What's law got to do with it?

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Assessing International Courts' Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes

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Chapter 1: Introduction

1. Problem Definition and Aim

Granting victims of international crimes a role and the possibility to avail themselves of rights within the context of international criminal law (ICL) institutions constitutes an important normative development in international law.[1] It refutes the previously held contention that victims are a forgotten party in their own trials,[2] demonstrated by the scarce attention paid to the plight of victims by the former *ad-hoc* and military ICL tribunals that centred solely on the punishment of the accused persons.[3] In addition, this normative development marks the erosion of the States' role as sovereigns over their domestic matters. It aims to supersede States by offering protection to victims outside of the traditional relationship between individuals and States, while placing the criminal responsibility of individuals at the center of these developments.[4] In the past decades, one modality whereby this normative development was formalized is the inclusion of a reparations regime within the mandate of international courts such as the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). For the first time in the context of ICL-based courts, in addition to their focus on punishing the perpetrators, these courts recognized the victims' role as active participants within trials. Moreover, they bestowed upon victims the possibility to request reparations, in addition to other prerogatives, such as voicing out their views and concerns as well as benefitting from the right to information, protection and assistance.[5] Importantly, as envisioned, reparations would be awarded against and borne by individuals found criminally responsible for incurring harm to victims.[6]

Central to the inclusion of a reparations regime within the mandate of these courts is the idea that providing reparations might contribute towards repairing the harm suffered by victims and afford reparative justice to victims of international crimes. This aspiration is laid out in the courts' legal bases as well as reiterated in their case law and other court documents. According to the ICC and the ECCC's legal bases, reparations aim to address,[7] acknowledge, and provide benefits for the harm[8] suffered by victims. Moreover, as far as the ICC is concerned, it held in its cases that the

[1] E.g. Conor McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice' (2012) 10 Journal of International Criminal Justice 351, 359. Ruti Teitel, Globalizing Transitional Justice: Contemporary Essays (Oxford Scholarship Online, 2014) 63-64. Sara Kendall, 'Beyond the Restorative Turn: The limits of legal humanitarianism' in Christian de Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 359

[2] See Nils Christie, 'Conflicts As Property' (1977) 17 The British Journal Of Criminology 1. Jo-Anne Wemmers, 'Where Do They Belong? Giving victims a Place in the Criminal Justice Process' (2009) 20 Criminal Law Forum 395; Antony Pemberton, Pauline GM Aarten, Eva Mulder Tilburg, 'Stories as Property: Narrative Ownership as a Key Concept in Victims' Experiences with Criminal Justice' (2019) 19 Criminology & Criminal Justice 404

[3] Marc Groenhuijsen and Anne-Marie de Brouwer, 'Participation of Victims: Commentary' in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Court 2005-2007* (Intersentia, 2010) 273; Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric And the Hague (2015) 13 Journal of International Criminal Justice 281, 282

[4] Frederic Megret,' 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 University Press, 2015) 25. See also Kamari Clarke, ''We Ask for Justice, You Give Us Law': The Rule of Law, Economic Markets and the Reconfiguration of Victimhood' in Christian de Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 283

[5] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) ICC-PIOS-LT-03-002/15_Eng (Rome Statute), articles 68 and 75; Internal Rules of ECCC (2007), Rule 23

[6] Rome Statute, art 75; Internal Rules of ECCC (2007), Rule 23(11)

[7] Rome Statute, art 75

[8] Internal Rules of ECCC (2015), Rule 23(1)

reparations awards aim to the extent achievable to relieve the suffering caused by international crimes and afford justice to victims by alleviating the consequences of the wrongful acts.[9] Further elaboration was provided by the Assembly of State Parties (ASP) in a policy document,[10] wherein it expressed that the Court's founding statute "reflects growing international consensus that participation and reparations play an important role in achieving justice for victims."[11] As stated, to achieve this aspiration, the ICC aims to employ a rights-based perspective that reconfirms and empowers the victim as a vital actor in the justice process.[12] Similarly, the ECCC held in its cases that its reparations awards aim to repair harm[13] by "removing the consequences of the criminal wrongdoing."[14] Links between reparations and justice for victims have also been made in ECCC documents, whereby it was acknowledged that "justice is a critical element for repairing the damage done to that society by the massive human rights abuses and for promoting internal peace and national reconciliation."[15]

Notwithstanding the aspirations instilled into these relatively new ICL-based courts and their reparations regimes, the inclusion of reparations regimes within the mandates of international courts is not unique to ICL-based courts. On the contrary, they are firmly anchored in the mandates of International Human Rights Law (IHRL) institutions such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) which long predate the ICL-based courts.[16] IHRL-based courts' central goal is the protection of individuals' human rights, which entails holding States accountable for human rights violations, in contrast with ICL-based courts, which aim to hold individuals accountable.[17] Additionally, underlying the inclusion of a reparations regime within the mandates of these courts is the idea of providing reparations that aim to repair the harm suffered as a result of human rights violations. This normative claim was incorporated into the IHRL-based courts' legal bases and was enforced throughout the courts' jurisprudence on reparations, including in cases dealing with gross human rights violations.[18] However, in contrast to ICL-based courts, IHRL-based courts are less explicit in their aim of providing reparative justice to victims by means of their reparations regime, although they also attach important aspirations to their regimes. To be precise, according to its legal basis, the ECtHR

[9] See e.g. *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) para 71. *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 15, para 267

[10] The Assembly of States Parties is the Court's management oversight and legislative body. It is composed of representatives of the States which have ratified or acceded to the Rome Statute. 'Assembly of States Parties' (ICC Website) <https://www.icc-cpi.int/asp> accessed 10 June 2020

[11] Assembly of States Parties (ASP), 'Report of the Court on the Strategy in Relation to Victims' (10 November 2009) ICC-ASP/8/45, para 3. See also the revised strategy ASP, 'Court's Revised Strategy in Relation to Victims' (5 November 2012) ICC-ASP/11/38 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf > accessed 29 January 2020

[12] See Alina Balta, Manon Bax, and Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System', 29 International Criminal Justice Review (2019) 221, 223

[13] See e.g. *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) para 658.

[14] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) para 699.

[15] 'Report of the Group of Experts for Cambodia Established Pursuant to General Assembly resolution 52/135' A/53/850S/1999/231, para. 2 < https://cambodia.ohchr.org/sites/default/files/report/other-report/Other_CMB16031999E.pdf> accessed 30 April 2020. See also 'Opening Speech by the Plenary's President Judge KONG Srim, during the 8th Plenary of the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (ECCC Website, 13 September 2010) < https://www.eccc.govkh/sites/default/files/media/8th_plenary_president_speech_EN.pdf > accessed 15 April.

[16] Theo van Boven, 'Victims' Rights to a Remedy and Reparation: the New United Nations Principles and Guidelines' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 21

[17] See e.g. *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015) para 112. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 104

[18] As will be explained below, this thesis focuses on victims of international crimes and gross human rights violations.

may award reparations in the form of 'just satisfaction',[19] which aims to "compensate the applicant for the actual harmful consequences of a violation."[20] Furthermore, this principle has been reiterated by the Court throughout its jurisprudence, as it held that reparations aim to tackle the "consequences [of human rights violations]."[21] Furthermore, as far as the IACtHR is concerned, its reparations regime aims to ensure that "the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."[22] In addition, as the IACtHR held throughout its case law,[23] its reparations regime is rooted in the understanding that any violation of an international obligation resulting in harm carries with it an obligation to provide adequate reparations, which shall aim to "make the effects of the committed violations disappear".[24]

As can be noticed, common to the inclusion of reparations regimes within the mandate of these international courts are normative underpinnings and high-level aspirations. Particularly, these courts assert that through their reparations regimes they may repair the harm suffered by victims and potentially contribute towards reparative justice for them. However, the extent to which these ICL and IHRL-based institutions succeed in achieving their stated aspirations through their reparations regime is yet to be substantiated in a thorough assessment. To begin with, these courts generally fail to set robust standards as to when the realisation of their aspirations is considered attained as well as to elaborate on its constitutive elements, such as, what amounts to repairing the harm of victims, how can the suffering or consequences be tackled or what actually constitutes reparative justice for victims.

Furthermore, evidence from empirical research into the victims' experiences and perceptions of international courts and their reparations awards reveal that the courts lag behind in achieving their aspirations. Understanding how victims experience and perceive the reparations awarded by courts is important because reparations are allegedly designed and awarded in order to benefit the victims (i.e. to repair their harm). Indeed, as the well-known dictum states, justice is seen to be done when it is seen in the eyes of the victimized population.[25] However, existing empirical studies with victims - which primarily research the victims' perceptions of ICL-based courts - reveal gaps in the victims' knowledge in regard to courts and their work in relation to victims. For instance, several studies carried out in the context of the ICC and the ECCC revealed the victims' scarce knowledge regarding the existence of these courts in the first place,[26] the potential roles they could

[19] 'European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16' (CoE, 4 November 1950) article 41

[20] Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 9 <https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf> accessed 15 April 2020

[21] E.g. *Abuyeva and Others v Russia* App no. 27065/05 (ECtHR, 2 December 2010) para 236

[22] American Convention On Human Rights (ACHR) (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969), article 63 <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> accessed 15 April 2020

[23] E.g. *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 133

[24] See *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 171

[25] As asserted by Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 175. See also, Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time Has Passed' (2005) 38 Cornell International Law Journal 753; Antony Pemberton and Rianne Letschert, 'Justice as the Art of Muddling Through' in Chrisje Brants and Susanne Karstedt, *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation* (Bloomsbury Publishing, 2017)

[26] See 'Living With Fear: A Population-based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo' (Human Rights Center, Payson Center for International Development and International Center for Transitional Justice, August 2008) 47 <https://www.ictj.org/sites/default/files/ICTJ-DRC-Attitudes-Justice-2008-English.pdf>

avail themselves of before courts,[27] and the existence of reparations awarded by courts.[28] In regard to the courts' reparations regime and their potential contribution to justice, the empirical studies reported different victims' perceptions. A study with victims before the ICC by Cody et al. found out that the prospect of receiving reparations was the primary motivation for victims to engage with the ICC, yet no reparations had been implemented by that time to enable victims to express their opinion on them.[29] Cody et al. furthermore underlined the importance of courts' interaction with victims, reporting that the victims' satisfaction with the ICC depended on their personal interactions with ICC staff and their legal representatives.[30] In regard to the ECCC, a 2009 study revealed that even though victims perceived justice as being important, their priorities lied with the realization of basic needs and they would have preferred that the money to fund the ECCC had been spent on something else.[31] However, a later study revealed that victims believed that the ECCC had delivered them justice and furthermore the victims who did know about reparations expressed their satisfaction with them and their positive impact on their community.[32] In regard to IHRL-based courts, empirical studies researching the victims' perception and experience with the courts and their reparations awards are generally scarce. In regard to the IACtHR, an empirical study revealed that the victims were generally satisfied with the court and its reparations awards, however, they reported dissatisfaction in regard to the actual implementation of reparations.[33]

The results of empirical studies into the victims' experiences with courts, which highlight shortcomings in the attainment of the courts' aspirations, are further aligned with a bulk of critical academic research challenging the courts' ability to realize their ambitions in relation to victims.[34]

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accessed 30 April 2020. See also Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018) 120 <https://www.swisspeace.ch/assets/publications/downloads/Reports/af32f3c3a1/Justice-and-Reconciliation-for-the-Victims-of-the-Khmer-Rouge-Report-2018-.pdf> accessed 15 April 2020

[27] Another study carried out between 2013 and 2014 with 622 victim participating or having submitted applications to participate in ICC proceedings similarly revealed the victims' insufficient knowledge to make informed decisions about their participation in ICC cases, although they generally knew about the existence of the court. Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 3

[28] As held in regard to ECCC, "despite being consulted on reparations projects, the level of knowledge about reparation projects in Cases 001 and 002/01 was very low among civil party survey respondent." This study's results draw on surveys with 439 victims and a follow up of 65 in-depth interviews. Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018) 120

[29] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 3

[30] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 4

[31] Phuong Pham, Patrick Vinck, Mychelle Balthazard and Sokhom Hean, 'After the First Trial. A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia' (Berkeley: Human Rights Center, University of California, June 2011)

[32] Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018) 120

[33] These results were reported by a study (in Spanish) including interviews with 72 victims as well as 62 victims' lawyers defending them before the IACtHR. Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 553 <https://www.iidh.ed.cr/IIDH/media/2120/dialogo_reparacion_tomo1.pdf> last accessed 15 April 2020

[34] *Inter alia*, Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time Has Passed' (2005) 38 Cornell International Law Journal 753; Antony Pemberton and Rianne Letschert, 'Justice as the Art of Muddling Through' in Chrisje Brants and Susanne Karstedt, *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation* (Bloomsbury Publishing, 2017); Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*

For instance, Jeremy Rabkin, in an article discussing international criminal justice characterized it as a vision that captivated the world for a brief moment in the 1990s but whose moment has passed. As Rabkin posits, international criminal justice "was always a dream. […] If global justice were something real, the victims of mass atrocities throughout the world would have powerful claims against it. In the real world, there is no global authority to be held accountable for the world's enduring miseries."[35] In addition, Antony Pemberton and Rianne Letschert characterized international criminal justice as being "remote justice, meted out by an 'international community' which may have positive connotations for many commentators, but whose actions in the experience of inhabitants of war-torn societies are most often characterized succinctly as 'too little, too late'".[36] Similar remarks have been made in regard to human rights institutions, with Makau Mutua positing that the realisation of human rights' ideals should strive for an understanding of conceptions of human rights within the societies subjected to tyrannies, a perspective currently missing from official human rights narratives.[37] Kieran McEvoy furthermore skilfully summarized common critiques against human rights and its institutions across literature, stressing their disconnect from the lived reality of victims and the political and social world permeating situations of (gross) human rights violations.[38]

Given the inclusion of reparations regimes within the international courts' mandates positing that reparations may repair the victims' harm and potentially deliver reparative justice and, on the other hand, the existent, although scarce, evidence pointing to shortcomings in the realisation of these courts' aspirations, this thesis set out to address this gap.[39] This thesis aims to assess in a systematic manner how international courts mandated to provide reparations may contribute to reparative justice for victims of international crimes and gross human rights violations through their reparations regimes. Given the courts' scarce elaboration on standards to assess the attainment of their aspirations to deliver reparative justice for victims, drawing on theories and victimological research, this thesis will first put forward a taxonomy on reparative justice. The taxonomy was developed to assess reparative justice for victims in the context of international courts mandated to provide reparations. Thereafter, this thesis will scrutinize and assess the practice on reparations of four international courts, emerging through the materialization of their reparations regimes in judicial cases.

In order to establish how each of the courts may contribute to reparative justice, this thesis will take account of:

(Martinus Nijhof Publishers, 2009) 57-58; Gary Bass, 'Reparations as a Noble Lie' in Melissa Williams, Rosemany Nagy and Jon Elster (eds), *Transitional Justice* (Nomos Li, 2012); Kieran McEvoy, 'Towards a Thicker Understanding of Transitional Justice' (2007) 4 Journal of Law and Society 411

[35] Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time Has Passed' (2005) 38 Cornell International Law Journal 753, 754

[36] Antony Pemberton and Rianne Letschert, 'Justice as the Art of Muddling Through' in Chrisje Brants and Susanne Karstedt, Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation (Bloomsbury Publishing, 2017) 32

[37] Makau Mutua, 'Savages, Victims, and Saviors' (2001) 42 Harvard International Law Journal 201, 205

[38] Kieran McEvoy, 'Towards a Thicker Understanding of Transitional Justice' (2007) 4 *Journal of Law and Society* 411, 418-420, 425; Similar critique has been echoed in regard to international criminal justice institutions, see Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 57-58

[39] Unless stated otherwise, throughout the thesis expressions such as 'this study', 'this thesis', 'this analysis', 'the present analysis', 'the current analysis', 'the present study', 'the present analysis' reflect my choice of wording to refer to the content, analysis, and findings pertaining to *this dissertation*.

1) the courts and their reparations regimes' normative underpinnings and historical development;
2) the reparations regimes' characteristics and the role of victims, as laid down in their legal bases and elaborated in practice; and
3) this study's taxonomy of reparative justice.

By taking into account these aspects, this thesis aims to enlarge the 'thin' understanding of law and courts and instead, highlight how elements external to law shape the courts' jurisprudence.[40] Ultimately, drawing on the robust assessments of each of the courts' practice, the thesis attempts to generalize how international courts mandated to provide reparations may contribute to reparative justice for victims, while also highlighting in a comparative manner the specifics of each court. In addition, in line with the aim to 'enlarge' the thin understanding of law and courts, the thesis will also touch upon how the courts' potential contribution can be explained. In doing so, it will highlight how elements internal and external to courts that emerge from the research may help explain the courts' potential contribution to reparative justice. Finally, this thesis will discuss several implications flowing from the research's findings. It will reflect on the notions which informed this thesis' theoretical framework, put forward recommendations for international courts to enhance their potential contribution to reparative justice as well as reflect on the suitability of including a reparations regime and aspirations of reparative justice within the mandate of international courts to respond to mass atrocities.

2. Research Question and Sub-Questions

The main research question guiding this research is:

How do international courts mandated to provide reparations potentially contribute to reparative justice for victims of international crimes and gross human rights violations through their reparations regimes and additionally, how can their potential contribution be explained?

By answering this research question, this thesis will bring a four-fold value to the existing scholarship. First, the study will put forward a taxonomy on reparative justice by means of reparations, drawing on theories and victimological research about the victims' perception of justice as they engage with judicial settings such as (international) courts. This is important amid a general lack of standards elaborated by international courts as to what amounts to justice for victims as well as different understandings attached to reparative justice across literature.[41] Second, given the abovementioned shortcomings concerning the courts' ability to realize their aspirations in relation to victims, this study will discuss how courts mandated to provide reparations to victims may contribute to reparative justice for victims. It will do so in a systematic and robust manner,[42] scrutinizing the courts' practice on reparations for international crimes and gross human rights violations. Third, by adopting a multi-court approach, in addition to the individual analyses establishing how each of the courts may contribute to reparative justice for victims through their reparations regimes, this study allows for a deeper reflection on how courts

[40] In line with Kieran McEvoy, 'Towards a Thicker Understanding of Transitional Justice' (2007) 4 Journal of Law and Society 411, 414

[41] This matter is elaborated further in chapter 2, section 1.2. Reparations and reparative justice for victims of mass atrocities.

[42] The use of the word 'systematic' refers to the methodology used, which will be elaborated in section 3 of this chapter. The use of the word 'robust' refers to the fact that this thesis aims to cover to a large extent the courts' entire practice on reparations since their establishment, bearing in mind caveats in regard to the ECtHR which features an impressive database of cases. The caveats are elaborated on in chapter 5, section 3.

may generally contribute to reparative justice through their reparations regime, while also showcasing in a comparative perspective similarities and differences across courts.[43] Finally, by adopting both an internal and external perspective to the study of courts and their reparations regimes,[44] this study will expand the understanding of courts and their potential contribution to reparative justice beyond a traditional approach.[45]

The constitutive elements of the research question will be elaborated upon below.

International courts mandated to provide reparations

In order to understand how international courts may contribute to reparative justice for victims of international crimes and gross human rights violations, this study aims to scrutinize the practice on reparations of four international courts mandated to provide reparations, namely, the ICC, the ECCC, the ECtHR, and the IACtHR.

The reason for choosing these four courts for the purpose of the current inquiry is three-fold:

First, these courts operate at the international level, which constitutes the focus of this thesis.[46] Second, all these international courts have the mandate to provide reparations to victims under their jurisdiction. More specifically, the choice for the courts operating under ICL, namely the ICC and the ECCC, is justified by the fact that they are amongst the few ICL-based courts that have the mandate to provide reparations to victims, as well as have developed their practice on reparations.[47] Similarly, the choice for the courts operating under IHRL, namely the ECtHR and the IACtHR is that they feature reparations mandates and have already developed their practice on reparations.[48] Third, in order to gain a comprehensive understanding of how international courts

[43] The existent studies researching the courts' work in relation to (reparative) justice to victims and their reparations regimes usually focus on one single court or on either ICL or IHRL-based courts. See e.g. Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge Research in International Law, 2014) focusing on the ICC; Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) focusing on the ECCC; Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) focusing on both the ICC and ECCC; Octavian Ichim, *Just Satisfaction under the European Convention on Human* Rights (Cambridge University Press, 2014) focusing on the ECtHR. To the author's knowledge, there are no studies adopting a multi-court approach to the study of reparative justice for victims and reparations in systematic manner.

[44] By adopting this approach, this research responds to criticism that the legal scholarship is dominated by a thin understanding of law, focusing only on 'the formal or instrumental aspects of a legal system'. Kieran McEvoy, 'Towards a Thicker Understanding of Transitional Justice' (2007) 4 Journal of Law and Society 411, 414

[45] See also section 3 below.

[46] To be precise, ECCC is a hybrid or international(ized) court, which came about as a result of negotiations between the UN and the Government of Cambodia. See 'Is the ECCC a Cambodian or an International Court?' (ECCC Website, 20 July 2017) <https://www.eccc.govkh/en/faq/eccc-cambodian-or-international-court> accessed 19 March 2020. While keeping in mind this legal characterization of ECCC, which is further explained in chapter 4 focusing on ECCC, this thesis' general use of the terms 'international courts' also includes ECCC. In addition, ECtHR and IACtHR are also known as regional human rights courts due to their regional focus on Europe and Americas, respectively. See Dinah Shelton, *Remedies in International Human Rights Law* (Third Edition, Oxford University Press, 2015)

[47] To the author's knowledge, the Extraordinary African Chambers is the only other ICL based court that includes a reparations regime, yet its jurisprudence involves only one case, rendering it unsuitable for the current research, which aims to build a more robust understanding of courts and their practice. See 'Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7June 1982 and 1 December 1990' (Human Rights Watch website, unofficial translation, 2 September 2013) <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> accessed 28 April 2020

[48] The African Court on Human and People's Rights is the only IHRL-based court left out of this analysis. Despite the fact that according to the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, the Court may "make appropriate orders to remedy the violation, including the payment of fair

may contribute to reparative justice for victims though their reparations regimes, it was necessary to include in the analysis both ICL and IHRL-based courts. Including both ICL and IHRL-based courts allows for a deeper reflection on how courts may generally contribute to reparative justice through their reparations regime, while also showcasing in a comparative perspective the similarities and differences across courts that pertain to their respective underlying legal frameworks.

Reparative justice

This study refers to reparative justice as justice afforded to victims by means of reparations. In addition, in order to study reparative justice in the context of international courts mandated to provide reparations, the current research developed a taxonomy on reparative justice for victims using the procedural justice and substantive justice dichotomy. This dichotomy appears a robust theoretical framework amid a rigorous body of research showing that procedural justice and substantive justice elements inform the victims' perception of justice in the context of judicial settings. Chapter two provides a detailed elaboration on the theoretical framework.

Victims

This thesis' understanding of 'victims' draws on definition set forth in 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 referred to as 'van Boven/Bassiouni Principles'), unless specified otherwise. Accordingly, victims are:[49]

> "*persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization*".

As such, this thesis' focus is on the courts' practice on reparations in relation to victims as defined above. Although the assessment of the ECtHR includes also a handful of inter-State cases, they are reviewed bearing in mind a focus on victims. In addition, this thesis' emphasis is on victims falling under the courts' jurisdiction and are entitled to receive reparations.

International crimes and gross human rights violations

In line with the generally agreed understanding in ICL, international crimes include the 'core crimes' of genocide, crimes against humanity, war crimes, and in some cases, the crime of

compensation or reparation" (article 27), its practice on gross human rights violations is underdeveloped and hence unsuitable for this research. See 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court On Human And Peoples' Rights' (African Court website, 25 January 2004) < https://www.african-court.org/en/images/Basic%20Documents/africancourt-humanrights.pdf> accessed 28 April 2020

[49] UNGA, 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, Res 60/147 (16 December 2005) para 8

aggression.[50] Consequently, this thesis adheres to this understanding of international crimes, all the while keeping in mind that the mandates of each of the international courts operating under the ICL's ambit might feature variations in their understanding of these core crimes. In addition, for the comparability of IHRL-based courts and their approaches to reparations with ICL-based courts, this thesis is focusing on violations of human rights comparable to international crimes, also known as 'gross human rights violations'. This thesis adheres to the understanding of gross human rights violations articulated by Theo van Boven. As such, the term 'gross' qualifies the term 'violations' and indicates the serious character of the violations while it is also related to the type of human rights that is being violated.[51] Additionally, the scope of gross human rights violations would be 'unduly circumscribed' if the notion were to be understood 'in a fixed and exhaustive sense' and as such, it may include a wide range of crimes,[52] as long as they are comparable to international crimes.[53] Finally, for brevity, this research may utilize the term 'mass atrocities' to jointly refer to international crimes and gross human rights violations.[54]

Reparations regimes

The international courts' reparations regimes are set forth in their respective founding Statutes and Rules of Procedure and entail the prerogatives bestowed upon victims in relation to reparations. More specifically, they entail prerogatives in relation to the process of obtaining reparations such as, for instance, the victims' opportunity to submit claims for reparations and prerogatives in relation to the actual reparations that victims may benefit from. However, as will be seen in each of the courts' chapters, the prerogatives bestowed upon victims vary on a court-by-court basis, depending on their underlying legal framework.

How can the courts' potential contribution be explained

For the purpose of this thesis, explaining the courts' potential contribution to reparative justice entails an inductive approach whereby what explains the courts' potential contribution emerges from the analysis of the courts' practice on reparations. As such, drawing on the analysis, the research will both attempt to provide a general understanding of what explains the courts' potential contribution while also putting forward in a comparative perspective the similarities and differences across courts.

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[50] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 2019) 23

[51] Theo van Boven, 'The United Nations 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' (2010) United Nations Audiovisual Library of International Law 1, 2

[52] As van Boven exemplified, gross human rights violations may include "genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender". Theo van Boven, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (2 July 1993) E/CN.4/Sub.2/1993/8, para. 13

[53] Theo van Boven, 'The United Nations 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' (2010) United Nations Audiovisual Library of International Law 1, 2

[54] The use of the term 'mass atrocities' draws inspiration from Marina Aksenova's conceptualization of international crimes and gross human rights violations as mass atrocities that shake the consciousness of humanity as a whole. 'Introduction: Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches to International Criminal Law' in Marina Aksenova, Elies van Sliedregt and Stephan Parmentier (eds), *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart Publishing, 2020) 5-6

In addition to the main research question, this thesis also features research sub-questions:

1. What is reparative justice by means of reparations and how can it be assessed in the context of international courts mandated to provide reparations?

In order to provide an answer to the main research question, it is important to put forward the theoretical basis of this study, namely to elaborate on the meaning of reparative justice by means of reparations and put forward the theoretical framework utilized in this thesis to assess it.

2. - 5. Taking into account the ICC's /ECCC's /ECtHR /IACtHR's reparations regime and its practice on reparations for international crimes, how does the Court potentially contribute to reparative justice for victims under its jurisdiction?

The core of this thesis are the individual chapters devoted to analyses of each of the courts' potential contribution to reparative justice for victims under their jurisdiction. As such, the same research sub-question features per each individual chapter, except that it is tailored to the specific court under scrutiny. For coherence and comparability reasons, each of the chapters entails an elaboration on the courts' reparations regime, analysis of their practice, and evaluation of their potential contribution to reparative justice. In addition, to put each of the courts into context, the chapters also feature short historical immersions highlighting how the courts came into existence and their normative approaches to victims and their rights. However, elements unique to a court may feature in a court's respective chapter if they appear to have a prominent role in relation to the reparations regime of a court (i.e. in the ICC chapter an additional section on 'justice for victims' in regard to reparations is included as it a narrative commonly linked to reparations in the ICC context).

3. Methodology

This research pertains to empirical legal scholarship due to its central preoccupation to study institutions and their procedures to obtain a better understanding of how they operate and what effects they have.[55] Consequently, it features a combination of research methods. To begin with, in order to put forward a coherent theory on reparative justice, this thesis employed an in-depth study of existing theories and victimological research at national and international level showcasing that procedural justice and substantive justice elements inform the victims' perception of justice in the context of judicial settings. These elements were further elaborated upon to highlight their implications for victims (i.e. how they may contribute to reparative justice for victims).

