoph Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, The Hague: T.M.C. Asser Press, 345-372.
[166] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[167] Interview with Cambodian ECCC officer working on victim issues (ECCC32), Phnom Penh, 9 December 2015; and interview with international victim representative (ECCC19), Phnom Penh, 4 August 2015. This may in fact more apply to *Case 002/02*, where numerous new NGOs engaged with reparations.
[168] Interview with international civil party legal representative (ECCC19), Phnom Penh, 4 August 2015.
[169] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[170] Interview with international Court observer (ECCC4), Phnom Penh, 8 December 2014.

Case 002/02 has seen new NGOs join the fray, many of which had never engaged with the ECCC previously.

Similar to the ICC, ECCC Judges began their adjudicative practice regarding reparations with the convicted persons' liability for reparations. However, ECCC Judges abandoned this practice much sooner than their ICC peers. With little sign of more substantive Cambodian government involvement, the Judges modified their legal framework with the explicit aim of attracting external donor funding to reparations. This adjudicative practice has left aside accountability-based conceptions of reparations, favouring instead a feasibility-driven approach in *Case 002/01* that enabled more than a dozen collective projects to materialise.

4. Conclusion

The account of the ECCC's adjudicative practices from *Case 001* to *Case 002/01* has revealed a steep institutional learning curve in adapting the scheme initially created through the Internal Rules to the context in Cambodia. While there was a genuine desire among Cambodians to see survivors involved in the proceedings, the reparations scheme originally modelled on the French-inspired civil party system was not able to deliver tangible reparations in *Case 001*. In fact, the debates among legal professionals over the pros and cons of the civil party model obscured deeper contestations between proponents of more judicialised adjudicative practices regarding reparations and those favouring less legalistic practices in order to produce some outcomes within the ECCC's lifespan. Different to the ICC experience, this struggle was won by those seeking solutions outside the courtroom.

Civil party lawyers in *Case 001* had demanded that the Judges "develop a more flexible, pragmatic and feasible approach to reparations requests".[171] They probably received more than they asked for. A handful of ECCC officials took it into their hands to considerably remodel the reparations scheme. These individuals were aided by the fact that Judges held rule-making powers allowing them to redesign the system at will, within the broad framework of the ECCC agreement and law. In doing so, they were driven by a mix of self-interest and pragmatism. Convinced that it would be too difficult to make the civil party system work with 3,800 civil parties in *Case 002* – no one wanted to deal with thousands of individual claims – these Judges felt that victims' interests were best served outside juridical constraints. They adopted reparations practices that changed the central constituency away from individual civil parties towards a more symbolic acknowledgment of broader victims' collectives. Whilst this move largely de-judicialised

[171] *Case 001*, 'Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties Group 2', Civil Party Group 2, F13, 2 November 2010, para. 71.

reparations, the Judges adopted other adjudicative practices – such as regular status updates, legal memos and a final act of 'recognition' by the bench – that left a façade of judicial reparations.

Some victim lawyers and ECCC judicial officials were critical of this pragmatic practice and promoted a more legalistic approach. Despite the de-judicialisation of reparations, both sides kept the judicial façade intact, albeit by way of different practices. For example, whilst the Judges had intentionally obscured the nexus between reparations and the charged crimes, some civil party lawyers fought for upholding principles of accountability in the criminal trial. Yet, one legal officer working for civil parties confirmed that "this is more something that we require, and not the Chamber".[172] There was a fear that the Judges' practice would undermine hard-fought-for victims rights and put too much discretion into the hands of non-judicial entities, such as the VSS or local NGOs. A former ECCC legal officer regarded the changes therefore as "a step back in the recognition of individual rights of victims".[173]

These contestations were strikingly similar in nature to the ones at the ICC: between proponents of a more symbolic acknowledgement of broader victim constituencies (seeing the purpose of reparations more at the level of societal reconciliation), and proponents of a fulfilment of victims' individual right to reparation (seeing the purpose of reparations more in accountability with awards preferably directed against convicted persons and benefitting mainly the smaller group of civil parties). Both sides justified their practices by arguing that they were acting in the best interests of victims: be it through the pragmatic delivery of a few reparations projects at the cost of legal principles, or the strengthening of individual victim rights at the expense of outcomes or broader societal impact.

The Judges' pragmatic attitude was best articulated in their feasibility-driven adjudicative practice to reparations: It was not what civil parties wanted or were entitled to that guided the process, but rather it was what was possible to fund and implement in a short time period. Intermediary organisation first struggled with the impact this practice had on consultations, with one local NGO coordinator remarking succinctly, "in Cambodia we just claim, and then the judges look at the claims and rule on them. This is different from the ECCC, which looks first for what is possible, and then formulate claim."[174]

The consequence of this practice was an expansion of ECCC activities into areas where it had little expertise. The most problematic aspect was the absence at the ECCC of a joint judicial and administrative strategy on reparations. Judges drafted rules on reparations, which administrators

[172] Interview with international ECCC legal officer working on victim issues (ECCC21), Phnom Penh, 5 August 2015.
[173] Interview with former international ECCC legal officer (ECCC18), 7 July 2015.
[174] Interview with Cambodian NGO coordinator (ECCC24), Phnom Penh, 7 August 2015.

never underpinned with sufficient resources and capacities. Steering an institution run on voluntary contributions, the administration did not consider victims and reparations a priority, despite a rhetoric that would suggest otherwise, and instead left it to bilateral donor support and NGOs to pick up the Court's responsibilities. As one ECCC legal officer put it, "everyone cares, but no one takes responsibility".[175]

The result of this attitude was that Judges and lawyers in *Case 002/01* adopted adjudicative practices that would normally be associated with project managers. Drawing on managerial knowledge, this involved giving instructions on technical aspects of project design and funding modalities, which were mostly aimed at guiding local NGOs. The Cambodian state stayed out of this, which has limited the reparative legacy of the ECCC. Instead, international donors paid the bill. While this arrangement led to tangible reparations projects at the end of the trial, it also meant that the process was driven by what projects NGOs could offer or what donors wanted to fund, rather than by civil parties' needs and preferences. One ECCC legal officer described the outcomes therefore as "funding-driven, not civil party-driven".[176] The Judges' own rules amendments requiring funding to be in place prior to a judgment had reoriented practices into a more funding-driven direction.

Both the ECCC and NGOs benefitted from this arrangement: the Court was able to take credit for a dozen reparations projects it could never have implemented on its own. NGOs were able to improve their standing and get some additional funding. One Cambodian ECCC officer involved in this collaboration took a positive view of reparations as an enabler of social processes at the Court's periphery, noting "reparations is a tool, which can be used to involve all the stakeholders in the justice process; not just the judges, prosecutors or legal officers".[177] Indeed, the amendments to the ECCC's reparations mandate created a new space of connection and engagement with society.[178] With low expectations at the outset, most of my interviewees from the ECCC and civil society ultimately assessed the outcomes as positive or even a 'success'. However, little is known about how civil parties perceived these reparations. This is the subject of the next chapter.

[175] Interview with international ECCC legal officer working on victim issues (ECCC21), Phnom Penh, 5 August 2015.
[176] Ibid.
[177] Interview with Cambodian ECCC official working on victim issues (ECCC26), Phnom Penh, 19 August 2015.
[178] See Jeffrey, Alex, 2011, 'The Political Geographies of Transitional Justice', 36(3) *Transactions of the Institute of British Geographers*, 344-359.

PART IV: Comparative Discussion

My account of the adjudication of reparations in the first two cases at the ICC and ECCC has revealed fundamental disagreements about the purpose of court-ordered reparations and the role of international(-ised) criminal courts in conceiving such reparations. The nature of these disagreements was more than just the ideological divides between proponents of human rights and criminal law logics that existed in Rome. When conceiving reparations, international criminal justice came into contact with other fields, including conflict transformation/ peacebuilding, development and humanitarian assistance. Whilst the limitations and contradictions in the legal frameworks, such as expanded human rights-inspired notions of reparations with no leverage over state responsibility, circumscribed the space of manoeuvre for both Courts, the real struggle now was been competing legal and social imperatives.

One interviewee summarised the debates in *Lubanga* at the ICC the following way: On the one side, the Trial Chamber seemed to have erred on the side of inclusion, allowing for more broad-based reparations to wider beneficiary groups, to the detriment of concrete legal rules. On the other side, the Appeals Chamber was more focused on the "institution of reparations" going forward – rather than the specific situation in Ituri – by inserting heightened legal requirements, which were difficult to implement in the challenging environment in the DRC.[179] This statement encapsulates the dilemmas encountered by practitioners at the ICC and the ECCC alike when they tried to reconcile through their practices competing legal and social concerns surrounding court-ordered reparations.

These contested visions became visible in the courtrooms of the ICC and ECCC, where ambiguous legal rules and those claiming to represent the survivors converged in the hope of a long-awaited resolution of the reparations predicament. In determining reparations in the cases before them, judges' adjudicative practices have sought to manoeuvre the space between competing legal and social logics: between accountability vs. broader goals of transitional justice and peace; between more tangible outcomes to narrow groups of victim participants vs. more symbolic outcomes to broader victims collectives; between rights-based vs. needs-based approaches to reparations; and hence between more legalistic and judicialised vs. more pragmatic and de-judicialised ways of making reparations (see Figure 7). Courtrooms became arenas where various actors competed over tipping the scales in favour of one direction or the other – with all sides regularly claiming to act in the interest of survivors and victims. These contestations have

[179] Interview with ICC court officer working on victim issues (ICC16), 13 July 2015.

been a continuous feature of the operation of both Courts. They have simultaneously constrained and shaped the Courts' adjudicative practices. They also became sources for adaptation and change in the complex contexts in which these institutions and their practitioners operate.

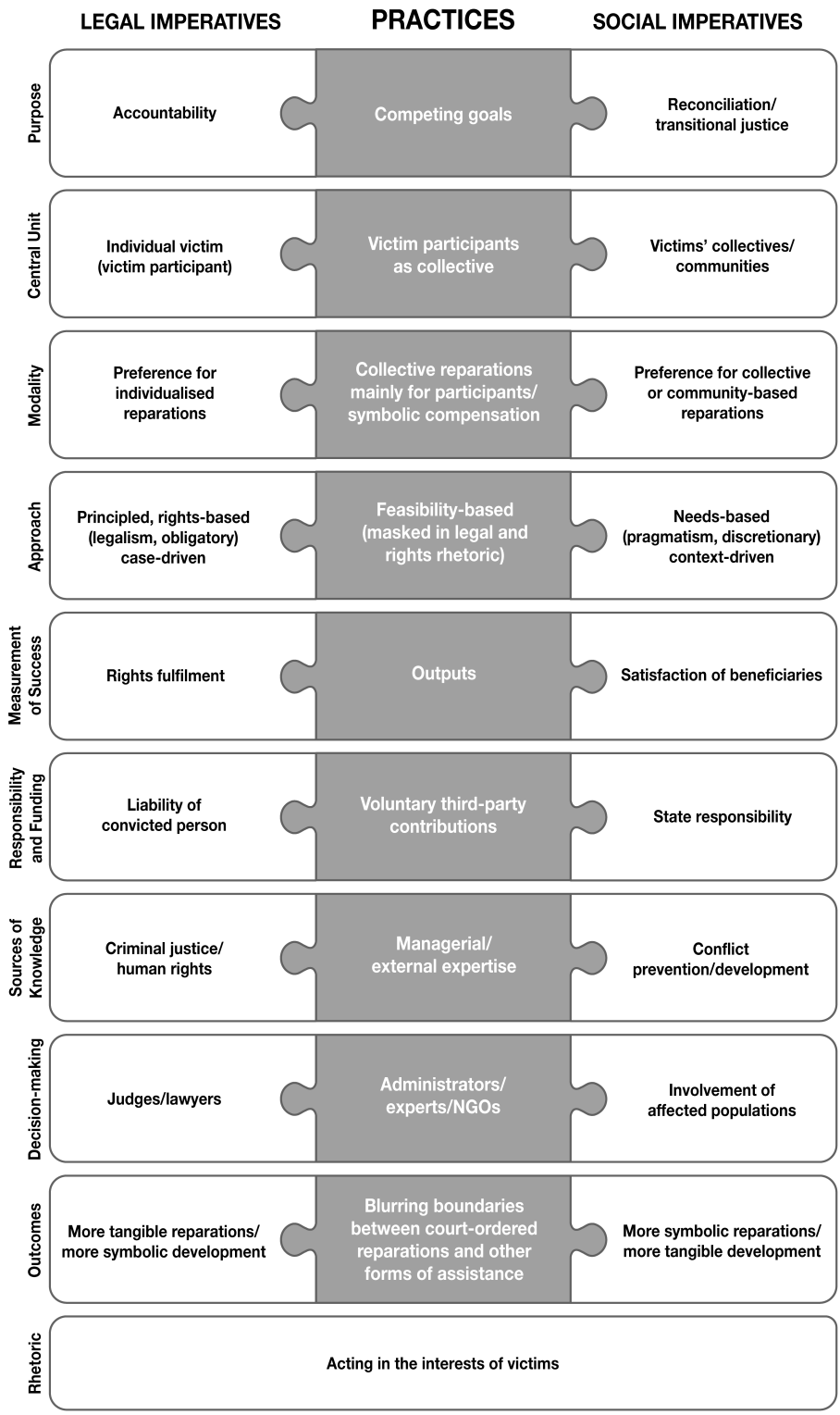

Figure 7: Adjudicative practices

Between principles and social responsiveness

Despite the fact that the first cases at both Courts have progressed more or less in parallel, some of their adjudicative practices have moved into opposite directions (see Figure 8). The permanent ICC, as the guardian of the future of international criminal justice, has looked beyond individual cases and focused on upholding the legality of its decisions. It has for now settled on a more legally principled path with demanding judicial requirements. An accountability-based conception of reparations has resulted in more tangible forms of reparations (service-based collective reparations and symbolic compensation) to narrower groups of victims, whilst upholding the mantra of the responsibility of convicted persons. It has also led to yearlong and resource-intensive litigation from which reparations have still not fully materialised.

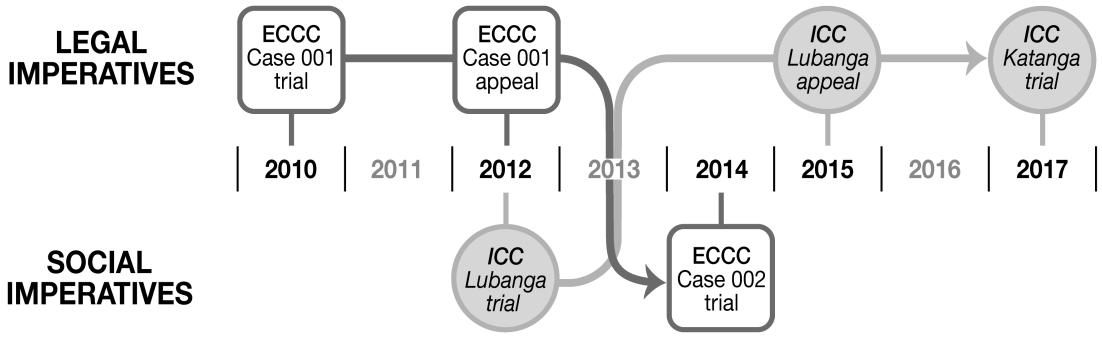

Figure 8: Adjudicative practice at the ICC and the ECCC in comparison

The temporary ECCC at the periphery, on the other hand, adapted its practice to the circumstances of the limited number of cases before it. After failing with a more legalistic approach in its first case, the Judges proved a quick learners and became driven by feasibility concerns in an attempt to deliver at least a few collective projects. Based in the country where the crimes occurred and armed with rule-making powers, ECCC Judges displayed a willingness and ability for socially responsive adjudicative practices on reparations. The less legalistic approach taken by the ECCC Judges in *Case 002/01* resembles in many ways the 'wholly flexible' approach initially proposed by the ICC Trial Chamber in *Lubanga* that was later abandoned by the Appeals Chamber.

On the whole, this practice has resulted in more symbolic collective measures to wider constituencies, often with little tangible benefits for civil parties, whilst severing the link to the criminal trial. The ECCC's practices have enabled the mobilisation of funds across the two sub-trials of *Case 002* more or less equivalent to what has so far been made available for reparations in the ICC's first two cases; and a much swifter implementation of reparations projects. Yet, and

as I will further discuss in Part V, ECCC Judges have advanced their managerial approach to a degree that the reparative value of the resulting projects is now being debated. There just does not seem to be an easy way out of the reparation conundrum.