Furthermore, systematic content analysis of each of the courts' practice on reparations was central to the assessment of international courts' potential contribution to reparative justice by means of reparations regimes. Unlike doctrinal analysis of the courts' jurisprudence which centers on a handful of judicial cases to illustrate a certain issue, systematic content analysis entails a systematic selection and analysis of the cases and documents.[56] This method brings the rigor of social science

[55] See Jan M. Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing, 2012) 28
[56] Rachel Cahill-O'Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (Hart Publishing, 2020) 29

to the understanding of law, creating a distinctively legal form of empiricism.[57] As such, in a first step, relevant judicial cases (i.e. judgments) and documents pertaining to each of the courts were selected.[58] As a general rule, only judgments and documents available in the English language were selected; however, several documents in the French language were also included (in the ICC and the ECCC's analyses), given their sole availability in the French language. In a second step, the cases and documents were coded in Atlas.ti[59] using codes derived from the use of both deductive and inductive approaches. The use of Atlas.ti enabled a systematic coding of over 135 judgements and 150 other documents including legal representatives of victims' submissions, Trust Fund for Victims' submissions and Trial Days transcripts.[60] The codes that were utilized were primarily derived from the theoretical chapter and consisted in the elements which were found to inform the victims' perception of procedural justice (voice, information, interaction, length) and of substantive justice (tangible reparations that respond to victims' harm and preferences). Additional codes that appeared relevant to this study emerged from the judicial cases and documents, yet there were not accounted for in the theoretical chapter (i.e. emergent coding).[61] Moreover, to minimise bias and to ensure the reliability of the coding, this research carried out an inter-coder reliability check in regard to the first court scrutinized in this thesis (the ECCC). As such, in addition to the author of the thesis, two other researchers coded a set of judgments and documents, which led to further refinement of the codes utilized throughout this study.[62] In a third step, on the basis of the coding, observations in regard to each of the courts' practice on reparations were drawn, consisting in elucidation of how voice, information, interaction, length, and tangible reparations are materialized across each of the courts. Ultimately, each of the courts' potential contribution to reparative justice by means of their reparations regimes was established by evaluating these observations ('what is') in light of the courts' reparations regimes (established through a doctrinal approach to elicit 'what ought to be') and the previously established theoretical basis (captured in a taxonomy on reparative justice, which conceptualizes reparative justice as procedural justice and substantive justice).

Finally, in order to elaborate on how international courts may contribute to reparative justice for victims by means of their reparations regimes as well as how their potential contribution may be explained, this study brought together the findings across each of the courts' analyses but also considered them in a comparative perspective. While a fully-fledged comparative analysis between courts was beyond the goal of this study, not in the least because of the challenging character of such an endeavor,[63] this thesis considered comparatively the courts and their approaches in regard to a common denominator, namely, the courts' reparations regimes, their characteristics, and their potential contribution to reparative justice.

4. Limitations

[57] As articulated by Mark Hall and Ronald Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 63, 64

[58] The methodology employed to select judicial cases and documents is explained at large in chapters 3-6, devoted to each court.

[59] Atlas.ti is a software utilized in quantitative research.

[60] For a list with all the judgments and documents that have been coded and analysed see Annexes 1-4.

[61] See Maryam Salehijam, 'The Value of Systematic Content Analysis in Legal Research' (2018) 23 Tilburg Law Review 34

[62] It must be mentioned that it is not common for legal studies utilizing the systematic content analysis to address reliability, see Mark Hall and Ronald Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 63, 112

[63] The courts scrutinized in this study feature historical, legal, structural, jurisdictional characteristics that are unique to the courts, making a fully-fledged comparative analysis challenging. See also Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 1

This research features several limitations.

First, as explained, this thesis aims to assess the courts' potential contribution to reparative justice for victims relying on data emerging from the courts' practice on reparations and taking into account theories and victimological research. As such, this research remains at its core a theoretical endeavor and empirical studies scrutinizing the actual experience and perception of victims involved with these courts and their reparations regimes might yield different results. Moreover, while the author of this dissertation conducted the research with integrity and utmost respect for scientific rigor, she holds academic and professional training in law and victimology. In turn, this may have induced a certain understanding and vision on victims and their rights, which may have had an impact on the choices and perspectives expressed throughout the study. To manage this limitation, the data and results of this dissertation were complemented by results of existent empirical studies with victims, although as already acknowledged, there is a scarcity of such studies and their prime focus is on ICL-based courts. Importantly, this dissertation is part of a larger research project '*What's law got to do with it? Assessing the contribution of international law to repairing harm*', made possible through a VIDI grant awarded by the Netherlands Organisation for Scientific Research (NWO) to Professor Rianne Letschert. In addition to this dissertation, the larger research project features four empirical studies with 60 victims each (30 beneficiaries and 30 non-beneficiaries of reparations awarded by each of the courts) in the context of the international courts scrutinized in this thesis. Taking into account, on the one hand, the findings of this dissertation and on the other hand, the findings of these four empirical studies, the entire research project aims to provide an in-depth reflection on the contribution of international law to repairing harm. At the moment of writing this dissertation, the four empirical studies are still ongoing and as such, their findings could not be included herein.

Second, the assessment of each of the courts' practice on reparations is based on analysis of data coming from sources that are different across courts. Consequently, this renders the findings and analyses across chapters asymmetrical (this limitation is particularly important in view of a comparison across courts). While the analysis of judicial cases (i.e. judgments) is a constant across all the courts, the other documents analysed vary across courts, either due to the lack of (public) availability of comparable documents or because of language limitations. Detailed elaboration on the cases and documents specific to each courts is furthermore provided in the 'methodological considerations' section featuring across all chapters devoted to courts.

Third, as explained above, drawing on theories and victimological research, a taxonomy on reparative justice was developed whereby procedural justice was operationalized using four elements, namely voice, information, interaction, and the length of proceedings, whereas substantive justice was operationalized in terms of tangible reparations that respond to victims' preferences in regard to reparations. The choice for these elements and their implications for victims are elaborated at length in the theoretical framework chapter. In order to grasp the victims' preferences for reparations to assess whether the tangible reparations awarded by courts respond to them, this study relied on legal submissions primarily submitted by the victims' legal representatives (and at times legal submissions by other organs within a court's structure) on victims' behalf. While these documents may appear to be a reasonable source to grasp victims' preference since the legal representatives' function is to capture and represent victims' preferences, at the same time they may not be the best representation of the actual preferences of victims in

regard to reparations as they may be conscripted by the predefined patterns of legal submissions and the characteristics of reparations regimes underlying each of the courts.[64]

5. Structure

This thesis is divided into seven chapters.

The first two chapters constitute the methodological and theoretical configuration of the thesis. The current Chapter 1 aims to establish the initial parameters of this study, whereas Chapter 2 is dedicated to the theoretical framework underlying this thesis. The theoretical framework puts forward a robust theory on reparative justice, showcasing that procedural justice and substantive justice elements inform the victims' perception of justice in the context of judicial settings and discussing their potential implications for victims of international crimes and gross human rights violations.

Chapters 3 to 6 constitute the core of this thesis and consist in the application of the aforementioned theoretical basis to assess how four international courts may contribute to reparative justice for victims by means of their reparations regimes. As such, these four chapters focus on the ICC, the ECCC, the ECtHR, and the IACtHR. Each of these chapters include an introductory section setting the scene and providing the initial context of establishment of the courts, focusing on the courts' institutional evolution and their general approach to victims and their rights. The focus is then placed on the legal framework on reparations, elaborating on the travaux préparatoires establishing the *rationale* for the inclusion of a reparations regime within the mandate of courts, and the reparations regime of each of the courts. Drawing on the founding Statutes and Rules of Procedure of each of the courts, the section devoted to the reparations regime details the prerogatives statutorily bestowed upon victims in relation to reparations, including for instance the opportunity to express their preferences in relation to reparations or the types of reparations the victims may receive. Thereafter, the results of the case-law analyses are put forward, taking into account the reparations regimes of courts as well as the theoretical framework. The final section of each of the chapters brings together the entire chapter and elaborates on each of the courts' potential contribution to reparative justice for victims.

Chapter 7 is integrative and conclusive, as it elaborates on the international courts' potential contribution to reparative justice and on how this potential contribution can be explained. It also puts forward final implications of this study.

[64] The limitations inherent in the legal submissions and reparations regimes are discussed at length throughout the thesis, and in particular in chapter 7.

Chapter 2: International Courts and their Potential Contribution to Reparative Justice for Victims by Means of Reparations: a Theoretical Framework

The chapter aims to put forward the theoretical framework employed in this research to assess how four international courts, through their reparations regimes, may contribute to reparative justice for victims of mass atrocities. In doing so, the chapter will first clarify the meaning of reparations and reparative justice for victims of mass atrocities, starting from a general outlook on reparations as a justice reaction to mass atrocities, to their link to reparative justice for victims, and their conceptualization in the context of international courts. Then, it will elaborate upon the theoretical notions of procedural justice and substantive justice, employed in this research to conceptualize reparative justice by means of reparations in the context of international courts. Finally, the chapter will put forward a taxonomy on reparative justice, eliciting how procedural justice and substantive justice elements may amount to reparative justice for victims in the context of international courts mandated to provide reparations.

1. Clarifying the Meaning of Reparations and Reparative Justice for Victims of Mass Atrocities

1.1. Reparations as a Justice Reaction to Mass Atrocities

Mass atrocities involve what Immanuel Kant labelled as 'radical evil'.[65] They are offenses against human dignity so widespread, persistent and organized that mundane moral assessment seems inappropriate.[66] 'Wrong' appears too weak an adjective to describe actions that knowingly caused the deaths of more than 20 million people and the unimaginable suffering of millions more, as witnessed during Hitler's regime. Hannah Arendt described the Holocaust as a period marked by a total collapse of all established moral standards in public and private life.[67] She explained that mass atrocities, such as the Holocaust, transcend the realm of human affairs and the potentialities of human power, both of which they radically destroy wherever they make their appearance.[68] This apparent powerlessness in the face of 'radical evil' appears as a way of expressing the inadequacy of social evaluation, human justice, and our capacity to punish,[69] which in turn translates in a sense of difficulty in establishing some measure necessary to do justice to these experiences.[70] In addition, it reveals the difficulty to respond to such crimes with ordinary measures that are usually applied to ordinary crimes, and, as such, history indicates that "silence and impunity have been the norm rather than the exception".[71] Action informed by ordinary justice responses such as those that underpin national legal systems seems largely inadequate in the face of mass atrocities rife with mass violence and suffering, massive number of victims and perpetrators, crimes of political nature, and a decimated rule of law,[72] to highlight several complexities. As Scott Veitch

[65] As posited by Hannah Arendt, referring to Immanuel Kant's notion of 'radical evil'. In Hannah Arendt, *The origins of Totalitarianism* (A Harvest Book, 1985) 459
[66] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish, 2007) 8
[67] Elisabeth Young-Bruehl, *Why Arendt Matters* (Yale University Press, 2006) 200
[68] Elisabeth Young-Bruehl, *Why Arendt Matters* (Yale University Press, 2006) 102
[69] Carlos Santiago Nino, *Radical Evil on Trial* (Yale University Press, 1996) viii
[70] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish, 2007) 8
[71] Carlos Santiago Nino, *Radical Evil on Trial* (Yale University Press, 1996) viii and 3
[72] Stephan Parmentier, 'Transitional Justice' in William A. Schabas (ed), 'The Cambridge Companion to International Criminal Law' (Cambridge University Press, 2015) 56; Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H.

highlighted, trying to grapple with and give measure to such horrors seems to do them injustice: what balanced normative response could be made that would be proportionate to 'untold suffering'?[73] However, the victims of such crimes are forced to live with the mass atrocities' indelible consequences, which entail mass victimization and mass harm, at individual, collective and societal levels.[74] For the survivors, the crimes produce a rupture in the individuals' being, shattering even their most basic assumptions about life and world.[75] The victims are left with the task of incorporating their experience of the violation into their life stories, and crafting new understandings that include the traumatic event.[76] In addition, these crimes induce long-term trauma, which can play out for the rest of the victims' lives as well as be passed on to the new generations.[77]

However challenging it may be to develop a response to mass atrocities, experience shows that silence and inaction cannot constitute an answer either.[78] Illustrative of this challenge are discussions during the Claims Conference on Jewish Material Claims against Germany. Referring to the Holocaust survivors, Gideon Taylor, the executive vice president of the Claims Conference expressed that justice as such is impossible to achieve in the circumstances of mass atrocities.[79] Israel Singer, an important negotiator on the Jewish side, maintained that "you can't make the dead good again; […] we can only take a modicum of justice—a modicum of attempting to somehow right wrongs in a small way for those who are still alive."[80] When discussing what form the justice may take, he added, "At most, the justice we are doing is going to be very rough; if we are paying someone who worked for 58 months in conditions which should have killed them DM15.000, I would like to say it's a pittance and an insult, rather than being a good gesture".

Across time, reparations for victims have constituted a possible justice reaction to mass atrocities, alive to the limitation that they can never be adequate if measured against the depth of the wounds they attempt to repair.[81] To be precise, reparations as benefits bestowed upon victims of mass atrocities have started to feature more prominently in international law in the aftermath of the Second World War. Until the Second World War, traditional international law did not provide for a legal standing of individuals at the international level. In addition, within States' internal matters,

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Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339

[73] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish, 2007) 8-9

[74] Stephan Parmentier and Elmar Weitekamp, 'Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes' in Stephan Parmentier and Elmar Weitekamp (eds), *Crime and Human Rights* (Series in Sociology of Crime, Law and Deviance, vol 9, Emerald Group Publishing Limited, 2015) 118

[75] See Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), *Victimlogical Approaches to International Crimes: Africa* (Intersentia, 2011) 50; Margaret Urban Walker, *Moral Repair Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006) 18

[76] Marta Minow, *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence* (first edition, Beacon Press, 1999), 64, citing Robert Jay Lifton; Margaret Urban Walker, *Moral Repair Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006) 18

[77] See See Yael Danieli, 'Massive Trauma and the healing role of reparative justice' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 50

[78] Carlos Santiago Nino, *Radical Evil on Trial* (Yale University Press, 1996) 3; Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish, 2007) 8-9

[79] John Authers, 'Making Good Again: German Compensation for Forced and Slave Laborers' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 426

[80] John Authers, 'Making Good Again: German Compensation for Forced and Slave Laborers' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 439

[81] Gary Bass, 'Reparations as a Noble Lie' in Melissa S. Williams, Rosemany Nagy and Jon Elster (eds), *Transitional Justice* (Nomos Li, 2012) 171

the individuals were the exclusive prerogative of national law, and States – as sovereigns – were free under international law to treat their own citizens as they pleased. However, the magnitude of human victimization arising out of the First and Second World Wars derived essentially from the States' action, either intentional or negligent, led to the establishment of numerous international instruments, requiring States to enact domestic legislation to protect their citizens' human rights, which gradually fostered the recognition and development of the right to reparation.[82] With the advancement of international human rights law and the establishment of international and regional human rights systems of protection, and later on of transitional justice which specifically aims to deal with past atrocities,[83] the notion of a right to reparation of victims begun to solidify.[84] The existence of a victims' right to reparations was subsequently formalized at the international level through the development and adoption of legal instruments specifically dealing with reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law such as the van Boven/Bassiouni Principles and the 'Impunity Principles'.[85] The latest development in regard to the right to reparation for victims of mass atrocities is its incorporation within the ambit of international criminal law, through its inclusion in the mandates of relatively newly established international criminal courts.[86]

Amid the evolution and development of reparations, authors nowadays distinguish between reparations in the context of international law[87] - or juridical reparations[88] - and non-juridical

[82] See Mahmoud Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203, 209

[83] There is no one definition of transitional justice, as different authors use different definitions, conceptualizations, and periods of times to explain the advent, development, and meaning of transitional justice. See Stephan Parmentier, 'Transitional Justice' in William A. Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press, 2015) 53-54; However, transitional justice refers to the array of justice mechanisms, including reparations, adopted to deal with past atrocities. Lisa J. Laplante, 'Just Repair' (2015) 48 Cornell International Law Journal 1, 4. For two interesting analyses on the advent of transitional justice see Ruti Teitel, 'Transitional Justice Geneaology' (2003) 16 Harvard Human Rights Journal 69; Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321

[84] Theo van Boven, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (2 July 1993) E/CN.4/Sub.2/1993/8; Lisa J. Laplante, 'Just Repair' (2015) 48 Cornell International Law Journal 1, 13

[85] UNGA, 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, Res 60/147 (16 December 2005); UNCHR, Updated Set of Principles for the Prosecution and Promotion of Human Rights through Action to Combat Impunity, UN doc. E/CN.4/2005/102/Add. 1. Back in 1999 Christian Tomuschat criticized the UN Basic Principles for claiming the existence of an individual right of reparation under international law, however, the present days' jurisprudence of international courts indicates that such a right exists today. Christian Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: the Position under General International Law' in Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual—Reparation in Instances of Grave Violations of Human Rights* (The Hague, 1999) 173

[86] Stephan Parmentier, 'Transitional Justice' in William A. Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press, 2015) 65

[87] Reparations have been included in the International Law Commission's Draft Principles on State Responsibility, in International Humanitarian Law, International Human Rights Law, International Criminal Law, etc. For a detailed overview and analysis see Theo van Boven, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (2 July 1993) E/CN.4/Sub.2/1993/8; Richard M. Buxbaum, 'A Legal History of International Reparations' (2005) 23 Berkley Journal of International Law 314; See Mahmoud Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012); Liesbeth Zegveld, Remedies for Victims of Violations of IHL (2003) 85 IRRC 497; Reparations have also been provided in the context of The United Nations Compensation Commission , established by a UN Security Council Resolution, for direct loss and damage arising as a result of Iraq's unlawful invasion and occupation of Kuwait, see Emanuela-Chiara Gillard, 'Reparation for Violations of IHL' (2003) 85 IRRC 529, 541. Each of chapters devoted to the four courts under investigation consists in a thorough elaboration on how the right to reparations came to be incorporated within their mandates.

[88] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 452

reparations, referring to a second context wherein the concept of reparations developed and was employed.[89] Namely, in the design of administrative programs with massive coverage, such as national reparations programs[90] and in the context of Truth and Reconciliation Commissions.[91]

Depending on the use of reparations in the two contexts, reparations may pursue different aims and have different meanings. Reparations in the first context are conceived of as benefits geared towards redressing the various harms suffered as a consequence of certain crimes or breaches of State responsibility, whereas reparations in the second context aim to provide direct benefits to the victims of different types of violations, in the aftermath of conflicts or periods of political turmoil.[92] Furthermore, the meaning of reparations in the first context is tied to the specific aim pursued by the judicial setting in whose mandate reparations are incorporated, that is, the achievement of justice for individuals under jurisdiction, whereby the means of achieving justice, namely, the trial of isolated cases, has an impact on the concrete content of justice. However, in the second context, the reparations have to respond to a much wider and complex universe of victims, and those responsible for the design of reparations programs must employ methods and forms of reparation suitable to these circumstances.[93]

In what follows, this dissertation is concerned with reparations in the first context - i.e. juridical reparations - due to its focus on reparations in the context of international courts mandated to provide reparations. Consequently, it adheres to an understanding of reparations as benefits bestowed upon victims, which try to repair the harm suffered by victims as a consequence of mass atrocities. As elaborated across literature, proponents of reparations posit that by offering repair for the harm done, they are an essential means to provide justice for the benefit of individuals and

[89] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006); Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009)

[90] In this context, Pablo de Greiff makes reference to several national reparations programs, such as as, for instance the reparations programs implemented in Chile from 1990 to 2004 that target the victims of human rights violations committed during the military regime (1973-1990). Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 453; see also Elizabeth Lira, 'The Reparations Policy for Human Rights Violations in Chile', in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006). Other examples include reparations provided by Germany to compensate the Holocaust victims, in the context of Conference on Jewish Material Claims against Germany. For more information see Conference on Jewish Material Claims against Germany, 'History' <http://www.claimscon.org/about/history/> accessed 16 January 2020. Reparations have also been provided in the context of The United Nations Compensation Commission , established by a UN Security Council Resolution, for direct loss and damage arising as a result of Iraq's unlawful invasion and occupation of Kuwait, see Emanuela-Chiara Gillard, 'Reparation for Violations of IHL' (2003) 85 IRRC 529, 541

[91] For a detailed overview, see Priscilla B. Hayner, *Unspeakable Truths Transitional Justice and the Challenge of Truth Commissions* (Routledge, 2011) 163; Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 169-181

[92] In line with Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 452-453; See also Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 83-84

[93] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 454; see also Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009)

collective victims.[94] Moreover, reparations awards show that victims of mass atrocities are not without protection and that violations of their rights can be remedied through reparations.[95]

1.2. Reparations and Reparative Justice for Victims of Mass Atrocities

As becomes apparent, one important aspiration of reparations is to contribute to justice for the victims benefiting from reparations.[96] However, defining justice for victims in the aftermath of mass victimization is a daunting endeavor. The needs and wishes of victims in the aftermath of mass victimization may vary significantly, depending on the nature and consequences of victimization, the (cultural, social, political, economic, etc.) context in which the victims find themselves in, as well as the particular characteristics of victims (for instance, gender, age, education, financial situation, etc.). Additionally, needs may change over time.[97] Consequently, what informs justice for victims is a complex matter, which can take a needs-based approach,[98] a rights-based approach,[99] or an approach motivated by the intrinsic motivations of victims.[100]

In line with the reparations' aim to repair the harm suffered by victims,[101] there is currently an emerging literature linking reparations for victims of mass atrocities with the notion of 'reparative justice', attempting to address what victims seek, what their needs are,[102] and what may inform

[94] Theo van Boven, 'Victim-oriented Perspectives: Rights and Realities' in Thorsten Bonacker and Christoph Safferling (eds) *Victims of International Crimes: an Interdisciplinary Discourse* (Springer, 2013) 25; Gary Bass, 'Reparations as a Noble Lie' in Melissa S. Williams, Rosemany Nagy and Jon Elster (eds), *Transitional Justice* (Nomos Li, 2012) 176; Jo-Anne M. Wemmers, 'The Healing Role of Reparation' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014) 222

[95] Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731; Liesbeth Zegveld, Remedies for Victims of Violations of IHL (2003) 85 IRRC 497

[96] See e.g. Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 455

[97] For a detailed overview see research by Rianne Letschert and Stephan Partmentier showcasing through research in Cambodia, Bosnia and Serbia, and Northern Uganda that victims have a multitude of individual attitudes and needs in relation to justice. Rianne Letschert and Stephan Parmentier, 'Repairing the Impossible: Victimological Approaches to International Crimes' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on rights, transition and reconciliation* (Routledge Research, 2014) 218

[98] For instance, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power understands justice for victims as the "responsiveness of judicial and administrative processes to the needs of victims". UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution 40/34, 29 November 1985) para 6

[99] For instance, the EU Victims' rights Directive 2012/29/EU adopts a rights-based approach to justice for victims. As explained, this view departs from a needs-based, adopting a rights-based understanding of victimization. The victim is seen as wronged (i.e. her rights violated), not harmed; and as such, justice for victims is no longer owned to victims on the basis of their vulnerability, pressing needs and deservingness, but demanded, on the basis that the state should take seriously what it owes to the individuals living on its territory and their human rights. European Union Fundamental Rights Agency, 'Victims' Rights As Standards Of Criminal Justice: Justice for victims of violent crime, Part I' (2019) 17 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-justice-for-victims-of-violent-crime-part-1-standards_en.pdf > accessed 16 January 2020

[100] This approach values a bottom-up approach, which measures justice by the extent to which victims' preferences are taken into account and not imposed from the top. Heidy Rombouts, 'Importance and Difficulties of Victim-Based Research in Post-Conflict Societies' (2002) 10 European Journal of Crime, Criminal Law and Criminal Justice, 216

[101] Admittedly, particularly in times of transitions, multiple goals can be attached to reparations. For instance, Pablo de Greiff explains that "in transitional periods reparations seek […] to contribute (modestly) to the reconstitution or the constitution of a new political community. In this sense also, they are best thought of as part of a political project". Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 454. Another perspective on reparations centers on their potential to transform the societies where there are provided, as in fact, they do not only aim to redress the past harm but also to prevent future re-occurrence of crimes. See e.g. Luke Moffett, 'Transitional Justice and Reparations' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing, 2017) 382

[102] See e.g. Rianne Letschert and Stephan Parmentier, 'Repairing the Impossible: Victimological Approaches to International Crimes' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge Research, 2014) 218

their conceptions of justice in relation to reparations in the aftermath of mass crimes.[103] However, reparative justice as such is not a novel concept,[104] and on a theoretical level, different authors have attributed to it distinct normative meanings and goals. For instance, early day discussions around reparative justice emerged in the context of criminal sanctions for the offenders in the context of national criminal justice systems. They aimed to benefit the victims but centered on the offender, being viewed as a way to avoid more severe sanctions imposed by the victims.[105] Furthermore, reparative justice has been equated with restorative justice, viewed as a process that aims to repair the harm between an offender and victim through dialogue and negotiation among the major parties with a stake in the dispute.[106] In this perspective, the victims have a more central role in the process; however, the focus is on restoring the victim-offender relationship that was broken by the commission of a crime rather than on the victims, with reparations to the victims being one component of the process.[107] Another example concerns the understanding of reparative justice as corrective justice, which posits that reparative justice consists in cancelling out or reversing wrongful harms and bringing the victims to the situation prior to the commission of crimes.[108] However, in situations of mass victimization, this perspective on reparative justice is bound to result in what Margaret Urban Walker labelled as the 'impossibility argument'.[109] If reparative justice is achieved when the wrongful harms are reversed or cancelled out, then reparations are doomed to inadequacy, as it is impossible to turn back victims to the situation in which they were before the atrocity took place.[110] While corrective justice remains an important principle in the reparations discourse,[111] it is generally agreed that in situation of mass victimization and harm, equating reparative justice with corrective justice is a normative fallacy.[112]

Amid mass atrocities and historical injustices around the world, the advent of transitional justice to come to terms with these injustices, as well as the increased concern for the plight of victims of such crimes,[113] new understandings of reparative justice emerged, which center on reparations for

[103] See Luke Moffett, Justice for Victims before the International Criminal Court (Routledge Research in International Law, 2014)
[104] See Elmar Weitekamp, who explained how the idea of reparative justice dates back to primitive societies, only to be revived around the 1970s, with discussions concerning the criminal justice's focus on punishment, rather than on a restitutive/reparative approach based within the community which is more humane, more just, and more beneficial to society and does not exclude the victim. Elmar Weitekamp, 'Reparative justice: Towards a Victim oriented system' (1993) 1 European Journal on Criminal Policy and Research 70
[105] Elmar Weitekamp, 'Reparative justice: Towards a Victim Oriented System' (1993) 1 European Journal on Criminal Policy and Research 70, 77
[106] Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice: From Philosophy to Practice* (Dartmouth, 2000) 5
[107] Jemima García-Godos, 'Victims in Focus: Review Essay' (2016) 10 International Journal of Transitional Justice 350, 355
[108] See Lisa J. Laplante, 'Just Repair' (2015) 48 Cornell International Law Journal 1, 34; Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotond (eds) *Theorizing Transitional Justice* (Ashgate, 2015) 211. Both of them make reference to Aristotel's conceptualization of corrective justice.
[109] This can also be the case in regard to individual forms of victimization, for instance, in the case of murder.
[110] Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotond (eds) *Theorizing Transitional Justice* (Ashgate, 2015), 212
[111] Restitution, which entails bringing back the victim to the situation before the victimization took place, remains the first type of possible forms of reparations to be awarded across all legal instruments on reparations. See e.g. International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentary' (United Nations, 2008), article 31; UNGA, 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 Res 60/147 (16 December 2005) para 19
[112] E.g. Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625; Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotond (eds) *Theorizing Transitional Justice* (Ashgate, 2015) 212
[113] See e.g. Ruti Teitel, *Humanity's law* (Oxford University Press, 2011); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998)

victims.[114] As Rama Mani put it, reparative justice consists in a centralization of reparations, as the origin and core of the need for justice in times of violent and brutalizing transition.[115] Furthermore, Rianne Letschert and Stephan Parmentier explained that reparative justice can be defined as justice aimed at repair.[116] Other authors, such as Margaret Urban Walker[117] and Mariana Goetz similarly conceptualized reparative justice as being attained through reparations.[118] As such, the current thesis will adopt this common trend across literature and consequently, for the remainder of the thesis, the reparations' potential contribution to justice for victims of mass atrocities is understood as reparative justice and is used interchangeably with 'reparative justice by means of reparations'. In addition, in line with other authors' understanding, reparative justice by means of reparations places the victims at its core, i.e. it is victim-centered, which means that it is attuned to the actual needs, perceptions, and desires of victims of mass atrocities in relation to reparations.[119]

However, affording reparative justice to victims of mass atrocities characterized by complex circumstances[120] entails significant challenges, some of which will be briefly reiterated here. As Rianne Letschert and Theo van Boven posited, there are at least three challenges that complicate reparative justice efforts.[121] The first challenge concerns the conceptualization of victimhood, i.e. defining who can be considered a victim. Outside pre-established legal frameworks that have certain definitions of victims, thousands or millions of people may consider themselves victims of mass atrocities as they may have suffered harm as a result of one form of victimization or another.[122] In the words of Mani, "conflict or repression is sometimes so widespread and traumatizing that the entire population is victimized and there is a need to redefine victims as the

[114] See e.g. Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011); Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 The International Journal of Transitional Justice 250; Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotond (eds) *Theorizing Transitional Justice* (Ashgate, 2015) 212.

[115] Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict,' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 79

[116] Rianne Letschert and Stephan Parmentier, 'Repairing the impossible: Victimological Approaches to International Crimes' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives On Rights, Transition And Reconciliation* (Routledge Research, 2014) 210

[117] Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotond (eds) *Theorizing Transitional Justice* (Ashgate, 2015) 212

[118] Mariana Goetz, 'Reparative Justice at the International Criminal Court? Best Practice or Tokenism?' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014) 5

[119] Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotond (eds) *Theorizing Transitional Justice* (Ashgate, 2015) 219; Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 The International Journal of Transitional Justice 250, 253; Jo-Anne M. Wemmers, 'The Healing Role of Reparation' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014) 231

[120] Stephan Parmentier, 'Transitional Justice' in William A. Schabas (ed), 'The Cambridge Companion to International Criminal Law' (Cambridge University Press, 2015) 56; Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339

[121] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 156

[122] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 Law and Contemporary Problems 235, 241

entire society".[123] Delimiting who can be considered a victim in situations of mass atrocities and on the basis of what criteria (e.g. harm, needs, etc.) is a complex endeavor, which necessitates that difficult choices are made.[124] An additional complexity consists in the fact that in situations of mass atrocities it is not as easy to delineate victims from perpetrators, as throughout conflicts groups and individuals may switch roles across time; "a victim one day might turn perpetrator the next in a perceived struggle for survival".[125] To complicate matters further, those that may be considered victims may have their own (political) interests, which may not fit well with conceptions of victims held by certain mechanisms that attempt to provide reparative justice to victims and may lead to their exclusion as beneficiaries of reparative justice.[126]

Connected to the first challenges is a second challenge, relating to the type of reparations necessary to materialize reparative justice and respond to the victims' harm, i.e. individual reparations, collective reparations or both. As Rianne Letschert and Theo van Boven put it, the conundrum lies in how to navigate, on the one hand, the legal and moral consideration to make reparations complete and inclusive with respect to all victims, and on the other hand where to draw lines of demarcation in view of the large number of victims and the massive harm.[127] The appeal of reparations provided on an individual basis is that they take into account and respond to the individual nature of the violations that victims experienced and the ensuing harm,[128] while collective reparations are conferred onto collectives and aim to undo the collective harm that was caused as a consequence of crimes.[129] In situations of mass atrocities, providing individual reparations may be difficult, if not impossible, taking into account the magniture of harm, especially when directed at a large class of victims and in societies transitioning to democracy, the challenges in conceptualizing victimhood as expressed above, and the financial efforts that such an endeavor might entail.[130] As Pablo de Greiff put it, efforts to redress victims on a case-by-case basis are overwhelmed when the crimes cease to be the exception and become all too frequent.[131] On the other hand, a purely collective approach to reparations comes with its own difficulties, including the risk of subordinating the harm and needs of individuals to those of collectivities, and

[123] Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict,' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 68

[124] See also Vincent Druliolle, Roddy Brett, 'Introduction: Understanding the Construction of Victimhood and the Evolving Role of Victims in Transitional Justice and Peacebuilding' in Vincent Druliolle, Roddy Brett (eds), *The Politics of Victimhood in Post-conflict Societies: Comparative and Analytical Perspective* (Palgrave Macmillan, 2018) 5.

[125] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 165

[126] For an interesting discussion, see e.g. Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 Law and Contemporary Problems 235, 261

[127] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 166

[128] See e.g. Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009) 187

[129] As per Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731

[130] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 169

[131] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 454

failing to acknowledge the divergences between individual and collective psychological processes.[132]

Finally, the third challenge refers to the dynamics between reparations and development programs that aim to create conditions for all people to develop their fullest possible range of capabilities.[133] Given the scarce resources and capacity of States in the aftermath of mass atrocities, one challenge facing the States is whether to provide reparations or to invest in development programs that are beneficial to more people and would provide broader benefits to the society as a whole. While the idea of development programs is appealing, as it would bypass the agonizing issues of establishing the responsibility of perpetrators as well as determination of who is a victim,[134] the rationale of reparations is that that they aim to acknowledge and provide atonement, however small, for the harm suffered by victims. At a societal level, the reparations represent a recognition of the wrong done and the accompanying responsibility to make amends.[135] Failing to provide reparations could represent a denial of these potential effects and represent a tacit acquiescence of criminal behavior.[136] An alternative to the States' dilemma would be the provision of collective reparations focusing on development aid; however, this is also problematic as what is being passed as reparations, for example, basic social services should be provided by States to all citizens as an entitlement under human rights law.[137] Naomi Roht-Arriaza and Katharine Orlovsky explained the potential synergy between reparations and development programs, arguing that their respective effects may feed into each other. As argued, while providing reparations will never be large enough to make a difference on a macroeconomic scale, as development programs would do, they may affect development.[138] For instance, reparations may have positive effects on rebalancing power relations within families and in local communities and may unleash the energy and creativity of previously marginalized sectors (although this approach is not without perils as reparations may also fuel existing divisions).[139] At the same time, development programs may also contribute to an improved ability to provide reparations; for instance, efforts aimed at strengthening the capacity

[132] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 170

[133] Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009) 187

[134] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 177

[135] Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotond (eds) *Theorizing Transitional Justice* (Ashgate, 2015) 217

[136] Drawing on Dan Kahan, 'Social Meaning and the Economic Analysis of Crime' (1998) 27 Journal of Legal Studies 609, 615

[137] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 177

[138] Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009) 174

[139] Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009) 174; This vision on reparations ties into a current debate in literature regarding transformative reparations. See e.g. Brianne McGonigle Leyh, Julie Fraser, 'Transformative Reparations: Changing the Game or More of the Same?' (2019) 8 Cambridge International Law Journal 39

of the State in certain areas such as anticorruption or public administrative might make the State more effective in delivering reparations.[140]

As can be inferred, affording reparative justice for victims of mass atrocities entails complex challenges that need to be carefully navigated by those in charge with providing reparations to victims.

1.3. Reparations and Reparative Justice in the Context of International Courts

Despite defining the reparations' potential contribution to justice for victims of mass atrocities as reparative justice, there are different conceptualizations of reparations across literature, which in turn influence how reparative justice may be attained. For instance, Rama Mani differentiated between, on the one hand, reparations as a legal concept, which refers to repair through various measures such as compensation being provided to victims and, on the other hand, reparations as a psychoanalytical term, which consists in coming to terms with the crime and its consequences.[141] As Mani iterated, this double conceptualization of reparations is significant because repair in the psychoanalytical sense must occur both at individual and social levels but it can only take place fully when it is linked with reparations in the legal sense.[142] Consequently, Mani views the conceptualization of reparations as a starting point for the construction of reparative justice, which seeks to provide an integrated response to claims for justice in post-conflict situations. In addition, she considers reparative justice as a broader framework that aims to accommodate the various functions of justice vis-à-vis the offender, victims, and survivors, within the available means, resources and human requirements of a post-conflict society.[143]

In a different conceptualization, Anne Saris and Katherine Lofts put forward a perspective on reparations made up of three forms, namely, reparation-as-right, reparation-as-symbol, and reparation-as-process.[144] Reparation-as-right involves the victims' right to remedies, including access to justice; adequate, effective and prompt reparations for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Reparation-as-symbol refers to the symbolic meaning of certain forms of reparation and goes beyond individual victims' rights and interests as to represent strong social and community values. Finally, reparation-as-process places emphasis on role that reparations play in the complex transition out of a period of human rights violations, for individuals and for society. It promotes participation and

[140] Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009) 174

[141] In doing so, she draws on the work of Melanie Klein and David Becker and others. Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict,' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 71-72

[142] In doing so, she cites the work of David Becker and others. Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict,' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 71-72

[143] Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict,' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 75

[144] Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 79

empowerment, in particular with respect to victimized persons and groups and ultimately aims to achieve reconciliation and a fair and equitable share in reconstruction efforts.[145] As can be inferred, this perspective promotes a holistic approach to reparative justice which includes both the individuals and the society, and its realization requires the mobilization of a multitude of efforts.

The different conceptualizations put forward are useful to clearly delineate reparations and reparative justice for victims as employed in this thesis. Since the focus of this thesis is on reparations for victims provided in the context of international courts, which correspond to the courts' reparations regimes, the thesis adheres to a conceptualization of reparations before judicial bodies that is commonly posited across relevant literature.[146] As such, for the purpose of this thesis, reparations in the context of international courts are considered to encapsulate two separate dimensions: procedural and substantive. The first dimension refers to the process of accessing courts or adjudicative bodies, whereby claims for reparations are heard and decided usually during judicial proceedings. The second dimension refers to the outcome of the said judicial proceedings, which are the tangible reparations that the successful claimant is entitled to.[147] In other words, this thesis views reparations in the context of international courts as consisting in the process whereby reparations are provided and the outcome of the said process.

While viewing reparations in terms of process and outcome appears to correspond to a narrow perspective on reparations compared to the conceptualization of Mani and of Saris and Lofts, it does not, in and of itself, exclude a larger impact that these authors postulate. However, while these authors postulate a holistic vision of reparative justice, which may expand its benefits beyond victims and which requires the mobilization of a multitude of efforts, this thesis is solely concerned with how international courts may contribute to reparative justice for victims through their reparations regime. To achieve a holistic form of reparative justice in situations of mass atrocities, parallel efforts, both at the national and international levels, must be deployed as this goal cannot and should not be the sole responsibility of international courts.[148]

2. Procedural Justice - Substantive Justice Dichotomy to Assess the International Courts' Potential Contribution to Reparative Justice for Victims through their Reparations Regimes

As detailed in the previous section, on a theoretical level, reparations are conceived to contribute to reparative justice for victims. In addition, reparations awarded in the context of international courts, i.e. through their reparations regimes, entail the process whereby reparations are provided and the outcome of the said process. As such, in order to assess the courts' potential contribution to reparative justice for victims through their reparations regimes, the current research

[145] Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 86-87

[146] Theo van Boven, 'Victims' Rights to a Remedy and Reparation: the New United Nations Principles and Guidelines' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 22; See also Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 16; Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge Research in International Law, 2014)

[147] See e.g. Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge Research in International Law, 2014) 30-32

[148] See e.g. Carla Ferstman, Mariana Goetz, and Alan Stephens, 'Introduction' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 11-12

operationalized reparative justice for victims in terms of procedural justice and substantive justice. The choice for this operationalization is rooted in previous research showing that the victims' experience with the process and the outcome of court proceedings informs the victims' perceptions of procedural and substantive justice, respectively.[149] Since reparations in the context of international courts include both a process and an outcome,[150] it can be extrapolated that the process whereby reparations are provided and the outcome of this process inform the victims' perceptions of reparative justice, where reparative justice consists in procedural justice and substantive justice.

The following sections will introduce studies which, building on each other across time have shaped the present day understanding that the victims' experience of justice in the context of international courts is informed by both procedural justice and substantive justice indicators. First, the section will introduce the initial studies and findings of social psychologists investigating procedural justice and substantive justice in different settings. Then it will discuss how these findings have been transplanted to studies with victims of ordinary crimes and their experiences with legal authorities and then to studies with victims in the context of international courts. After having established the core theoretical concepts guiding this research, the final section will put forward a taxonomy eliciting what might amount to reparative justice by means of reparations. In doing so, it will detail the content of the procedural and substantive justice elements that inform it and showcase their importance and potential implications for victims.

2.1. Procedural Justice and Substantive Justice as Indicators of Justice

Essential in understanding how reparations in the context of international courts may contribute to reparative justice for victims, operationalized as procedural justice and substantive justice, are previous studies showing that how individuals participating in court proceedings experience the procedures they were involved in (i.e. procedural justice) and the outcomes they receive (i.e. substantive justice) influence their perceptions of justice.[151] As conceptualized initially, procedural justice posits that the fairness of procedures and processes influence the attitudes and the behavior of those people involved with the procedure,[152] whereas substantive justice refers to the people' reactions to the outcome of a dispute or a resource allocation.[153] Nowadays, a plethora of victimological research shows that how courts proceed and how they treat victims is important to victims' sense of justice, which is made up of both procedural justice and substantive justice.[154]

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[149] E.g. Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988); Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996); Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012)

[150] See Theo van Boven, 'Victims' Rights to a Remedy and Reparation: the New United Nations Principles and Guidelines' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009)22; See also Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 16; Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge Research in International Law, 2014)

[151] E.g. Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996); Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 120; BrianneMcGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011)

[152] E.g. Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 54

[153] See e.g. Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988) 62

[154] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996); Jo-Anne Wemmers, 'Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims' (2009) 16 International Review of Victimology 211-222; Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions

Most of this victimological research draws on early studies in social psychology in non-legal dispute resolution contexts; nonetheless, in the words of Allan Lind and Tom Tyler, given the general interest in how procedures affect the behavior of those involved with legal institutions, legal procedures have appeared a natural locus for studying the psychology of procedural justice.[155] Similarly, given the present study's concern with understanding how reparations through international courts may contribute to reparative justice for victims, previous research on procedural justice and substantive justice is particularly enlightening to understand the processes and outcomes' relative importance to the victims' perception of reparative justice.

Initial empirical studies investigating the perceptions of justice of participants involved in procedures, including courts, focused almost exclusively on distributive justice - defined as whether participants were satisfied with case outcomes.[156] However, the line of research on procedural justice in legal settings and how experiences with a process and outcome influence people's perceptions of the fairness of dispute resolution's process and outcome started in mid 1970s, when social psychologists investigated the effects of adversary and inquisitorial procedures on the disputants' perception of the fairness of judgments in a laboratory adjudication.[157] Initial experimental studies were carried out by John Thibaut and Laurens Walker in 1975. They established that variation in the procedure has an effect on the disputants' attitude towards the procedure and that the method of reaching a decision, as well as the outcomes resulting from the decision are important in the disputants' determination of fairness and satisfaction with the decision.[158] Later on, John Thibaut and Laurens Walker, drawing on their previous empirical research, established a general theory on procedural justice applicable to legal processes.[159] One of the main points of their research was that procedures were viewed by participants in a process simply as a means to obtain fair outcomes (the self-interest model).[160] They found out that procedures matter to people because they ensure fair outcomes, but equally important, in order to maximize the outcomes, people want control over the process and control over the outcome. The former refers to the extent to which parties are given control over the content of the dispute, i.e. having a voice during the trial, whereas the latter refers to the extent to which parties are free to reject or accept the outcome. They argued that a procedural system designed to achieve outcomes that are perceived to be fair by the disputants will function best if process control is assigned to the disputants. They typically have more information than a third party (i.e. a Judge) does about their respective inputs and, therefore, can better plan the reporting of this information. Conversely, lacking direct knowledge of the feelings or intentions behind the disputants' claims, a third party must always consider the participants' experience from a normative perspective, grounded in the

of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 1, 16 International Criminal Law Review 31; Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 120; BrianneMcGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011) 47

[155] Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988) 61

[156] See Laurens Walker, Allan Lind and John Thibaut, 'The Relation between Procedural and Distributive Justice' (1979) 65 Virginia Law Review 1401

[157] Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988) 26-27. As reported, Thibaut and Walker studied did this by creating an experimental situation that placed the participants in apparent conflict over an alleged rule violation and that resolved the conflict using either an adversary or an inquisitorial hearing procedure.

[158] Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988) 29

[159] See John Thibaut and Laurens Walker, 'A Theory of Procedure' (1978) 66 California Law Review 541

[160] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 55

third party's own understanding.[161] In regard to substantive justice (i.e. distributive justice in Thibaut and Walker's definition) in the context of legal proceedings, the distribution of rewards is considered to be "fair, just, and equitable" when the ratio of the disputants' awards is equal to the ratio of their contribution.[162]

These initial studies by Thibaut and Walker were important, as they suggested that the opportunity to express one's opinions i.e. the chance to tell one's own side of the story is a potential factor in evaluating the experience of procedural justice. This finding has been consequently confirmed by various studies positing that the opportunity to express one's views and opinions before the decision is made enhanced the perception of procedural fairness; this created the so-called voice effect, according to which being allowed to express the voice was believed to increase the probability of either a favorable outcome or an equitable outcome.[163] However, Thibaut and Walker's studies have also spurred further research exploring procedural justice from other angles, including research into other criteria linked to the perception of procedural justice. Notable in this regard is work by Gerald Leventhal who provided his own contribution to theories on substantive justice and procedural justice. He also conceptualized the individuals' perception of outcomes as distributive justice and defined it as the individuals' beliefs that the outcome is fair and appropriate when rewards, punishments, or resources are distributed in accordance with certain criteria.[164] He further explained that these criteria include the matching of rewards proportional to contributions (as Thibaut and Walker's understanding above), matching rewards to needs, or dividing rewards equally.[165] In terms of procedural justice, he created a taxonomy of procedural justice made up of five criteria, which must be satisfied in order for the individuals involved to see the procedures as fair. They include representation – the concerns and viewpoints of individuals affected by the process should be taken into account throughout the proceedings; consistency across persons and time; bias suppression which means that decision making should be based on as much good information and informed opinion as possible; and correctability, which requires methods for modifying and reversing decisions made in the allocative process.[166] However, these theories developed by Leventhal were not specifically designed in a legal context, and as Leventhal himself explained, they are speculative amid a scarcity of research into what exactly defined procedural justice.[167] Nonetheless, this study constituted a source of inspiration for further empirical studies on procedural justice, which contributed to the development of more robust criteria for assessing procedural justice. To this end, additional important work was developed by Allan Lind and Tom Tyler, who looked for other ways to explain perceptions of procedural justice that did not involve the self-interest model supported by Thibaut and Walker. As such, they developed the group-value

[161] See John Thibaut and Laurens Walker, 'A Theory of Procedure' (1978) 66 California Law Review 541, 549
[162] John Thibaut and Laurens Walker, 'A Theory of Procedure' (1978) 66 California Law Review 541, 548; They define distributive justice drawing on previous research by John Stacey Adams who conceptualized the equity theory in a workplace setting.
[163] Allan Lind and Ruth Kanfer, 'Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments' (1990) 59 Journal of Personality and Social Psychology 952
[164] Gerald Leventhal, 'What Should be Done with Equity Theory?' in Kenneth Gergen, Martin Greenberg and Richard Willis (eds), *Social Exchange: Advances in Theory and Research* (Springer, 1980) 4
[165] Gerald Leventhal, 'What Should be Done with Equity Theory?' in Kenneth Gergen, Martin Greenberg and Richard Willis (eds), *Social Exchange: Advances in Theory and Research* (Springer, 1980) 5
[166] Gerald Leventhal, 'What Should be Done with Equity Theory?' in Kenneth Gergen, Martin Greenberg and Richard Willis (eds), *Social Exchange: Advances in Theory and Research* (Springer, 1980); Allan Lind, Susan Kurtz, Linda Musante, Laurens Walker, 'Procedure and outcome effects on reactions to adjudicated resolutions of conflicts of interest' (1980) 39 Journal of Personality and Social Psychology 643
[167] Gerald Leventhal, 'What Should be Done with Equity Theory?' in Kenneth Gergen, Martin Greenberg and Richard Willis (eds), *Social Exchange: Advances in Theory and Research* (Springer, 1980) 44

model, which places emphasis on the effects of values associated with group membership.[168] They argued that individuals evaluate procedures in terms of their implications for group values and for what they imply for how one is viewed by the group using the procedures.[169] Concretely, Lind and Tyler's research posited that procedural justice is valuable for its symbolic and informational function rather than its capacity to provide good outcomes (as previously found by Thibaut and Walker). They found out that the voice effect stems from the implication that those accorded an opportunity to present information are valued, their views are worthy of hearing, and consequently, procedures that accord people status in this way are viewed favorably, whatever their likely effects on the outcome of the procedure.[170]

Furthermore, Lind and Tyler, inspired by the previous work of Leventhal distinguished three factors which influence the people's assessment of fairness of procedures. They viewed the perceived fairness of procedural justice as valuable in itself and not dependent on the outcome, and developed three criteria that influence the people's perception of procedural justice.[171] The first criterion is information about standing or status recognition, which is communicated to people by the interpersonal quality of their treatment by those in a position of authority.[172] As Lind and Tyler explained, when a person is treated politely, with dignity, and when respect is shown for one's rights and opinions, feelings of positive social standing are enhanced.[173] In addition, they posit that trust and neutrality are two other types of relational concerns that affect procedural justice assessments. Trust refers to the people's perceptions that decision-making by authorities is done in a neutral matter, utilising facts, not opinions, in an effort to produce decisions of objectively high quality; whereas trust refers to beliefs about the intentions of the authority making the decisions, and whether the person believes that the authority can be trusted to behave fairly.[174]

Later on, more studies emerged in this field of research, positing that the people's assessment of procedural justice should also include the propriety of the authorities' behaviors, which led to the development of new criteria to assess the fairness of procedure.[175] Notable are contributions by Robert Bies and J. F. Moag who established the concept of interactional justice, different from procedural and substantive justice, to refer to the quality of interpersonal treatment that people

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[168] Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988) 231

[169] Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988) 233-234

[170] Allan Lind and Ruth Kanfer, 'Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments' (1990) 59 Journal of Personality and Social Psychology 952

[171] Tom R. Tyler and Allan Lind, 'A Relational Model of Authority in Groups' in Mark Zanna (ed), *Advances in Experimental Social Psychology* (Academic Press, 1992) 141. These three criteria have been developed by Tyler, following survey interviews with a random sample of the population of Chicago in 1984, including respondents who had had several experiences with different legal authorities, Tom Tyler, 'The psychology of procedural justice: A test of the group-value model' (1989) 57 Journal of Personality and Social Psychology 830

[172] Tom R. Tyler and Allan Lind, 'A Relational Model of Authority in Groups' in Mark Zanna (ed), *Advances in Experimental Social Psychology* (Academic Press, 1992) 141

[173] Tom R. Tyler and Allan Lind, 'A Relational Model of Authority in Groups' in Mark Zanna (ed), *Advances in Experimental Social Psychology* (Academic Press, 1992) 141

[174] Tom R. Tyler and Allan Lind, 'A Relational Model of Authority in Groups' in Mark Zanna (ed), *Advances in Experimental Social Psychology* (Academic Press, 1992) 142

[175] E.g. Robert Bies, 'Interactional (In)justice: the Sacred and the Profane' (2001) Advances in Organisational Studies 89, 93; Jason Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 Journal of Applied Psychology 386, 389. Robert Bies argues however that due to the fact that his theory on interactional justice has been elaborated in the context of decision making, interactional justice has been viewed – wrongly – as a category of procedural justice and not a separate type of justice.

receive during the enactment of procedures.[176] In subsequent studies, interactional justice was further broken down into interpersonal and informational justice.[177] For instance, Jason Colquitt, relying on all the previous research done on substantive justice, procedural justice and interactional justice, tried to understand the theoretical dimensionality of justice.[178] His findings are important as they show the different elements that inform the people's assessment of justice in the context of procedures. His results showed that justice is best conceptualized as four distinct dimensions: procedural justice, distributive justice, informational justice and interactional justice. According to his study, informational justice conveys both inclusion and trustworthiness by reducing secrecy and dishonesty, and refers to the manner of communication and quality of information provided by the authority figure who enacted the procedure.[179] Interactional justice is fostered when people are treated with respect, dignity, and sensitivity by the decision makers.[180] Overall, all these studies are relevant as they built on each other across time and converged to show that, in addition to the outcome, the quality of the procedures and the quality of the treatment experienced contribute to the people's overall sense of justice.[181]

2.2. Procedural Justice and Substantive Justice as Indicators of Justice for Victims of Crime in National and International Settings

Although some of the studies investigated above were carried out in legal settings, they have not focused specifically on victims of crime and hence, did not assess how victims of crime evaluate justice in the context of criminal justice proceedings. However, these initial studies into what informs the people's evaluation of outcome and process have constituted an important basis for subsequent research with victims of crime. As such, the current section will first focus on studies investigating how victims of crime evaluate justice in the context of national criminal justice proceedings, and then move on to what informs the victims' evaluation of justice in the context of international courts.

One important research with victims of crime in the criminal justice system was carried out by Jo-Anne Wemmers, who set out to investigate, amongst others, what it is about the legal procedure

[176] This study was carried out in organizational studies sphere, with a sample of 260 employees working in different banks in Pakistan. RJ Biesa and JF Moag, 'Interactional Justice: Communication Criteria of Fairness' in RJ Lewicki, BH Sheppard and MH Bazerman,(eds), *Research on Negotiations in Organizations* (JAI Press, 1986) 43-55

[177] Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 15

[178] Jason Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 Journal of Applied Psychology 386, 389. Colquitt carried out two separate studies in the field of organizational studies, one with Study 1 occurred in a university setting, and Study 2 occurred in a field setting using employees in an automobile parts manufacturing company.