Despite these differences, practitioners at both Courts have adopted some similar practices to mediate between competing imperatives. This included relying on voluntary funding when resources from convicted persons or responsible states were out of reach, and blurring the lines between reparations and other non-judicial form of assistance. At both Courts, judicial professionals tapped into external knowledge to fill gaps of expertise not available at these institutions, and to seek legitimacy for judicial decisions that were breaking new ground in international criminal law. The ICC and the ECCC both suffered from the fact that reparations remained institutionally marginalised, most prominently expressed in late action and insufficient preparation for reparations, and a constant lack of resources and high-level attention.

The institutions continue to learn while engaging these adjudicative practices. The ICC's responsive capacity was, for instance, demonstrated by the fact that Judges and the TFV ultimately conceded to accepting symbolic compensation – a red line that the feasibility-driven practice at the ECCC from the outset did not dare to cross. Yet, it is curious that despite the fact that both Courts were the first institutions in international criminal justice to adjudicate reparations, there exists little indication for cross-fertilisation or cross-institutional learning.

Both Courts have so far a mixed record with two of their main aspirations: to encourage complementary efforts by host governments, and to employ more victim-oriented justice. Hoped-for catalytic effects from the ICC and ECCC's towards more government engagement with reparations have not materialised. Both the DRC and Cambodian governments have remained bystanders observing the Courts do their business. In rhetoric the ICC is supposed to be a last resort, whilst the main responsibility for reparations remains with the respective states. In reality, however, few complementary national-level initiatives accompany the work of the ICC or the ECCC. The ECCC's hybrid nature only made a marginal difference.

But what became of the aspiration for more victim-oriented justice? My observations of the ICC and ECCC indicate that the main legitimacy audiences for both Courts have been international and domestic NGOs and the wider legal profession, including lawyers and legal scholars. Those affected by mass atrocities, including participating victims, have gained little legal agency. Their voices get lost in the contests between judges, lawyers, NGOs and other actors. When these voices are heard, such as through the victim consultations in *Katanga*, they shatter long-held assumptions of those inhabiting the institutions or disturb the delicate balance between competing interests. The combined effect of representational practices and guided consultations (as described in Part

III) on the adjudication of reparations was described by an ICC victim lawyer as follows: "What we are seeing is not a *request* for reparations by victims, which is ignored, but an *offer* of reparations by the Court to the victims" [italic by the author].[180] So far we know relatively little about whether victim participants and other survivors in Ituri or Cambodia accept or how they perceive the offer made to them by the ICC and the ECCC. In the following chapter I provide some early observations from Cambodia.

[180] Interview with victim lawyer (ICC3), 12 May 2015.

PART V

Implementing Reparations

CHAPTER 9

The Materialisation and Meaning of Reparations at the ECCC

Legal scholarly accounts of reparations in international criminal justice usually end with the reparations judgment. Yet, the pronouncement of reparations is not the end of their pursuit. Turning words into deeds is just another stage in the social life of reparations. Leaving the courtrooms in The Hague and Phnom Penh, reparations materialise at the local levels in Ituri and Cambodia, or elsewhere where beneficiaries and survivor populations reside. In the process of implementation reparations continue to be produced and transformed.

With post-verdict reparations proceedings at the ICC still ongoing at the time of writing, this chapter focuses on the early experience with implementing ECCC reparations in Cambodia. The purpose is to study the effects of communicative and representational practices (Part III) and adjudicative practices (Part IV) on the materialisation and meaning of reparations. Meaning-making is arguably a key aspect of reparations, leading to the question 'what makes reparations'? Behind this question is the dynamic interrelationship between what courts have to offer and what victims accept as reparations. This relationship is not straightforward.

An inquiry into the effects of practices on the meaning of reparations is difficult to pursue at a general level. I explore this topic by way of studying four concrete reparative measures considered or implemented in the context of the ECCC's reparations mandate. I chose two measures that were granted by ECCC Judges as 'reparations', and two measures that were rejected. Juxtaposing these two allows for studying the effects of practices on the making and meaning of reparations. Due to the difference between *Case 001* and *Case 002/01*, I present my analysis of these measures in the context of the respective trials they have been associated with.

Preliminary note on researching survivors' views and attitudes

Exploring people's views on reparations is a difficult endeavour, as empirical data on Cambodia is scarce. Nevertheless, the creation of the ECCC has reinvigorated scholarly attention on survivors of the Khmer Rouge. Two population-based surveys conducted by UC Berkeley's Human Rights Center (HRC) in 2008 and 2010 respectively provide a more representative picture

of attitudes among the general population towards justice and the Khmer Rouge trials.[1] The survey found that "most respondents did not emphasise reparations or compensation when talking about the trials or obtaining justice for the crimes committed by the Khmer Rouge".[2] When asked specifically about collective reparations,[3] respondents in the 2008 survey requested largely tangible measures, such as social or health services (20 per cent), infrastructure (15 per cent), economic measures (12 per cent), while less than 10 per cent asked for symbolic measures, such as memorials and museums.[4] In 2010, these attitudes notably reversed with a majority now requesting more symbolic measures such as building memorials (47 per cent), public ceremonies (34 per cent), movies, songs or books (10 per cent), and a commemoration day (6 per cent), while the proportion of those asking for social or health services (27 per cent) remained stable.[5] These findings show how people's attitudes and expectations are not static, but change over time. They may be subject to external influences, such as Duch's conviction in *Case 001* or communicative practices in ECCC-related outreach.

Despite limited empirical information, we know comparatively more about the ECCC's impact at the social level, than we currently do about the ICC in Ituri, where conducting empirical inquiries is more demanding. In this chapter, I distil information on reparations found in these studies conducted around the ECCC in the past decade. Much of this research does not specifically deal with reparations, but contains pieces of information that can be used for my larger puzzle on reparations' effects at local levels. I complement this with data gathered in 2015, when I engaged with an empirical study that also assessed civil parties' views on reparations in the aftermath of the *Case 002/01* trial judgment.[6]

[1] Pham, Phuong, Patrick Vinck, Mychelle Balthazard, Sokhom Hean and Eric Stover, 2009, 'So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia', Berkeley: Human Rights Center (conducted in 2008); and Pham, Phuong, Patrick Vinck, Mychelle Balthazard, and Sokhom Hean, 2011, After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia, Berkeley: Human Rights Center (conducted in 2010).
[2] Pham et al., After the First Trial, 35.
[3] The survey organisers distinguished the question on reparations from a question about what should be done for victims more generally, with somewhat different results. Pham et al., So We Will Never Forget, 43; and Pham et al., After the First Trial, 35.
[4] Pham et al., So We Will Never Forget, 44.
[5] Pham et al., After the First Trial, 36-37.
[6] Sperfeldt, Christoph, Melanie Hyde and Mychelle Balthazard, 2016, 'Voices for Reconciliation: Assessing Media Outreach and Survivor Engagement for Case 002 at the Khmer Rouge Trials', Phnom Penh, East-West Center. <http://www.eastwestcenter.org/publications/voices-reconciliation-assessing-media-outreach-and-survivor-engagement-case-002-the> (accessed 2 February 2018)

1. Considering Reparations in Case 001

I examine the outcomes of two reparations requests advanced by civil parties and their lawyers in *Case 001*: a compilation of statements of apology and remorse by the defendant, and the construction of a memorial at the Tuol Sleng museum – the former being granted by the Judges, but then rejected by most civil parties; and the latter rejected by the Judges, but desired by most civil parties in that case. I bring these accounts into conversation with the effects of the practices identified in previous chapters and civil parties' views regarding reparations.

1.1. The reparation that no one wanted: Apologies as reparations

An intriguing aspect of reparations in *Case 001* is that one of the only two granted measures, namely the compilation of statements of apology from the convicted person, was also the most controversial among civil parties. Apologies are frequently cited as part of the toolbox of transitional justice, but much of the scholarly literature focuses on state or other forms of official apologies in the context of historical injustices.[7] The role of apologies from perpetrators generally, and in the context of an international(-ised) criminal trial specifically, is less explored.[8] The literature is inspired by restorative justice theories, often developed in domestic settings, which are then transposed to mass atrocity settings.[9] Such apologies are also considered to be a form of reparations.[10] The Basic Principles and Guidelines deem a "public apology, including acknowledgment of the facts and acceptance of responsibility" a form of satisfaction and reparations.[11] The example of *Case 001* reveals some of the complexities associated with conceiving perpetrator apologies as a form of reparations in the framework of an internationalised criminal trial.[12]

[7] See for instance Brooks, Roy, 1999, *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, New York: NYU Press; and Celermajer, Danielle, 2009, *The Sins of the Nation and the Ritual of Apologies*, Cambridge/New York: Cambridge University Press.
[8] See for instance Combs, Nancy, 2007, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Stanford: Stanford University Press; and Jenkins, Catherine, 2007, 'Taking Apology Seriously', in: Du Plessis, Max, and Stephen Pete (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Oxford: Intersentia, 53-81.
[9] See Clamp, Kerry, and Jonathan Doak, 2012, 'More than Words: Restorative Justice Concepts in Transitional Justice Settings', 12(3) *International Criminal Law Review*, 339-360.
[10] See for instance Wolfe, Stephanie, 2014, *The Politics of Reparations and Apologies*, New York: Springer.
[11] Basic Principles and Guidelines 2005, para. 22.
[12] See also Jeffery, Renée, 2015, 'The Forgiveness Dilemma: Emotions and Justice at the Khmer Rouge Tribunal', 69(1) *Australian Journal of International Affairs*, 35-52.

When sorry is not enough: A missed encounter in Case 001

The trial against Kaing Guek Eav, alias 'Duch', was remarkable in that the defendant acknowledged the bulk of the crimes committed at the S-21 security centre, collaborated with the Court and testified against other senior leaders of the Khmer Rouge.[13] This was a rare instance in the history of international criminal trials, where defendants have usually little to gain from acknowledgment, due to the nature and scale of the crimes they are charged with. Early in the trial, one defence lawyer had still hope that Duch's attitude would provide an opportunity for a 'recontre' (an encounter) between the defendant and his victims.[14] Indeed, Duch's repeated expressions of remorse and attempts at seeking forgiveness sparked much debate among civil parties. Eventually civil party lawyers included a request for a compilation of Duch's apologetic statements into their final reparations claim. However, civil parties made the acceptance of the apology conditional on the understanding that it would avoid an "excuse-based apology" that "only hurts victims and makes his apologies seem insincere".[15] One of the civil party groups noted,

> the admission of guilt and the apologies may be one of the elements of the reparation for [the victims'] suffering, but also of the reconciliation process; however, for this to happen, one condition is absolutely necessary, that is, a sincere acknowledgement of the truth, at the very least, of the crimes for which the Accused is being prosecuted.[16]

Civil parties felt justified about their concerns when Duch, during the trial's closing statements, and after the reparations claims were submitted, decided at last minute to change his plea to 'not guilty', and his Cambodian lawyer asked for an acquittal. Thierry Cruvellier observed on that day that this dramatic turn of events was proof to the civil parties "of what they have long claimed: that Duch is a master manipulator, that his confessions are nothing more than a smokescreen".[17] Indeed, many civil parties felt that Duch's apology was not genuine.[18] Stover and colleagues found that civil parties "became most animated when recalling the moments when Duch apologised", but none of the interviewed civil parties felt the defendant's apology was sincere.[19]

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[13] The fact that Duch converted to Christianity is often cited as one reason for his attitude during trial.
[14] Interview with defence lawyer (ECCC15), 3 June 2015.
[15] *Case 001*, 'Civil Parties' Co-Lawyers' Joint Submission on Reparations', Civil Parties, E159/3, 14 September 2009, para. 16.
[16] *Case 001*, 'Co-Lawyers for Civil Parties (Group 3): Final Submission', Civil Party Group 3, E159/5, 11 November 2009, para. 148. The group added "Duch's guilty plea and remorse are not sincere enough to provide the civil parties and victims with an adequate measure of reparation". Ibid para. 153.
[17] Cruvellier, Thierry, 2014, *Master of Confessions: The Trial of a Khmer Rouge Torturer*, New York: HarperCollins, 298.
[18] See Chum Sirath, 'Latest Maneuver by Duch's Lawyer Should Not Impress Anyone', *Cambodia Daily*, 20 October 2009, 35.
[19] The study contains various statements from interviews with civil parties, highlighting the mixed views the participating victims held about Duch's apologies. Stover, Eric, Mychelle Balthazard and Alexa Koenig,

Undisturbed by these events, the Trial Chamber rendered its judgment in *Case 001*. In a few sentences, the Judges granted the compilation of statements of apology as a reparations measure; the only measure apart from the publication of civil parties' names in the verdict. The Judges noted, "the compilation of these apologies and expressions of remorse may provide some satisfaction to victims".[20] However, the Judges simultaneously rejected the request to include statements of civil parties within this compilation. This prompted an appeal by the civil parties. The lawyers argued that the purpose of the request was "to give expression to these doubts and to demonstrate the interaction between the accused's apologies and the civil parties perception of those apologies", further stating that following the events during the closing statements "this reparations request is no longer meaningful and even less so without the statements of civil parties on these apologies during trial".[21]

In considering these appeals, the Supreme Court Chamber came to a noteworthy ruling that reveals the nature of reparations at international(-ised) criminal courts. The Judges rejected the inclusion of civil parties' comments and statements on the grounds that "apology as a form of reparation does not foresee the participation of victims via their comments on the apologies".[22] Describing the apology as "court-controlled", the Judges further noted, "an apology that includes criticism by some of the addressees, or which includes content that would diminish the convicted person, would readily devalue itself and not serve the purpose of just satisfaction".[23] But satisfaction for whom? Moreover, while acknowledging civil parties' objections, the Judges re-affirmed the grant of the reparations award finding that

> notwithstanding the fact that not all victims accept the sincerity of the apology, its value is still retained by virtue of publication and memorialisation of the harm and the apology. Apology transcends the time and the scene of the courtroom and in this sense contributes to just satisfaction in the long term and beyond the immediate audience, leaving the victims the choice of how to receive it.[24]

In this reading, the Chamber's audience is not necessarily the survivors before it, but a more anonymous constituency that transcends the time and space of the trial. The Judges did not need to wait long for civil parties' choice of how to receive the apology. The victim association Ksem Ksan issued a press release shortly after the appeals judgment, describing Duch's apologies as "a

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2011, 'Confronting Duch: Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia', 93(882) *International Review of the Red Cross*, 25-27.

[20] Case 001 TC Judgment 2010, para. 668. The Trial Chamber simultaneously rejected the request to include statements of civil parties within this compilation.

[21] *Case 001*, 'Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties Group 2', Civil Party Group 2, F13, 2 November 2010, para. 46.

[22] Case 001 SCC Appeal Judgment 2012, para. 676.

[23] Ibid para. 676.

[24] Ibid para. 677.

trick" and posing the rhetorical question, "how could one sincerely think that a simple compilation of these declarations of Duch constitutes a moral reparation for the victims?".[25] Regarding the hope for an encounter between Duch and his victims, the defence lawyer cited earlier described the outcome as a "rendez-vous raté" (a missed encounter).[26] Two months after the appeals judgment, the ECCC posted a publication of Duch's apologies on its website – the ECCC's newsletter proudly titled "First Reparations Awarded to Civil Parties".[27]

Symbolic reparations and the limits of the criminal trial

The more reasoned appeals judgment, in effect, elevated the defendant's apology to the status of a greater public good that required neither participation from his victims nor their acceptance of the apology. The Judges seem to conceive here of apology as a reparations measure with a higher purpose that transcends its "immediate audience"; presumably the civil parties who brought a claim against Duch. Apology as a reparation in this sense is a one-way road, and its supposed beneficiaries remain obscure. This approach emptied the award of its meaning for most civil parties. A reparations judgment alone may often not be enough to produce a reparative value and meaning for survivors. The example illustrates that a mass atrocity trial is a tricky platform for restorative justice-inspired notions of reparations, where a 'court-controlled' environment and subordination to the criminal trial makes genuine encounters between perpetrators and victims difficult.

Admittedly, the Judges had to deal with a philosophically and emotionally charged topic, even more so when considering apologies as a quasi-legal construct in the context of reparations. The Judges acknowledged that granting this request did not amount to a reparations order against the defendant, but they felt nevertheless vindicated on the ground of "widespread recognition of similar measures of reparations".[28] ECCC Judges drew on knowledge from the human rights domain and made reference to the Basic Principles and Guidelines and jurisprudence from the Inter-American Court of Human Rights. In doing so, they imported conceptions developed in the context of state conduct (and thus mainly used in relation to state apologies) into the criminal trial, where the conduct of an individual defendant and its impact on participating victims is under scrutiny. *Case 001* demonstrates the consequences of such unreflective 'conceptual creep'.[29]

[25] Ksem Ksan, 'Convicted Person Duch's Apologies: A Trick to Avoid his Conviction by the ECCC', Press Release, 24 February 2012 (on file with the author).
[26] Interview with defence lawyer (ECCC15), 3 June 2015.
[27] ECCC, 'The Court Report', Issue 48, May 2012, 1-2.
[28] Case 001 TC Judgment 2010, para. 668, footnote 1153.
[29] So referred to in Haslam's work on conceptual change. See Haslam, Nick, 2016, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology', 27(1) *Psychological Inquiry*, 1-17.