[179] Jason Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 Journal of Applied Psychology 386, 389

[180] Jason Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 Journal of Applied Psychology 386

[181] Wemmers refers to these studies as a theoretical framework for her own work on procedural justice in victimological settings, reffered to later in the chapter. See Jo-Anne Wemmers, 'Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims' (2009) 16 International Review of Victimology 211, 215. In addition, it has to be acknowledged that the dependant variable utilized in many of the aforementioned studies was not always 'a sense of justice' but rather 'satisfaction' and 'fairness'.

that leads victims to consider it fair.[182] In conducting the research, Wemmers utilized the theoretical models on procedural justice elaborated upon in the section above (the self-interest model and the group-value model) and tested their applicability in relation to victims of ordinary crimes. As such, Wemmers' study found out that victims place greater importance on the process rather than on the outcome, preferring to focus on the process itself and the message it sends to them about their status in the group.[183] Wemmers concluded that two main factors determine a victim's assessment of a criminal justice procedure and perception of procedural justice. First, the neutrality of the decision making process, which should be free from bias, dishonesty and be based on accurate information, and second, respect, showcasing that victims want to be treated with dignity and respect, as well as be kept informed of the developments in their case.[184] According to her study, failure by authorities to respect the victims' wish to be informed was perceived by victims as a lack of interest in their plight.[185] Another clear finding of her study is that victims valued an opportunity to express their wishes as well as appreciated consideration of their wishes by the decision-maker.[186] It is unclear from her study though whether this was the case because the victims – through their voice – hope to influence the outcome of the decision or because it suggests that victims' wishes are worth listening to.[187]

Another interesting study was conducted by Malini Laxminarayan, who systematically reviewed 25 studies focused on victim satisfaction with criminal justice proceedings,[188] in order to understand which procedural and outcome preferences have been shown in the past to be associated with justice for victims.[189] In her study, Laxminarayan tested for previously introduced taxonomies in relation to procedure, namely, procedural justice, interactional justice and informational justice. In addition, she did not only measure whether the outcome is important to victims, but also, she operationalized the outcome using three indicators. Namely, retributive justice (whether the perpetrator's punishment was meted out in proportion to the harm committed), deterrence (whether the punishment can prevent future wrongdoing) and restorative justice (defined as monetary and symbolic measures to repair the victims' harm). Interestingly, the results of the study revealed that interpersonal treatment – i.e. whether victims are treated with respect and dignity - and the perceived fairness of the procedures were the highest predictors of the victims' perception of procedural justice. However, the results with regard to the victims' interest in receiving information about the cases were mixed, and voice was found unrelated to the victims' perception of procedural justice. In addition, Laxminarayan found out that the outcome of a decision is important to victims; specifically, her study showed that victims value if the decision has a retributive and deterrent effect, while the results in relation to the victims' perceptions of restorative justice were mixed.[190] However, one of the most important findings of Laxminarayan was that there are also other variables that may influence the perception of procedural justice and

[182] Wemmers' study is based on interviews with victims of felonies in The Netherlands, and included a sample of over 600 victims. Examining what procedural justice means to victims involved studying how victims are treated by the police and the prosecution. Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 105.
[183] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 202
[184] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 216
[185] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 208
[186] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 202
[187] Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 217
[188] The victims' evaluation of outcome and process focused on the victims' encounters with police, prosecutor, courts, and judges.
[189] Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 18
[190] Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 37

substantive justice, including age, mental health, education, etc., of the victims.[191] Another important finding was that differences among victims and their victimizations may warrant different procedural and outcome preferences.[192]

Assertions that justice for victims is comprised of both the procedural and substantive justice aspects have also been echoed in relation to victims of international crimes and gross human rights violations.[193] Some authors put forward normative theories of justice for victims, positing that for victims of international crimes, justice is both a means (procedural) and an end (substantive) to remedy their harm.[194] Other authors showed empirically that the victims' conception of justice in the context of international courts is dependent on both procedural justice and substantive justice.[195] In doing so, they similarly relied on the previous theories on procedural justice and substantive justice, referring to studies in social psychology and with victims in national criminal justice settings.[196] For instance, Rachel Killean carried out a revealing study, exploring through semi-structured interviews the perceptions of justice held by 27 victims participating as civil parties in trials 001 and 002 before the ECCC.[197] She assessed the victims' evaluation of procedural justice focusing on the quality of decision-making and the quality of interpersonal treatment.[198] The former refers to concepts such as neutrality and ethicality, consistency, and the correctability of decisions, while the latter incorporates dignity and respect, voice, representation and the provision of information.[199] The victims interviewed by Killean viewed as important the neutrality and ethicality of the ECCC, believing that the involvement of the UN staff in the ECCC would "deliver justice to victims and support and provide 'a model for the Cambodians'".[200] The additional factor of expediency relating to the length of proceedings, which Killean argued that may have been overlooked in previous procedural justice assessments, was reported as highly

[191] Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 38

[192] Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 186

[193] E.g. Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge Research in International Law, 2014); Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1; Jo-Anne M. Wemmers, 'Restoring justice for victims of crimes against humanity' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014)

[194] Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge Research in International Law, 2014) 37; Dinah Shelton has also posited that justice for victims is virtually synonymous with ensuring their right to an effective remedy in human rights law and distinguished remedies as including two concepts – procedural and substantive. Dinah Shelton, *Remedies in International Human Rights Law* (Third Edition, Oxford University Press, 2015) 7

[195] E.g. Jo-Anne M. Wemmers, 'Restoring Justice For Victims of Crimes Against Humanity' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014)

[196] See e.g. Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1; Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1; Rianne Letchert, 'Expert Report on the Views and Concerns of the Victims Participating at the Special Tribunal for Lebanon' (Maastricht University, August 2017) 24 <https://www.stl-tsl.org/crs/assets/Uploads/20170918_F3282_PUBLIC_PRV_A01_LRV_Req_Admis_Opin_Letschert_EN_LW_Web.pdf> accessed 25 May 2020

[197] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1

[198] In doing so, she drew, *inter alia*, on studies by Tyler, Leventhal and Wemmers (her study with victims in national criminal justice systems) referred above.

[199] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 5

[200] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 17

influential in the victims' satisfaction with the Court's work.[201] Furthermore, the victims interviewed viewed their opportunity to express their voice through participation in the trials as important to share their story and to represent the deceased relatives, although a smaller number of victims indicated that they did not wish to speak before the Court, but rather to listen to the proceedings. Very few interviewees expressed a wish for greater voice.[202] The victims also valued being treated with respect and provided with food and accommodation with the occasion of visiting the Court for testimony purposes.[203] In addition, the victims viewed information as very important, with many of the victims reporting frustration with the Court and their lawyers for failing to provide them with information for an extensive period of time.[204] In addition, in her research, Killean found out that while procedural justice considerations did appear to play a role in the victims' overall perceptions of justice, it was the outcome that victims primarily focused on and which influenced the most victims' perception of justice. This was particularly illustrative by the distress witnessed in the aftermath of *Case 001*'s judgment (when the accused person - Duch - did not initially receive a life imprisonment sentence) and the limited reparations, suggesting that procedural justice may do little to 'cushion' unpleasant outcomes.[205] Killean operationalized substantive justice in terms of truth, accountability, and reparations, and all three aspects appeared very important for the victims to see justice meted out.[206]

Similar research was carried out by researchers at Berkeley School of Law, focusing on 622 victims participating in cases at the ICC.[207] In the study, the researchers set out to understand how victims made sense of their ICC participation, relying on procedural justice[208] and substantive justice elements to grasp their experience.[209] In terms of procedural justice, the study revealed that for victims of international crimes, voice, neutrality, trust, and respect, were still relevant and salient aspects of procedural justice.[210] Importantly, it also revealed that, the victims' concerns over physical safety and lengthy judicial processes influenced the victims' evaluation of

[201] She attributed this fact to the nature of international trials, which take a long time, in comparison to their domestic counterparts. Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 18

[202] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 20

[203] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 20

[204] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 23

[205] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 32

[206]Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 25

[207] According to this study, these 622 people were registered as victim participants or had submitted applications for consideration as victim participants to the ICC and were awaiting responses. Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 9. Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1; Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 1

[208] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1; Similarly, they made reference to the studies in social pshychology and with victims in national criminal justice systems.

[209] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015)

[210] One caveat that must be acknowledged is that in the group-value model on which these aspects rely procedural justice is contingent on being a member of a group, while the process is a representation of the group's values. Given that for victims at the international level the group they belong to and which values underlie it are not clearly established, it is unclear whether the group-value model is as relevant to conceptualize procedural justice in the context of international courts.

procedural justice.[211] Interestingly, only few victims expressed their wish to participate directly in trial proceedings, with the overwhelming majority stating their wish to have the legal representative pass on to the Court their voice.[212] In terms of substantive justice, the study revealed that the outcome of the proceedings mattered to the victims, inasmuch as they stressed the importance of receiving tangible reparations and seeing the Court deliver convictions against the perpetrators.[213]

As can be noticed, extrapolating the findings of research in national settings to international legal proceedings may be perilous.[214] The most notable difference between victims in national and international settings is the clear emphasis on substantive justice by victims of international crimes. In situation of mass victimization such as those investigated before international courts, the reconstruction of lives of victims may be more dependent upon the outcome of cases,[215] with implications that procedural justice may not be as important substantive justice. As Laxminarayan hinted at, the experience of the victim of mass atrocities is different and the seriousness of the harm they have suffered undeniably calls foremost for a favorable outcome.[216] Similarly, Wemmers explained that an emphasis on the outcome for victims of international crimes can primarily be due to the severity of the harm done to them, and their continued struggle for survival.[217] However, she also mentioned that the outcome alone is not sufficient; how justice is done is also important.[218]

Against this background, the studies outlined above provide robust evidence to support the claim that the process (experienced by victims as procedural justice) and the outcome (experienced by victims as substantive justice) at stake in the materialization of reparations regimes might contribute to reparative justice for victims in the context of international courts. In addition, the applicability of the procedural justice-substantive justice dichotomy to the study of reparations in the context of international courts has already been endorsed by various scholars, albeit not in

[211] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 4

[212] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 3

[213] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 3

[214] The aforementioned studies carried out at the national level were done in certain cultural settings and importing these findings to the international level dealing with different cultures and sociaties must be done with caution. Stephen Cody and Alexa Koenig similarly posited that the findings of their research with victims of international crimes complicating long-standing theories of how procedural justice works and challenging existing conceptualizations of core procedural justice principles. Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 28

[215] For instance, a study with victims in the ECCC context revealed that the victims' priorities were jobs and services to meet basic needs, including health and food as well as improvements in the country's infrastructure, such as electricity, roads, and building of schools. Phuong Pham Patrick Vinck Mychelle Balthazard Sokhom Hean, A Population-Based Survey on Knowledge And Perception Of Justice And The Extraordinary Chambers In The Courts Of Cambodia (Berkeley: Human Rights Center, University Of California, 2011) 3. Another study of ICTY surveying victims experience of justice yielded similar results holding that while both procedures (neutrality) and outcomes (decisions) are important for victims of war crimes, for the victims in their study, the quality of decisions was more important than procedural justice. However, it is well known that victims had no formal role in the ICTY other than that of witness. The focus on the outcome may be due to their exclusion from the trial, i.e. procedure. See Sanja Kutnjak Ivkovich and John Haga, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (first edition, Oxford University Press, 2011)

[216] Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 181

[217] Jo-Anne M. Wemmers, 'The Healing Role of Reparation' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014) 228

[218] Jo-Anne M. Wemmers, 'The Healing Role of Reparation' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014) 226

empirical studies. Luke Moffett explained that both the process and outcome of reparations contribute to remedy the harm.[219] In addition, Yael Danieli argued that tangible outcomes are neither the sole component nor the only ultimate goal of the victims; instead, every step throughout the justice process – from the first encounter with the court until after the completion of the case – presents an opportunity for redress, healing, and justice.[220]

Consequently, the starting point of this research is the following. International courts might contribute to reparative justice for victims by means of their reparations regime if in the process victims may express their voice, are treated with respect and dignity, are provided with information in relation to their case, and have a timely resolution of their case as well as receive tangible reparations.

3. A Proposed Taxonomy of Reparative Justice to Assess the International Courts' Potential Contribution to Reparative Justice through their Reparations Regimes

As the sections above showed in a consistent manner, when victims seek justice in the context of international courts, it is possible to identify some common elements whose realization may contribute to justice for victims. However, international courts represent only one possible justice forum where victims can turn to, next to other national and international justice bodies.[221] As held above, the needs and wishes of victims of international crimes in the aftermath of mass victimization may vary significantly, depending on the nature and consequences of victimization, the (cultural, social, political, economic, etc.) context in which the victims find themselves in, as well as the particular characteristics of victims (for instance, gender, age, education, financial situation, etc.).[222] Consequently, what informs victims' perceptions of procedural justice and substantive justice may be different across contexts,[223] as well as across victims within a certain context,[224] and may change over time.

While bearing in mind these caveats and drawing on previous research in relation to procedural justice and substantive justice in social psychology and in victimology (both in national and international settings), this study proposes a taxonomy of reparative justice to study international courts' reparations regimes and their potential contribution to reparative justice. The taxonomy consists in elements pertaining to procedural justice (consisting in voice, information, interaction, and the length of proceedings) and substantive justice (outcome) which may potentially contribute to reparative justice for victims. The selection of these elements to assess procedural justice and

[219] Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge Research in International Law, 2014) 37.
[220] See Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 230
[221] Other options include Truth and Reconciliation Commissions, UN bodies, fora at the national level, informal justice mechanisms, etc. see e.g. research discussing gacaca courts in Rwanda Anne-Marie de Brouwer and Etienne Ruvebana, 'The Legacy of the Gacaca Courts in Rwanda: Survivors' Views' (2013) 13 International Criminal Law Review 937
[222] For a detailed overview see research by Rianne Letschert and Stephan Partmentier showcasing through research in Cambodia, Bosnia and Serbia, and Northern Uganda that victims have a multitude of individual attitudes and needs in relation to justice, and in addition, victims' attitudes and needs change over time. Rianne Letschert and Stephan Parmentier, 'Repairing the Impossible: Victimological Approaches to International Crimes' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge Research, 2014) 218
[223] Ezzat Fattah, 'Victimology: Past, Present and Future' (2009) 33 Criminology 29
[224] See research by Malini Laxminarayan, who specifically highlighted the heterogeneity of victims of crimes in both what concerns procedural justice and substantive justice evaluations. Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012)

substantive justice is informed, firstly, by previous research, which posits that these elements have been found to contribute to the victims' perception of procedural justice and substantive justice. The subsequent division into sub-elements, to the extent it exists, follows from the in-depth study of literature carried out to design the proposed taxonomy of reparative justice. As can be noticed, this study includes in its evaluation of procedural justice the element 'length of proceedings' amid empirical studies showing its apparent relevance in the victims' evaluation of their involvement with international courts.[225] In addition, the exclusion of the 'neutrality of decisions' as an element of procedural justice[226] is due to the fact that the data analysed in this thesis does not contain sufficient information to enable an inquiry into whether the courts' decisions have been perceived to be neutral. In addition, different studies have operationalized the outcome using different elements; however, they mainly focused on international criminal justice proceedings generally.[227] Since the current study is focused on reparations proceedings, their outcome consists in tangible reparations, whose meaning is elaborated below.

Before proceeding to discuss the elements pertaining to the victims' evaluation of procedural and substantive justice, one aspect which does not appear to feature as prominently across previous research reviewed in order to design this taxonomy of reparative justice, yet appears paramount is the victims' access to justice. Indeed, many of the studies which constitute the theoretical basis of this research either do not make reference to the matter of access to justice[228] or mention it briefly without elaborating on its meaning.[229] Nevertheless, the importance of victims' access to justice was demonstrated in empirical studies with victims at both national[230] and international levels,[231] and was furthermore recognized as an important legal principle.[232] Consequently, although it may not be deemed an element of procedural justice and substantive justice as such, access to justice appears to be a necessary precondition for unlocking all the potential benefits associated with procedural justice and substantive justice. As such, it will be included in the current assessment of the courts' potential contribution to reparative justice. As to its meaning, while having access to

[225] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 18; Rianne Letschert, 'Expert Report on the Views and Concerns of the Victims Participating at the Special Tribunal for Lebanon' (Maastricht University, August 2017) 30

[226] As per Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1

[227] E.g. Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge Research in International Law, 2014) 35; Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1; Jo-Anne Wemmers, 'Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims' (2009) 16 International Review of Victimology 211, 224

[228] E.g. Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988); Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996); Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012); Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 18

[229] E.g. Jo-Anne Wemmers, 'Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims' (2009) 16 International Review of Victimology 211, 224

[230] See e.g. Malini Laxminarayan, 'Measuring Crime Victims' Pathways to Justice: Developing Indicators for Costs and Quality of Access to Justice' (2010) 23 Acta Criminologica - Southern African Journal of Criminology 61, 62

[231] For instance, lack of knowledge regarding the existence of international courts, as demonstrated by several studies might be an impediment to the victims' access to justice. See e.g. Living With Fear: A Population-based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo' (Human Rights Center, Payson Center for International Development and International Center for Transitional Justice, August 2008)

[232] In international law, it was the 1985 Victims' Rights Declarations that codidfied and provided recognized to a victims' right to access to justice. UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution 40/34, 29 November 1985) paras 4-7

justice may have different connotations,[233] in regard to the victims' access to justice it refers to not being hampered by several barriers, including of financial, knowledge-related, or legal nature[234] in gaining access to and having the case adjudicated by courts or adjudicative bodies.[235]

In what follows, the next sections will introduce each of the elements that are considered to inform the victims' perceptions of procedural justice and substantive justice and discuss their potential implications for victims of mass atrocities.

3.1. Procedural justice

3.1.1. Voice

Initially developed within social psychology and then imported to victimology, the concept of 'voice' refers to the opportunity to express one's views, concerns, and opinions before a decision is taken.[236] In the context of international courts providing reparations, the victims' voice refers to their opportunity to express their views, concerns, and opinions in the context of reparations proceedings that concern them.

As the psychoanalyst Dori Laub explained, referring to survivors of Holocaust,[237]

"*[S]urvivors did not only need to survive so that they could tell their story; they also needed to tell their story in order to survive. There is, in each survivor, an imperative need to tell and thus to come to know one's story, unimpeded by ghost of the past against which one has to protect oneself*".

It is asserted that some victims of mass atrocities have an urge to tell their stories, to give an account of their experiences for various reasons, including the urge to remove the pain, to celebrate the memories of those who did not make it, or to ensure, through imparting experiences that the crimes would not be committed again.[238] Viewed this way, judicial proceedings might have a symbolic importance for the victims, inasmuch as they constitute a forum that enables victims to voice out their stories.[239] Teresa Godwin Phelps provided an interesting addition to this point,

[233] See e.g. Francesco Francioni discussing access to justice as human right and asserting that the term 'access to justice' has acquired a variety of meanings. Francesco Francioni, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press, 2007) 64

[234] Bariers of financial nature might include the impossibily of victims to pay for a lawyer to represent them during proceedings, bear the costs of coming to hearings, or taking a day off work to participate in court hearings (this also have a time element, which the victims would be required to spend). Barries of knowledge-related nature might refer to the victims' lack of knowledge regarding the existence of their rights, whereas barriers of legal nature include what has been refered to earlier as a challenge of reparative justice whereas who is a victim might be subjected to procedural conditions (and conceptions of victimhood) set forth by relevant judicial bodies.

[235] For an interesting elaboration on how focus on access to justice started to develop within the (international) legal ambit and potential barrier see Garth Bryant and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181, 186-292

[236] Allan Lind and Ruth Kanfer, 'Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments' (1990) 59 Journal of Personality and Social Psychology 952

[237] Dori Laub, 'The Event without a Witness: Truth, Testimony and Survival' in Shoshana Felman and Dori Laub (eds), *Testimony: Crises of Witnessing in Literature, Phsycoanalysis, and History* (Routledge, 1992) 78

[238] Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate Publishing Limited, 2007) 27

[239] It must be admitted that providing victims a voice in the context of international courts rarely amounts to the opportunity to convey their story. Rather the apropriate form to convey voice depends on the procedural rules imposed by the legal framework of

referring to victims expressing their voice in the context of the Truth and Reconciliation Commission in South Africa, which enabled victims to tell their stories at large in front of extensive audiences. She explained that the hearings gave victims the opportunity and the public avenue to tell to the unknowing world how things really unfolded.[240] As Phelps put it, the hearings were a public enactment of a radical kind of justice, one that returns dignity to the victims who have undergone harm, giving them back the power to speak in their own words and to shape the experience of violence into a coherent story, thereby allowing for a renewed (or new) sense of autonomy and sense of control over their lives.[241] As such, the victims' opportunity to express their voice may enable them to tell the world about their victimization as well as may attend to their intrinsic motivations to do so.

Admittedly, the victims' experience of expressing their voice in the context of a Truth and Reconciliation Commission may vary from that in an international trial, not in the least because of the more open-ended structure of a Truth and Reconciliation Commission as opposed to stricter procedural requirements of trials.[242] Nonetheless, different empirical studies in the context of international courts similarly show that to the extent that some victims want to express their voice, they may do so in order to satisfy different motivations. They include the need to tell one's story, to remember the deceased family members, [243] or to feel that their voice is heard and suffering known.[244] A powerful account of the importance of expressing victims' voice – through oral testimony as witnesses during the Nuremberg trials - was captured by Annette Wieviorka, who referred to its political and social significance:

"*The [surviving] witnesses told their own stories and that is what gave weight to their words. The extraordinary force their words acquired can also be attributed to the place where they were pronounced, which gave them a political and social significance no book could confer. Their political dimension lays in the fact that the state, represented by the prosecution underwrote their testimony and thus lent it all the weight of the state's legitimacy and institutional and symbolic power. The witnesses' words attained a social dimension because they were uttered before judges whose responsibility it was to acknowledge the truth they contained and because they were relayed to the world media as a whole. For the first time since the end of the war, the witnesses had the feeling that they were being heard*".[245]

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the respective court. In addition, whether (international) courts are necessarily a good forum for victims to express their voice and convey stories has been subject to criticism. See e.g. Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 331-336; see also Judith Lewis Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16 Journal of Traumatic Stress 159

[240] Teresa Godwin Phelps, *Shattered Voices Language, Violence, and the Work of Truth Commissions* (University of Pennsylvania Press, 2006) 111

[241] Teresa Godwin Phelps, *Shattered Voices Language, Violence, and the Work of Truth Commissions* (University of Pennsylvania Press, 2006) 111; However, Sandra Young warned against such a positive appraisal in that for some people, the act of testifying proved traumatic, while for others it 'openeded those wounds'. Sandra Young, 'Narrative and Healing in the Hearings of the South African Truth and Reconciliation Commission' (2004) 27 Biography 145, 152

[242] Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 331

[243] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 522; Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 19-20

[244] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 33

[245] Annette Wieviorka, *The Era Of The Witness* (Cornell University Press Ithaca And London, 1998) 84

Furthermore, as Antony Pemberton et al. posited, by being subjected to mass victimization, victims are placed outside the moral sphere of perpetrators – States or individuals – and become mere objects in the eyes of perpetrators.[246] Providing the victims the opportunity to express their voice within a trial entails an official acknowledgement that they were indeed victims and that what happened to them was criminal.[247] Absent an acknowledgment of the serious wrong perpetrated against the victims and concern for the suffering and loss of victims, victims and their families can become ravaged by bitterness or despair.[248] Not being acknowledged may entrap one to the so-called 'ethical loneliness'. It refers to the condition of people who have suffered injustice at the hands of individuals or political structures, who emerge from that injustice only to realize that the surrounding world will not listen to or cannot properly hear their testimony - their claims about what they suffered and about what is now owed them - on their own terms.[249] Nonetheless, it appears that not only expressing one's voice is important, but also, the act has to be matched by 'hearing.' For hearing to be meaningful, "it has to be embedded in an openness where what is said might be heard even if it threatens to break the order of the known world for those who listen".[250] As Jamie O'Connell argued referring to Judges at the ICC, by listening carefully, they can implicitly affirm the victims' understanding of what happened, and help repair their confidence in their own judgment.[251]

As illustrated, providing victims with the opportunity to express their voice in the context of international courts can have positive implications for victims for a number of reasons. International courts can constitute a forum that enables victims to recount their stories, attend to the intrinsic motivations of victims for expressing their voice, and provide acknowledgment of the suffering and harm incurred upon them. However, in the context of international courts the opportunity for the victims to express their voice is linked with the legal concept of victim participation.[252] As such, there are different modalities whereby victims can participate and express their voice within proceedings in the context of international courts. They include oral testimony before a court in their role as victims or as victims-witness,[253] submission of written

[246] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 351

[247] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 359

[248] Margaret Urban Walker, *Moral Repair Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006) 108

[249] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 1

[250] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 80

[251] Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 343

[252] See e.g. Fiona McKay, 'Victim Participation in Proceedings before the International Criminal Court, Human Rights' (2008) 15 Human Rights Brief 1; Elisabeth Baumgartner, 'Aspects of Victim Paticipation in the Proceedings of the International Criminal Court' (2008) 90 IRRC 409

[253] Depending on the courts, victims may either provide oral testimonies in their role as victims or as victims-witnesses. There are important differences between the two roles. One difference is that in their role as victims, the oral testimony aims to capture the victims' own interests and concerns and it is up to the victims to decide what to say. Whereas in the role of victims-witness, the oral testimony serves the interests of the court and the party that calls them to testify, and furthermore consists in testifying and answering questions. As such, strictly speaking, the participation as victims-witness might create more distress especially during the questioning stage. In addition, the oral testimony cannot be considered as amounting to telling a story, as the details of the story are filtered according to the questions. For an elaboration on differences see ICC, 'Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court' 10 <www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> accessed 23 January 2020. Furthermore, in practice, the difference might not be as rigid, as for instance, ICTY, which in theory enabled victims to only provide oral testimonies as victim-witnesses, provided the victims with the opportunity (on an ad-hoc basis) to say something at the end of the testimony or even to give a victim impact statement as part of the sentencing process. See Kimi King, James Meernik, Sara Rubert, Tiago de Smit and

testimonies,[254] but most commonly, it involves the practice of legal representation, whereby a lawyer or legal representative passes on to the court the victims' voice.[255] As such, although providing victims with an opportunity to express their voice is on its face beneficial, the variations in the modalities through which voice can be expressed in the context of international courts may add nuances and adjustments to the benefits outlined above or may indeed diminish any benefits.

I. Voice through Oral Testimony

As already explained above, testifying before an international court is alleged to have important benefits for victims. For instance, Jonathan Doak posited that testifying before a court gives victims the chance to break their silence, instilling them with a sense of empowerment and control.[256] Payam Akhavan highlighted the symbolic function of testimony giving in the context of an international court specifically set up to sanction the crimes the victims suffered.[257] However, recent studies adopt a more critical approach to the benefits of oral testimony, with two important critiques focusing on the oral testimonies' alleged therapeutic benefits and the expectations oral testimonies raise.

In regard to the first one, scholars increasingly criticize the previously advocated beliefs that victims' testimony in the context of international courts helps victims find closure,[258] advances healing,[259] and acknowledges their suffering.[260] Pemberton et. al argued that the assertion that testifying brings about closure is not accurate, as recovery from severe trauma and grief is a lengthy process, to which the positive experience of testifying is at best minor, while in other cases it may prolong rather than reduce suffering.[261] Laurel Fletcher and Harvey Weinstein were also critical of the alleged healing benefits associated with testifying. Drawing on psychological literature, they posited that while catharsis may have short-term benefits for some victims, healing is a long-term process that involves significantly more than emotional abreaction.[262] Jill Stauffer attributed the assertions about the healing or closure-inducing power of testimony to anecdotes or 'hopeful thinking', arguing that they lack backing from empirical data.[263] O'Connell similarly posited that legal proceedings are not designed to help victims cope; they aim to determine legal liability that could impose penalties, challenging thus the extent to which international courts can acknowledge

Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 51

[254] E.g. The submission of written testimonies or affidavits before the IACtHR, which enables victims to express their voice in writing, before a notary.

[255] E.g. The practice of legal representation is next to exclusive in the work of the ECtHR, with variations in the work of the ECCC, IACtHR, and ICC.

[256] Jonathan Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 International Criminal Law Review 263, 271

[257] Payam Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 Human Rights Quarterly 737, 766

[258] See e.g. Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2014) 12 Journal of International Criminal Justice 81, 84

[259] See e.g. Fiona McKay, Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture & Genocide (REDRESS, 1999) 15

[260] See Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573, 592, criticizing the so-called therapeutic benefits.

[261] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 360

[262] See Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573, 594.

[263] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 52-53

and alleviate the victims' suffering.[264] In regard to the second critique, several studies have highlighted that despite the oral testimonies' positive benefits they may have for the victims, an aspect that is overlooked is that providing oral testimony within the context of certain proceedings may raise the victims' expectations in regard to the outcome of the proceedings, including expectations of reparations, justice or reconciliation.[265] As Lisa Laplante and Kimberly Theidon warned, proceedings that employ oral testimonies must take into account this fact, and refrain from the 'use' of survivors to share their stories only to further interests unrelated to the victims' own healing. [266] Worse, by raising the victims' expectations and then leaving those unmet could result in negative consequences for the victims, including deception, neglect and helplessness.[267]

In the past years, several empirical studies with victims of international crimes who testified before international courts were conducted and new insights into the relative importance of oral testimony for victims emerged. The studies outlined below focus on the experience of testifying before the ICTY in their capacity as victims-witnesses. They are a robust source, due to the extensive number of victims who testified before the ICTY[268] and the amount of time elapsed since the ICTY first started its functioning in 1994, which enabled extensive research – in various points in time – to be carried out into the victims' experience of testifying.

Interestingly, these studies confirmed that for certain victims the experience of testifying might fulfil certain intrinsic motivations, such as enabling one to tell one's story, for one's own benefit and for the benefit of those deceased, or even for the benefit of future generations.[269] For instance, Eric Stover's 2005 study with 87 victims-witnesses who testified before the ICTY found out that most of the respondents expressed that they valued the opportunity to tell their story to the wider world and that featured prominently among their reasons for testifying. Especially for the relatives of the deceased, they perceived it as a moral duty to testify. Discussions about potential cathartic benefits indicated that although some of the victims experienced them, they often disappeared once the victims returned home.[270] Diane Orentlicher also conducted a study in 2010 on the impact of the ICTY in Bosnia, including interviews with victims-witnesses before the ICTY. She concluded in her study that the ICTY provided an inestimably important measure of justice for victims who testified in ICTY cases. She explained that testifying was deeply important for victims for various intrinsic reasons, of which the "core reason is moral, not instrumental, and it sifts down to a deeply

[264] Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 331

[265] E.g. Lisa Laplante and Kimberly Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29 Human Rights Quarterly 228, 240; Gearoid Millar, 'Performative Memory and Re-victimization: Truth-telling and Provocation in Sierra Leone' (2014) 8 Memory Studies 242. These two studies have noticed this occurrence in regard to oral testimonies in the context of empirical research in relation to the Truth and Reconciliation Commissions in Peru and Sierra Leone.

[266] Lisa Laplante and Kimberly Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29 Human Rights Quarterly 228, 241

[267] See e.g. Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573, 630

[268] For instance, Daniela Kravetz reported 4000 victims to have testified before ICTY. Daniela Kravetz, 'The Protection of Victims in War Crimes Trials' in Thorsten Bonacker, Christoph Safferling (eds) *Victims of International Crimes: an Interdisciplinary Discourse (Springer, 2013)* 150

[269] See Eric Stover, *The Witnesses War Crimes and the Promise of Justice in The Hague* (Pennsylvania Studies in Human Rights, 2005); Diane F. Orentlicher, That Someone Guilty Be Punished The Impact of the ICTY in Bosnia (Open Society Justice Initiative and International Center for Transitional Justice, 2010) 86; Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 50-51

[270] Eric Stover, *The Witnesses War Crimes and the Promise of Justice in The Hague* (Pennsylvania Studies in Human Rights, 2005)

felt need to bear witness for those who did not survive "ethnic cleansing."[271] Other insights into the victims' experience of testifying as victims-witnesses come from another extensive study carried out in 2016, looking into the long-term impact of bearing witness before the ICTY and involving 300 interviewees.[272] Interestingly, the study confirmed the generally positive benefits of testifying, however, it nuanced the findings by explaining that while providing oral testimony tends to be perceived more positive than negative, the process of testifying is more complicated than simple conclusions about whether bearing witness is ultimately an act of "re-traumatization" or "catharsis".[273] In addition, it also held that the victims' satisfaction with the oral testimony tended to depend on what he/she was expecting to gain from the experience.[274] As such, the study reported that for some of the victims giving oral testimony induced both physical and emotional reactions during the process of testifying, with one third reporting emotional distress.[275] In addition, for some of the victims the experience of testifying was painful; the testimony made some of the victims relieve the painful events, which in turn induced intense physical and emotional pain directly linked to injuries and experiences, and difficulty sleeping and eating.[276]

These empirical studies provided important insights into the importance of testifying for victims. Consequently, it appears that there is value for the victims in providing an oral testimony in the context of international courts, even as victims-witnesses, although the exact motivations and benefits will depend on each victim.[277] At the same time, providing voice though oral testimony is not positive across all victims and the importance of voice through oral testimony should be assessed taking into account certain caveats, including a critical assessment of the therapeutic benefits and attention to expectations they raise.

II. Voice through Written Testimony

Another modality of expressing the victims' voice is through written testimonies. Writing is known to be an important modality of expressing one's voice and story, as the literature on Holocaust is rife with testimonies of the survivors of the Nazi regime,[278] with the books of Primo Levi or Viktor Frankl being some of the most well known examples. As Alexandra Garbarini noted, referring to such publications as Primo Levi's trilogy of his Holocaust experience; their aim was to disperse skepticism about atrocity narratives and elicit sympathy among the reading public for the plight of victims of mass violence.[279] In addition, she acknowledged that the publication of written testimonies in the form of books was not an end in itself, as it was hoped that these volumes would

[271] Diane F. Orentlicher, That Someone Guilty Be Punished The Impact of the ICTY in Bosnia (Open Society Justice Initiative and International Center for Transitional Justice, 2010) 86
[272] Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 21
[273] Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 83
[274] Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 51
[275] Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 83
[276] Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 71
[277] Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012)
[278] See Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate Publishing Limited, 2007) 28
[279] Alexandra Garbarini, 'Document Volumes and the Status of Victim Testimony in the Era of the First World War and Its Aftermath' (2015) Études arméniennes contemporaines 113

generate knowledge and they would inspire people to act on behalf of victims.[280] In the context of international courts, written testimonies are far from free writing; they are typically provided through application forms that need to follow certain procedural requirements to be admitted as evidence in the context of a trial. As such, the importance of written testimonies might be dependent on their form; whether victims are allowed to recount their stories according to what they consider important[281] or whether they would need to merely mark fields on standard application forms that merely record facts. Nonetheless, providing the victims' voice through written testimonies might be of added value for the victims who do not want to express their voice by means of oral testimony, due to the emotional stress connected with the experience of testifying.[282] Recalling that for some victims telling their stories can be very important, written testimonies represent an opportunity for the victims to express themselves, their stories, and recount the harm suffered, albeit in a written form.[283]

III. Voice through Legal Representation

Finally, the most common modality for expressing the victims' voice within proceedings in the context of international courts is through legal representation of people identified as victims. In the context of international courts dealing with mass victimization, passing on to the Judges the voice of dozens, hundreds, and sometimes thousands of victims inevitably requires that victims are legally represented by a lawyer or legal representative. Reasons vary from the necessity of ensuring a fair and expeditious trial for the accused,[284] ensuring an "effective victim participation",[285] or a purely instrumental motivation, as advocated by former ICC Judge Christine Van den Wyngaert who expressed that "although theoretically possible for victims to appear individually, this would be totally impractical in view of the high number of victims".[286]

As such, for several reasons, the legal representation practice appears to constitute an important vehicle for passing on to the courts the victims' voice. First, it is argued that the legal representation practice is efficient to convey the victims' interests and voice to the court, as they are well versed in the intricacies of courts proceedings and the highly technical language utilized in these legal settings.[287] Second, legal representation is useful for passing on to the court the voice of those

[280] Alexandra Garbarini, 'Document Volumes and the Status of Victim Testimony in the Era of the First World War and Its Aftermath' (2015) Études arméniennes contemporaines 113

[281] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 1

[282] E.g. The long-term ICTY study discussed above; Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 83

[283] See also Naomi Roht-Arriaza, 'Punishment, Redress, and Pardon: Theoretical and Psychological Approaches' in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law And Practice* (Oxford University Press, 1995) 19

[284] For instance, enabling a large number of victims to testify might prolong unreasonably the trial, breaching the accused's right to an expeditious trial. See Salvatore Zappalà, 'The Rights of Victims *v* the Rights of the Accused' (2010) 8 Journal of International Criminal Justice 137. For instance, at the ECtHR level, once a case is considered admissible by the Court, the legal representation of victims is mandatory. ECtHR, 'Rules of the Court' (1 January 2020) <https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf> accessed 16 January 2020, rules 36 and 54

[285] See e.g. Assembly of States Parties, Report of the Court on the strategy in relation to victims (10 November 2009) ICC-ASP/8/45 paras 46-49; Emily Haslam, Rod Edmunds, 'Whose Number is it Anyway? Common Legal Representation, Consultations and the 'Statistical Victim'' (2017) 15 Journal of International Criminal Justice 931

[286] Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 480

[287] See, for instance, a study featuring interviews with lawyers representing victims before the ECtHR, discussing the challenges they encounter in translating the language of the Court to the victims, Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303; See also Rachel Killean and Luke Moffett, 'Victim Legal Representation before the ICC and ECCC' (2017) 15 Journal of

victims who view the experience of recounting painful events as too harmful,[288] or who are simply too traumatized to testify or indeed, to interact with the court.[289]

However, conveying the victims' voice through legal representation has also been contested on several grounds. One important debate across literature concerns the implications of legal representation for the victims' agency to define their interests as well as to voice out their preferences.[290] Kieran McEvoy and Kirsten McConnachie made a point that the practice of 'speaking for others' by means of legal representation blurs the voice of victims, referring to what Nils Christie described as the 'theft' of conflict by lawyers, highlighting the risk that the victims' voices are often picked out, appropriated and then re-presented to suit different aims in a trial.[291] For the victims who want to tell a story on their own terms and to reclaim themselves by means of her own stories,[292] having the legal representatives gain control over what gets across to the Judges might result in a weakening of the victims' agency.

Furthermore, a connected challenge echoed across literature concerns the extent to which the victims' voice and interests are put forward by the legal representatives amid the extensive number of victims each legal representative needs to represent, especially in cases of mass atrocities. It is hardly feasible for a handful of legal representatives (potentially assisted by legal assistants),[293] to capture and adequately pass on to the court the voice and interests of dozens of victims. As Sara Kendall and Sarah Nouwen expressed, the legal representatives engage in the process of re-producing the victims' voice, distilling generalizable 'interests', and making important choices over what gets passed on to the Judges.[294] While this is a limitation inherent in the practice of legal representation of victims in the context of international courts,[295] the consequence is that victims are unable to truly exercise agency and voice within courtrooms.[296] Having their story amalgamated with other stories and adjusted to fit the requirements of legal litigation does not sit

International Criminal Justice 713, 715 - they explain that "Legal representatives can be an appreciated source of information, serving as valuable translators of legalese and conveyers of victims' interests." Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court (2015) 26 Criminal Law Forum 255, 263

[288] Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 83

[289] See, for instance, Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' (2009) 22 Journal of Traumatic Stress 351, 354; Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) Social & Legal Studies 489, 499

[290] See Dianne Orentlicher, 'Settling Accounts Revisited: Reconciling Global Norms with Local Agency' (2007) 1 International Journal of Transitional Justice 10, 19. Although she refers to the victims' agency in relation to participation in national processes aimed at designing policies of transitional justice, I believe the idea is equally applicable here.

[291] Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) Social & Legal Studies 489, 495

[292] See Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 82

[293] The Legal Representatives for Victims could be assisted by some assistants; see Prosecutor v Ntaganda (Decision Concerning the Organisation of Common Legal Representation of Victims) ICC-01/04-02/06-160 (2 December 2013) paras 10 and 23

[294] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 Law and Contemporary Problems 235, 250

[295] Indeed, a lawyer advocating before the IACtHR expressed concern at the prodigious job of conveying her clients' voice to the Court. See Claudio Grossman,, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1422

[296] See also Rachel Killean and Luke Moffett, 'Victim Legal Representation before the ICC and ECCC' (2017) 15 Journal of International Criminal Justice 713, 717

well with the victims' agency over their story as well as the choice of words to tell their story.[297] Finally, the practice touches upon discussions over the extent to which the individual victims' needs are actually represented and put forward before the court, or merely subsumed to the needs of the collectives.[298] As explained above, the victimizing event places the victims outside the moral sphere, de-individualizing the victims and lumping them together in their subhuman or inhuman status.[299] The legal representation of a large number of victims runs the risk of failing to counter, if not perpetuate, the lack of the acknowledgement of the individuals' personal story and harm, which may otherwise contribute to their re-individualization.

3.1.2. Interaction

Another element that informs the victims' perception of procedural justice is 'interaction', which in organizational studies - where it was initially researched - refers to whether people are treated with respect, dignity, and sensitivity during the enactment of procedures.[300] In the context of international courts, interaction and its quality – whether victims are treated with respect, dignity, and sensitivity – are relevant throughout the court proceedings, which could include encounters with the Judges during oral testimonies but also interaction with other court actors, for instance, the legal representatives.[301]

Empirical studies with victims confirm the importance of interaction and its quality, both inside the courtroom and outside of it. For instance, a study with 144 victims-witnesses who testified before the Special Court for Sierra Leone found out that interaction inside the courtroom may make the victims feel respected and acknowledged, and in addition, it may enhance significantly the victims' experience of providing oral testimony.[302] Another study with 622 victims participating in ICC proceedings showed that for the victims interacting with court officials outside the courtroom, the frequency of interaction – e.g. how many times people from the Court, including their lawyers, visited them – influenced their feeling of being respected and supported. Conversely, infrequent visits and scarce interaction made victims feel disrespected, fearful, and hopeless.[303] Furthermore, there are other benefits associated with a quality interaction;[304] recalling that the victimizing event usually results in the de-humanisation of victims, a respectful and dignified treatment by court officials in the aftermath of victimization might help counter some of the

[297] See Teresa Godwin Phelps, *Shattered Voices Language, Violence, and the Work of Truth Commissions* (University of Pennsylvania Press, 2006) 111; this book is cited above, highlighting the value victims find in telling the story in their own terms.
[298] See, e.g., John D. Ciorciari, Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia (Law, Meaning, and Violence)* (University of Michigan Press, 2014) 221-222
[299] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 351
[300] Robert Bies and JF Moag, 'Interactional Justice: Communication Criteria of Fairness' in RJ Lewicki, BH Sheppard and MH Bazerman,(eds), *Research on Negotiations in Organizations* (JAI Press, 1986); Jason Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 Journal of Applied Psychology 386
[301] See also Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1
[302] Rebecca Horn, Simon Charters and Saleem Vahidy, 'The Victim-Witness Experience in the Special Court for Sierra Leone' (2009) 15 International Review of Victimology 277, 284
[303] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 35
[304] E.g. Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' (2009) 22 Journal of Traumatic Stress 351, 355

consequences of victimization.[305] In addition, a quality interaction may acknowledge the victims' story, assert the seriousness of the crimes, and express sympathy with the victims.[306]

Despite the importance of interaction and its quality for victims, research in the context of international courts has highlighted the sensitivity of the matter, with many victims being at risk of suffering secondary victimization in the context of court proceedings. [307] It must be recalled here that the victims interacting with court officials are victims who suffered massive harm, trauma, and might continue to suffer from different health conditions. As such, secondary victimization can ensue as a result of disrespectful treatment during the oral testimony,[308] as a result of admonishing the victim to stick to the facts relevant to the case rather than recounting what the victims want to recount,[309] or 'simply' as a result of the regular unfolding of the trial, which may contain questioning by the Judges, cross-examination, or even encounter with the accused.[310] While all these are risks usually encountered during the interaction in the context of an oral testimony, some of them are equally applicable during all types of interactions between court officials and the victims. As such, recalling that Marc Groenhuijsen argued that a bedrock principle of victims' procedural justice is 'do no further harm',[311] it is necessary for court officials to understand that interaction remains an important part of satisfying the needs of victims, but it must be handled carefully, without subjecting them to additional trauma.[312] More importantly, this principle should indeed prevail in all the instances of attempting to afford victims procedural justice, and cannot be limited only to interaction.

3.1.3. Information

The concept of 'information' as a criterion to inform the victims' perception of procedural justice was imported to the study of victimology from organizational studies. It refers to the manner of communication and quality of information provided by the authority figure who enacted the procedure.[313] In the context of international courts, information refers to the court's provision of

[305] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 352

[306] Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 343

[307] Victims may suffer secondary victimization as a result of treatment by court officials, which can include inappropriate attitudes, denial of their rights, etc. See Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15 Social Justice Research 313. For secondary victimisation of victims of international crimes see also Marc Groenhuijsen and Antony Pemberton, 'Genocide, Crimes against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011)

[308] For instance, Danieli gives an example of an ICTR judge who started laughing at the story of a victim of multiple rapes during the genocide, while she was being cross-examined by a defense lawyer. Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' (2009) 22 Journal of Traumatic Stress 351, 355

[309] For instance, Stover concluded in a study with 87 victims-witnesses who testified before the ICTY that the Judges' interjection with the victims' recounting of the story to admonish them to stick to the facts frustrated the victims who waited for years to tell their stories. Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Pennsylvania Studies in Human Rights, 2005) 129

[310] Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 333

[311] Marc Groenhuijsen, 'Victims' Rights in the Criminal Justice System: a Call for a More Comprehensive Implementation Theory' in Jan Van Dijk, RGH Van Kaam and Jo-Anne Wemmers (eds), *Caring for Crime Victims. Selected Proceedings of the 9th International Symposium on Victimology* (Criminal Justice Press, 1999)

[312] Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge Research in International Law, 2014) 32

[313] Jason Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 Journal of Applied Psychology 386, 389

information to victims with regard to their rights, for instance to participate in a case to request reparations, the support or protection that is available for them, the choices that are open to them, and the expectations they can have from the court.[314] In addition, it also refers to the information and the updates victims receive with regard to the procedural and factual developments in their case.[315]

As elicited by theoretical and empirical research, receiving information is very important for victims for various reasons. To begin with, providing information with regard to the various aspects of their involvement in the proceedings provides a form of acknowledgment of their role as participants in the proceedings and a recognition of their interest in the case.[316] In addition, it provides clarity with regard to the structure and steps of the proceedings, manages the expectations of victims, and conveys to them that they are not forgotten.[317] Furthermore, information with regard to the developments in the case may be conceived as a form of acknowledgment of their harm and respect of their suffering. In situation of mass victimization many of the victims have a compelling need to know – e.g. why they were targeted, what happened to their family members, etc. – thereby informing victims swiftly regarding new developments in their cases may contribute to alleviating their pain and uncertainty.[318] The importance of information for victims was also confirmed by empirical research, with many victims interviewed reporting frustration with the courts or their legal representatives for lack of updates regarding their cases over extended periods of time, triggering distrust in the court and even fear.[319]

Finally, in the context of international courts, a connected issue to the provision of information to victims concerns the outreach of these courts to raise awareness and to inform the victims about the existence of a court, about the victims' opportunities to bring cases, and about the various ways in which they may participate in these courts.[320] Outreach activities conveying information across to victimized populations is paramount, as they may instill hope for the victims that they may access judicial bodies beyond the national level which could hold their tormentors accountable and provide relief. In addition, particularly in the context of the ICL-based courts, outreach activities may signal to the victims that international criminal justice is a reaction to what was done to them, and that they can have an active role in its pursuit if they wish so.[321] Finally, outreach activities

[314] See e.g. Assembly of States Parties, 'Report of the Court on the strategy in relation to victims' ICC-ASP/8/45 (10 November 2009) 4

[315] See e.g. Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 157

[316] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 361

[317] Jo-Anne Wemmers, 'Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims' (2009) 16 International Review of Victimology 211, 221

[318] See e.g. discussion about victims of forced disappearances in Latin America, Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 321; see Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 157

[319] E.g. Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 542

[320] See e.g. Assembly of States Parties, 'Report of the Court on the strategy in relation to victims' ICC-ASP/8/45 (10 November 2009) 19

[321] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 362

are important to counter misunderstandings about the work of a court, which could result in reluctance on the victims' part to engage with the proceedings out of fear or mistrust.[322]

3.1.4. Length of Proceedings

A final element that may inform the victims' evaluation of procedural justice in the process of obtaining reparations before international courts is the length of proceedings, although as will be shown below, it has a rather hybrid status, in that its relevance pertains both to the process and the outcome. Interestingly, this element of procedural justice has not featured prominently in previous research on procedural justice, neither in the context of other disciplines nor in research with victims of crime at the national level.

The importance of the length of proceedings has started to surface in research with victims in the context of international courts,[323] but not as an element that may influence positively the evaluation of procedural justice as the previous three elements discussed but rather one that might influence it negatively, as victims may even withdraw their involvement with the courts.[324] In addition, the length of proceedings appears to also have impact in regard to the outcome of the proceedings, to the extent that lengthy proceedings might preclude victims from benefiting from the outcome they are interested in. This became particularly stringent in the context of the ICTY and resulted in several implications for victims. With the death of Slobodan Milošević, former president of Serbia, while his case was still under investigation, many of the victims have reportedly felt disillusioned and betrayed.[325] In addition, many of the victims had passed away, before seeing the end of the trials featuring the perpetrators they wanted to see punished.[326] Similarly, Bosnian women who survived rape by Serbian soldiers and paramilitaries and provided extensive evidence to the ICTY started growing frustrated when years passed without accountability for the perpetrators, with some of the victims even withdrawing from the process.[327]

As such, delays in proceedings can have several implications for victims, as they may affect negatively the victims, inducing frustration and disappointment. Extended trials might result in distrust in the proceedings, frustration,[328] and disappointment, especially when coupled with lack of interaction and information, and might result in victims withdrawing from proceedings.[329] In addition, they may prolong the suffering of victims, hampering their ability to heal and move on with their lives amid a failure to bring the case to a resolution, particularly when the victims want

[322] See the experience of ICTY as far as outreach is concerned; Diane F. Orentlicher, That Someone Guilty Be Punished The Impact of the ICTY in Bosnia (Open Society Justice Initiative and International Center for Transitional Justice, 2010) 101-106

[323] See e.g. Diane F. Orentlicher, That Someone Guilty Be Punished The Impact of the ICTY in Bosnia (Open Society Justice Initiative and International Center for Transitional Justice, 2010) 74

[324] See e.g. Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 23; Rianne Letchert, 'Expert Report on the Views and Concerns of the Victims Participating at the Special Tribunal for Lebanon' (Maastricht University, August 2017) 26, 30

[325] Diane F. Orentlicher, That Someone Guilty Be Punished The Impact of the ICTY in Bosnia (Open Society Justice Initiative and International Center for Transitional Justice, 2010) 74

[326] Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) 157

[327] Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered (2009) 50 Harvard International Law Journal 323, 332

[328] Rianne Letchert, 'Expert Report on the Views and Concerns of the Victims Participating at the Special Tribunal for Lebanon' (Maastricht University, August 2017) 26

[329] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1; Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 44

to see the perpetrators punished,[330] or want the court to render them justice.[331] Against this background, the timely resolution of the proceedings victims are involved in appears to represent an important elements in the victims' evaluation of both procedural and substantive justice.

3.2. Substantive justice

3.2.1. Tangible Reparations that Respond to Victims' Harm and Preferences

As already discussed above, substantive justice refers to the outcome of proceedings and its evaluation by victims.[332] In the context of reparations proceedings, the outcome may encompass different types of reparations that the victims might actually receive, i.e. tangible reparations. In what follows, this section will elaborate on importance of tangible reparations for victims, the different tangible reparations that the victims might receive, as well as clarify how they might contribute to substantive justice for victims.

Affording reparations to victims of mass atrocities might be important for victims for several reasons. Foremost, reparations aim to provide the most direct form of redress for the massive harm suffered by victims through various symbolic and material measures.[333] In addition, they aim to acknowledge the harm and suffering experienced by victims at both individual and collective levels and may represent a form of recognition owed to victims whose rights have been violated,[334] placing the wrongful act within a new officially sanctioned history of trauma.[335] This latter aspect is important as labelling responsibility has the potential to redirect blame towards perpetrators and relieve the moral ambiguity and guilt that some victims experience.[336] From a psychological perspective, reparations might play important role in processes of opening space for bereavement, addressing trauma, and can mark a point of moving on with the victims' life.[337]

A plethora of empirical studies carried out with victims in different conflict situations confirmed the importance of reparations for victims to address their suffering and redress harm.[338] However, these studies also offered two other important insights. The first one is that reparations are not the

[330] For a detailed analysis of the importance of retributive responses for victims of international crimes, see Alina Balta, 'Retribution through reparations? Evaluating the European Court of Human Rights' Jurisprudence on Gross Human Rights Violations from a Victim's Perspective' forthcoming in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020)

[331] Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered (2009) 50 Harvard International Law Journal 323, 331

[332] E.g. Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012) 37

[333] Mijke de Waardt and Sanne Weber, 'Beyond Victims' Mere Presence: An Empirical Analysis of Victim Participation in Transitional Justice in Colombia' (2019) 11 Journal of Human Rights Practice 209, 214

[334] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 461

[335] Brandon Hamber and Richard Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 Journal of Human Rights 35, 38

[336] Brandon Hamber and Richard Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 Journal of Human Rights 35, 38

[337] Brandon Hamber and Richard Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 Journal of Human Rights 35, 38

[338] See e.g. 'Living With Fear: A Population-based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo' (Human Rights Center, Payson Center for International Development and International Center for Transitional Justice, August 2008) 47; Rianne Letschert and Stephan Parmentier, 'Repairing the Impossible: Victimological Approaches to International Crimes' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge Research, 2014) 219; Abdulsalam Ajetunmobi, 'Victims' responses after mass atrocities: a note on empirical findings' (2012) 15 Contemporary Justice Review 39, 46-47

only outcome that the victims are interested in and other actions such as finding the truth about crimes or punishing the perpetrators are also important or even more important to them.[339] Of course, the relative importance of various outcomes might differ from victim to victim. This insight is also posited across literature, with for instance, Pablo de Greiff, discussing the link between reparations and truth, stressing that truth-telling in the absence of reparations can be seen by some victims as an empty gesture, while reparations in the absence of truth-telling can be seen as an attempt to buy the silence or acquiescence of victims and their families, turning the benefits into 'blood money'.[340] The second one concerns the diversity of reparations measures that victims might be interested in receiving, including the return of property, compensation, apologies and others.[341] This is justified by the diversity of victims' needs, individual characteristics, and types of victimization and harm endured. Furthermore, as Laplante posited, the reparations measures that the victims request might also be influenced by the society, the social group to which he or she belongs or by the victims' affiliations with particular victim groups - such as families of the disappeared and killed - but it may also be entirely individualized.[342]

In the context of international courts, the potential tangible reparations that victims of mass atrocities might receive are best captured by the van Boven/Bassiouni Principles. After all, they not only represented a source of inspiration for the design of some of the international courts' reparations regimes,[343] but also, they are an important inspiration for some of the courts' interpretation of their reparations regimes.[344] This legal instrument represents the state of the art in regard to reparations,[345] and aggregates decades of research on reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law.[346] In addition, the van Boven/Bassiouni Principles embody the insights offered by empirical research, in that they acknowledge that reparations awards should be tailored to the various characteristics of victims and situation they find themselves in. According to the Principles, victims of mass atrocities should, "as appropriate and proportional to the gravity of the violation, harm suffered and circumstances of each case, be provided with full and effective reparations".[347] Furthermore, the Principle also provide a wide range of reparations measures that victims might

[339] See e.g. Research by Rianne Letchert shows that finding out the truth was considered by all victims interviewed in her sample as the most important outcome of the Special Tribunal for Lebanon. Letchert, 'Expert Report on the Views and Concerns of the Victims Participating at the Special Tribunal for Lebanon' (Maastricht University, August 2017) 30-33

[340] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 461

[341] See e.g. Rianne Letschert and Stephan Parmentier, 'Repairing the Impossible: Victimological Approaches to International Crimes' in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge Research, 2014) 219

[342] Lisa J. Laplante, 'Just Repair' (2015) 48 Cornell International Law Journal 1, 32

[343] For instance, as stated the Principles represented a source of inspiration for the drafting of ICC's Rules of Procedure and Evidence. See Peter Lewis and Hakan Friman, 'Victims and Witnesses' in Roy S. Lee (ed), The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results (Kluwer Law International, 1999) 478

[344] E.g. reference to the Van Boven/Bassiouni Principles in *Case of Gomes Lund et al. ("guerrilha do araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 219 (24 November 2010) footnote 194

[345] See also Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 Netherlands Quarterly of Human Rights 641

[346] As the Van Boven/Bassiouni Principles' provisions explain, "the Principles do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms." UNGA, 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, Res 60/147 (16 December 2005), preamble

[347] UNGA, 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, Res 60/147 (16 December 2005), article 18

benefit from, but take a comprehensive approach in that other outcome-related measures victims might be interested in receiving (e.g. truth finding and the punishment of perpetrators) are included.

As such, the van Boven/Bassiouni Principles elaborate on five possible types of tangible reparations that victims may receive to redress their harm,[348] namely, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Restitution aims to restore the victim's status to the original situation before the violation took place. It includes, among other things, 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 can be provided to any economically assessable damage, as appropriate and proportional to the gravity of the violation, which took place. This measure aims to compensate not only for economic loss, but also for moral, physical or mental harm. Rehabilitation refers to the set of measures that provide medical, psychological, legal, and social services to victims. Satisfaction includes, but is not limited to, effective measures aimed at the cessation of continuing violations, verification of the facts and full and public disclosure of the truth under certain conditions, search for the whereabouts of the disappeared, assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities, public apology, including acknowledgment of the facts and acceptance of responsibility, commemorations and tributes to the victims, etc. Guarantees of non-repetition aim to contribute to prevention and may include measures to ensure effective civilian control of military and security forces, to strengthen the independence of the judiciary, to promote mechanisms for preventing social conflicts and their resolution.[349] Finally, the van Boven/Bassiouni Principles adopt a holistic understanding of harm, acknowledging that, in the context of mass atrocities, harm can be suffered both individually and collectively. As van Boven later acknowledged in an academic article co-authored with Rianne Letschert, "the acknowledgement of the victimological notion of collective victimhood makes this instrument conceptually truly innovative".[350] Consequently, reparations may be awarded on an individual basis, as individual reparations and on a collective basis for harm suffered collectively as collective reparations.[351]

[348] As authors argue, central to reparations is the idea of addressing and repairing the harm caused to victims. See Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 83. See Jo-Anne Wemmers, 'Victims' Need for Justice: Individual versus Collective justice', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), *Victimlogical Approaches to International Crimes: Africa* (Intersentia, 2011) 148. The reparations' aim to repair the victims' harm has also been confirmed through the Judges' interpretation of courts' reparations regimes. See *Lubanga case* (Trial Chamber: Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) para 179; *Case of La Cantuta v Perú* (Interpretation of the Judgment on Merits, Reparations, and Costs) IACtHR Series C No. 162 (29 November 2006) para 3; *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012), para 699

[349] UNGA, 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, Res 60/147 (16 December 2005), articles 19-23

[350] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 171

[351] UNGA, 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, Res 60/147 (16 December 2005), article 8

While the assessment of the courts' potential contribution to substantive justice will be evaluated in light of each of the courts' own reparations regimes, due to their comprehensive and innovative character as well as the perspective, forms, and types of reparations they feature, the Van/Boven Bassiouni Principles and its characteristics represent a benchmark to put into perspective each of the courts' reparations regimes and their perspective on reparations.