Similar dynamics were to be found at the ICC. During the consultations in *Katanga*, the strongest reactions were provoked by the VPRS suggestion of publicising apologies from Germain Katanga. Here, too, many victims did not consider these apologies to be genuine or saw them as being motivated by self-interest. The VPRS noted, "some victims became so emotional that the interview had to be stopped, while others conveyed anger at the Court process in general and became dissatisfied with the interview".[30] In its reparations judgment, in 2017, ICC Trial Chamber II directed the TFV to explore a contribution by the convicted person to reparations by way of a voluntary apology.[31]

These examples shed light on the complexities associated with symbolic reparations.[32] When limiting their mandate to 'collective and moral reparations', Judges wanted to avoid the difficult terrain of material reparations. A practice based on symbolic or 'moral' reparations seemed to be the easier path.[33] However, symbolism and the use of a court's symbolic powers comes along with its own challenges. Nowhere is the 'moral' nature of reparations more pronounced than in the apology of a defendant to his and her victims; but it is equally tricky, especially if expressed in the framework of a criminal trial. In his astute observation of the Duch trial, Thierry Cruvellier noted, "a confession is always the result of some compromise, some agreement, some deal; and in some cases such deals have been sufficiently opaque to mask the degree of dishonesty shared by all the parties involved … there is no such thing as an honest or dishonest confession."[34] He concluded, "a trial is an emotional dead end: when the defendant denies responsibility, the victims suffer; when he admits it, they suffer. Either way, they can't escape."[35] Thus, an apology as reparation is not straightforward. It involves an inter-personal and emotional dimension that criminal trials find hard to capture.

1.2. The reparation that wasn't: The Tuol Sleng memorial

Whilst granting two symbolic reparations in *Case 001*, the trial Judges rejected all other requested reparations. The story of the Tuol Sleng memorial is about a measure that the Judges rejected, but that was nevertheless pursued with persistence by a local victim association and eventually implemented as a non-judicial measure. It is arguably the most survivor-owned initiative at the

[30] Katanga Consultation Report 2014, para. 28.
[31] Katanga TC Reparations Order 2017, paras. 315-318.
[32] See for instance Hamber, Brandon, and Richard Wilson, 2002, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies', 1(1) *Journal of Human Rights*, 35-53; and Brown, Kris, 2013, 'Commemoration as Symbolic Reparation: New Narrative or Spaces of Conflict', 14(3) *Human Rights Review*, 273-289.
[33] The Supreme Court Chamber defined the term as "'moral' denotes the aim of repairing moral damages rather than material ones". Case 001 SCC Appeal Judgment 2012, para. 658.
[34] Cruvellier, *Master of Confessions*, 287.
[35] Ibid 247.

ECCC. The example sheds light on the acknowledging power of court-ordered reparations and the meaning they produce.

The smaller number of civil parties in *Case 001* and the focus on one crimes site, the S-21 security centre and the execution site at Cheung Ek, provided opportunities for more active participation and a more unified voice among the civil parties. The request for a memorial at S-21, which nowadays hosts the Tuol Sleng museum, emerged as one of the key demands by these civil parties.[36] The importance of the request was reiterated throughout the reparations submissions in *Case 001*.[37] While the exact form of the memorial varied between a stupa and a commemorative plaque, its central feature was the listing of the names of those who died at S-21. One civil party said, "the most important is that the names are not forgotten".[38]

Surveys among *Case 001* civil parties highlighted the positive effects from regular meetings among the larger group of civil parties, which introduced them to others who had suffered.[39] One civil party remembered, "we come to know each other, to know the story of the other, and this alleviates a lot of our suffering".[40] The empowerment of civil parties and the bonds they forged became evident when they established, in 2009, the victim association Ksem Ksan, with S-21 survivor Chum Mey becoming its first president.[41] The founding declaration stated that the association was created "to give a unified and strong voice to the victims".[42] As one of its goals,

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[36] For background on the Tuol Sleng museum and its connection to the ECCC, see Chhim, Kristina, 2012, '"Pacifying Vindictiveness by Not Being Vindictive": Do Memory Initiatives in Cambodia Have a Role in Addressing Questions of Impunity', Research Report, Impunity Watch; and Emde, Sina, 2013, 'National Memorial Sites and Personal Remembrance: Remembering the Dead of Tuol Sleng and Choeung Ek at the ECCC in Cambodia', in: Pholsena, Vatthana, and Oliver Tappe (eds.), *Interactions with a Violent Past: Reading Post-Conflict Landscapes in Cambodia, Laos, and Vietnam*, Singapore: NUS Press, 19-45.

[37] See *Case 001*, 'Civil Parties' Co-Lawyers' Joint Submission on Reparations', Civil Parties, E159/3, 14 September 2009, paras. 28-30; *Case 001*, 'Co-Lawyers for Civil Parties (Group 2): Final Submission', Civil Party Group 2, E159/6, 5 October 2009, para. 15; and *Case 001*, 'Co-Lawyers for Civil Parties (Group 3): Final Submission', Civil Party Group 3, E159/5, 11 November 2009, paras. 159-162.

[38] Interview with ECCC civil party and Ksem Ksan member (ECCC22), Phnom Penh, 5 August 2015.

[39] Stover et al., Confronting Duch, 34. Such meetings were also able to overcome initial tensions among the group. S-21 was a political detention centre, where many internees were former Khmer Rouge who fell victim to internal purges. The presence of former lower-level Khmer Rouge cadres among the civil parties led to discussions about who is a 'victim'. See Bernath, Julie, 2015, '"Complex Political Victims" in the Aftermath of Mass Atrocity: Reflections on the Khmer Rouge Tribunal in Cambodia', 10(1) *International Journal of Transitional Justice*, 46-66.

[40] Interview with ECCC civil party and Ksem Ksan member (ECCC22), Phnom Penh, 5 August 2015.

[41] This process of empowerment throughout the *Case 001* trial is described at Strasser, Judith, Julian Poluda, Chhim Sotheara, and Phuong Pham, 2011, 'Justice and Healing at the Khmer Rouge Tribunal: The Psychological Impact of Civil Party Participation', in: Van Schaak, Beth, Daryn Reicherter, and Youk Chhang (eds.), *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge*, Phnom Penh: Documentation Center of Cambodia, 149-171, 161-162.

[42] The idea of creating the Association emerged when the ECCC, in August 2009, decided that civil parties had no right to question character witnesses in Case 001. Civil parties sent a letter to the Judges protesting that decision and boycotting attendance at the trial. Shortly thereafter, more than 30 civil parties came together to create Ksem Ksan. See Ksem Ksan, 'United in the Quest for Justice, Social Harmony, a Culture of Peace and Spiritual Healing', public statement, 20 March 2010.

the association listed "the construction of a stele with the names of all 17,000 human beings tortured and assassinated at Tuol Sleng and Cheung Ek", noting that it would build the memorial itself in the event that the ECCC did not grant the reparations measure.[43]

A few weeks later, with the Trial Chamber still deliberating over its judgment, Ksem Ksan submitted a letter to the Judges to articulate its demands for collective reparations. At that time, 71 of the more than 90 civil parties in *Case 001* were members of the association. Ksem Ksan reiterated its demand for a stele with the names of all victims of S-21, further stating

> the money is not the real point here because our association is ready to do our own fundraising for that memorial if necessary. What we expect from the ECCC is that by the collective and moral reparations it will restore the dignity of the victims. ... After all the burdens of becoming and being civil parties we do not want to lobby other Cambodian authorities for years or even decades for something rather simple like that memorial.[44]

Civil parties' motivation for their request was two-fold: On one hand, the survivors believed that the Judges' acknowledgment would assist in restoring their dignity; on the other hand, there existed pragmatic considerations in that ECCC recognition would assist with a more speedy implementation. Money did not appear a consideration, as civil parties were ready to fundraise for their own memorial. All they expected was an act of judicial recognition.[45] In its judgment, the Trial Chamber took one paragraph to reject the memorial. Citing a lack of specificity, not the defendant's indigence, including design and costs of the memorial as well as the lack of building permits, the Judges rejected the request, "as the material before it does not enable the Chamber to issue an enforceable order against Kaing Guek Eav".[46]

The aftermath of reparations

After initial disappointment, and with appeals against the reparations order still pending, Ksem Ksan asked the artist Vann Nath, himself a survivor of S-21, to design the memorial in consultation with its members.[47] This created a formidable alliance with Cambodia's largest victim association, comprising the few remaining survivors of S-21 – one of whom personally prepared the design of the memorial before passing away one year later.[48] The result of this

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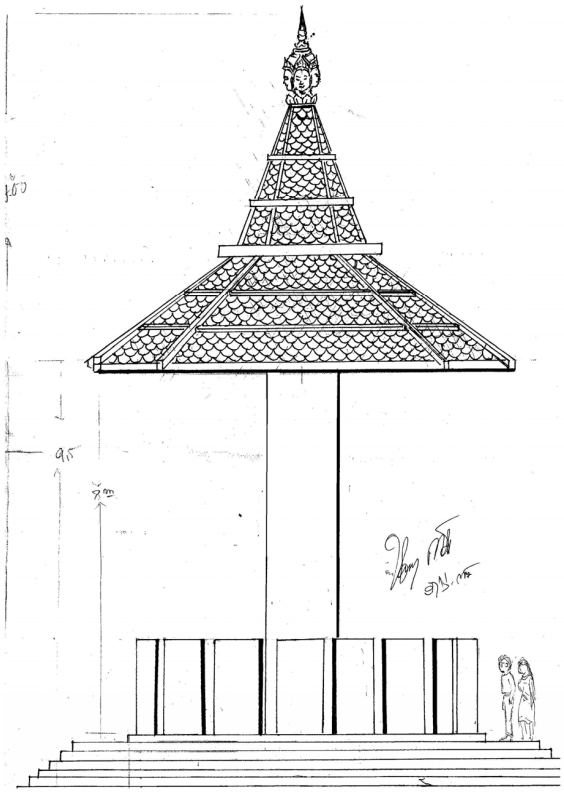
[43] A second request involved the DNA testing of remains at Tuol Sleng and Choeung Ek. Ksem Ksan, 2010, 'United in the Quest for Justice, Social Harmony, a Culture of Peace and Spiritual Healing', public statement, 20 March 2010.
[44] Ksem Ksan, 'Letter to the Cambodian and International Judges of the ECCC Trial Chamber', dated 7 April 2010 (on file with the author). See also Saing Soenthirith, 'Khmer Rouge Victims Group Calls for Preservation of Bones', *Cambodia Daily*, 23 March 2010, 23.
[45] Interview with ECCC civil party and Ksem Ksan member (ECCC22), Phnom Penh, 5 August 2015.
[46] Case 001 TC Judgment 2010, para. 672.
[47] Ksem Ksan, 'Association Ksem Ksan's Notice', 23 September 2010 (on file with the author).
[48] Vann Nath passed away on 5 September 2011.

collaboration was a detailed proposal, including sketches and cost estimates, which the association submitted in December 2010 to the Ministry of Culture and Fine Arts, the government entity overseeing the Tuol Sleng museum (see Figure 9).[49] The Ministry rejected the request, noting that constructing the memorial at the premise would affect the museum buildings and that new constructions were not allowed, as the museum's authenticity is protected by its UNESCO status.[50] Following the government's refusal, the project threatened to end in a standstill. One association member remembered, "at that time, it was very difficult, nobody supported us", and further, "donors are interested in bringing justice to the people… but they are not interested in helping victims".[51]

Figure 9: The initial sketch of the Tuol Sleng Memorial



Source: Ksem Ksan, 2010, Detailed Proposal for the Memorial Stupa.

[49] The association estimated the overall costs of the memorial to be more than USD 100,000. At the time of the submission of the proposal in December 2010, the association's membership had risen to 875. Ksem Ksan, 'Detailed Proposal for the Memorial Stupa "Ksem Ksan" on the Premise of Tuol Sleng Genocide Museum', December 2010 (on file with the author).
[50] Ministry of Culture and Fine Arts, 'Letter to Ksem Ksan regarding request of new construction of memorial stupa in Tuol Sleng museum', dated 26 January 2011. In 2008, the Tuol Sleng museum's archives were registered as part of UNESCO's Memory of World Register.
[51] Interview with ECCC civil party and Ksem Ksan member (ECCC22), Phnom Penh, 5 August 2015.

At that stage new stakeholders entered the fray. The NGO DC-Cam wrote a letter to the VSS to convey its views about reparations. Rather than endorsing the survivors' memorial project, the NGO put forward a counter-proposal by suggesting a rebuilding of the wooden stupa that stood at Tuol Sleng during the 1980s.[52] The NGO rejected the idea of listing the names of victims as foreign to Cambodian culture, and additionally noted that compiling a complete list of S-21 victims was not possible. DC-Cam's Director stated, "when you start to name and you start to inscribe names, and you start to identify, then you create questions".[53] Whatever one might think about these arguments, it required some boldness for a local NGO to overrule the most survivor-driven project at the ECCC, including a design that was developed by a S-21 survivor and endorsed by the majority of civil parties. Ksem Ksan responded in a public statement, with the usual Cambodian politeness, saying that it respected other ideas but "in the spirit of non partisan and common effort to honour our victims of S-21, we respectfully call on all members, all associations, all national and international NGOs to support the Ksem Ksan memorial project".[54]

Following the amendment of the ECCC's reparations framework, the VSS became interested in supporting the memorial as part of its non-judicial measures mandate.[55] Considering that *Case 001* civil parties had not received tangible reparations, adopting a project idea that had strong support from civil parties seemed a sensitive start for putting into practice the still untested non-judicial measure mandate. Ksem Ksan was receptive to the VSS' involvement, hoping that the ECCC's Cambodian officials would assist with changing attitudes at the Ministry.

Meanwhile, the association had not given up on judicial recognition of its project. In 2011, with *Case 001* appeals still pending, Ksem Ksan submitted its proposal to the ECCC Supreme Court Chamber.[56] When rendering their appeals judgment, the Judges noted that from among all the proposals, the S-21 memorial "stands out because of the specificity provided";[57] thus addressing the primary reason cited by the Trial Chamber for its rejection. The Supreme Court Chamber made an effort to provide some form of recognition of the civil parties' request, stating

> The Supreme Court Chamber, considering its high level of specificity and its notable endorsement

[52] This wooden stupa was built, in 1987, in the museum's courtyard, but collapsed in the early 2000s. See Jarvis, Helen, 2015, 'Powerful Remains: The Continuing Presence of Victims of the Khmer Rouge Regime in Today's Cambodia', 1(2) *Human Remains and Violence*, 36-55, 41.
[53] Quoted from Carmichael, Robert, 'Cambodia's Genocide Memorial A Controversial Reminder of a Brutal Past', *UCA News*, 27 March 2015.
[54] Ksem Ksan, 'Opinion of Ksem Ksan Association on the Construction of a Memorial to the Victims of S-21 in the Tuol Sleng Museum Compound', Public Statement, 11 April 2011.
[55] See Mom Kunthear, 'KR Tribunal Mulls Tuol Sleng Reparation Plan with Culture Ministry', *Phnom Penh Post*, 8 March 2011.
[56] Ksem Ksan, 'Opinion of Ksem Ksan Association on the Construction of a Memorial to the Victims of S-21 in the Tuol Sleng Museum Compound', dated 11 April 2011.
[57] Case 001 SCC Appeal Judgment 2012, para. 690.

> by all civil party applicants in Case 001, recognises, without prejudging any outstanding technical specifications, the S-21 Victims' Memorial as an appropriate form of reparation … As confirmed by [Civil Party Group 3], such official and solemn acknowledgement by the ECCC of the adequacy of the present reparation request constitutes in and of itself a form of reparation irrespective of its future implementation.[58]

Despite acknowledging the "adequacy" of the request, the Judges did not grant the measure due to the convicted person's indigence. Still, this time the Judges called upon national and international entities to assist with the memorial project.[59] Ultimately, the Judges did perhaps what they could under the existing mandate, although it might have been difficult for survivors to understand the nuance between acknowledging the adequacy of the reparations request without granting it.

At the end, it was neither the ECCC's acknowledgment nor the Cambodian government's support that made the difference, but the announcement by the German government, in July 2013, to commit EUR 65,000 towards the memorial.[60] This gave new impetus to the VSS' slow-going negotiations with the Ministry, and one year later, the ECCC signed a memorandum of understanding with the Ministry to establish a memorial at Tuol Sleng. There was no mention of the victim association in the corresponding ECCC press release.[61]

In September 2014, the VSS and the Ministry hosted a consultation on the design of the memorial, involving Court officials, civil party lawyers, UNESCO and NGO representatives. Ksem Ksan and the civil parties were suddenly just one voice among many others who wanted to decide about the memorial. Vann Nath's original design proposal disappeared from the discussions, which focused instead on a more traditional memorial design.[62] Whilst the preparations for constructing the memorial progressed, one of its core features, the inscription of the names of those who died at S-21, remained controversial.[63] It was not only DC-Cam continuing to lobby against the inscription of names, but even Ksem Ksan president Chum Mey seemed to have doubts; in open opposition to the association's deputy president.[64] The topic required further consultations, in

[58] Ibid para. 691.
[59] Ibid para. 692.
[60] ECCC, 'The Court Report', Issue 63, August 2013, 8.
[61] ECCC, 'ECCC and Ministry of Culture and Fine Arts to Sign a Memorandum of Understanding to Establish a Memorial in Tuol Sleng Museum', Press Release, 8 July 2014.
[62] Ksem Ksan had highlighted in earlier statements that discussions with UNESCO and Ministry had revealed some reservations regarding a 'stupa' design, which was more associated with Buddhist traditions. Instead, it was suggested to design a more neutral 'memorial' that would also appeal to victims and survivors of other faiths. See Ksem Ksan, 'Opinion of Ksem Ksan Association on the Construction of a Memorial to the Victims of S-21 in the Tuol Sleng Museum Compound', 11 April 2011.
[63] Kuch Naren, 'Survivor Against Inscribing Names of all S-21 Victims', *Cambodia Daily*, 7 May 2014.
[64] Deputy President Bou Meng always wanted to have the names inscribed. McPherson, Poppy, 'Memorial Plan Prompts Debate about Victims and Perpetrators of Genocide', *Phnom Penh Post*, 9 May 2014.

January 2015, which broke the deadlock and found most of the civil parties arguing in favour of inscribing the names.[65] Ultimately, more than 12,000 names were inscribed into black marble blocks surrounding the memorial.[66]

Figure 10: Photo of the Tuol Sleng memorial today

Source: Photo taken by the author in 2017.

Blurring the boundaries of reparations and its effects

Two observations emerge from the story of the Tuol Sleng memorial project. First, the account of the more than four years from Ksem Ksan's initial reparations request to the memorial's inauguration revealed a gradual process of disappropriation, during which the project turned from a memorial 'from' survivors to one 'for' the victims. While the VSS concluded multiple agreements with other NGOs to jointly work on the implementation of reparations, it fully appropriated the memorial project from Ksem Ksan and implemented the project itself. The

[65] Even President Chum Mey voted ultimately in favour of the inscriptions. See also Jarvis, Powerful Remains, 47.
[66] The number is presumably based on the 12,272 detainees identified on a S-21 prisoner list used in *Case 001*. Case 001 TC Judgment 2010, paras. 340 & 597. Discussions are ongoing about adding another 3,000 names, which have been put forward by the ECCC prosecutors in *Case 002*. Interview with Tuol Sleng museum representative (ECCC36), Phnom Penh, 11 January 2017.

effects of representational and adjudicative practices became plainly visible, when survivors' initiatives are seized by Court managers and lawyers and turned into 'projects' for victims.

Nothing illustrates this better than the inauguration of the memorial on 26 March 2015 – a solemn event with more than 300 attendees; even the Cambodian Deputy Prime Minister.[67] The survivors' central role in conceiving and promoting the memorial idea had disappeared from the ECCC's press release issued at the occasion of the event.[68] The speeches at the inauguration highlighted above all the contributions of the Cambodian government, the ECCC and the donor. Two survivor representatives, Chum Mey and Bou Meng, were welcome as 'beneficiaries' to express their gratitude. [69] Is a passive notion of victims as mere 'recipients' perhaps in the nature of the practices at the ECCC and other courts? Reparations then appear as something that is done *for* victims, who need to be assisted and cared for, rather than survivors who own their reparations.

Moreover, the Tuol Sleng memorial is *not* a reparation in the judicial sense. ECCC officials took great care to distinguish the project from reparations and framed it as part of the VSS' non-judicial measures mandate.[70] However, whilst this distinction mattered for judicial officials, it was less pronounced outside the Court. In his speech at the memorial's inauguration, the Deputy Prime Minister Sok An himself described the memorial as a "reparation project".[71] The German Ambassador had likewise described the memorial earlier as "a symbolic compensation for victims and witnesses of the Khmer Rouge regime".[72] Even the VSS continued to list the memorial as part of its 'ECCC reparation program'.[73] The example shows how actors' practices consciously blur the boundaries between reparations and other victim-oriented measures to instil new meaning into their activities. The effects of this boundary blurring are less obvious: Bothered neither by this appropriation nor the lack of judicial acknowledgment as 'reparation', most civil parties and

[67] Aun Pheap and Maria Brito, 'At Unveiling of S-21 Stupa, Ambassador Calls in Youth', *Cambodia Daily*, 27 March 2015.
[68] The press release noted: "The memorial … was designed and erected by the Ministry of Culture and Fine Arts, in close cooperation with the Victims Support Section of the ECCC, and other stakeholders with financial support from German Ministry of Economic Cooperation and Development." ECCC, 'Inauguration of the Memorial to Victims of the Democratic Kampuchea Regime at Tuol Sleng Genocide Museum', Press Release, 24 March 2015.
[69] ECCC, 'The Court Report', Issue 84, April 2015, 8-9.
[70] One of those press releases stated that non-judicial "can be implemented outside of the judicial proceedings of the ECCC. They are separate from Civil Party reparation projects, which are decided by the Judges in a case verdict." ECCC, 'ECCC and Ministry of Culture and Fine Arts to Sign a Memorandum of Understanding to Establish a Memorial in Tuol Sleng Museum', Press Release, 8 July 2014.
[71] 'Remarks by H.E. Dr. Sok An, Deputy Prime Minister', on the occasion of the Inauguration of the Memorial in Remembrance of the Victims of the Khmer Rouge Regime, Tuol Sleng Genocide Museum, 26 March 2015. See 'Memorial to Victims of Khmer Rouge Regime in Tuol Sleng Genocide Museum Inaugurated', *Agence Kampuchea Presse*, 26 March 2015.
[72] Quoted from Crothers, Lauren, 'MoU Paves Way for KR Memorial Stupa', *Cambodia Daily*, 11 July 2014.
[73] Since 2012, the VSS listed the Tuol Sleng memorial as part its 'ECCC Reparations Program'. See ECCC Victims Support Section, 'ECCC Reparation Program 2013-2017', 14 January 2013.

other members of the victim association seemed ultimately to be happy with the outcome.[74] When I visited again in 2017, Chum Mey and Bou Meng were selling their books opposite the memorial at the Tuol Sleng museum. Asked if they were satisfied with the memorial, which they had pursued for so many years, they just smiled and nodded.

1.3. Civil party perspectives on reparations in Case 001

How important were Court-ordered reparations for civil parties in *Case 001*? Two post-trial surveys provide insights into the views of civil parties that are currently not available for *Case 002/01*.[75] According to this research, survivors had a range of motivations for their decision to participate at the ECCC other than obtaining reparations. Pham and colleagues found that 69 per cent wanted to obtain justice for themselves or their lost relatives, 43 per cent wanted to know the truth, 32 per cent wanted to honour the memory of their lost relatives, and 27 per cent wanted to tell their story – only 9 per cent mentioned reparations as a motivating factor.[76] Stover and colleagues similarly identified the following motivations for civil parties to come forward: the need to know, to obtain justice, to tell one's story, and to educate Cambodians and the world.[77] These findings were echoed by one local NGO staff who worked closely with civil parties and stated, "reparations was never the ultimate goal, the ultimate goal was the conviction of Duch".[78]

Likewise, reparations were not at the forefront of civil parties' minds following the Trial Chamber judgment in 2010. While civil parties were generally happy with the conviction, they mentioned as negative outcomes of the judgment the sentence (16 per cent), the rejection of civil party claims

[74] Chum Mey was quoted as saying that he was "satisfied" with the memorial. Quoted at 'Cambodia Unveils Memorial at Brutal Khmer Rouge Prison', *AFP*, 26 March 2015. Similarly at Interview with ECCC civil party and Ksem Ksan member (ECCC22), Phnom Penh, 5 August 2015. Knowledge of civil parties' attitudes is anecdotal and a more comprehensive assessment is a task for future researchers.

[75] Compared to the ICC's first cases, *Case 001* at the ECCC can be considered a well-researched case in terms of attitudes and impact on participating victims. Pham and colleagues interviewed all 75 Cambodia-based civil parties (not the 15 civil parties residing outside the country). The interviews were conducted nearly one year after the end of the trial and about six months after the trial judgment. Pham, Phuong, Patrick Vinck, Mychelle Balthazard, Judith Strasser and Charyia Om, 2011, 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia,' 3 *Journal of Human Rights Practice*, 264-287. Stover and colleagues interviewed 21 out of the 22 civil parties who testified at trial, including the ones from overseas. The initial interviews took place shortly after the end of closing statements, with another 17 of those respondents re-interviewed shortly after the pronouncement of the verdict. See Stover, Eric, Mychelle Balthazard and Alexa Koenig, 2011, 'Confronting Duch: Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia', 93(882) *International Review of the Red Cross*, 1-44.

[76] Pham et al., Victim Participation and the Trial of Duch, 273-274.

[77] Stover et al., Confronting Duch, 14-21. The authors did not focus on reparations in their study, but merely noted that the interviews revealed a wide range of opinions among civil parties on reparations. Ibid, 32-33.

[78] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.

(12 per cent), and the narrow reparations order (12 per cent).[79] Psychosocial workers reported that many civil parties "expressed strong feelings of anger, sadness, disappointment, injustice, and helplessness" at both the sentence and the rejection of civil party status of more than a quarter of participating victims.[80] And one lawyer remembered the hours after verdict, "the worst for the civil parties was the admissibility decision … [T]his was so shocking for civil parties that reparations were pushed into the background."[81] The majority of those who got their status rejected thought the Judges did not believe their claims or did not regard them as victims.[82] These findings confirm the importance of acknowledging and recognising victim status, with or without reparations.

Notwithstanding these events and the minimal reparations in *Case 001*, surveys concur in finding that civil parties assessed their overall experience as positive. Pham and colleagues concluded that "despite some disappointments in the Duch trial outcomes, civil parties felt positive about their overall participation, suggesting the importance of that process".[83] These results suggest that a satisfactory participation process could, to some extent, mitigate negatively perceived reparations outcomes. However, Stover and colleagues cautiously suggested that these outcomes relate to the specific characteristics of the case: one defendant, one main crime site, and a limited number of civil parties, of which many were allowed to testify – something that would be difficult to replicate in *Case 002* with its larger number of civil parties. The authors anticipated, "what the civil parties take away from their participation in Case 002 may be more formulaic and less individualized, and therefore less transformative".[84] One NGO staff simply concluded, "if you were a civil party, you'd be better to participate in Case 001 than in Case 002".[85]

2. Considering Reparations in Case 002/01

Following the conclusion of *Case 001* and the amendment of the ECCC's Internal Rules, adjudicative practices shifted the attention decisively from the convicted-borne avenue of

[79] Pham et al., Victim Participation and the Trial of Duch, 280-281. This assessment was supported during a second round of interviews conducted by Stover and colleagues after the verdict. Stover et al., Confronting Duch, 35-38.
[80] See Transcultural Psychosocial Organization (TPO), 2010, 'Report on TPO's After-Verdict Intervention with Case 001 Civil Parties', 27 July 2010, Cambodia: TPO (unpublished document). TPO also reported that many civil parties "expressed strong feelings of anger, sadness, disappointment, injustice, and helplessness" at both the sentence and the rejections.
[81] Interview with international civil party lawyer (ECCC16), 3 June 2015.
[82] The language in the rules, both at the ECCC and ICC, defining 'victims' for the purposes of the Courts' proceedings, contributes to this unfortunate misunderstanding.
[83] Pham et al., Victim Participation and the Trial of Duch, 284-285. Similarly, Stover and colleagues at Stover et al., Confronting Duch, 38.
[84] Stover et al., Confronting Duch, 41.
[85] Interview with Cambodian NGO worker (ECCC13), Melbourne, 9 February 2015.

reparations to the new reparations project mandate. This resulted in 11 projects being 'recognised' by the Trial Chamber as collective and moral reparations in its judgment in *Case 002/01*. By the time the ECCC's Supreme Court Chamber issued, in November 2016, its final appeal judgment in *Case 002/01*, more than two years after the trial judgment, 9 out of 11 projects had been fully implemented.[86] Only the National Day of Remembrance, awaiting the finalisation of a governmental sub-decree, and the French-sponsored memorial for Khmer Rouge victims in Phnom Penh were still under implementation.[87]

How did the ECCC's communicative and adjudicative practices affect the nature and meaning of these reparations projects? To answer this question, I examine two measures requested by civil parties in more detail. I use a collective psychosocial support project recognised as reparation by the Judges as an example to inquire into the meaning of reparations granted by the ECCC. Civil parties' unsuccessful attempts to claim individual monetary compensation before the Court are then examined as an instance where survivors contested the legal boundaries of Court-ordered reparations.

2.1. Collective reparations projects

The ECCC's reparations mandate has been limited to collective reparations. Whilst at domestic levels individual reparations tend to dominate, such as in form of compensation or restitution, collective reparations have emerged as a central element in post-atrocity reparations programs.[88] Many scholars argue that the nature and gravity of international crimes, in which entire communities are targeted and lines between victims and perpetrators are blurred, renders inappropriate any approach that relies solely on individual reparations.[89] Yet, the meaning and legal status of collective reparations is ambiguous, and no universally recognised definition exists under international law.[90]

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[86] ECCC Civil Party Lead Co-Lawyers Section, 'Civil Party Judicial Reparations in Case 002/01', Press kit disseminated at a press conference held in November 2016.

[87] *Case 002/01*, 'Civil Party Lead Co-Lawyers' Submission on the Implementation of Judicial Reparation Awards for Case 002/01', Civil Party Lead Co-Lawyers, E218/7/9, 1 March 2017. The memorial for Khmer Rouge victims in Phnom Penh was inaugurated in late 2017.

[88] See International Center for Transitional Justice, 2009, 'The Rabat Report: The Concept and Challenges of Collective Reparations', New York: ICTJ.

[89] See for instance Roht-Arriaza, Naomi, 2004, 'Reparations in the Aftermath of Repression and Mass Violence', in: Stover, Eric and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocities*, Cambridge: Cambridge University Press, 121-139; and Rosenfeld, Friedrich, 2010, 'Collective Reparations for Victims of Armed Conflict', 92 *International Review of the Red Cross,* 731-746.

[90] A study by the Essex Transitional Justice Network identified three parameters through which the collective dimension of reparations could be considered: (1) reparations awarded for the violation of a collective right or the violation of a right that has a community-level impact; (2) reparations awarded for the benefit of a specific group; or (3) reparations in which the mode of distribution is collective in nature.

At the ECCC, only civil parties can seek collective reparations, which must address the harm suffered by civil parties as a result of the crimes for which an accused is convicted.[91] In its appeal judgment in *Case 001*, the Supreme Court Chamber added that the term excludes individual awards, favours measures that benefit as many "victims" as possible and considers collective harm.[92]

Uncertainty exists over how Cambodian survivors perceive collective reparations. According to the two Human Rights Center population-based surveys, a majority of respondents (2008: 68 per cent; 2010: 73 per cent) said that reparations should be provided to a community as whole, with others stating that reparations should be provided to both communities and individuals (2008: 21 per cent; 2010: 19 per cent). Only a minority of respondents requested that reparations should be provided to individuals only (2008: 11 per cent; 2010: 8 per cent).[93] Studies indicate that civil parties share similar views. According to ADHOC's civil party survey, conducted ahead of *Case 002*, about two-thirds of respondents said that reparations should be provided to communities.[94] In our own survey conducted after the end of the *Case 002/01* trial, civil parties were more divided.[95] Almost one-third of civil parties (29 per cent) believed that reparations should be provided to individuals; while more than one-third said to communities (37 per cent) or to both (35 per cent).[96] The general support for collective measures found in these studies lends some support to the ECCC's collective reparations mandate.[97] That said, preferences are not static, and we know little about how civil parties view the specific collective projects that the ECCC recognised in *Case 002/01*.

Against the background of limited empirical data, I discuss the complexities associated with

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Aubry, Sylvain and Maria Isabel Henao-Trip, 2011, 'Collective Reparations and the International Criminal Court', Essex Transitional Justice Network, Reparations Unit, 2-3.

[91] ECCC Internal Rules (v9), 16 January 2015, Rule 23*quinquies*.

[92] Case 001 SCC Appeal Judgment 2012, paras. 659-660.