Furthermore, since substantive justice is necessarily informed by how victims perceive the tangible reparations, this study furthermore posits that the tangible reparations that courts award might contribute to substantive justice for victims if they respond to the victims' preferences in regard to reparations.[352] As such, whether the tangible reparations awarded take into account the victims' expressed preferences is central to the appraisal of substantive justice. The main reason is that the victims themselves are best placed to express their outcome-related preferences in accordance with their harm and needs, based on their specific realities. As Heidy Rombouts acknowledged, the victims themselves are aware of their own situation and consequently they can provide valuable information based on their everyday experience in view of designing reparations that respond to their existing needs. [353] Consequently, what victims want in terms of reparations will also depend on their personal situation and context.[354] In addition, this approach runs counter misconceptions that victims are passive recipients of reparations, too traumatized to make decisions about their future, or "people driven by a destructive psychosis that renders them incapable or morally unworthy to make a positive contribution" [355] to reparations.

Tangible reparations that take into account the victims' preferences and respond to them are important for victims for several reasons. Foremost, recalling Heidy Rombouts' assertion, reparations that take into account victims' preferences would be effective and respond to the lived reality of the victims, as perceived by them.[356] On the contrary, reparations measures that do not respond to the victims' preferences and needs run the risk that they will not help victims overcome the consequences of conflicts and be perceived as paternalistic and 'imposed by elites'.[357] In addition, they have the potential to empower the victims by treating them as responsible decision makers, which may also help them feel they are regaining control over some aspects of their lives,[358] and transcend their former identity as powerless.[359] This point draws on Carlton Waterhouse's assessment of Germany's compensation scheme for the Holocaust victims, who

[352] Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotond (eds) *Theorizing Transitional Justice* (Ashgate, 2015) 219; Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 The International Journal of Transitional Justice, 250, 253; Jo-Anne M. Wemmers, 'The Healing Role of Reparation' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014) 231

[353] See e.g. Heidy Rombouts, 'Importance and Difficulties of Victim-Based Research in Post-Conflict Societies' (2002) 10 European Journal of Crime, Criminal Law and Criminal Justice 216

[354] See also Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 Journal of Law and Society 265, 274, citing Michael Pugh

[355] Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 Journal of Law and Society 265, 278

[356] See e.g. Kelli Muddell and Sibley Hawkins, 'Gender and Transitional Justice: a Training Module Series' (International Center for Transitional Justice, 2018) 1, 7

[357] Heidy Rombouts, 'Importance and Difficulties of Victim-Based Research in Post-Conflict Societies' (2002) 10 European Journal of Crime, Criminal Law and Criminal Justice, 216, 221

[358] Marta Minow, *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence* (first edition, Beacon Press, 1999), 65. Margaret Urban Walker, *Moral Repair Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006) 20

[359] Carlton Waterhouse, 'The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs' (2009) 31 University of Pennsylvania Journal of International Law 257, 270

praised the responsibility and opportunity given to victims to participate in the crafting of their own reparations.[360] In addition, in line with Kieran McEvoy and Kirsten McConnachie's research, reparations that take into account victims' preferences have the potential to foster the victims' agency,[361] enabling them to decide and express what best suits their needs.[362] Finally, in line with Patricia Lundy and Mark McGovern's study, the reparations may also foster the victims' perception of ownership over the reparations measures, inasmuch as that they are involved in various steps of the reparations process and are not only passive receivers of reparations.[363]

Despite the importance of awarding tangible reparations that respond to victims' preferences, it has to be recalled that in situations of mass victimization such an endeavor is marred by complex challenges that require difficult choices. To recall the insight put forward by Rianne Letschert and Theo van Boven, affording reparations entails a balancing of the legal and moral consideration to make reparations complete and inclusive with respect to all victims, and on the other hand the reality of large number of victims and the massive harm.[364] In addition, responding fully to the victims' harm and preferences might not always be possible, especially in situations when doing so would have negative effects within societies, or indeed, might annul the potential benefits of reparations. Consequently, awarding tangible reparations in situation of mass victimization might oscillate from awards that fully respond to victims' harm and preferences to awards that entail a balancing of different interests. While the latter approach might be unavoidable in complex situations, the interests against which victims' harm and preferences are balanced out must carefully construed and essential in light of the situation at stake, to avoid an erosion of victims' rights and their protection.[365]

4. Final Remarks

The aim of this section was to elaborate on the notions that will be used in this study to assess the practice of four international courts and potential contribution to reparative justice by means of their reparations' regimes. The choice for these notions is rooted in extensive research, showing across different settings that what informs the victims' experience of justice is their evaluation of the process (defined as procedural justice) and the outcome of the process (defined as substantive

[360] Carlton Waterhouse, 'The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs' (2009) 31 University of Pennsylvania Journal of International Law 257

[361] Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 Social & Legal Studies 489, 499

[362] See also Dianne Orentlicher, 'Settling Accounts Revisited: Reconciling Global Norms with Local Agency' (2007) 1 International Journal of Transitional Justice 10, 19

[363] For instance, see Patricia Lundy and Mark McGovern who argue for the involvement of victims in the conception, design, decision-making, and management of initiatives. Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 Journal of Law and Society 265, 266

[364] Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 166

[365] These insights draw on Paul Gewirtz' theory on 'Remedies and Resistance' whereby he dicusses the 'transition from an abstract legal standard to its approximation in social reality'. He refers to two approaches that courts may take when awarding reparations 'Rights-Maximizing' which takes the viewpoint of the victims alone and 'Interest-Balancing' which also considers other social interests. In addition, he argues that "Both remedial approaches require courts to recognize that resistance can weaken victims' rights and to consider strong measures to prevent or defeat that resistance; under both approaches, however, courts may at times approve limited desegregation remedies because of resistance, although the occasion and scope of appropriate limitations depends upon the approach that is used." While his theory particulatly draws on Supreme Court of the United States's practice in relation to segregation in schools, I believe the complexity of both situations make his theory relevant to this study. Paul Gewirtz, 'Remedies and Resistance' (1993) 92 The Yale Law Journal 585

justice). The starting point was research in social psychology and organizational studies, then research relating to victims of crimes at the national level, and finally, research relating to victims in the context of international courts. As such, these studies provided the theoretical basis for the current research, which imported previous findings to the study of reparations in the context of international courts. For the purpose of this research, procedural justice was operationalized using four elements, namely voice, information, interaction, and the length of proceedings, due to previous research showing how they might contribute to procedural justice for victims. At the same time, substantive justice has been operationalized in terms of tangible reparations that respond to victims' harm and preferences in regard to reparations. The meaning of each of the elements and their relative importance for the victims has been elaborated extensively in this section. In what follows, this theoretical basis will be employed to scrutinize the four international courts' potential contribution to reparative justice by means of their reparations regimes using the procedural justice-substantive justice dichotomy.

Chapter 3: The International Criminal Court and its Reparations Regime: Reparative Justice for Victims of International Crimes?

Introduction

This chapter aims to assess the International Criminal Court's (hereinafter 'the ICC' or 'the Court') potential contribution to reparative justice for victims by means of its reparations regime. In doing so, this chapter is divided into four sections. After the brief introduction, the first section will provide an immersion into the establishment of the Court, focusing on the normative developments in relation to victims and their rights at the ICC level. The second section will provide a detailed overview of the Court's reparations regime, delving into how reparations for victims became incorporated into the ICC's mandate and consolidated as a reparations regime. Furthermore, it will elaborate on the 'justice for victims' narrative attached to the reparations regime, and will detail the reparations regime's prerogatives statutorily bestowed upon victims in relation to the process and outcome of the reparations proceedings, as well as who can be entitled to reparations at the ICC. The third section will explain the methodological choices for the current investigation, followed by the core of this chapter, the analysis of how the ICC's reparations regime is transposed into practice, structured alongside procedural justice and substantive justice sections. By analyzing the Chambers' decisions, submissions by the legal representatives on victims' behalf, Trust Fund for Victims' implementation reports and submissions, as well as other reports detailing the victims' views in the Lubanga, Katanga and Al Mahdi cases, this section will paint a comprehensive outlook on how the ICC's reparations regime is materialized in the Court's practice. Furthermore, drawing on the ICC's practice as well as insights from the theoretical framework, this section will also provide an assessment of how the ICC, through its reparations regime, may potentially contribute to reparative justice for victims. This section will elaborate on how the elements that inform the victims' perception of procedural justice and substantive justice pan out in practice, what implications they might have for the victims, and how the victims might perceive them. The final section will put forward final consideration regarding the ICC's potential contribution to reparative justice for victims by means of its reparations regime.

1. The Establishment of the ICC

1.1. Institutional Evolution

17 July 1998 marked an historical moment, as 120 States adopted the Rome Statute, the legal basis for establishing the first permanent international criminal court. The ICC started its operations after the entry into force of the Rome Statute on 1 July 2002.[366] Although the idea of an international criminal court had frequently been on the international agenda,[367] it was the end of the Cold War in the 1990s that created the appropriate climate to resurrect this ambition.[368] Faced with the Balkan wars and the massive crimes committed in that context, and later on, with the genocide in Rwanda, the UN Security Council established the ICTY and ICTR in the first half of

[366] ICC, 'The ICC at a Glance' <https://www.icc-cpi.int/Publications/ICCAtAGlanceENG.pdf> accessed 23 January 2020

[367] John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11 Pace International Law Review 361

[368] For a detailed discussion on the legal climate permeating the period before the ICC's establishment see Alina Balta, Manon Bax, Rianne Letschert, 'Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia' (2019) International Journal of Comparative and Applied Criminal Justice 1

the 1990s, amid enormous political pressure to tackle the situation in those countries.[369] These developments spurred the UN General Assembly to reignite initiatives to draft the founding document and to set up an international criminal court. The ICC project emerged from preparatory work of the International Law Commission (ILC) in 1994, consolidated by the UN Preparatory Committee on the Establishment of an International Criminal Court (PrepCom), and concluded by negotiations carried out in Rome in 1998, under the auspices of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[370] Currently, the ICC mainly operates under its founding document, the Rome Statute, and the Rules of Procedure and Evidence (RPEs),[371] all negotiated by States' delegations during the 1998 Rome Conference.

The Rome Conference and the subsequent establishment of the ICC have been heralded as achieving what has once been considered impossible;[372] the creation of a permanent international institution to prosecute and punish perpetrators of international crimes, such as genocide, crimes against humanity, war crimes and the crime of aggression.[373] As one scholar put it, the ICC project propelled the utopia of a realizable notion of global justice one small but significant step closer to its realization.[374] Interestingly, the success of the Rome Statute's drafting, including all the legal innovations included therein, can be attributed to several factors. At the normative level, the period in international law leading up to the Rome Conference was characterized by an elevated concern for the role of individuals in international law, as well as the erosion of the traditional focus on the State as the absolute sovereign.[375] This can be attributed to increased attention to universal human rights principles and norms since the aftermath of the Second World War, when the institutionalization of human rights and international law norms made enormous progress.[376]

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[369] Nicole Deitelhoff, 'The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case' (2009) 63 International Organization 33, 36

[370] John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11 Pace International Law Review 361

[371] 'Rules of Procedure and Evidence' (Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 3-10 September 2002) (ICC-ASP/1/3 and Corr.1) <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

[372] As former ICC judge Christine Van den Wyngaert mentioned, "Like most scholars of my generation, I never expected to see international criminal courts emerge in my own lifetime." In Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 476

[373] Roy S. Lee, 'The Rome Conference and its Contributions to International Law' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 27

[374] Joe Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function Reflections on Sources of Law and Interpretative Technique' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 444

[375] Frederic Megret expressed that international criminal justice in the context of the ICC has been shaped by the debate that a traditional focus on the state and public order has ceded space to a view of criminal justice as having a more societal function or as directed primarily at victims. Frederic Megret,' 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 University Press, 2015) 25. See also Kamari M. Clarke, ''We Ask For Justice, You Give Us Law': The Rule of Law, Economic Markets and the Reconfiguration Of Victimhood' in Christian de Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 283

[376] For a detailed account of the International Law's recognition of the human rights of individuals, as well as the development of victims' rights under International Law, see Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010) 33 – 41

Secondly, the ICC built its work on the already existing international criminal justice infrastructure generated by the former tribunals,[377] which the ICC drafters aimed to expand and perfect.[378] As David Bosco put it, the Nuremberg and Tokyo trials represented a revolutionary development in international law, as well as a dramatic triumph of law over force; however, they were confined to a specific historical context.[379] The ICTY and ICTR featured similar characteristics; they were fashioned by some of the most powerful countries in the world and were temporally and territorially limited to specific episodes of violence in the world.[380] On the other hand, the initial effort to establish the ICC was led by a small 'like-minded group' of countries that conceived of themselves as depoliticized, in the sense that they lacked strong political interests and strategic entanglements in many parts of the world.[381] This group had a clear aim: to construct international criminal justice architecture that would be perceived as fair and legitimate by the rest of the world, which at the same time would be insulated from powerful States with complex interests whose ability to advance impartial international justice was limited.[382] After lengthy negotiations during the Rome Conference, Judge Philippe Kirsch, who presided over the negotiations of the Rome Statute, reinterated the same ideals deeply held by the initial like-minded group. He expressed that, through the Rome Statute: [383]

"*[T]he delegates reflected their commitment to an instrument that they hoped would mark the beginning of a new era in which humanitarian values and the protection of victims might finally become center stage and not the usual side show to the protection of sovereignty or even the exercise of raw power*".

1.2. Development and Evolution of the Victims' Role and Rights at the ICC

Although the Rome Statute is progressive in many aspects of international criminal law,[384] the inclusion of victims and their rights were hailed as one of the most distinctive aspects of the Statute,[385] breaking new ground in international criminal justice.[386] The Rome Statute marked the move away from the exercise of a purely retributive justice function, which permeated the

[377] Ernst Hirsch Ballin, 'The Value of International Criminal Justice: How Much International Criminal Justice Can the World Afford?' (2018) 19 International Criminal Law Review 201, 203

[378] David Bosco explained that the ad-hoc tribunals ICTY and ICTR galvanized the broader movement for international criminal justice. David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 38. For criticism of the ad-hoc tribunals in relation to victims and their rights see Charles P. Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2009) 29 Michigan Journal of International Law 777

[379] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 27-28

[380] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 35-37

[381] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 39

[382] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 39

[383] Philippe Kirsch and John Holmes, 'The Birth of the International Criminal Court: The 1998 Rome Conference' (1998) 36 Canadian Yearbook of International Law 3, 37

[384] The ICC Statute is unique in its approach to various aspects of international criminal law, such as the principle of complementarity, jurisdiction, crimes, harmonization of distinct world judicial systems, etc. See Roy S. Lee, 'The Rome Conference and its Contributions to International Law' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 37-38

[385] Eva Dwertmann, *The Reparation System of the International Criminal Court : Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010) 2

[386] Christian de Vos, Sara Kendall, and Carsten Stahn 'Introduction' in Christian de Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 4

international criminal justice doctrine prior to the establishment of the ICC, to include a new dimension of participation of and restoration to victims.[387] The ICC's inclusive approach to victims can be attributed to two important developments in international law, which informed each other. One is the expansion of international human rights law, which later on spurred interest in victims' welfare among legal scholars and practitioners.[388] By the 1980s,[389] several victim-oriented instruments that aimed to enhance the positon of victims of crimes within the general protection of international human rights started to emerge.[390] As William Schabas put it, the interest in victims' rights in international criminal law, came from outside of the international criminal law tradition, from the distinct, although related field of international human rights law.[391] In parallel, the transitional justice movement started to take center stage, spurred by the decline in the polarisation between the East and the West, which started in the 1980s, combined with erosion of authoritarian governments. The movement led to the establishment of mechanisms – such as the Truth and Reconciliation Commissions - that placed emphasis on the condition of victims and their rights.[392] They focused on restorative justice, and promoted the victims' reconciliation and recovery from past harms, in consultation and with the assistance of various non-state actors and in dialogue with the perpetrators of crimes.[393]

The inclusion of victims and their rights within the Rome Statute are symbolized as the merger of two streams of justice – international human rights law and transitional justice, all the while favored by the political climate of that time.[394] As scholars argued, this is the most innovative feature distinguishing the ICC from predecessor tribunals. The role granted to victims is also a "happy illustration of that fact that in many ways the statute is not the product of one predominant legal system and culture but the results of a healthy cross fertilization of several legal systems and cultures."[395] Consequently, the Rome Statute emerged as a legal instrument with several victim-

[387] Silvia Fernandez de Gurmendi, 'Elaboration of the Rule of Procedure and Evidence' in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 256

[388] Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 128

[389] It has to be acknowledged that interest in victims and their rights is largerly due to the victims' rights movements at the national level which started to slowly develop around the 1950s, continued with the feminist movement and its focus on hidden victims, including victims of domestic violence and rape, and then cemented with the growth of a large number of groups and NGOs fighting for the rights of victims of a multitude of crimes. For a detailed analysis, see Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 8

[390] William A Schabas, *An introduction to the International Criminal Court* (3rd edition, Cambridge University Press, 2007) 326; Theo Van Boven, 'The Victim and the ICC Statute' in Herman von Hebel et al (eds), *Reflections on the International Criminal Court – Essays in Honor of Adrian Bos* (TMS Asser Press, 1999) 88. The reference as 'victim-oriented' refers to the attempt to meet victims' needs and concerns. As per Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls' (2012) 12 International Criminal Law Review 375, 380

[391] William A Schabas, *An introduction to the International Criminal Court* (3rd edition, Cambridge University Press, 2007) 325

[392] Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 30; see also Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 Social & Legal Studies 489

[393] Ruti Teitel, *Globalizing Transitional Justice: Contemporary Essays* (Oxford Scholarship Online, 2014) 57

[394] Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 30. It is argued that the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power as well as the 2005 Basic Principles of Reparations (or van Boven/Bassiouni Principles) are the foundational texts of the extensive victims' rights to participation and reparation inscribed in the Rome Statute. Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 478; Kamari M Clarke expressed that the 1985 UN Victims' Declaration, alongside the setting up of the United Nations Compensation Commission, laid the foundation for the negotiations on how victims' participatory and reparative rights at the ICC were to be defined in the ICC texts during the Preparatory Committee discussions, leading to the signing of the Rome Statute in 1998. Kamari M. Clarke, ''We Ask for Justice, You Give Us Law': The Rule of Law, Economic Markets and the Reconfiguration of Victimhood' in Christian de Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 246. The political climate leading up to the establishment of the ICC is elaborated upon in sections 2.1, 2.3 and 3.1.

[395] Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010).

oriented provisions, and bestowed upon victims a robust set of rights such as the right to participation, protection, and reparation.[396] Victims can participate in the trial against the accused person,[397] to express views and concerns, if their personal interests are at stake.[398] They can also benefit from protection, security and privacy, as well as request and receive reparations.[399] In what follows, the remainder of the chapter will solely focus on the ICC's mandate in relation to reparations,[400] as this is the focus of this thesis.

2. Legal Framework on Reparations

The section above provided a concise overview of the evolution and development of the ICC, and introduced one of its most important achievements, the inclusion of victims and their rights within the mandate of an international criminal court. What is unique to the ICC is the inclusion of a victims' right to reparations, a right never bestowed upon victims in international criminal tribunals prior to the ICC.[401] The ICC's reparations regime marked the departure from the traditional inter-state approaches to the rights granted to individuals, towards a reparations system in which individuals and collectives of victims identified as beneficiaries have a right to apply for reparations directly from the individual perpetrator.[402]

This section will focus on the reparations' regime included in the Rome Statute. It will first explain how the right to reparations developed, and then elaborate on the 'justice for victims' rhetoric associated with reparations, both inside and outside of the Court. The final part of the section will detail the ICC's reparations regime, focusing on prerogatives bestowed upon victims in relation to the process and the outcome of reparations, as well as an illustration of who is entitled to become beneficiary of reparations at the ICC.

2.1. Travaux Préparatoires

Notwithstanding the inclusion of victims and their rights, including the right to reparations, within the mandate of an international criminal court, a review of the travaux préparatoires to the Rome Statute highlighted that the process of including reparations within the Statute was marked by intense negotiations and compromise.[403] To be precise, a review of the preparatory work for the Rome Statute, at its very beginnings, reveals that the 1993 Draft by the ILC, on which the ICC

[396] ICC, 'Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court' 12 <www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> accessed 23 January 2020. Admitedly, as will be seen, the right to reparations can only be unlocked by victims considered to be beneficiaries of reparations in particular cases.

[397] However, the Rome Statute does state that victims' participation within the trial may be exercised "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Rome Statute, art 68(3).

[398] Rome Statute, art 68(3)

[399] Rome Statute, artts 57(3)(c) , 64(2), 75

[400] For an encompassing understanding of the ICC, see generally Kevin Heller, Frédéric Mégret, Sarah Nouwen, Jens Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020)

[401] The history of international criminal tribunals indicates that the victims and their rights were largely absent at the Nuremberg and Tokyo Tribunals. At the ICTY and ICTR tribunals, victims could only participate as witnesses, and reparations could only be claimed before national courts. See Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 59-60

[402] Eva Dwertmann, *The Reparation System of the International Criminal Court : Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010) 26

[403] As Conor McCarthy argued, the reparations regime at the ICC is not the result of some grand design but an arrangement that evolved in the later stage of the negotiations process from a number of negotiations and proposals. Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) 36

Statute developed, did not even provide reference to reparations.[404] The idea of bestowing upon the ICC the power to award reparations resurfaced again during negotiations by PrepCom leading up to the Rome Conference. According to Christoph Sperfeldt's analysis, France was the first delegation to submit a Working Paper elaborating on the proposed reparations regime at the ICC, giving rise to further proposals and debates that shaped the current article 75 on reparations.[405] As explained by Christopher Muttukumaru, an observant of the Rome Conference, there were several concerns on the mind of negotiators that opposed the inclusion of reparations in the Statute.[406] First, some States' delegations asserted that a determination of a reparations function would distract the Court's attention from its trial and appeals functions. A second concern related to the practical difficulty of delegating to a criminal court the task of deciding on the form and extent of reparations, exacerbated by the different legal background of Judges. Another point of contention concerned the implications of reparations awards for the national legal systems that did not recognize the concept of reparations. Finally, and perhaps the most contentious point related to the notion of State responsibly; certain States' delegations feared that the inclusion of reparations may activate the responsibility of States and may eventually be used to make reparations orders against them.[407] Muttukumaru concluded: "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".[408]

The form ultimately taken by the Statute's regime on reparations is a reflection of the involvement of key States' delegations, the ILC's work on the topic, and importantly, the lobbying of international NGOs during, and in the period leading up to, the Rome Conference.[409] Due to all these efforts, the incorporation of reparations for victims within the Statute was eventually agreed upon, although the drafters left many procedural and substantive aspects of reparations for the Court to decide on.[410] Further elaboration on issues relating to reparations was carried out by the Preparatory Commission tasked to prepare the ICC's Rules of Procedure and Evidence; however, they did not address substantive issues but only developed the procedural aspects of reparations.[411] As former ICC Judge Van den Wyngaert expressed, the reparations regime enshrined in the Rome Statute is "a clear example of 'constructive ambiguity' which places a high burden on the shoulders

[404] See ILC, 'Revised Report of the Working Group on a Draft Statute for the International Criminal Court – Reproduced in document' (1993) A/CN.4/L.490 and Add.1, art 53(3)

[405] Christoph Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court' (2017) 17 International Criminal Law Review 351, 358

[406] Christopher Muttukumaru, 'Reparations for Victims' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 262

[407] Christopher Muttukumaru, 'Reparations for Victims' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999); Conor McCarthy, 'The Rome Statute's Regime of Victim Redress: Challenges and Prospects' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court,* (Oxford University Press, 2015) 1205

[408] Christopher Muttukumaru, 'Reparations for Victims' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 268

[409] As David Donat-Cattin explained, the issue of victims' redress in the ICC has been central to the work of many NGOs participating in the Preparatory Committee and the Rome Conference, and constituting the Victims Rights' Working Group of the Coalition for an ICC. David Donat-Cattin, 'Article 75: Reparations to Victims' in Otto Triffterer, Kai Ambos (eds), *Rome Statute of the International Criminal Court: A commentary* (Bloomsbury, 2016) 1885

[410] Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010) 25. See Cherif M. Bassiouni, *The Legislative History of the International Criminal Court* (Vol 3, Ardsley, 2005) 97

[411] Silvia Fernandez de Gurmendi, 'Elaboration of the Rule of Procedure and Evidence' in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 256

of the judges".[412] It is drafted in general lines, as the negotiators could not agree on many aspects of reparations, and left it up to the Court to grapple with the contentious issues and give further interpretation and meaning to the provisions.

2.2. Justice for Victims Narrative

Notwithstanding the constructive ambiguity embedded in the Rome Statute due to lack of agreement among negotiators, supporters of the ICC, from both inside and outside of the Court, have attached to the right to reparations the narrative that it has the potential to deliver justice to victims. The idea that reparations might provide justice to victims can be traced back to the negotiations on reparations before the adoption of the Rome Statute. On the one hand, NGOs were fervently militating that the establishment of the ICC – able to put on trials perpetrators of international crimes - is in itself an important symbol for the survivors of those crimes. However, as they explained, justice cannot be truly achieved without providing justice to victims; this could be done by empowering the ICC to address the victims' rights and needs, including the provision of the right to reparations.[413] At the same time, during negotiations, the delegations started to accept that reparations provided by the ICC could contribute to reconciliation at both individual and societal level, and the entire process could help create conditions that would diminish the reoccurrence of further violations.[414]

With the adoption of the Rome Statute, the reparations system at the ICC became a reality, conferring upon the Court the power to award reparations via an Order on Reparations under article 75. Through the adoption of the 'Strategy in relation to victims' in the early years of its functioning, the Court reiterated the narrative circulating during the negotiations; it expressed that the ICC Statute "reflects growing international consensus that participation and reparations play an important role in achieving justice for victims."[415] The Court further elaborated that one of its objectives in relation to victims is to ensure that as many victims as possible have access to reparations. It also acknowledged that victims' needs for reparations are diverse, and as such, efforts must be made to ascertain what the most appropriate form of reparation is. At the same time, reparations must be meaningful for the victims, involve consultations with victims, avoid negative impact, as well as be as widely known as possible.[416] In sum, according to its own strategy, the ICC posits that its aim is to deliver justice to victims by employing a rights-based perspective, including the realization of the right to reparations, which reconfirms and empowers the victim as a vital actor in the justice process.[417]

In addition, as the judicial reparations system was conceived of, reparations are linked to the individual criminal responsibility of an accused person, and consequently, they may be awarded

[412] Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 486

[413] Fiona McKay, 'REDRESS on behalf of the Victims' Rights Working Group' (1998) <https://www.legal-tools.org/doc/46e5ed/pdf/> accessed 29 January 2020

[414] Roy S. Lee, 'The Rome Conference and its Contributions to International Law' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 264

[415] Assembly of States Parties (ASP), 'Report of the Court on the Strategy in Relation to Victims' (10 November 2009) ICC-ASP/8/45, para 3. See also the revised strategy, ASP, 'Court's Revised Strategy in Relation to Victims' (5 November 2012) ICC-ASP/11/38 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf > accessed 29 January 2020

[416] ASP, 'Report of the Court on the Strategy in Relation to Victims' (10 November 2009) ICC-ASP/8/45, para 52

[417] ASP, 'Court's Revised Strategy in Relation to Victims' (5 November 2012) ICC-ASP/11/38

only after a person has been convicted in separate proceedings.[418] As such, the realization of reparations is dependent on the accused persons' finding of guilt and his/her financial resources.[419] Interestingly, the negotiators predicted that in terms of financial resources, this approach might result in limited tangible reparations, and included in the Rome Statute an alternative mechanism that could contribute to the realization of reparations – the Trust Fund for Victims (hereinafter TFV).[420]

Indeed, the TFV emerged as a safety net for the realization of justice for victims under the ICC jurisdiction, through its reparations and assistance mandates.[421] The main difference between the two is that the former is linked to the criminal accountability of an accused person, which influences when the TFV deploys its reparations mandate and complements the Court awarded reparations. The latter enables the TFV to provide victims and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation.[422] Not only researchers link the TFV's establishment and involvement with reparations with its potential to deliver justice for victims,[423] but also, the TFV sees itself as essential in the realization of the "Rome Statute's reparative justice function".[424] Despite not elaborating on a definition of how it views reparative justice, the TFV detailed extensively on its vision, mission statements, and strategic goals in relation to its work, all the while holding that its mandates "put victims at the centre of justice".[425] In regard to the reparations mandate, the TFV explained that: [426]

"*[R]eparations, if well designed, acknowledge victims' suffering, offer measures of redress, as well as some form of compensation for the violations suffered. Reparations not only provide material benefit to victims but also recognition of the injustices that have occurred, which is an important step towards making amends, healing and reconciliation. Reparations serve as an acknowledgement and a record of the injustices*."