[93] Pham et al., So We Will Never Forget, 43-44; and Pham et al., After the First Trial, 36.

[94] The study was conducted among 414 civil parties. When asked about reparations, around two-thirds of the respondents, civil parties (CPs) and civil party representatives (CPRs), said that reparations should be provided to communities as a whole (65 per cent CPs, 70 per cent CPRs), whereas one out of five stated that reparations should be provided to both individuals and communities (20 per cent CPs, 20 per cent CPRs). About 14 per cent of CPs and 10 per cent of CPRs stated that individuals should received reparations. Kirchenbauer, Nadine, Mychelle Balthazard, Latt Ky, Patrick Vinck, and Phuong Pham, 2013, 'Victim Participation before the Extraordinary Chambers in the Courts of Cambodia: Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002', Cambodian Human Rights and Development Association (ADHOC), 39-40.

[95] See Chapter 2 for more information.

[96] These data differ with regards to the more informed CPRs who said that reparations should be provided to both (55 per cent), to individuals (24 per cent) or to communities (21 per cent). Sperfeldt et al., Voices for Reconciliation, 59.

[97] Not all surveys come to the same findings. See Stammel, Nadine et al., 2010, 'The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation', Berlin Center for Torture Victims, 35-36.

collective reparations by way of looking at the implementation of one reparations project that provided psychosocial support to civil parties. This project provided perhaps the most direct benefit of all the reparations projects implemented in *Case 002/01*. The project, proposed by a local NGO, was an extension of a project that existed before and continued beyond the reparations phase. The example brings to the fore the effects of adjudicative practices that blurred the boundaries between judicial reparations and other non-judicial measures.

Can psychosocial support be considered collective reparation?

The magnitude of conflict-related violence has left the people of Cambodia with widespread mental health challenges.[98] Surveys show the prevalence of post-traumatic stress symptoms, depression and other psychological consequences of mass atrocities.[99] Moreover, some studies suggest that civil parties experienced more traumatic events and showed higher rates of post-traumatic stress than the average survivor population.[100] This research highlighted the need for psychosocial support, and civil parties frequently expressed the desire for mental health support among their preferences for reparations.

As a post-conflict developing country, Cambodia lacks a comprehensive mental healthcare system. NGOs have therefore played an important role in delivering services, with the Transcultural Psychosocial Organization (TPO) being at the forefront.[101] As the ECCC has no in-house capacity for psychological support, TPO's Cambodian mental health workers have also provided psychological services to participating survivors.[102] Based on interviews with *Case 001* civil parties, Stover and colleagues highlighted the ECCC's contracting of TPO as "one of the Court's most important victim-related initiatives", noting that these services positively influenced civil parties' views of the Tribunal.[103]

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[98] See Van Schaak, Beth, Daryn Reicherter, and Youk Chhang (eds.), 2011, *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge*, Phnom Penh: Documentation Center of Cambodia.
[99] Sonis and colleagues estimate that more than 11 per cent of the Cambodian adult population show signs of probable post-traumatic stress disorder (PTSD). Jeffery Sonis et al., 2009, 'Probable Posttraumatic Stress Disorder and Disability in Cambodia Associations With Perceived Justice, Desire for Revenge, and Attitudes Toward the Khmer Rouge Trials,' 302(5) *JAMA*, 527-536.
[100] See Stammel et al., The Survivors' Voices.
[101] TPO Cambodia was established in 1995 as a branch of the Netherlands-based NGO 'TPO International' with the aim to alleviate mental health problems of Cambodians. In 2000, it was registered as an independent local NGO, 'TPO Cambodia', run and staffed by Cambodians.
[102] In May 2007, TPO and the ECCC signed a Memorandum of Understanding. In *Case 001*, TPO counsellors delivered on-site psychological support and follow-up care to approximately 90 civil parties and 31 witnesses. See Strasser, Judith, Julian Poluda, Mychelle Balthazard, Om Chariya, Yim Sotheary, Im Sophea, Eng Kok-Thay and Christoph Sperfeldt, 2011, 'Engaging Communities - Easing the Pain: Outreach and Psychosocial Interventions in the Context of the Khmer Rouge Tribunal,' in: Lauritsch, Katharina and Franc Kernjak (eds.), *We Need the Truth. Enforced Disappearances in Asia*, Guatemala: ECAP, 146-159.
[103] Stover et al., Confronting Duch, 14 & 42.

Given TPO's proximity to civil parties, no other NGO has worked so intimately with survivors at the ECCC, many people thought the organisation well placed to engage work on reparations. In *Case 001*, civil party lawyers requested that TPO's efforts to offer counselling to civil parties "should be supported and reinforced through a reparations award".[104] The Trial Chamber Judges rejected this request by ruling it to be outside the scope of 'collective and moral reparations'. The Judges contended that requests of this type "are not symbolic but instead designed to benefit a large number of individual victims".[105] In doing so, the Trial Chamber effectively ruled out one of the most prominent collective rehabilitation measures considered in ICC reparations.

Civil parties appealed the ruling, lamenting the Judges' failure to define 'collective and moral reparations'.[106] While the Supreme Court Chamber largely confirmed the Trial Chamber's reparations judgment, the Judges reversed the decision on the issue of psychosocial support. After reviewing international jurisprudence, the Judges concluded that psychological care "is internationally acknowledged as an appropriate form of reparation" and, as such, found the request to fall under 'collective and moral reparations' as stipulated by the Internal Rules.[107] While the Judges were unable to grant the request, due to the indigence of the convicted person, the ruling provided an opening to advance similar reparations requests in subsequent cases.

A contextualised approach: Testimonial Therapy in Case 002/01

TPO's Cambodian staff recognised the limitations of Western psychological approaches to managing the effects of trauma in Cambodia.[108] The organisation developed methods with greater cultural sensitivity, especially by giving more consideration to indigenous practices that Cambodians use to calm distress. Taking into account the overwhelming need and lack of resources, TPO accepted that conventional therapies were not feasible. Instead, the NGO tried "to identify short-term, community-based, culturally sensitive, psychosocial interventions, which can easily be implemented … and do not require large staff numbers".[109]

Inspired by an approach based on testimonies, TPO developed a short-term trauma treatment it

[104] *Case 001*, 'Civil Parties' Co-Lawyers' Joint Submission on Reparations', Civil Parties, E159/3, 14 September 2009, para. 20. The call for psychosocial support was reiterated in the individual reparations submissions by the legal teams.
[105] Case 001 TC Judgment 2010, paras. 674-675.
[106] *Case 001*, 'Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties Group 2', Civil Party Group 2, F13, 2 November 2010, paras. 93-108.
[107] Case 001 SCC Appeal Judgment 2012, paras. 699-701.
[108] See Agger, Inger, 2015, 'Calming the Mind: Healing after Mass Atrocity in Cambodia', 52(4) *Transcultural Psychiatry*, 543-560.
[109] Quoted in Strasser, Judith, Sotheara Chhim, and Sopheap Taing, 2015, 'Narrative Exposure Therapy (NET): Cultural Sensitive Trauma Treatment for Khmer Rouge Survivors' (on file with the author).

called the 'testimonial therapy'.[110] TPO culturally adapted the method by incorporating traditional and religious practices together with Buddhist monks. In brief, survivors are invited to talk about their traumatic experiences. With the help of a therapist they restore their memories and convert them into a written testimony. This testimony is read out and delivered to the survivors by monks as part of a ceremony. TPO believes that this technique delivers positive therapeutical effects, including acknowledging and easing of suffering, honouring the spirits of deceased family members, de-stigmatising victims and restoring their dignity.[111]

The feedback TPO received from participants, including civil parties, encouraged the NGO to propose the therapy as a project under the new reparations project avenue. Considering the large number civil parties, the short-term testimonial therapy was seen as an appropriate, low-budget measure to address the psychological suffering of civil parties. Since 2012, TPO's testimonial therapy featured among the priority reparations the Civil Party Lead Co-Lawyers were requesting for *Case 002/01*.[112] This project became, in July 2013, one of the first to secure funding from the German Ministry for Economic Cooperation and Development (BMZ).[113] Whilst TPO sought over USD one million for a more extensive coverage of civil parties throughout the country, the almost USD 200,000 it received was sufficient to propose 26 therapy sessions.[114] In its judgment in *Case 002/01*, the Trial Chamber endorsed it as a reparations measure.[115] At least 144 civil parties participated in these testimonial therapies; none of the other 11 reparations projects in *Case 002/01* provided more direct benefits to civil parties.[116]

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[110] This approach grew of a technique initially developed during the 1980s by Chilean therapists and has since been tested in different socio-cultural settings. Its more standardised version is also known as 'narrative exposure therapy'. The Denmark-based Rehabilitation and Research Center for Torture Victims (RCT) helped promote the technique with TPO in Cambodia. See Agger, Inger, Victor Igreja, Rachel Kiehle, and Peter Polatin, 2012, 'Testimony Ceremonies in Asia: Integrating Spirituality in Testimonial Therapy for Torture Survivors in India, Sri Lanka, Cambodia, and the Philippines', 49 (3-4) *Transcultural Psychiatry*, 568-589.

[111] Poluda, Julian, Judith Strasser, and Chhim Sotheara, 2012, 'Justice, Healing and Reconciliation in Cambodia', in: Charbonneau, Bruno and Genevieve Parent (eds.), *Peacebuilding, Memory and Reconciliation: Bridging Top-Down and Bottom-Up Approaches*, London/New York: Routledge, 91-109.

[112] TPO proposed a combined project consisting of testimonial therapies and the facilitation of so-called self-help groups. *Case 002/01*, 'Lead Co-Lawyers' Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations', Civil Party Lead Co-Lawyers, E218/7/1, 12 February 2013, paras. 15-18.

[113] Of the EUR 400,000 committed by the BMZ, TPO's project received the largest share of EUR 125,000. See ECCC, 'The Court Report', Issue 63, August 2013, 8.

[114] Apart from the BMZ, additional smaller grants were received from a Swiss foundation and Australia. Due to the budget constraints, most of the 26 sessions were held in Phnom Penh, mainly at the memorial site of Choeung Ek and a nearby pagoda. *Case 002/01*, 'Deuxième Complément d'Informations a la Demande Définitive de Réparations des Co-Avocats Principaux pour les Parties Civiles en Application de la Règle 80bis du Règlement Intérieur', Civil Party Lead Co-Lawyers, E218/7/8, 31 March 2014, paras. 20-24.

[115] Case 002/01 TC Judgment 2014, paras. 1154-1155.

[116] *Case 002/01*, 'Civil Party Lead Co-Lawyers' Submission on the Implementation of Judicial Reparation Awards for Case 002/01', Civil Party Lead Co-Lawyers, E218/7/9, 1 March 2017, para. 10.

Practices of boundary blurring in implementing reparations

When TPO began implementing the therapy as a reparations project, it had already implemented, for more than four years, various testimonial therapies for civil parties and other survivors. Concurrently with the reparations project, the NGO implemented the same therapy with civil parties and other survivors; both as a non-judicial measure in collaboration with the VSS, funded by the UN Trust Fund to End Violence Against Women,[117] and completely detached from the Court under separately funded projects.[118] Moreover, the reparations project already began half a year before the Trial Chamber rendered its verdict and actually endorsed it as reparation.[119] This raises intriguing questions about the nature and meaning of 'reparations' under the ECCC's more flexible practice that blurs the boundaries between judicial reparations and non-judicial measures: What makes some of these therapies 'reparations', and others not? And with civil parties benefitting from all of these different therapies, did they perceive those designated as 'reparations' differently from the ones implemented as mere services?

Answering these questions requires first an examination of how the ECCC and local actors differentiated between reparations and assistance projects, and how they employed these characterisations. The distinction between reparations, 'non-judicial measures' (NJM) implemented under the VSS mandate and other victim-related assistance projects was clouded in my interviews with ECCC and local NGO staff. The fact that ECCC reparations were only collective in nature and that convicted persons were not contributing to their costs further blurred the lines between judicial reparations and other forms of assistance.

Even VSS staff struggled with the meaning of such differences. One Cambodian officer queried, "why do you have two? One is reparations, and one is non-judicial measures; both of them are actually reparations projects."[120] The officer added, "although we say reparations is only for civil parties, since they are only collective, it is in a sense for all victims".[121] When asked about the difference between the two, the Cambodian officer tried to make sense of it the following way: First, "NJM is much easier to implement; reparation projects are more complicated". And yet,

[117] The VSS received more than USD 600,000 from the UN Trust Fund to End Violence Against Women for a project entitled "Promoting gender equality and improving access to justice for female survivors of GBV under the Khmer Rouge regime". This project was implemented from 2011 to 2014 in collaboration with TPO, after which it received another three years extension until 2018 (another USD 1 million). TPO implemented a series of testimonial therapies as part of the activities.
[118] This concerned especially a USAID-funded project since 2013. See Balthazard, Mychelle et al., 2015, 'Truth, Reconciliation and Healing in Cambodia: Baseline Survey Report', TPO Cambodia.
[119] See ECCC, 'The Court Report', Issue 70, March 2014, 8.
[120] Interview with Cambodian ECCC officer working on victim issues (ECCC32), Phnom Penh, 9 December 2015.
[121] Ibid.

"normally, donors are more interested in reparations, than in NJM; because reparations are recognised by the Court, while NJM are not. That is why, reparations is more important, than NJM … and that's why everyone applies for reparations."[122] The Court officer described the somewhat peculiar situation that, from an operational perspective, non-judicial measures are easier to implement than reparations, but still most organisations, including the VSS itself, chose to implement their projects under the more 'complicated' reparations avenue. As a result, VSS non-judicial measures remained "under-utilised".[123]

Operationally, there is little difference between NJM and the new reparations avenue. Projects under both modes have largely been implemented by non-ECCC actors with external funding. Thus, NGOs had a choice of either (i) proposing a project as reparation for recognition by ECCC Judges; (ii) working with the VSS to implement a NJM project not related to the trials; or (iii) implementing a project completely outside of the ECCC framework. Looking at these choices, it is not surprising that the NJMs never took off, as they were not attractive to external actors.[124] The few existing non-judicial measures are by and large projects that the VSS itself designed and fundraised for.[125] Moreover, the VSS did not seem to regard this distinction as important, generally calling the UN Trust Fund project, including TPO's therapy sessions, a 'non-judicial measure', but simultaneously listing it under its 'ECCC Reparations Program 2013-2017'.[126] While *Case 002/01* showed that there was a certain 'attraction' to do reparations, this can only partly be explained by a motivation for funding; in some instances NGOs themselves found the money for these projects.

The symbolic powers of courts and hierarchies of victim support

According to the rules, the main difference between judicial reparations and non-judicial measures is an act of 'recognition' by the ECCC's Judges. One Judge described this acknowledgment as "the only real bridge to the criminal proceedings".[127] This link was seen as

[122] Ibid. The staff noted that by December 2015, the Section oversaw 21 projects and proposals for reparations, but only one non-judicial measure.
[123] Interview with international civil party legal representative (ECCC19), 4 August 2015.
[124] One ECCC Judge stated that the NJM were also viewed as a "back-up" for reparations projects that would not be recognised by the ECCC or in cases where a conviction could not be achieved. While this was originally not intended by the drafters of the Internal Rules, it was seen as a "positive side effect" of the concurrent existence of reparations and NJM's in the ECCC's mandate. Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[125] The most significant non-judicial measures considered by the VSS included (a) the UN Trust Fund to End Violence Against Women-funded project, now in its second three-year implementation cycle; (b) the idea for a nation-wide victim register that never took off; and (c) the Tuol Sleng memorial (discussed under 1.2.).
[126] See Victims Support Section, 'ECCC Reparation Program 2013-2017', 14 January 2013.
[127] Interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.

instrumental in enabling the Court to employ its symbolic powers in relation to reparations. In the *Case 001* appeals judgment, the Supreme Court Chamber considered that "its acknowledgement of a proposed award as an appropriate reparation measure has a potential of being per se a form of satisfaction and redress, possibly capable of attracting attention, efforts, and resources toward its actual realisation".[128] Judges believed thus that their acknowledgement could have reparative effects, while simultaneously contributing to a mobilisation of actors and resources.[129] This confirms a rather pragmatic approach among Judges when they deployed their symbolic powers toward reparations.[130]

One effect of the ECCC's powers in acknowledging reparations is an appropriation of the label of 'reparations' in the public space. Whilst the ECCC's judicial reparations mandate is limited to matters before the Court, there existed often an understanding among Cambodian actors that it was for the Judges to decide more generally what constitutes reparations. Some local NGOs had claimed in the past that they were engaged in reparative work.[131] Yet, the ECCC and lawyers soon claimed authority over the use of the term 'reparations'. The introduction of other categories, such as 'non-judicial measures', created an unhealthy hierarchy of victim support that made many actors feel that a project rubber-stamped by the Court would be more 'worthy' than mere assistance for survivors. One international NGO lawyer was critical of this dynamic, arguing the connection to the harm of survivors is the key to determining reparations, not a court's acknowledgment. In this lawyer's view, many NGO projects could be considered 'reparations' as they addressed the consequences of past atrocities.[132] Thus, what constitutes reparations remained contested. The way Judges used their symbolic powers created a hierarchy of victim support, which put 'reparations' at the top and translated into the mobilisation of actors and resources around measures that sought the Judges' acknowledgment. One effect of this practice was that it reconfigured the existing landscape of victim assistance, which was now shaped by legal discourse and clustered around the Court.

The effects of boundary blurring on reparations

The effects of these practices on the meaning of reparations are less certain. Assessments show the benefit civil parties received through their participation in testimonial therapies. A randomised

[128] Case 001 SCC Appeal Judgment 2012, para 661.
[129] Also noted in at interview with ECCC Judge (ECCC6), Phnom Penh, 10 December 2014.
[130] Not all ECCC Judges shared this pragmatic approach, with one Judge noting, "this is something very non-judicial. It is not our role to recognise projects. A judicial decision needs to be resolved in a binding way, real legal relations. … If it pleases enough people, but I don't think it's the task of a court". Interview with ECCC Judge (ECCC29), Phnom Penh, 26 August 2015.
[131] Author's observations from NGO meetings in Phnom Penh.
[132] Interview with international civil party lawyer (ECCC14), 15 May 2015.

controlled trial drawn from a sample of 120 civil parties found that "testimony therapy plus ceremony reduced symptoms of PTSD, depression, and anxiety among war trauma survivors".[133] Similarly, an external evaluation of the VSS' UN Trust Fund project, a non-judicial measure, found that the therapy improved civil parties' mental health and helped them to better deal with their suffering.[134] Thus, while the benefits to civil parties were confirmed, it remains difficult to assess whether the impact differed between testimonial therapies recognised as 'reparations' and those implemented outside the judicial process.

When asked whether the distinction between reparations and non-judicial measures mattered for civil parties, one Cambodian NGO outreach worker felt, "in terms of implementation and impact, it doesn't make any difference".[135] A Cambodian Court officer observed about the civil parties, "most of them don't care, just a few care … they don't really understand the difference between reparations and NJM, and we all know that, but we cannot do anything."[136] One civil party lawyer added, "most clients wouldn't care where the reparations came from; this could also happen outside the ECCC".[137]

Considering the confusion surrounding the terms 'collective and moral reparations' and 'non-judicial measures', as well as the belief among implementers that the distinction did not really matter for beneficiaries, many local NGOs simply avoided the issue when communicating Court-recognised reparations.[138]An international lawyer observed, "sometimes [the civil parties] join a project, but no one explains to them that this for them … So, when TPO organises a testimonial therapy they don't explain that this is a reparations project, which for me is problematic."[139] Hence, it generally mattered for ECCC legal professionals to maintain a façade of judicial 'reparations' and its distinction from other assistance measures. However, the implementers of these projects more pragmatically employed 'reparations' as a label to manoeuvre the tensions between the Court's legal complexities and the social demands from their constituencies. The empirical

[133] The study was able to confirm the therapy's short-term benefits for participants, but was not able to ascertain the longer-term impact. Esala, Jennifer, and Sopheap Taing, 2017, 'Testimony Therapy with Ritual: A Pilot Randomised Controlled Trial', 30 *Journal of Traumatic Stress*, 1-5.
[134] Based on post-activity assessments, the evaluation reported that 70 per cent of the participants in testimonial therapy demonstrate a decrease in symptoms of posttraumatic stress, depression and anxiety. More than 93 per cent of the civil parties who participated in therapy reported that the treatment helped them to understand and better deal with their suffering. See Poluda, Julian, 2015, 'Promoting Gender Equality and Improving Access to Justice for Female Survivors and Victims of Gender-Based Violence under the Khmer Rouge Regime', Final Evaluation Report, ECCC Victims Support Section, 40-41.
[135] Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.
[136] Interview with Cambodian ECCC officer working on victim issues (ECCC32), Phnom Penh, 9 December 2015.
[137] Interview with international civil party lawyer (ECCC14), 15 May 2015.
[138] Some local NGO workers consciously evaded the term 'reparation', as they found it problematic. Interview with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014.
[139] Interview with international civil party legal representative (ECCC19), 4 August 2015.

information to date does not allow a full assessment of the effects of the ECCC's blurring practices on the meaning of these projects for civil parties. Yet, this can be said with certainty: meaning-making regarding collective reparations has many facets and involves more than a simple declaration in a judgment.

2.2. The story about individual reparations

A few months after the Trial Chamber had rendered its judgment in *Case 002/01*, in 2014, around 200 civil parties gathered in front of the ECCC premises.[140] They came to complain about the reparations projects endorsed in *Case 002/01*, which in their view benefitted more the ECCC and NGOs and did not reflect their wishes.[141] The civil parties delivered a petition to the Judges asking for individual monetary compensation from the Court, specifically demanding USD 13,500 for each dead relative.[142] In arriving at this number, the petitioners made reference to the so-called Koh Pich incident. In November 2010, approximately 350 people died in a massive stampede on a bridge near Koh Pich. The Cambodian Prime Minister then promised over USD 13,000 in compensation for the families of each of the dead.[143] The Koh Pich incident received great public attention, and many civil parties wondered why the government would compensate the victims of the stampede, but not similarly consider their suffering during the Khmer Rouge time.[144]

The controversy surrounding individual compensation at the ECCC was an instance in which victims actively sought to contest and negotiate reparations.[145] Court officials and others engaged in communicative and representational practices struggled to accommodate the voices of civil parties who left their passive victim subjectivities and rejected the reparations offered to them.

[140] The protest took place at the opening statements for *Case 002/02*. See White, Stuart, 'Khmer Rouge Accused Pledge to Boycott Trial', *Phnom Penh Post*, 18 October 2014.
[141] So reported at Pech Sotheary, 'KRT Civil Parties Say Reparations Benefit NGOs, Not Victims', *Phnom Penh Post*, 17 October 2014. Many of these civil parties were associated with one of the victim associations and claimed to represent 1,780 other civil parties. Kuch Naren and Holly Robertson, 'Victims Call for Money from ECCC', *Cambodia Daily*, 17 October 2014.
[142] Kuch Naren, 'Victims Stage Protest Outside Tribunal', *Cambodia Daily*, 18 October 2014. In their petition, the civil parties also requested that a library, museum and a place to commemorate the Khmer Rouge victims be built in each province. The Lead Co-Lawyers submitted this petition to the Trial Chamber. *Case 002/02*, 'Civil Party Lead Co-Lawyers' Interim Report on Reparations in Case 002/02 and Related Requests', Civil Party Lead Co-Lawyers, E352, 17 June 2015, para. 17.
[143] See Cambodian Center for Human Rights, 2011, 'The Koh Pich Tragedy: One Year on, Questions Remain', Phnom Penh, Cambodian Center for Human Rights.
[144] Interview with Cambodian NGO worker (ECCC33), Phnom Penh, 10 December 2015.
[145] Julie Bernath described this as 'discursive resistance'. Bernath, Julie, 2017, 'Civil Party Participation and Resistance at the Khmer Rouge Tribunal', in: Jones, Briony, and Julie Bernath (eds.), *Resistance and Transitional Justice*, Milton Park: Routledge, 103-122.

A problem of failed expectation management?

Despite the fact that Judges excluded individual compensation from the reparations permissible under the Internal Rules,[146] requests for financial reparations have been around since the early days of *Case 001*.[147] At the reparations conference in late 2008 some civil parties had requested individual compensation.[148] One prominent civil party said at the time that he could accept one dollar, as long as it represented individual compensation for the harm he suffered – highlighting demands for symbolic compensation similar to the ICC.[149] Surveys among civil parties have regularly confirmed that, even though a majority of respondents was supportive of collective reparations, a sizable proportion of civil parties also sought individual reparations, including monetary compensation.[150]

Court officials have frequently portrayed these demands for individual reparations either as a failure of those working with civil parties to appropriately communicate and manage expectations, or as a deliberate strategy by certain lawyers or NGOs to push their own agendas. For instance one international legal representative of civil parties stated, "I have the feeling that civil parties didn't really get the idea behind collective and moral reparations … which is normal, as it is quite tricky to understand; the only thing they can easily relate to is monetary compensation".[151] These explanations depict civil parties as passive individuals with insufficient knowledge of the legal limitations, incapable of articulating their own demands and reliant on outsiders' help. What these accounts do not appreciate is the gradual emancipation of numerous civil parties from the way others framed their demands and choices.

[146] I note that the Committee against Torture found in its 2010 review of Cambodia's treaty obligations that "the ECCC should amend its Internal Rules to permit reparation to victims consistent with article 14 of the Convention, including, as appropriate, individual financial compensation". See Committee against Torture, *Concluding Observation of the Committee against Torture on Cambodia*, GAOR, Forty-Fifth Session, UN Doc A/66/44, 1-19 November 2010, para. 27.

[147] Apart from the Koh Pich incident, many local actors cited the case of a Japanese philanthropist, who had announced, in 2005, a donation of USD 1.3 million for a compensation and memorial fund for victims of the Khmer Rouge. The funds were apparently used to provide USD 100 per family to around 10,000 families. See more at http://handafund.org (accessed 20 February 2017)

[148] Roughol, Isabelle, 2008, 'KR Survivors, Legal Experts Discuss Reparations for Victims', *Cambodia Daily*, 27 November 2008.

[149] See CHRAC/VU, Reparations for Victims, 10-16.

[150] In the Berlin Center for Treatment of Torture Victims' survey 39 per cent of civil party respondents asked for individual reparations (with more than 30 per cent requesting specifically monetary compensation), while 45 per cent thought reparations should be provided to communities. See Stammel et al., The Survivors' Voices, 35-36. In the 2013 ADHOC survey more than one third of respondents wanted individual reparations. Kirchenbauer et al., Victim Participation before the ECCC, 19-20.

[151] Interview with international civil party legal representative (ECCC19), 4 August 2015.

The emancipation of the passive reparations recipient

As seen with the example of the Tuol Sleng memorial, processes of emancipation were most pronounced among *Case 001* civil parties.[152] Many of these trial participants gained a certain prominence in the media and used this platform to articulate, with increasing candour, their own views on reparations. Chum Mey and Bou Meng, two of those civil parties, expressed their desire for monetary compensation and carried these demands over into the victim association they helped to establish.[153] One leading member of the association confirmed, "you know, the collective reparation is there for history, but the victims themselves what they need is personal reparation … because they are in need of everything."[154]And one lawyer remembered, "because everything was already collective under the Khmer Rouge, so they wanted now something individual".[155]

At times, civil parties were encouraged by their lawyers who advocated for change,[156] but less so by NGO intermediaries who were concerned that mismanaged expectations would eventually fall back onto them. Some intermediaries said in interviews that they were in principle against monetary compensation in the context of Cambodia,[157] but others felt that they could not simply silence survivors. The largest intermediary NGO, ADHOC, defended itself against claims that its activities would artificially raise civil parties' expectations. ADHOC stated that "it is the very nature and severity of the crimes and personal losses experienced by victims of the Khmer Rouge that has shaped the demands and expectations of victims".[158] While ADHOC staff conveyed the limitations of the ECCC's legal framework in outreach, it also stressed that it is not for ADHOC "to silence the voices of victims and civil parties, but rather to assist them in having their voices heard". The NGO viewed it as "vital" that all stakeholders "have a keen awareness of the full scope of victim's demands and expectations regarding reparations".[159]

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[152] This process of empowerment throughout the trial in *Case 001* is further described at Strasser et al., Justice and Healing at the Khmer Rouge Tribunal, 161-162.
[153] See Kurczy, Stephen, 'For Former Khmer Rouge Prisoners, Reparations are Key to Justice', *Christian Science Monitor*, 3 July 2009.
[154] Interview with civil party (ECCC22), Phnom Penh, 5 August 2015.
[155] Interview with international civil party lawyer (ECCC16), 3 June 2015.
[156] One international civil party lawyer was quoted at the 2008 reparations conference: "I was very happy ... that [the victims] expressed their interest in individual financial reparations and that now for the first time, the Court is confronted with this position". Quoted from Roughol, Isabelle, 2008, 'KR Survivors, Legal Experts Discuss Reparations for Victims', *Cambodia Daily*, 27 November 2008, 32.
[157] Interviews with Cambodian NGO coordinator (ECCC8), Phnom Penh, 11 December 2014; and with Cambodian NGO coordinator (ECCC13), Melbourne, 9 February 2015.
[158] Cambodian Human Rights and Development Association (ADHOC), 'ADHOC's Position on Reparations for Victims of the Khmer Rouge', Press Release, 8 December 2008 (on file).
[159] Ibid.

Regarding the 2014 civil party petition, one former Cambodian NGO worker asked, "was this unclear message from the tribunal or no adequate assistance from the NGOs at the time? At the end, we cannot blame anyone and anyway we cannot prohibit anyone to make their arguments."[160] About the challenge faced by outreach staff, this NGO worker further noted, "they were not able to stop people from talking about something unrealistic; we cannot stop them talking about individual monetary compensation … It is their voice that they want to express."[161] And another Cambodian NGO representative similarly stated, "it is not wrong that victims make reparations requests they really want to put forward … We should not limit their requests just because of limited mandates or limited capacities."[162] Even a Cambodian ECCC officer spoke almost admiringly about the civil party protest,

> in the past victims have been pressured by authorities to stay quiet, but now they come to the forum. They are allowed to testify and give their views. … An example how the empowerment happened is that they demonstrated, they protest the collective and moral reparation. They want individual compensation. This is also a positive sign of empowerment.[163]

Competing communicative and representational practices

Different communicative and representational practices of how to deal with diverging expectations and how to accommodate the active survivor clash here. On the one hand, there are the many local human rights NGOs that worked to empower victims of abuse and give them a voice. In fact, empowering survivors was one of their primary motivations to advocate for a more victim-oriented justice at the ECCC, including participation and reparations. One Cambodian NGO worker told me, "before only foreigners spoke about the Khmer Rouge, now survivors speak. This is empowerment."[164] On the other hand, there are ECCC officials and various outreach actors, including many of the same local NGOs, who want to avoid doing more harm than good by raising unrealistic expectations. Generally, my Cambodian interviewees from both the ECCC and NGOs were more receptive to victims articulating their demands, including for monetary compensation, than their international peers. The result was an incoherent communication strategy dominated by concerns around expectation management that foreclosed avenues for some civil parties to express their own preferences.

It is arguably in the nature of empowerment that its outcomes cannot be controlled. Surveys among civil parties indicate that more knowledge about the ECCC translated over time into more

[160] Interview with Cambodian NGO worker (ECCC10), Phnom Penh, 13 December 2014.
[161] Ibid.
[162] Interview with Cambodian NGO worker (ECCC33), Phnom Penh, 10 December 2015.
[163] Interview with Cambodian ECCC official working on victim issues (ECCC26), Phnom Penh, 19 August 2015.
[164] Interview with Cambodian NGO worker (ECCC34), Phnom Penh, 15 December 2015.

critical attitudes towards the Court.[165] When civil parties eventually felt confident enough to articulate their preferred reparations, they did not necessarily align with what the Court had to offer, or with what NGOs had recommended. Most of the petitioning civil parties were aware of the ECCC's limitations, but they simply did not want to accept them, or they wanted someone to listen to their real preferences. The ECCC and other outreach actors tried to counter these 'false' hopes by managing survivors' expectations. This became most visible in the practice of 'consultations', as discussed in Part III. The way expectation management was enacted often resulted in silencing survivors' voices, or reframing their requests to make them fit with the Court's mandate.

Rather than defying civil parties' empowerment, the ECCC might have considered other practices to channel survivors' interests and energy into the reparations process. One primary reason many civil parties' demanded individual compensation was that this would have allowed them to take more control of the outcomes. One international civil party lawyer stressed that although civil parties asked for money, it was always money for a particular task: money for medical treatment, for education for their children or grandchildren, for ceremonies etc.[166] Many of those demands were also articulated in collective projects but, as noted succinctly by one ECCC legal officer, "this is the problem with collective reparations generally: it is easy to get lost in the collectivity".[167] Surveys among civil parties indicate that survivors wanted to be involved in reparations.[168] In our 2015 survey, when asked if they would assist if a small project were to be implemented in their community, the majority of respondents answered positively.[169] For such practices of engagement to materialise, courts and intermediaries need to put aside the imaginary of a passive victim and instead provide avenues for survivors to play a more active role in the reparations process.[170]

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[165] Pham and colleagues reported from their survey among civil parties in *Case 001* that "civil parties who reported greater understanding and attended more of the court proceedings held less positive perceptions and attitudes towards the Duch trial proceedings". Pham et al., Victim Participation and the Trial of Duch, 277. The 'Voices for Reconciliation' study similarly found that the group of civil party representatives, which had more knowledge about the ECCC and more involvement in its proceedings, had generally more nuanced and critical views about the work of the Court than other civil parties. Sperfeldt et al., Voices for Reconciliation, 46-47.