[418] Rome Statute, art 75. Of course, this refers to the reparations over which the Court adjudicates and is different from the assistance mandate of the TFV, which may enable victims to receive reparations outside of Court proceedings.
[419] See for instance *Lubanga case* (Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable) ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017) paras 268-269
[420] According to article 75, the Court may order that the award for reparations may be made through the TFV In addition, rule 98 of the RPEs puts forward that the order for reparations against the convicted person could be made through the TFV Finally, in its own Regulations (para 56), the TFV posits that its resources could include, amongst others, resources collected through awards for reparations, which could be complemented upon TFV's consideration. See Rome Statute, art 75; RPEs, rule 98; and ASP, 'Regulations of the Trust Fund for Victims' ICC-ASP/4/Res.3 (3 December 2005) (TFV Regulations) para 56. <https://trustfundforvictims.org/sites/default/files/imce/ICC-ASP-ASP4-Res-03-ENG.pdf> accessed 29 January 2020
[421] See ICC, 'How the Court works' <https://www.icc-cpi.int/about/how-the-court-works> accessed 29 January 2020; see also the ASP's resolution which reiterated the will to establish a Trust Fund for Victims; ASP, 'Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the Families of such Victims' (9 September 2002) ICC-ASP/1/Res.6 <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-06-ENG.pdf>
[422] See TFV, 'Reparations and Assistance' <https://www.trustfundforvictims.org/en/about/two-mandates-tfv> accessed 3 February 2020; For a detailed elaboration on how these two mandates interact in practice see Alina D. Balta, Manon Bax, Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System' (2019) 29 International Criminal Justice Review 221, 233
[423] See for instance, Marieke Wierda and Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims* (International Center for Transitional Justice, 2004) 1
[424] TFV, 'TFV Strategic Plan 2014-2017' (2014) 14 <https://www.trustfundforvictims.org/sites/default/files/imce/1408%20TFV%20Strategic%20Plan%202014-2017%20Final%20ENG.pdf>
[425] TFV, 'TFV Strategic Plan 2014-2017' (2014) 11 and 15-16
[426] TFV, 'TFV Strategic Plan 2014-2017' (2014) 18

In regard to its assistance mandate, the TFV clarified that because it is not linked to the determination of guilt of a perpetrator, this mandate enables it to respond at the individual, family and community levels to rehabilitate injuries sustained as a consequence of crimes within the jurisdiction of the ICC. In addition, this mandate allows the TFV to assist a wider population of victims than only those who have suffered harm connected to the specific crimes charged to the accused.[427] According to its website and the 2017 Annual Report, through its assistance mandate, the TFV has so far helped an impressive number of over 300.000 victims in Northern Uganda, Democratic Republic of the Congo (hereinafter DRC), and Central African Republic.[428] As can be noticed, the TFV adopts a comprehensive approach to reparative justice, which is to be actualized through both its reparations and assistance mandate. While acknowledging the TFV's impressive efforts in relation to its assistance mandate, due to this chapter's aim to assess the ICC's potential contribution to reparative justice, the focus is only on the reparations mandate of the TFV, because of the role it plays in the design and implementation of reparations ordered through a court judgment.

Furthermore, the link between reparations and justice for victims is not only reiterated in Court policy documents and permeating the vision of the TFV, but has also made its way into the case law, as reflected by the different Chambers' decisions on reparations. In the Lubanga case, the Appeals' Chamber expressed that: [429]

"Reparations in the present case must - to the extent achievable - relieve the suffering caused by the serious crimes committed; *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. [emphasis added]"

Similarly, in the Katanga case, the Trial Chamber stated that:[430]

"[It] is by virtue of the reparation proceedings that the Court gives public acknowledgement to the suffering which the grave crimes committed by the convicted person caused to the victims, and *delivers to them justice by alleviating, as far as possible, the consequences of the wrongful acts*. [emphasis added]"

Finally, in the Al Mahdi case, the Trial Chamber attached a multitude of goals to reparations: [431]
"*Reparations in the present case are designed – to the extent achievable – to relieve the suffering caused by the serious crime committed, address the consequences of the wrongful act committed by Mr Al Mahdi, enable victims to recover their dignity and deter future violations. Reparations*

[427] TFV, 'Annual Report' (2017) <https://www.trustfundforvictims.org/sites/default/files/reports/Annual%20Report-2017_Online_1.pdf>
[428] TFV, 'Annual Report' (2017) <https://www.trustfundforvictims.org/sites/default/files/reports/Annual%20Report-2017_Online_1.pdf> 8, 26; TFV, 'Reparations and Assistance' <https://www.trustfundforvictims.org/en/about/two-mandates-tfv> accessed 3 February 2020
[429] *Lubanga case* (Appeals Chamber, Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) para 71
[430] *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 15. See also para 267, quoting the Lubanga Judgment referenced above.
[431] *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 28. In addition, the same Chamber held that "Orders for reparations handed down by the Court cannot just be numbers on paper. Its restorative justice mandate depends on its awards being effective, even when a convicted person is indigent." *Al Mahdi case* (TFV, Public Redacted Version of Decision on the Updated Implementation Plan) ICC-01/12-01/15-324-Red (4 March 2019)

may also assist in promoting reconciliation between the victims of the crime, the affected communities and the convicted person."

Moreover, it is interesting to note that the 'justice for victims' narrative is also invoked by other organs of the Court, however, in connection with other goals pursued by the Court. For instance, the Office of the Prosecutor (OTP) before opening the investigation in the DRC concerning the crimes perpetrated by Germain Katanga and Mathieu Ngudjolo Chui, linked justice for victims with accountability for the alleged perpetrators:[432]

"*Our mandate is justice, justice for the victims. The victims of Bogoro; the victims of crimes in Ituri; the victims in the DRC. This case, and each of our cases, is a message to victims of crimes worldwide, that perpetrators will be held accountable*".

In addition, the Presidency of the Court is making appeal to 'justice for victims' to mobilize States Parties' support for the Court. For instance, in order to foster cooperation with the Court, former President Judge Silvia Fernández highlighted that "it is our duty to do our utmost to provide justice to victims of such acts."[433]

As can be noticed, the 'justice for victims' narrative might be employed for different purposes pursued by the different organs of the Court. The present research is particularly concerned with the 'justice for victims' narrative in connection with reparations. As observed, during the negotiations to the Rome Statute, the reparations' potential to deliver justice for victims appeared to be one important driver for bestowing upon the Court a reparations mandate. Since the Rome Statute was adopted, the link between reparations and justice for victims was appropriated in the Court's overall strategy to victims, as well as made central to the work of the TFV, and reiterated by the Chambers.

2.3. The ICC's Reparations Regime

The ICC's reparations regime is set forth in the Rome Statute and the Rules of Procedure and Evidence (hereinafter RPEs), which provide further clarification to the Statute.[434] The following

[432] OTP, 'Press Release: ICC Cases an Opportunity for Communities in Ituri to Come Together and Move Forward' (2008) <https://www.icc-cpi.int//Pages/item.aspx?name=icc%20cases%20an%20opportunity%20for%20communities%20in%20ituri%20to%20come%20together%20and%20move%20forward> accessed 29 January 2020. With other occasion, the OTP linked justice for victims with accountability and prevention of future crimes. See Mrs Fatou Bensouda 'Prosecutor of the International Criminal Court Diplomatic Briefing in The Hague' (2017) <https://www.icc-cpi.int/itemsDocuments/26db-OTP-Eng.pdf> accessed 29 January 2020.

[433] ICC President Statement on the occasion of 17 July 2016, 'Day of International Criminal Justice' (2016) <https://www.icc-cpi.int/Pages/item.aspx?name=statement160717> Judge Sang-Hyun Song (The 2nd President of the ICC) similarly mentioned that 'the lack of cooperation can seriously diminish the ICC's ability to deliver justice'. Judge Sang-Hyun Song, 'Past Achievements and Future Challenges of the ICC: Keynote Speech for the 20th Anniversary of the Rome Statute' (2018) <https://www.icc-cpi.int/itemsDocuments/20a-ceremony/20180717-sang-speech.pdf> accessed 29 January 2020

[434] The Statute contains general principles as well as a complex set of very detailed provisions. The rules are needed only to underpin these provisions and supplement them when more detailed provisions are required. However, during the process of drafting the RPEs, it was of paramount importance not to affect the integrity of the Articles in the Statute. In case of conflict between the Statute and the RPEs, the provisions of the Statute prevail. See Silvia Fernandez de Gurmendi, 'Elaboration of the Rule of Procedure and Evidence' in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 235-236; Rome Statute, art 51 (4) and (5)

sections will draw on the Rome Statute and the RPEs to introduce the ICC's reparations regime – structured along prerogatives bestowed upon victims in relation to the process of obtaining reparations and the outcome of the process, as well as elaborate on who can benefit from these prerogatives.[435] In addition, this section will also introduce the various organs established pursuant to the Rome Statute to fulfill the ICC's reparations regime, facilitate, and lend assistance to the victims who want to benefit from reparations.

2.3.1. Process-related Prerogatives

As can be inferred from the legal instruments underlying the functioning of the Court and, specifically, its reparations regime, a clear-cut set of provisions applicable to the process of obtaining reparations does not exist. Article 75 of the Rome Statute is the main article devoted to 'Reparations to victims', however, the provisions incorporated therein relate mainly to the outcome-related prerogatives in relation to reparations, which will be discussed in the next section. Nonetheless, the legal instruments do provide general provisions relating to the victims' involvement and participation in ICC proceedings, which are by extension applicable to the process of obtaining reparations i.e. the reparations proceedings, unless stated otherwise.

As such, Article 68 of the Rome Statute regulates the protection and participation of victims in ICC proceedings. As long as the Court considers that the personal interests of the victims are at stake, it shall permit the victims to present their views and concerns at different stages of the proceedings, including at the reparations stage.[436] In order to present their views and concerns, as well as request reparations from the Court, all victims or persons acting on behalf of victims must first fill out applications for participation and reparations.[437] Victims may submit applications for reparations at any stage of the proceedings, even prior to the formal commencement of the trial, and without obligation to link their applications to a specific case adjudicated before the ICC.[438] Within the ICC system, the reparations proceedings are linked to the criminal conviction of an accused person, and as such, the Court will first need to conduct a trial into the criminal responsibility of an accused.[439]

The Victims Participation and Reparations Section (VPRS) has been established under the Registry of the ICC, to facilitate the victims' participation and provide assistance with their reparations applications.[440] VPRS is responsible to receive all the application forms, review them,

[435] Article 21 of the Rome Statute sets forth the sources of law the Court can rely on in its case law, including the case law on reparations. As such, the Court will first refer to the Rome Statute and the RPEs. Second, it will resort to applicable treaties and the principles and rules of international law and finally, failing that, it will resort to general principles of law derived by the Court from national laws of legal systems of the world as long as they are not incompatible with the Statute or international law. Importantly, the Principles and Orders on Reparations must be consistent with internationally recognized human rights, which once again highlights the importance of international human rights law in the establishment of the ICC and its Statute. Rome Statute, art 21

[436] Rome Statute, art 68(3)

[437] RPEs, rule 89, rule 95. Rules 94 and 95 of RPEs further shed light on the procedure of reparations upon victims' request or the procedure on the motion of the Court. The latter situation refers to exceptional circumstances where victims are not in a position to come before the Court to present their claims. In the situation under Rule 94 – Procedure upon victims' request - victims may request reparations under article 75 in a written form. A request for reparations is required to contain extensive information on the award sought.

[438] Gilbert Bitti and Gabriela Gonzalez Rivas, 'The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court' in The International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press, 2006) 313

[439] Rome Statute, art 75 (2) and (3)

[440] ICC, 'Regulations of the Court ICC-BD/01-01-04 53' (2004) regulation 86(9)

compile reports and pass on the relevant information to the relevant Chamber. In addition, VPRS is mandated to inform the victims of their participation rights and about reparations, as well as provide to support and assistance in the election of a legal representative of victims (LRV).[441] Next to the VPRS, the role of Public Information and Documentation Section (PIDS) is also important, as it is the official section tasked with outreach.[442] *In concreto*, according to the Court's Strategy on Outreach, the role of PIDS is to provide information to the affected communities regarding the Court's role and activities, inform victims of their rights and possibility of submitting applications before the Court, as well as foster greater participation of local communities in the activities of the Court.[443] In addition, relevant for the victims' participation is the Victims and Witnesses Unit of the Court, to provide support to victims and witnesses in relation to testimony giving and ensure their security.[444]

Furthermore, as early as the moment of filling in the application form, the victims have the possibility to choose their own LRV, whose representation continues into the reparations stage, if the accused person is convicted. The role of the LRV is to put forward the victims' views and concerns before the Court, although the wording of article 68(3) implies that the victims may do so themselves as well.[445] Furthermore, the LRVs may represent the victims either orally during hearings or through written observations or submissions.[446] According to Rule 91, the Court may limit the LRVs' role to written participation in all the hearings except during hearings in relation to reparations, where the LRVs have broader prerogatives, being allowed to represent the victims orally as well as question witnesses or experts.[447]

In order to ensure the effectiveness of the proceedings, in cases involving large numbers of victims, the Court may request the victims to select a common legal representative.[448] If the victims are unable to choose a common legal representative or representatives within a time limit, the Chamber may request the Registrar to choose one or more common legal representatives on victims' behalf.[449] In the process of selecting an LRV, both the Registry and the Chamber need to take all the reasonable steps to ensure that the distinct interests of the victims are represented and any

<https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf>

[441] Regulations of the Court ICC-BD/01-01-04, Regulation 86(9) <https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf>; see also Melissa Fardel and Nuria Vehils Olarra, 'The Application Process: Procedure and Players' in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 14

[442] See ASP, 'Strategic Plan for Outreach of the International Criminal Court' (29 September 2006) ICC-ASP/5/12, paras 69-84; However, the OTP is also involved in outreach and it conducts victim outreach by holding town hall meetings in the field to help the prosecution team identify the best witnesses to call at trial, but they also allow the victims to express their views and concerns and to share their stories. See Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010) 124

[443] For more see ASP, 'Strategic Plan for Outreach of the International Criminal Court' (29 September 2006) ICC-ASP/5/12, para 13

[444] Rome Statute, art 68(3); Regulations of the Court, Regulation 41

[445] Rome Statute, art 68(3)

[446] The modality for putting forward the victims' views and concerns is dependent upon the Chamber's decision. See RPEs, Rule 91. There is a difference between victims participating in proceedings to express views and concerns and the victims participating as witnesses during proceedings. In the latter role, the victims come before the ICC to testify if he or she is called as a witness for the Prosecution, defence, or the victims' legal representative. VPRS, 'Victims Before the International Criminal Court: A Guide for the Participation of Victims in The Proceedings of the ICC' 13 <https://www.icc-cpi.int/about/victims/Documents/VPRS_Victim-s_booklet.pdf> accessed 3 February 2020

[447] RPEs, Rule 91(4)

[448] RPEs, Rule 90

[449] RPEs, Rule 90 (3)

conflict of interest is avoided.[450] Relevant for the organization of legal representation is the role of the Office of the Public Counsel for Victims (OPCV), an organ of the Court that provides support and assistance to victims and to the LRVs, including, where appropriate, legal research and advice.[451] Lawyers of the OPCV may also represent the victims without a lawyer who wish to benefit from legal assistance,[452] or appear before the Court "in respect of specific issues".[453] Finally, the victims or their LRV participating in any stage of the proceedings, including reparations, need to be informed by the Court in relation to all the developments and decisions taken in the cases.[454]

2.3.2. Outcome-related Prerogatives

In addition to the process-related prerogatives bestowed upon victims, the ICC's reparations regime entails prerogatives relating to the outcome. Article 75's provisions are mainly related to the outcome of the reparations proceedings, i.e. the forms of potential reparations that victims at the ICC may receive, the basis for deciding the content of the tangible reparations to be awarded, as well as the mechanisms for determining these reparations.

As such, paragraph 1 of article 75 establishes the general types of reparations that victims at the ICC may receive: "the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." It goes on to state in an ambiguous manner (in paragraph 1 read in conjunction with 2) that on the basis of these principles, the Court, either upon request or on its own motion will apply these principles to each of the cases coming before the Court, i.e. through orders on reparations.[455] Consequently, it is upon the Court to establish the tangible reparations that the victims will receive, which include restitution, compensation and rehabilitation,[456] although the use of the word 'including' indicates that other forms of reparations might be awarded too.[457] Interestingly, the meaning of these forms of reparations is not defined neither in the Statute nor in the RPEs. However, according to the negotiators to the RPEs, the Court shall establish principles on reparations taking into account the

[450] RPEs, Rule 90(4). The Court moreover explains that in order to protect the victims' interests effectively, it is necessary to apply a flexible approach to the question of the appropriateness of common legal representation, and the appointment of any particular common legal representative. It also lays down some criteria that might be considered in this regard. *Lubanga case* (Trial Chamber, Decision on victims' participation) ICC-01/04-01/06-1119 (18 January 2008) para 124

[451] Regulations of the Court, Regulation 81

[452] As stated in the VPRS's booklet, "Although the Court's resources for legal aid are limited, the Court may be able to provide financial assistance to victims who lack the financial resources to pay for their own lawyer." VPRS, 'Victims Before the International Criminal Court: A Guide For The Participation Of Victims In The Proceedings of the ICC' 23

[453] Regulations of the Court, Regulation 81(4)(b)

[454] RPEs, Rule 92

[455] Rome Statute, art 75 (1) and (2). The Court itself clarified the difference between Principles regarding Reparations and Orders on Reparations at the Appeals Stage of the Lubanga Case. It held that the former are general concepts formulated against the circumstances of a specific case but can nonetheless be amended, expanded at a later date, whereas the latter consist in Trial Chamber's holdings, determination, and findings based on those principles. *Lubanga case* (Appeals Chamber, Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) 3

[456] Rome Statute, art 75 (1). As the travaux preparatoires indicate, the inclusion of these forms of reparations in the Rome Statute follows proposal from France and the UK. Christopher Muttukumaru, 'Reparations for Victims' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 266.

[457] According to the travaux preparatoires, the proposal put forward by France, which constitutes the initial legal basis for these forms of reparations, stated that victims might pursue "appropriate forms of reparations, such as restitution compensation and rehabilitation." [emphasis added] Christopher Muttukumaru, 'Reparations for Victims' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 264. This indicates the illustrative character of the list, which could include other measures too. See also Frederic Megret, 'The International Criminal Court Statute and the Failure to mention symbolic reparation' (2009) 16 International Review of Victimology 127, 136

1985 UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power and the van Boven/Bassiouni Basic Principles on Reparations.[458] These documents can constitute the basis for defining the forms that reparations will take in the ICC's case law.[459]

In addition to the forms that reparations might take, according to Rule 97 (1), "the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both".[460] The RPEs do not clarify further the meaning of individual or collective reparations but do mention that the Court might receive expert help in making the reparations awards.[461] Finally, the RPEs recall that in all cases the Court's assessment and the decision on the reparations shall respect the rights of victims and the rights of the accused.[462]

Furthermore, article 75(1) states the criteria upon which the Court will make its determination of reparations: "in its decision, the Court may […] determine the scope and extent of any damage, loss and injury to, or in respect of, victims". Rule 97 similarly clarifies that: "Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations […]."[463]

As can be observed in the elements required for an application for reparations, the victims have to provide a 'description of the injury, loss or harm'. It is therefore unequivocal that the 'damage, loss and injury' of victims is the main criterion for an award on reparations, which will furthermore be connected with the accused persons' individual criminal responsibility for the 'the damage, loss, and injury'. However, neither the Statute nor the Rules provide a definition of the meaning attached to these criteria – i.e. moral, material, etc. – or the procedure to be followed to determine

[458] Indeed, the negotiators of the RPEs agreed that "For the purposes of interpretation of the terms 'victims' and 'reparations' definitions are contained in article 44 (4) of the Statute, article 68 (1) and its accompanying footnote, the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation". See Peter Lewis and Hakan Friman, 'Victims and Witnesses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 478

[459] As per Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Mr. Theo van Boven, pursuant to decision 1995/117l' (24 May 1996) E/CN.4/Sub.2/1996/17; See theoretical framework chapter 2, section 3.5. for elaborated definitions of the reparations forms.

[460] RPEs, Rule 97

[461] The travaux preparatories indicate that the negotiators of the RPEs debated whether it was appropriate to make collective awards. The main debates were construed along three lines. First, some negotiators perceived the reparations regime as a form of civil remedy, which made it complicated to understand the concept of collective awards. This because a victim pursuing a civil claim would wish to have their individual positon restored by the Court and a collective award would not satisfy them. Also, there were concerns that a convicted person would not face more than one claim for the same loss. Second, other negotiators perceived reparations as 'another' form of sanction imposed by the Court to satisfy victims' needs. A third view posited that the Court should have flexibility to make individual and collective awards as reparations would attempt to address the needs of victims and as such, victims should have a say in how resources were used. All the three views on reparations led up to lengthy discussions that in end converged into the current rule 97. See Peter Lewis and Hakan Friman, 'Victims and Witnesses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 482-483. In addition, it is reported that the rule on collective reparations is proof of a compromise between the effectiveness of rights of victims to participate in the trials and to obtain reparations and the logistic constraints that will be imposed by the very nature of the crimes within the jurisdiction of the ICC, where a large number of victims may overwhelm efforts to fulfill participation and reparations. See Silvia Fernandez de Gurmendi, 'Elaboration of the Rule of Procedure and Evidence' in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 256-257

[462] RPEs, Rule 97 (3). Again, the travaux preparatories indicate that this paragraph was specifically added at the request of those delegations that wanted to make sure that the Court would not award reparations against the wishes of victims. See Peter Lewis and Hakan Friman, 'Victims and Witnesses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 484

[463] Rule 97 (1) of RPEs

the damage, loss, and injury.[464] Furthermore, they do not clarify the burden and standard of proof or the causation link that will be applied to the reparations regime, leaving it up to the Judges to give meaning to these provisions throughout the case law.[465] Nonetheless, the Rules do state that the Court might appoint appropriate experts "to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations".[466] In addition, article 75(3) states that before deciding on the reparations, the Court may invite and take into account different submissions stemming from the convicted person, victims, other interested persons or interested States.[467]

Finally, article 75(3) reiterates the principle underlying the reparations awarded at the ICC, i.e. individual criminal responsibility, as it clarifies that the order on reparations is made against the convicted person.[468] Consequently, orders on reparations will not be directed against States or any other legal entities.[469] In addition, of particular importance to the requirement that the Court may make orders on reparation against the accused persons is the provision according to which "where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79".[470] Indeed, these provisions within Rome Statute represented the initial legal basis for the establishment of the TFV, an organ essential for the materialization of the ICC's reparations regime, as discussed above in section 3.2. According to article 79, the TFV operates "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."[471] The role of the TFV in relation to reparations at the ICC is further clarified in Rule 98 RPEs, which differentiates between the dual mandate of the TFV; the reparations mandate, according to which the TFV is tasked to enforce orders on reparations handed down by the Court,[472] and the assistance mandate, which is disconnected from the reparations awards provided by the Court.[473]

2.3.4. Beneficiaries

The sections above explained the reparations regime's process- and outcome-related prerogatives that the victim may benefit from, according to the legal instruments governing the functioning of the ICC. As already established above, as per article 75, the Court will award reparations "to, or in respect of, victims".[474] This *ratione personae* qualification embedded in article 75 merits

[464] See also Peter Lewis and Hakan Friman, 'Victims and Witnesses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 478
[465] Insights into the preparatory work leading up to the establishment of the RPEs highlight the difficulty amongst negotiators to agree on these matters. As explained, part of the difficulty in resolving the question of 'standard of proof' was that delegations had very different views on what proof meant. While the negotiators decided to leave the question up to the judges establishing principles on reparations, they did agree that the standard of proof would not be the same as for criminal conviction "beyond reasonable doubt", as it would severely affect the reparations. See Peter Lewis and Hakan Friman, 'Victims and Witnesses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 484-486
[466] RPEs, Rule 97 (2)
[467] Rome Statute, art 75(3)
[468] Rome Statute, art 75(2)
[469] The only appeal that article 75 makes to States in regard to reparations concerns their obligation to give effect to a Court decision regarding fines or forfeitures that could contribute to reparations. See Rome Statute, art 75(5) and art 109
[470] Rome Statute, art 72(2)
[471] Rome Statute, art 79(1)
[472] RPEs, Rule 98
[473] Regulations of the Trust Fund for Victims, para 47. As explained above, the TFV's decisions in relation to the assistance mandate are under the purview of the TFV, and do no undergo the Chambers' scrutiny.
[474] Rome Statute, art 75

elaboration of two aspects, namely who the 'victims' entitled to reparations are and what 'to, or in respect, in respect of'' refers to. These categories of persons make up the general characteristics of the population of beneficiaries, which however, are unique to each of the cases brought before the ICC.

In regard to the first aspect, the Rome Statute does not provide any explanation as to the meaning of 'victims',[475] and consequently, the issue was taken up in the negotiations to the RPEs. Indeed, after intense debates over who should be considered a victim for the purpose of the ICC,[476] rule 85 emerged regulating two categories of victims. First, natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Second, legal persons such as organizations or institutions, including NGOs, "that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes".[477] In addition to being natural and legal persons, several criteria have to be fulfilled to be considered victims. The natural person must: a) suffer harm; and b) the harm must be a result of the crime (causal link), whereas the legal person must a) sustain direct harm; and) be one of the protected objects outlined above.

With regard to the second aspect, it is clear from the above that the Statute provides that reparations be awarded to victims, natural or legal persons – the so-called direct victims. However, neither the Statute nor the RPEs provide elaboration on the meaning of 'in respect of' expression, and records of the travaux préparatoires to both instruments do not indicate debates on this issue.[478] However, the literature reports that the French and the Spanish versions of the Statute indicate that the term 'in respect of' covers the family members of the direct victims –dependents and/or relatives-, all the while acknowledging that the definition of 'family' might diverge according to national laws and traditions.[479] This category is referred to as indirect victims. Ultimately, it will fall on the Court to clarify who can actually benefit from reparations at the ICC in its subsequent case law on reparations.

[475] The travaux preparatories report that "who should be regarded as victims was not specifically discussed during the elaboration of the Rome Statute, despite major and distinctive role contemplated for them". Silvia Fernandez de Gurmendi, 'Elaboration of the Rule of Procedure and Evidence' in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 430

[476] The travaux preparatoires indicate that a large majority of negotiators supported that the definition of victims before the ICC should follow the definition embedded in the 1985 UN Declaration, however, not all the negotiators agreed. In addition, the negotiators were concerned that, depending on the definition of victims, very large number of victims might overwhelm the Court with their participation and request for reparations. Silvia Fernandez de Gurmendi, 'Elaboration of the Rule of Procedure and Evidence' in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 429, 433

[477] RPEs, Rule 85

[478] The travaux preparatoires do indicate that in regard to the definition of victims, the drafters intended that reference be made to the 1985 UN Declaration and the draft Basic Principles on Reparations. These documents provide for the right to reparation to indirectly harmed individuals, such as the families of victims and their successors. David Donat-Cattin, 'Article 75 – Reparations to Victims' in Otto Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article (Baden-Baden, 1999) 965-969

[479] Gilbert Bitti and Gabriela Gonzalez Rivas, 'The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court' in The International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press, 2006) 310; Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010) 111

3. Analysis and Results

3.1. Methodological Aspects of the ICC's Practice Analysis

Bearing in mind the general context exposed above detailing how the ICC came to be established, its mandate relating to victims and reparations as well as its reparations regime, this section will introduce the research question and methodology guiding the empirical inquiry of this chapter.