[166] Interview with international civil party lawyer (ECCC14), 15 May 2015.

[167] Interview with international ECCC legal officer (ECCC21), Phnom Penh, 5 August 2015.

[168] Kirchenbauer et al., Victim Participation before the ECCC, 41-44.

[169] Interviewees said they would assist mainly by providing money (CPs: 87 per cent, CPRs: 74 per cent), and labour (CPs: 21 per cent, CPRs: 43 per cent). Sperfeldt et al., Voices for Reconciliation, 62.

[170] I agree here with those who argue that participatory approaches are not just a one-time exercise during the design phase of reparations, but should instead be applied throughout the reparations process. See also Dixon, Reparations and the Politics of Recognition, 348.

2.3. Civil party perspectives on reparations in Case 002/01

Compared to *Case 001*, relatively little is known about the views on reparations of the more than 3,800 civil parties involved in *Case 002/01*. Empirical research on the ECCC decreased over time in the same manner as funds for outreach and other victim-related activities. The last population-based survey was conducted in 2010, and few empirical enquires exist into the attitudes of civil parties after the trial verdict in 2014.[171] Against this background, I engaged during my fieldwork, in 2015, in a survey among civil parties as part a NGO outreach project evaluation.[172] The survey was conducted among ADHOC's civil party representative scheme and comprised a sample of 147 civil parties (CPs), including 46 civil party representatives (CPRs).[173] While this information is not representative of the broader group of civil parties in *Case 002/01*, it provides some indication of the state of knowledge and post-verdict attitudes of civil parties regarding reparations.

One year after the Trial Chamber had rendered its judgment in *Case 002/01*, most civil parties did not know about the reparations projects ultimately 'recognised' by the Judges. The majority of civil parties (92 per cent) did not know the number of recognised projects; even among the better-informed CPRs only one-third reported the correct number.[174] As to the specific projects, almost half said that they did not know (see Figure 11). Most other civil parties named memorials, highlighting the effectiveness of communicative practices centred on managing expectations and guided consultations. The more informed civil party representatives on the other hand were able to list several of the recognised reparations projects. These results show that a large number of the civil parties were not aware or had little knowledge of the reparations order in *Case 002/01*.[175]

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[171] See for instance Strasser, Judith, Silke Studzinsky, Thida Kim, and Sopheap Taing, 2015, 'A Study about Victims' Participation at the Extraordinary Chambers in the Courts of Cambodia and Gender-Based Violence under the Khmer Rouge Regime', TPO Cambodia. A new survey among more than 400 civil parties is being conducted by Timothy Williams from the University of Marburg and Julie Bernath with results to be published in mid-2018.

[172] The USAID-funded 'Voices for Reconciliation' project was implemented, from September 2013 to September 2015, by the East-West Center and the Handa Center for Human Rights and International Justice, in collaboration with the local NGOs ADHOC and the Cambodian Defenders Project (CDP). The survey among civil parties was part of the final project evaluation that was overseen by an external evaluation consultant. See Sperfeldt, Christoph, Melanie Hyde and Mychelle Balthazard, 2016, 'Voices for Reconciliation: Assessing Media Outreach and Survivor Engagement for Case 002 at the Khmer Rouge Trials', East-West Center and Handa Center for Human Rights and International Justice.

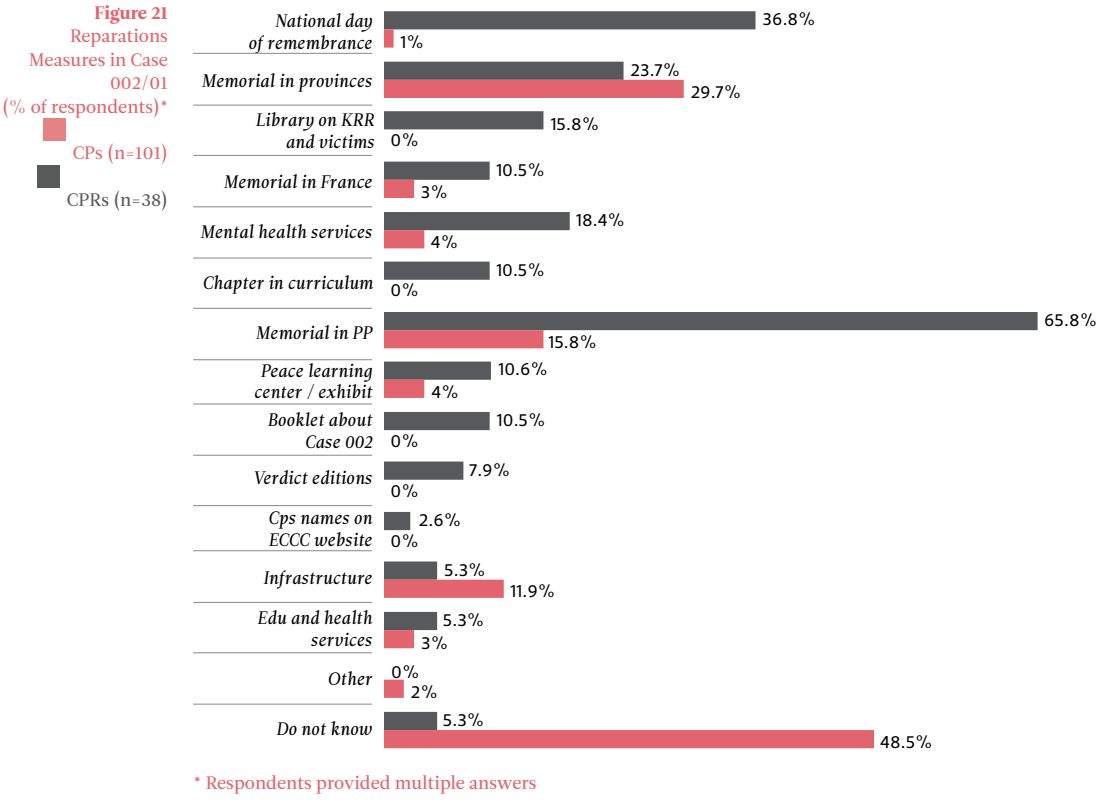
[173] The sample represents a more informed set of civil parties, who have received regular updates over the course of the trial proceedings in Case 002/01. It included a total of 101 civil parties (CPs) and 46 civil party representatives (CPRs). CPRs are a more informed sub-group of civil parties who receive regular training by ADHOC. Data for civil parties and CPRs are therefore presented separately.

[174] Among the 101 civil parties, only 2 people stated the correct number of reparations projects (11 projects). Sperfeldt et al., Voices for Reconciliation, 57.

[175] One civil party legal representative confirmed, "most of the civil parties we talk to they don't really know what projects have been implemented in Case 002/01". Interview with international civil party legal representative (ECCC19), Phnom Penh, 4 August 2015.

Among those who knew about the reparations, most were satisfied with the outcomes (CPs 88 per cent; CPRs 64 per cent).[176] These data confirm that one-off consultations, without continuous communication, are insufficient to enable reparative effects among civil parties or to realise aspirations for participatory outcomes.

Figure 11: Knowledge of reparations measures in Case 002/01 (% of respondents)



Source: Sperfeldt et al., Voices for Reconciliation, 58 (reprinted with permission of the Handa Center for Human Rights and International Justice, Stanford University)

Notwithstanding the lack of knowledge among civil parties about the reparations outcomes, most civil parties still believed it was important to provide collective and moral reparations to victims (CPs 85 per cent; CPRs 79 per cent).[177] The most prominent reasons cited by respondents for reparations were: to remind the youth of the Khmer Rouge regime (CPs 50 per cent; CPRs 61 per cent); to commemorate the dead (CPs 24 per cent; CPRs 17 per cent); and to relieve suffering (CPs 6 per cent; CPRs 28 per cent).[178] Most of these reasons would align with projects proposed

[176] Sperfeldt et al., Voices for Reconciliation, 57.
[177] Ibid 59.
[178] Ibid.

under the ECCC's reparations scheme, but without knowledge of or participation in these projects, reparative effects among civil parties remain in doubt.

Regardless of the reparations outcomes, most civil parties were overall satisfied with their participation experience.[179] One international ECCC officer working with victims recounted, "a lot of civil parties talk about their satisfaction of being civil parties, without having gotten any reparations, because they feel part of the system".[180] These preliminary findings concur with the views of *Case 001* civil parties discussed above. Despite their more limited involvement in the trial, most *Case 002* civil parties – at least the ones supported by active intermediaries – emphasise participation over reparations.

3. Conclusion: The Making and Meaning of Reparations

Practices surrounding court-ordered reparations have flow-on effects to the making of reparations in the conflict-affected situations where reparations eventually materialise: Negotiation practices circumscribe reparations' boundaries in legal frameworks without involving reparations' primary constituency, the survivors. Communicative and representational practices focus on expectation management and often exclude the voices and genuine preferences of those supposed to benefit from reparations. And adjudicative practices blur the boundaries of reparations for pragmatic reasons or in pursuance of larger social goals. As result, once reparations materialise, their meaning may be confused, contested or rejected. From the implementation of reparations in Cambodia to date, I draw a few preliminary observations relating to the meaning of reparations and its interrelationship with the role of courts and survivors in the reparations process.

I have shown in Part IV how actors at international(-ised) criminal courts contest the goals of court-ordered reparations and pull it into different directions. Even after a reparations order, these actors' practices continue to blur the boundaries of reparations or employ the notion of 'reparations' for more pragmatic or more principled reasons. At the ECCC, many of the, admittedly often creative, collective reparations projects geared towards broader societal purposes may ultimately have limited remedial effects on civil parties, especially if they do not know about these projects or are not involved. One side effect of these practices has been the formation of a

[179] These results are similar to the 2015 TPO study among 222 civil parties. Being asked about the impact of participating at the ECCC, almost all respondents (95 per cent) in this survey reported experiencing a positive impact as result of their civil party participation. Only a few reported having a negative impact (2 per cent). 71 per cent of respondents expressed that they were strongly satisfied and 26 per cent stated that they were satisfied with their level of participation as civil parties at the ECCC. Strasser et al., A Study about Victims' Participation at the ECCC, 49-50.
[180] Interview with international ECCC officer working with victims (ECCC11), Phnom Penh, 15 December 2014.

hierarchy of victim support that has steered the mobilisation of capacities and resources towards Court-ordered reparations whilst subordinating other forms of non-judicial victim support. It remains to be seen whether such 'crowding-out' of non-judicial assistance by judicial reparations will also occur at the ICC, where the TFV is struggling to defend its assistance mandate against the needs of the growing number of cases reaching the reparations stage.

As a result of these practices through which judges and other actors mediate competing legal and social imperatives, 'reparations' emerge as an empty signifier that receives its meaning in the context where it materialises. The examples of the Tuol Sleng memorial and TPO's testimonial therapy have shown how a non-judicial measure can feel to survivors like 'reparations', whilst the meaning of a Court-ordered collective reparations project may remain elusive. Court officials are not very perceptive about these meaning-making processes, often assuming that victims will gratefully receive the reparations offered to them. Meaning-making is an interactional process that goes beyond the one-directional offer made by way of a reparations order. My observations from the ECCC seem to suggest that the symbolic powers and authority of a court play an important role in this process. Yet at the same time there seems to be little awareness within courts of these symbolic powers, their social effects and the best ways to use of them. The example of Duch's apology highlighted the challenges associated with symbolic reparations when courts disregard their interrelational dimension.

Passive victim subjectivities seem to be at the core of court-ordered reparations. Communicative and representational practices often crowd out survivors' voices from the reparations space. These voices then reappear during the implementation phase where victims show agency by negotiating or contesting the Court-ordered reparations. The examples of individual monetary compensation and Duch's apology have both shown instances of resistance by civil parties to the reparations offered to them. ECCC officials and legal professionals have struggled to accommodate victims' agency that unsettled their imaginary. In the case of the Tuol Sleng memorial, they re-appropriated a survivor-initiated project and turned it instead into an offer by the Court. Only if courts change their image of victims and more genuinely involve them, can they realise their meaning-making potential with regards to reparations.

Notwithstanding the focus on reparations in my research, studies with civil parties at the ECCC seem to concur that reparations have not been at the forefront of people's expectations of the Court. Although the importance of reparations may have grown over the course of the proceedings, they have not supplanted Cambodian civil parties' primary motivations for participation, including the need to know, to honour the memory of lost relatives, to tell one's story, to obtain justice and to educate future generations about the past. One international court observer therefore

described the ECCC's collective reparations mandate more as an "extension" of its participation scheme. The observer further noted,

> it makes me wonder about the question of how victim participation would have looked without reparations, and I think it would not have looked much different. … The value in the system was the participation itself, and the reparations are a bit of an after thought … and as a symbol they are good, but substantively they are too small to make a difference in people's lives.[181]

These findings may be largely determined by the Cambodian context and might play out rather differently at the remotely located ICC, where active participation is extremely limited and where most victim participants will never see the Court or the defendants. Yet, these findings also point to the need to listen more to victims' primary motivations for coming forward and to explore more the interrelationship between participation, reparations and recognition.

[181] Interview with international Court observer (ECCC4), Phnom Penh, 8 December 2014.

Conclusion

This study has drawn attention to the multitude of practices that often get overlooked in scholarly research on reparations in international criminal justice. The aim was not to capture the totality of practices surrounding reparations, but rather to identify those practices that are particularly salient in the making of reparations at the ICC and the ECCC. A practice perspective allowed me to study the people and professionals behind the pursuit of the reparations ideal, to understand how institutions matter in shaping reparations and the obstacles they face when translating the ideal into tangible redress for victims of mass atrocities. This approach complements other, more victim- and survivor-focused research on reparations by bringing to light both explanatory and interpretive insights into the working of reparations.

The social life of reparations through a practice lens

As an analytical lens, a practice-based approach unsettled preconceived notions of reparations and redirected attention to the many practices through which reparations are constituted and performed. In identifying and studying these practices, this study interrogated how actors at and around international(-ised) criminal courts make sense of their actions regarding reparations. Through their practices, these actors give meaning to reparations based on the preferences, interests and values they embody, and the opportunities and constraints they face in their daily activities. Often this behaviour of lawyers, judges, outreach workers or intermediaries is not articulated or appears experimental, when they try to reconcile existing background knowledge with external demands and influences. Nevertheless, these practices have an impact on the performance of institutions and reparations outcomes.

The practice lens has made visible the different communities of practices that are involved in conceiving and shaping reparations in international criminal justice.[1] At times, these communities align with organisational units and the logics of action they generate, such as human rights NGO activists, state diplomats or judges. Yet at other times, communities of practice span across courts, NGOs and diplomatic services and involve agents from different organisations. Communities of practice comprising legal professionals and promoting legalistic solutions to reparations cross the organisational boundaries of courts and international NGOs. A practice lens is able to capture

[1] See also Adler/Pouliot, International Practices, 18 (partly quoting Wenger et al. 2002).

such constellations that are difficult to grasp by accounts that focus on 'actors' along the more traditional lines of institutions or organisations.

One example of such communities of practice that exist within and across organisational boundaries are communities that follow similar communicative and representational practices. The very nature of the interventions of the ICC and the ECCC in the DRC and Cambodia produced expectations that then needed to be 'managed' through communicative practices that spanned across the Courts' outreach units and intermediary NGOs. In this process, a range of different representatives, from lawyers to intermediaries, came into play to speak on behalf of victims. This became particularly visible in the practice of 'consultations', where a combination of communicative and representational practices adjusted and channelled victims' inputs into the processes that determined reparations outcomes. Such practices shaped key parameters of reparations even before judges adjudicated reparations requests. These practices helped those working at and around these Courts to translate and discipline the multitude of demands from survivor communities so as to make them fit with the requirements of legal proceedings. Yet, at same time, they also hampered genuine two-way communication and left those framing the claims of victims with limited insights into their actual wants and needs.

This study has also shown the different forms of interconnection that exist between various practices or across communities of practice. Two or more practices can form bundles that reinforce their effects.[2] In recounting the social life of reparations from the negotiations of their foundational legal frameworks over their institutional operationalisation to the way they are enacted in different conflicted-affected situations, I have shown the interconnections that exist between one set of practices and another set of practices across space and time. Identifying and tracing such 'chains of action' and the interrelationships between certain practices helped to reconstruct the life of a social phenomenon, such as reparations, in a more contextualised manner.[3]

One example of such chains is the effects of negotiation practices that incorporated competing rationales into the legal frameworks of the ICC and the ECCC which continue to affect their operation. When in the late 1990s and early 2000s competing visions of international justice converged on a continuously expanding international criminal justice field, believers in a rules-based global order hoped that international justice could also be brought to bear on the plight of victims of mass atrocities. Yet, the encounter of human rights activists, criminal lawyers and state diplomats in Rome in 1998 was not an easy one. It required a range of negotiation practices to

[2] Adler and Pouliot have similarly argued that practices can be considered through different levels of such aggregation. Adler/Pouliot, International Practices, 8.
[3] I draw here on Theodore Schatzki who has called for the study of such 'chains of action'. See Schatzki, Theodore, 2016, 'Keeping Track of Large Phenomena', 104 *Geographische Zeitschrift*, 9-16.

bring about consensus. The effect of these practices, however, was to insert a range of competing rationales into the legal frameworks: human rights logics (promoting the rights of victims to redress and reparations), criminal law logics (giving primacy to punishing perpetrators), and sovereignty logics (resistance to notions of state responsibility for reparations). ICC practitioners have since struggled to give effect to an expansive human rights-inspired concept of reparations within the ICC's highly legalised criminal justice framework.

Since the beginning, contestations over different visions of justice have been at the core of the production of reparations. The encounter of international criminal law and reparations are a site of friction and re-constitution of the use and meaning of reparations – and international criminal justice for that matter – without necessarily arriving at a shared understanding. Examining the struggles over who determines what reparations mean and entail in a particular space and time has shed light on the interplay of different actor and power constellations. These contestations have simultaneously constrained courts' action and became drivers for change and sources of flexible adaptation to make reparations fit new contexts and circumstances.

For instance, the fact that judges have been torn between different legal and social imperatives when adjudicating reparations – oscillating between more legalistic and more pragmatic practices – suggests that they are actively mediating these tensions, while showing different degrees of responsiveness to institutional constraints or local demands. Such adjudicative practices have included tapping into external knowledge to fill gaps of expertise and seek legitimacy; relying on voluntary funding when resources from convicted persons or responsible states were out of reach; and blurring the boundaries between reparations and other non-judicial forms of victim assistance. The fact that the ICC and the ECCC have, despite some similar practices, chosen different pathways to manoeuvre the space between competing legal and social demands suggests that individual and contextual factors warrant more attention in research on reparations than they have so far been accorded.

From this perspective, practices result from different institutional or individual responses to limitations and uncertainties that mediate the space between competing rationales in legal frameworks and the constraints in conflict-affected situations. Appreciating the nature and effects of these practices provides us with a deeper understanding of the discrepancies that exist between the reparations ideal and how it imperfectly functions in diverse mass atrocity situations. My practice-based inquiry into the social life of reparations contributes to a nascent conversation between socio-legal scholars and practice researchers by making visible the hidden dimensions that often get lost in formal accounts of law and rights. In particular, it has helped to shift the analysis beyond questions of mere compliance and instead direct attention to the transformation of norms and their constituent practices.

Possibilities and meanings of reparations in international criminal justice

Ongoing contestations create uncertainty about the future of reparations in international criminal justice. This was reflected in many interviews with practitioners who, towards the end of our conversations variously, and at times passionately, spoke out against or in favour of delivering reparations through international criminal justice. Instead of ending my thesis with speculations about the future of reparations, I provide some observations that may assist with delineating the space that reparations could occupy within international criminal justice and point to areas of future action and research.[4]

My account has shown that the initial promise for more 'victim-oriented justice' through reparations has been realised only superficially. On the surface, victims have become a central figure in the discourse of Court officials, in institutional policies and the legal submissions circulating before judges. However, the 'victim' remains an amorphous category that is constructed and regulated through the legal logics prevailing at these Courts. Those few who qualify as Court-recognised victims for the purposes of reparations often transform into an anonymous collective that becomes the subject of communicative and representational practices performed by those working at and around the Courts. As a result of these practices, victims' voices are received through a voice distorter, rather than through a megaphone. On the whole, we still know relatively little about how victims perceive the reparations eventually granted to them.

Those involved in enacting such practices struggle to leave behind images of the passive victim, most visibly articulated in the notion of the passive reparation 'beneficiary'. Reflexive of their actions and surrounding contexts, these actors make attempts to adjust their practices, such as by contesting and blurring the boundaries of legal categories of victimhood, holding more and more inclusive consultations or, where possible, amending legal frameworks. The comparison of practices between the ICC and the ECCC has demonstrated a certain responsiveness of actors to their environment.

Yet, these efforts are not able to overcome the more fundamental institutional limitations that are inherent in the juridical approach to reparations. As one interviewee summarised, "the problem is

[4] Since 2012, the ICC has tried to capture its experience in a more structured lessons learned process. On reparations, this included discussions on individual and collective reparations, whether principles on reparations should be addressed in a court-wide document or need to be further developed on a case-by-case basis and whether reparations to victims might be dealt with by a single judge. These considerations have so far led to only a few technical changes. See ICC, *Lessons Learnt: First Report of the Court to the Assembly of State Parties*, Study Group on Governance, 11th Assembly of States Parties, ICC-ASP/11/31/Add.1, 23 October 2012, Annex.

not the victims, the problem is the system into which you inserted the victims".[5] In redeploying institutions traditionally oriented towards ending impunity through punishment towards new reparative purposes, reparations have not only become attached but also subordinated to the dominant legal and jurisdictional logics of the criminal trial.[6] This state of affairs explains why reparations remain marginalised and have not been internalised in the operations of institutions. While this does not take away from practitioners' efforts in dispensing more victim-oriented justice, it points to clear limitations for court-ordered reparations schemes. They cannot act as stand-alone reparations programs in the aftermath of mass atrocities. At best, they can improve the participation and recognition experienced by participating victims; at worst, they create victim hierarchies and grievances among excluded survivor populations.

Should we abandon the idea that reparations can be delivered through international criminal justice? The dynamics at the negotiations in Rome indicated that retributive justice alone might not anymore be sufficient to justify states' substantial financial and political investment in international criminal justice. Yet, recasting international criminal justice as a site for realising reparative ambitions has limits.[7] My research findings suggest a cautionary 'less is more' approach[8] and a more honest appreciation of the limits of delivering reparations for victims of mass atrocities through international(-ised) criminal courts.

The practice lens has enabled such an appreciation of both the possibilities and limitations of reparations in international criminal justice. It has made visible instances of unreflective 'conceptual creep',[9] such as when a broad notion of 'reparations' from the human rights context – and thus originally aimed at the state – was transplanted into international criminal justice institutions that do not deal with state behaviour. This raises the question of whether reparations measures that make sense in the context of state responsibility, such as certain types of satisfaction or more far-reaching guarantees of non-repetition, can be re-conceived in a context of individual criminal responsibility. There is the more fundamental question at stake of whether courts should 'see' like a state and address broader societal-level consequences of violence, or rather focus on the more immediate victims before them and their harm. The Basic Principles and Guidelines still

[5] Interview with ECCC Defence Lawyer (ECCC15), 3 June 2015.
[6] Luke Moffett has similarly noted, "the problems with reparations at the ICC stem from pasting it onto the end of a criminal trial, which undermines its victim-centred nature". Moffett, A New Way Forward, 1218. See also Chappell, Louise, 2014, '"New," "Old," and "Nested" Institutions and Gender Justice Outcomes: A View from the International Criminal Court', 10(4) *Politics & Gender,* 572-594.
[7] See Kendall, Sara, 2015, 'Beyond the Restorative Turn: The Limits of Legal Humanitarianism', in: De Vos et al., *Contested Justice*, 352-376.
[8] As called for by Louise Chappell at Chappell, Louise, 2017, 'The Gender Injustice Cascade: "Transformative" Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga Case at the International Criminal Court', 21 (9) *International Journal of Human Rights*, 1223-1242.
[9] So referred to in Haslam's work on conceptual change. See Haslam, Nick, 2016, 'Concept Creep: Psychology's Expanding Concepts of Harm and Pathology', 27(1) *Psychological Inquiry*, 1-17.

represent valid aspirations and sources of inspiration for reparations to victims of mass atrocities, but they do not provide a ready-made guide for action. Courts need to return to the question of why victims of mass atrocities still, and despite all drawbacks, turn to them in their quest for justice.

This study of the practice of reparations in international criminal justice shows that international(-ised) criminal courts wield types of authority that other institutions do not seem to have.[10] This authority is intrinsically related to the symbolic powers these courts hold.[11] In instances of large-scale atrocities no full repair is ever possible. Hence, any reparations will, in one way or the other, be symbolic. Courts with their limited mandates and resources, but distinct authority, should pay more attention to the symbolic dimension of reparations; both in the cases of less and more tangible awards.[12] At the core of this dimension is the capacity of reparations to provide some form of acknowledgment or recognition to victims.[13] Yet, what this means and how it is produced is less certain, especially in the context of international(-ised) criminal courts. Judges and other court officials show often little awareness of these aspects of their work.

Many observers and scholars remain sceptical about the degree to which courts can produce or convey such recognition.[14] One interviewee in Cambodia noted, "reparations are designed to make people feel like there has been some personal acknowledgment and attempt to their own suffering and losses, and the Court really isn't well designed to do that".[15] Existing practice and research suggests that the symbolic power to recognise is a court's strength but is also challenging to exercise.[16] Effective and meaningful approaches to reparations will require new ways of

[10] On authority and international (criminal courts) refer for instance to Levi, Ron, John Hagan and Sara Dezalay, 2016, 'International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law', 79 *Law and Contemporary Problems*, 289-314*;* Alter, Karen, Laurence Helfer and Mikael Madsen, 2016, 'How Context Shapes the Authority of International Courts', 79 *Law and Contemporary Problems,* 1-36; and Duff, Antony, 2010, 'Authority and Responsibility in International Criminal Law', in: Besson, Samantha, and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford: Oxford University Press, 589-604.

[11] See Aksenova, Marina, 2017, 'Symbolism as a Constraint on International Criminal Law', 30(2) *Leiden Journal of International Law*, 479-499.

[12] See also the literature on the role of expressivism in international criminal justice, e.g. McCarthy, *Reparations and Victim Support*; Elander, The Victim's Address; and White, Cheryl, 2017, *Bridging Divides in Transitional Justice: The Extraordinary Chambers in the Courts of Cambodia*, Mortsel: Intersentia.

[13] Frank Haldemann argues that the symbolic dimension is at the core of moral recognition for victims of collective and systematic wrongs. Haldemann, Frank, 2008, 'Another Kind of Justice: Transitional Justice as Recognition', 41 *Cornell International Law Journal*, 675-737.

[14] Sara Kendall noted that the ICC's work within legal and jurisdictional categories sets limits to the recognition it might grant. Kendall, Beyond the Restorative Turn, 365.

[15] Interview with international ECCC observer (ECCC4), Phnom Penh, 8 December 2014.

[16] Peter Dixon shows the workings of the politics involved in recognition, which entail "interpreting, representing and rendering visible (and invisible) categories of people" and harm. See Dixon, Reparations and the Politics of Recognition, 326-351.

thinking about recognition in the aftermath of mass atrocities that push beyond practices more familiar to criminal courts and lawyers.

The little empirical research on victim participants or reparations claimants before these courts shows some pathways for thinking about repair and recognition. Stover and colleagues have shown in their research with victims in *Case 001* at the ECCC that the initial expectations and motivations for turning to courts are often similar: the need to know, to obtain justice, to tell one's story, to educate etc. Stover also noted that "civil parties spoke of reparations in the same terms as they did about their court testimonies: namely, as a form of official recognition and acknowledgement of their suffering, and that of the Cambodian people".[17] Such findings imply that, in the case of international(-ised) criminal courts, the line between participation and reparations may be thinner than often suggested. Rather than seeing reparations as a *goal* in itself (that is pre-conceived by human rights or outsiders), an alternative approach might be to identify these expectations and needs of victims in relation to their engagement with courts and then design corresponding measures as *means* to address those needs; many of which may be associated with context-specific forms of recognition. One Cambodian interviewee described this as 'justice with a little bonus'.[18]

It is not certain, however, whether – in the eyes of those affected by mass atrocities – there is a value to calling any of these forms of recognition 'reparations' and whether it changes the meaning they attach to such measures. What is often in the way of realising courts' potential for recognition is the notion of 'reparations' itself. People in the DRC and Cambodia never related to the term, as they were more familiar with notions of monetary compensation or the return of lost property. The broad notion of reparations often created confusion and brought into discussion other priorities that they would normally not have associated with 'repair' or a court process. This observation suggests that more attention should be devoted to processes of recognition and meaning-making and bring them into critical conversation with empirical research on victims' views and attitudes.[19] I believe such insights might heighten our awareness of the possibilities and limitations for courts to provide such recognition, be it called reparations or not. Already my research confirms other scholars' work arguing that it is critical to develop avenues other than through legal fields for victims to be recognised.

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[17] Stover et al., Confronting Duch, 32-33.

[18] The respondent said about the ECCC's collective reparations, which did not bring much tangible benefits to civil parties, "yes, we get justice, and we get this little thing as a bonus". Interview with Cambodian NGO worker (ECCC8), Phnom Penh, 11 December 2014.

[19] See also Martha Minow's work on the 'social meaning' of reparations at Minow, Martha, 1998, *Between Vengeance and Forgiveness: Facing History of Genocide and Mass Violence*, Boston: Beacon Press, 91-117.

"Because there is nothing else": Looking beyond courts

My interviews with practitioners at the two Courts have revealed the many intricate problems associated with routing reparative aspirations through the international criminal justice field. When pressing these judicial officials, human rights advocates or local NGO workers on why they, despite all challenges, continued to push for courts to deliver reparations, the most frequently cited reason was "because there is nothing else". Most proponents would agree that reparations and international criminal justice are in a difficult marriage, but eventually find that there is no other pathway to reparations available for many conflict-affected societies. This is a rather unsatisfactory state of affairs, as courts are not chosen because they represent the most effective conduit to deliver reparations, but because of a lack of alternatives.

Such attitudes maintain the disproportionate attention given to criminal courts in transitional justice initiatives. The mismatch is evident in funding statistics: In the case of Cambodia, until 2012, the ECCC received 91 per cent of overall transitional justice assistance, while complementary local civil society initiatives only received 9 per cent.[20] Similarly, the resources currently made available for reparations at international(-ised) criminal courts stand in no proportion to the costs of complex legal reparations proceedings or maintaining temporary operations, especially at the ICC. Given the mood at recent Assemblies of States Parties, it seems unlikely that states will commit significantly more voluntary resources to reparations.

This thesis identifies a pressing need to look beyond courts in the pursuit of reparations for victims of mass atrocities. In the context of the ICC, Luke Moffett has been at the forefront of those trying to redirect the focus to complementary action on reparations at domestic levels.[21] In rhetoric these courts are supposed to be a last resort, with the main responsibility for reparations remaining with the respective states. This is also recognised in the Basic Principles and Guidelines.[22] Yet, in the cases of the ICC in the DRC and the ECCC in Cambodia, few complementary national-level reparations initiatives have accompanied the work of these courts outside civil society. The state – the main bearer of responsibility for reparations – has been markedly absent in both case studies.

[20] The ECCC received more than USD 250 million in between 2006 to 2012. Arthur, Paige and Christella Yakinthou, 2015, 'Funding Transitional Justice: A Guide for Supporting Civil Society Engagement', Public Action Research, 6.

[21] Moffett, Luke, 2013, 'Reparative Complementary: Ensuring an Effective Remedy for Victims in the Reparations Regime of the International Criminal Court', 17(3) *International Journal of Human Rights*, 368-390.

[22] The Basic Principles and Guidelines stipulate that "[s]tates should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations". Basic Principles and Guidelines 2005, Art. 16.

Thus, hopes for courts' catalytic effects vis-à-vis reparations at the domestic level have remained largely unfulfilled.[23]

The current model is convenient both for conflict-affected states, but also for the larger states funding the system, as it has meant a shift of attention to these courts. In effect, this leads to a system where responsibility for reparations is outsourced to institutions with limited mandates, which cloud their insufficient capacities and powers in sophisticated legal rhetoric. This does not mean that there is no role for reparations in international criminal justice. Yet, it will be a more modest one than the current promise suggests – one more rooted in the courts' symbolic powers, rather their ability to deliver tangible and equitable reparations to a large number of survivors.

[23] For this situation to change, researchers from the DOMAC project suggest some remedies for domestic prosecutions that are equally applicable to reparations, including moving beyond often-repeated rhetoric for holistic solutions and instead internalise the need for a comprehensive response; and avoiding excessive emphasis on international(-ised) criminal trials and instead structure more sustainable and locally embedded initiatives. See Shany, Yuval, 2013, 'How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation', 46(3) *Israel Law Review*, 431-453.

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