3.1.1. Research Question and Methodology

The research sub-question guiding this chapter is:

Taking into account the ICC's reparations regime and its practice on reparations for international crimes, how does the Court potentially contribute to reparative justice for victims under its jurisdiction?

In answering the research sub-question, this chapter was compiled in several steps.

In a first step, the ICC's reparations regime was put forward, structured along prerogatives statutorily bestowed upon victims in relation to the process and outcome of reparations at the ICC.

Second, in order to establish how the ICC's reparations mandate materialized across the Court's practice and how it may contribute to reparative justice for victims under its jurisdiction, the ICC's practice was scrutinized. The practice consists of the ICC's jurisprudence on reparations (at both Trial and Appeals Chambers' level), oral and written submissions by the legal representatives for victims on victims' behalf (mainly in the English language but also in the French language when it was the only option available), and submissions by the TFV. They were scrutinized along the procedural justice and substantive justice dichotomy and the elements that inform them, as elaborated upon in the methodology section of the Introduction chapter.

In a last step, the ICC's potential contribution to reparative justice was appraised, by assessing how the ICC's reparations regime materialized across its practice on reparations ('what is'), taking into account the reparations framework (what 'ought to be') and its potential implications for victims, as established in the theoretical framework.

In what follows, the next section will first describe the judicial cases adjudicated by the ICC wherein reparations were awarded. Then, it will put forward the results of the analysis and assessment of procedural justice and substantive justice elements, as they materialized across the ICC's practice. The assessment of the Court's potential contribution to procedural justice and substantive justice is complemented by empirical studies and secondary scholarship, to contextualize the findings to actual victims before the ICC and their expressed perceptions. However, amid a scarcity of empirical research evaluating the victims' experience with participation and reparations at the ICC, this research refers in particular to the findings of a study carried out at Berkeley School of Law by Stephen Cody et al., focusing on 622 victims participating in cases at the ICC.[480]

[480] According to this study, these 622 people were registered as victim participants or had submitted applications for consideration as victim participants to the ICC and were awaiting responses. Stephen Cody and Alexa Koenig, 'Procedural Justice in

In the last step, final considerations regarding the ICC's potential contribution to reparative justice for victims through its reparations regime will be put forward.

3.1.2. Case-Law

The ICC's current jurisprudence on reparations consists of three cases. The Lubanga case is the first case ever brought before the ICC and concerns the criminal conviction of Thomas Lubanga Dyilo, a Congolese citizen of Hema ethnicity.[481] He was found guilty, on 14 March 2012 of committing, as co-perpetrator, the war crimes of enlisting and conscripting children under the age of 15 years into the Force Patriotique pour la Libération du Congo (FPLC) and using them to participate actively in hostilities in the context of a national armed conflict.[482] He was sentenced to 14 years' imprisonment. In regard to his responsibility for reparations for the victims suffering harm as a result of his crimes, the Judges estimated his liability to 10 million USD.[483]

The Katanga case refers to the criminal conviction of Germain Katanga, also a Congolese citizen, partly of Ngiti origin.[484] He was found guilty on 7 March 2014 of committing, as an accessory, crimes against humanity (murder) and 4 counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) on 24 February 2003 during the attack on the village of Bogoro (DRC). He was sentenced to a total of 12 years' imprisonment.[485] Regarding his responsibility for reparations for his victims, the Judges estimated his liability to 1 million USD.[486]

The Al Mahdi case refers to the criminal conviction of Ahmad Al Faqi Al Mahdi, a citizen of Mali. He was found guilty, on 27 September 2016, of committing, as a co-perpetrator, the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012.[487] In the first ever conviction before the ICC regarding international crimes against cultural heritage, Al

Transnational Contexts' (2018) Virginia Journal of International Law 1, 9. Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1; Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 1

[481] *Lubanga case* (Trial Chamber: Judgement pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012), disposition

[482] See here for a short summary of all the proceedings in the Lubanga case: ICC, 'Case Information Sheet: Situation in the Democratic Republic of the Congo, the Prosecutor v Thomas Lubanga Dyilo' <https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf> accessed 3 February 2020

[483] *Lubanga case* (Trial Chamber: Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable) ICC-01/04-01/06 (21 December 2017) disposition

[484] See here for a short summary of all the proceedings in the Katanga case: ICC, 'Case Information Sheet: Situation in the Democratic Republic of the Congo, the Prosecutor v Germain Katanga' <https://www.icc-cpi.int/iccdocs/pids/publications/KatangaEng.pdf> accessed 3 February 2020

[485] *Katanga case* (Trial Chamber: Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) disposition

[486] *Katanga case* (Trial Chamber: Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) disposition

[487] See here for a short summary of all the proceedings in the Al Mahdi case: ICC, 'Case Information Sheet: Situation in the Republic of Mali, the Prosecutor v Ahmad Al Faqi Al Mahdi'< https://www.icc-cpi.int/CaseInformationSheets/Al-MahdiEng.pdf> accessed 3 February 2020

Mahdi was sentenced to 9 years' imprisonment.[488] In addition, in terms of responsibility for reparations, the Judges estimated that Al Mahdi is liable for 2.7 million EUR.[489]

It is important to note that at the moment of writing this thesis, both Lubanga and Katanga have already served their sentenced and have reportedly been released.[490]

3.2. Mapping the ICC's potential contribution to procedural justice and substantive justice for victims under its jurisdiction: analysis and assessment

After having established the parameters of the analysis as well as the jurisprudence assessed for this purpose, the remainder of this section aims to put forward the results of the analysis and the assessment of the Court's potential contribution to reparative justice for the victims under ICC jurisdiction. It will first focus on the procedural justice dimension – grasping how the various components pertaining to the process of obtaining reparations unfold in practice and assessing how they may contribute to procedural justice. Then, it will focus on the substantive justice dimension, by scrutinizing the actual reparations measures that victims are entitled to receive according to the Court's decisions against what the victims' preferences are. Before doing so, however, the next section will explain how the victims' access to justice at the ICC is subject to certain layers of selection that have an influence on the population of beneficiaries before the ICC. These layers emerged in the process of scrutinizing the Court's practice on reparations, and as such, appear relevant to put into perspective the Court's potential contribution to reparative justice for victims.

3.3.1. Access to Justice

There are several layers that appear to influence who will participate in reparations proceedings and is entitled to receive reparations before the ICC. They can either be attributed to the legal architecture of the Rome Statute or to the manner in which the different organs of the Court exercise their mandates. They will be introduced chronologically, following the structure of the trial from the period leading up to opening a trial until its end. The first layer relates to the different limitations embedded within the Rome Statute itself. As is well known, the ICC is an international court that operates under *ratione materiae, ratione temporis,* and *ratione personae* jurisdiction,[491] which means that only specific situations can be brought before the ICC.[492] In addition, one of the core principles of the ICC is the principle of complementarity to national courts, which makes the ICC a court of last resort, capable to prosecute international crimes only when a State is unable or unwilling to do so itself.[493]

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[488] *Al Mahdi case* (Trial Chamber: Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016)
[489] *Al Mahdi case* (Trial Chamber: Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016) disposition
[490] 'Two War Crimes Convicts Freed In Dr Congo' (JusticeInfo, 16 March 2020) < https://www.justiceinfo.net/en/live-feed/44022-two-war-crimes-convicts-freed-in-dr-congo.html> accessed 19 March 2020
[491] See part 2 of Rome Statute for Jurisdiction, Admissibility and Applicable Law.
[492] See also Rome Statute, art 13 on the Exercise of Jurisdiction. It indicates the three situations when a case may be brought before the ICC – investigation by the Prosecutor proprio motu, such as the situation in Kenya; referral by a State Party, as is the case of the situation in the DRC, which referred its situation to the Court; and finally, referral by the UN Security Council (UNSC) under Chapter VII of the Charter, such as the case of the situation in Libya referred to the Court by unanimous decision of the UNSC. For elaboration on these situations and the politics involved in bringing these cases before the ICC see generally David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014)
[493] See Rome Statute, art 17 on Issues of Admissibility

The second layer relates to the powers that the different Court organs have, to apply and interpret the Rome Statute according to their mandates, which inevitably results in the inclusion as well as exclusion of victims from the beneficiary category. In the case of the ICC, they include the OTP, the PIDS and the VPRS, as well as the Chambers. Their practice and influence of the categories of beneficiaries will be discussed in turn. The role of the OTP is of utmost importance at the start of an investigation, as the Prosecutor has the power, on the basis of all information made available to him or her, to proceed or not with an investigation.[494] In addition, one of the core aims of the OTP during the execution of its mandate is to frame the charges against an accused person in such a way as to ensure that a case will be successfully prosecuted.[495] Consequently, the Prosecutor's strategies have a direct effect on the determination of who may become a beneficiary and who may not, depending on the criminal charges presented in a case.[496]

Next to the role of the OTP, the outreach and information conveyed to the victimized populations where the OTP opens investigations has an influence on who is aware of the involvement of the ICC in a situation, its cases and work. Awareness of the Court and of the possibility to participate in the trials and request reparations might determine victims to participate in the ICC proceedings at various stages. As discussed above, PIDS and VPRS sections within the Registry are essential for the victims' participation in Court proceedings, including in reparations proceedings, to carry out a variety of activities, including to raise awareness of the existence of the ICC, the ongoing cases, and assist victims in the exercise of their rights to participation and reparations before the ICC. In practice, VPRS personnel do not generally communicate directly with the communities, but through local contacts such as NGOs, local authorities, and religious and traditional leaders – the so-called intermediaries.[497] The step-by-step process of how this occurs was explained in the ICC's Guide for the Participation of Victims in the Proceedings of the Court.[498] In short, after victims are informed of their rights before the ICC, they may opt to submit applications to

[494] See Rome Statute, art 53 (1) on Initiation of an Investigation

[495] By way of example, Luis Moreno Ocampo (the first ICC Prosecutor) took a conscious decision in the first case ever before the ICC, on the basis of the available evidence, to bring charges against Thomas Lubanga limited to the enlistment and conscription of child soldiers under the age of 15, thus leaving unprosecuted multiple other crimes that were reportedly perpetrated in the DRC. See Phil Clark, *Distant Justice: The Impact of the International Critical Court on African Politics* (Cambridge University Press, 2018) 177-178. An example of crimes excluded from the charges against Lubanga is the crime of sexual violence, in which case the Trial Chamber I deciding on the guilt of Lubanga held: "Although the former Prosecutor was entitled to introduce evidence on this issue during the sentencing hearing, he failed to take this step or to refer to any relevant evidence that had been given during the trial. As a result, in the view of the majority, the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt." *Lubanga case* (Trial Chamber: Public Decision on Sentence Pursuant to Article 76 of the Statute) ICC-01/04-01/06-2901 (10 July 2012) para 75

[496] Felix Nhahinda explained, with regard to the ICC case against Bemba, that there are clear indications that during the conflict in the Central African Republic (CAR), other actors committed horrendous atrocities. However, the inability to indict any person involved on the ground in the CAR, including CAR military commanders, can only lead to the partial documentation and establishment of responsibilities during an internal conflict. As such, in the CAR, as in the DRC (where Bemba and his army operated, too), numerous crimes were committed and thousands, if not millions, were victimized, but the OTP focused only on the prosecution of Bemba, and only in relation to the CAR situation. Felix Mukwiza Ndahinda, 'The Bemba-Banyamulenge Case before the ICC: From Individual to Collective Criminal Responsibility' (2013) 7 The International Journal of Transitional Justice, 476

[497] Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 132

[498] "1. Victims are informed about their rights and how to apply to participate in ICC proceedings; 2. Victims obtain and complete application forms with the assistance of individuals or organisations trained by the ICC 3. Victims submit their applications to the VPRS at the Headquarters or a Field Office 4. VPRS receives an application and provides the applicant with a reference number to the contact address provided or to the legal representative, if the applicant has appointed one 5. VPRS files the application with the Chamber of Judges. 6. Judges review and decide if the application is successful or rejected and the applicant is notified 7. If successful, applicant receives information, including about legal representation. If rejected applicant is allowed to apply again later in the proceedings". VPRS, 'Victims before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the ICC' 20

participate in ICC proceedings, with assistance from NGOs and local Court partners. The applications are then processed by the VPRS and transmitted to the Judges for the eligibility check. Notwithstanding the work of the Registry's sections in relation to outreach for victims,[499] the available research highlights that, for various reasons,[500] the victims' awareness regarding the existence of the Court and their rights, including the right to claim reparations remains limited.[501] Unfortunately, this lack of knowledge amongst the population of victims amounts to lost opportunities for the victims to participate in the ICC's trials and request reparations.

A further influence on the beneficiary category refers to limitations resulting from the Court's application and interpretation of its reparations regime – this time by the Chambers. Several examples will be put forward to explain how the layer of selection operates at the Chambers' level. As discussed above, the procedure of reparations at the ICC is triggered upon the victims' submissions of applications for reparations or on the motion by the Court.[502] To date, all cases involved the former procedure, which entailed that the Court was tasked to check the eligibility of applications submitted by victims. One of the requirements with major influence on the beneficiaries' eligibility is the causal link between the harm suffered by the victims and the commission of any crime within the jurisdiction of the Court.[503] The Court, since its early days in the Lubanga case interpreted that "a causal link must exist between the crimes charged and the victims' harm: the injury, loss or damage suffered by natural persons must be a result of the crimes confirmed against Thomas Lubanga Dyilo."[504] Since the functioning of the Rome Statute is framed along the principles of individual criminal responsibility and an order for reparations must be made directly against the convicted person,[505] the Court decided that reparations will be awarded strictly to those victims who can establish that their harm is the result of crimes perpetrated by the convicted person. The Court's interpretation of the causal link has at least three implications. One is that the trial will not proceed with the reparations segment if an accused person is not found guilty or is acquitted. For instance, the abrupt termination of proceedings against Bemba in the case of *Prosecutor v. Jean Pierre Bemba Gombo* signifies that the victims in this trial will not

[499] See also ASP, 'Report of the Bureau on the Impact of the Rome Statute System on Victims and Affected Communities' (Appendix III Discussion paper) (22 November 2010) ICC-ASP/9/25, paras 27-32

[500] For instance, Godfrey Musila wrote that the outreach strategies in the DRC targetted various sectors of society, but not the victims, which resulted in scarce knowledge on the victims' part. He wrote that "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." In Godfrey M Musila, *Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's work in the DRC* (Published Monograph, 2009) 51

[501] Claire Garbett, 'The International Criminal Court and restorative justice: victims, participation and the processes of justice' (2017) 5 Restorative Justice, 198. In addition, Sperfeldt reported that in the Lubanga and Katanga cases the capacity of the Registry's organs focused on victims is limited, due to scarce resources as well as practical challenges on the ground. For a detailed elaboration on outreach at the ICC in general and in relation to the DRC cases in particular, see Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 124. In addition, it is reported that in the DRC, VPRS was working closely with PIDS to develop and disseminate information about the ICC into local communities, which turned out to be challenging as most of the target communities have high levels of illiteracy and operate in local languages. Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 133

[502] As per RPEs, rules 94 and 95 RPEs

[503] As per RPEs, Rule 85

[504] *Lubanga case* (Pre-Trial Chamber I: Decision on the Application for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6) ICC-01/04-01706-172-tEN (20 July 2006) 8

[505] As is well known, the reparations proceedings may commence before the ICC only after a person has been found guilty and sentenced in a trial before the ICC; see also Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010) 75, 91

receive Court awarded reparations, despite making thousands of applications in this regard.[506] The second is that the victims will be awarded reparations only for the harm resulting from the crimes for which the accused person has been convicted. As can be observed in all three orders on reparations handed down by the Court, significant categories of victims were excluded from the beneficiary category. In the Lubanga case, the Trial Chamber appeared to take a more lenient approach, as to allow victims of sexual and gender-based violence to access reparations.[507] However, the Appeals Chamber corrected the 'error' and excluded the victims of sexual- and gender-based violence from the category of beneficiaries, since Lubanga has not been found guilty of these crimes.[508] Similarly, in the Katanga case, victims of rape, sexual violence, and gender-based violence as well as child soldiers under the age of 15 who have allegedly participated directly in the crimes charged to Katanga could not be considered beneficiaries.

Finally, in the Al Mahdi case, several victims alleging bodily harm or property damage as a result of Al Mahdi's crimes were considered ineligible. In all these cases, the reason for excluding these categories of victims from the beneficiary category is that the three accused could not be found guilty in relation to those crimes. Although detrimental to victims, the Court's interpretation of the causal link flows from the link of reparations with an individual's criminal responsibility.

In addition, the Chambers' interpretation of the causal link requirement further influenced the decision on who can be considered the indirect victims. In the Lubanga case, the Chamber held that indirect victims: [509]

"*[M]ust establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged.*"

As such, this decision included in the category of beneficiaries the family members of the direct victims (i.e. child soldiers under the age of 15, in the present case) as well as potential persons who might have intervened to prevent one of the crimes alleged against the accused, provided that these victims can prove that they have suffered harm as a result of the harm suffered by the direct victims. What was, however, excluded is the category of victims who have suffered harm as a result of the conduct of direct victims, even though it is clear from Lubanga's conviction decision that the child soldiers engaged in hostilities.[510] While from a legal perspective the Court's approach appears justified, from a victimological perspective it illustrates the challenges inherent in defininig who can be considered a victim in situations of mass victimization, signalized in the

[506] The case of Bemba serves as an illustration of the devastating effect a decision of acquittal, albeit justifiable from a legal perspective, will have on the victims looking to receive Court awarded reparations. As is well known, due to the fact that Bemba was acquitted on appeals, the trial did not proceed with the reparations phase, leaving thousands of victims disappointed with the ICC process of justice. See *Bemba case* (Appeal Chamber: Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/08-3636-Red (08 June 2018); *Bemba case* (Trial Chamber: Final Decision on the Reparations Proceedings) ICC-01/05-01/08-3653 (3 August 2018) para 6

[507] *Lubanga case* (Trial Chamber: Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) 217

[508] *Lubanga case* (Appeals Chamber, Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) para 199

[509] *Lubanga case* (Trial Chamber: Decision on 'Indirect Victims') ICC-01/04-01/06-1813 (8 April 2009, ICC) para 49

[510] *Lubanga case* (Trial Chamber, Judgement pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) disposition. For instance, in the case of The Prosecutor v Dominic Ongwen currently ongoing at the ICC, the Court is concerned with the investigation of Ongwen's liability for crimes allegedly committed as a child soldier. See ICC, 'The Prosecutor v Dominic Ongwen, Case Information Sheet'<https://www.icc-cpi.int/CaseInformationSheets/OngwenEng.pdf> accessed 3 February 2020

theoretical framework. Through its prerogative to apply and interpret the Rome Statute, the Court includes and excludes victims from the category of beneficiaries.[511]

As can be observed, the layers of selection are either inherent in the Rome Statute itself and the way it was negotiated and drafted during the Rome Conference, or flow from the different organs' interpretations of the Rome Statute provisions and enforcement of their mandates. As highlighted above, these layers carry along different criteria for selection and altogether have an impact on who can in the end access and participate in reparation proceedings and benefit from reparations. As a consequence, the number of beneficiaries at the ICC is generally limited. As one author described it, "this number obviously represents only a tiny sliver of the literally millions of potential victims from these conflicts."[512] However, this is not to say that other factors beyond the Court's control do not play a role (e.g. resources) or that it is feasible to award reparations to all these victims. Nonetheless, this section aimed to highlight how the layers of selection inherent in the ICC's legal system put a strain on an already volatile population of victims.

3.3.2. Procedural Justice

Notwithstanding the layers of selection that define who may participate in the ICC's reparation proceedings, the remainder of the chapter will switch focus to the victims who 'make it' through the layers of selection. The next section will assess the Court's potential contribution to procedural justice – defined in terms of voice, information, interaction and length - for these victims. To clarify, reference to the reparations proceedings throughout this chapter covers the judicial proceedings in relation to the Reparations Order, which include Trial Chamber and Appeals Chamber's decisions, and all the way to the Court's decisions regarding the implementation of reparations, where such information is available.[513] As is known, after the Court orders reparations for victims via a Reparations Order, it falls on the TFV to implement them;[514] as such, the TFV is first tasked with drafting an implementation plan and only after the Court approves the plan, the actual implementation by the TFV can commence.[515]

I. Beneficiaries

As far as who the victims involved in the process of obtaining reparations at the ICC are (i.e. the beneficiaries of procedural justice), this research identified that this category of beneficiaries cannot be easily delineated, for two reasons. First, victims interested in obtaining reparations at the ICC may submit applications in all stages of the trial – pre-trial, trial, reparations – as long as the applications are filed according to the deadlines for participation in the respective stage.[516] In

[511] See also Alina D. Balta, Manon Bax, Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System' (2019) 29 International Criminal Justice Review 221

[512] See Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010) 119

[513] This understanding of the reparations proceedings follows the Court's holding in Al Mahdi, wherein the Chamber sees the reparations proceedings in "terms of three core judicial decisions: the Reparations Order; the Draft Implementation Plan Decision approving the TFV's draft implementation plan; and the present decision, whereby the Chamber will approve the selected projects identified in the Updated Implementation Plan." *Al Mahdi case* (Trial Chamber: Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red (4 March 2019) para 14

[514] For instance, in the case against Lubanga, the Appeals Chamber directed the TFV "to prepare the draft implementation plan and submit it to the Trial Chamber within six months of the issuance of the [3 March 2015 Reparations] Order". *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) paras 75-76

[515] According to Regulations of the Trust Fund for Victims, Regulation 54

[516] According to Regulations of the Court, Regulation 86(3). Judges receive victims' applications from the Registry via reports, and then decide on their eligibility according to the criteria applicable in the respective trial stage. For instance, in the trial stage

addition, as the practice in the Lubanga and Al Mahdi cases revealed, the victims may even submit applications for reparations after the reparations stage concluded, however, these victims will not have participated in the reparations proceedings.[517] In the Katanga case, the Chamber took a different approach and set a cut-off date for the victims to submit applications.[518] As a result of this flexible and diverse approach, the population of victims involved in the process of obtaining reparations may fluctuate, as new victims may join these proceedings at any stage. Second, the victims' applications are scrutinized by the Judges who decide on the eligibility of the participating victims, according to the criteria pertaining to the reparations stage.[519] As such, in the Lubanga case, the Chamber held that: "425 of the 473 potentially eligible victims in the sample have shown on a balance of probabilities that they are victims – direct or indirect – of the crimes of which Mr Lubanga was convicted and, accordingly, are entitled to reparations awarded in the case".[520] Similarly, in the Katanga case, the Court determined that 297 of 341 applicants have shown on a balance of probabilities that they are victims of the crimes of which Katanga was convicted and accordingly, are entitled to reparations ordered by the Chamber in the case.[521] In the Al Mahdi case, however, the Court acknowledged that it had received 139 applications; however, it decided not to make a determination on the individual applications. Instead it left it up to the TFV to determine the beneficiaries of reparations according to the eligibility criteria set forth by the Chamber.[522] Consequently, the eligibility check by the Judges results in a fluctuation in the beneficiaries population, as those victims found ineligible will not continue with the reparations proceedings.

II. Voice

Bearing in mind this caveat exposed above, this section consists of an illustration of how voice is materialized across the ICC's reparations proceedings as well as an assessment of the potential implications for victims.

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victims must fulfill rule 85 requirements, which includes that victims must demonstrate that their harm is the result of the crime the accused persons is charged with. They must also demonstrate their personal interest in the trial stage according to article 68(3) Rome State. See for instance *Katanga and Chui case* (Trial Chamber: Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims) ICC-01/04-01/07-1491-Red-tENG (23 September 2009). If victims are denied participation in a specific stage, they may re-apply again at a later stage according to Regulation 107 of Regulations of the Court.

[517] See section 4.2.1. for elaboration.

[518] *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 168

[519] Judges receive victims' applications from the Registry via reports, and then decide on their eligibility according to the criteria applicable in the respective trial stage. The Registry reports may already include an assessment of eligibility under rule 85 made by the VPRS, but it is ultimately up to the Judges to decide on eligibility. As such, in the trial stage the Judges must decide whether the victims fulfill rule 85 requirements, which includes that victims must demonstrate that their harm is the result of the crime the accused persons is charged with. The victims must also demonstrate their personal interest in the trial stage according to article 68(3) Rome State. See for instance *Katanga and Chui case* (Trial Chamber: Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims) ICC-01/04-01/07-1491-Red-tENG (23 September 2009). If victims are denied participation in a specific stage, they may re-apply again at a later stage pursuant to Regulation 107 of Regulations of the Court. In addition to the criteria above, the criterion pertaining to the reparations stage is the 'causal link', i.e. whether the harm of victims results from the crimes the accused was found guilty of.

[520] *Lubanga case* (Trial Chamber: Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable) ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017) para 190

[521] *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017

[522] *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) 142

As the analysis revealed, the main modalities through which the victims' voice is transmitted to the Court in reparations proceedings are written submissions, the legal representation practice, and consultations with the TFV at the implementation of reparations stage. In order to benefit from reparations at the ICC, all victims participating in ICC trials or persons acting on behalf of victims must fill out application forms wherein they provide a written testimony.[523] As such, this constitutes the means for capturing the victims' voices in the initial stages of the victims' involvement with the Court. While the exact fields of the application forms may vary across cases, the application forms provide victims with the opportunity to explain the victimization they have been through, to provide details regarding the different types of harm suffered, including physical or mental injury, emotional suffering, harm to reputation, economic loss and/or damage to property or any other kind of harm, to elaborate on the type of reparations victims want to receive, as well as to express preferences in regard to legal representation.[524] Consequently, these application forms might be an important vehicle for the victims to convey their voice and recount their stories, especially for the victims who prefer this modality of self-expression to oral testimony.[525] However, their importance might be mitigated in the context of the ICC. Reasons might include the complexity of the applications forms, which include questions spanning across multiple pages, which may be overwhelming for victims not accustomed with complex application forms.[526] In addition, the languages of the application forms – usually English and French - might make it difficult for the voice of victims to be accurately captured within the applications forms. To ease this process, the role of intermediaries trained by the VPRS is essential, to help the victims fill in the application forms as well as to translate the victims' stories into the languages utilized by the Court, for victims speaking local languages.[527] While the use of intermediaries has immediate perks, in that the victims are helped with the application forms which might be confronting to them, it also entails the risk of having the victims' stories distorted or even devoid of the initial meaning, especially when translated into other languages.[528]

Despite the complexities involved in expressing the victims' voice through application forms at the ICC,[529] the remarks posited above have been refuted by an empirical research with 622 victims participating in different cases at the ICC.[530] In their research, Stephen Cody and Alexa Koenig discovered that victims at the ICC documenting their story through the application forms, expressed that these applications were "ultimately the best mechanism" for conveying information

[523] RPEs, Rule 89

[524] ICC, 'Request for Participation in Proceedings and Reparations at the ICC For Individual Victims'< http://www.victimdefence.com/pdf/SAFIndividualEng.pdf> accessed 3 February 2020

[525] See e.g. Kimi King, James Meernik, Sara Rubert, Tiago de Smit, Helena Vranov Schoorl, Echoes of Testimonies: A Pilot Study into the long-term impact of bearing witness before the ICTY (University of North Texas and Castleberry Peace Institute, ICTY, 2016) 83

[526] See for instance in the case of Bosco Ntaganda case where the Court decided on a simplified applications form consisting in one page, as opposed to other cases where the application form consisted in 17 pages. *Ntaganda case* (Pre-Trial Chamber, Decision Establishing Principles on the Victims' Application Process) ICC-01/04-02/06-67 (28 May 2013) para 21

[527] Kinga Tibori-Szabó, Barbara Bianchini, Anushka Sehmi and Silke Studzinsky, 'Communication Between Victims' Lawyers and Their Clients' in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 437

[528] This has also been argued in relation to the translation of Holocaust stories, where it has been argued that their translation will entail also the translator's attitude and concerns. See Jean Boase-Beier, 'Holocaust Poetry and Translation' in Jean Boase-Beier, Peter Davies, Andrea Hammel, Marion Winters (eds), *Translating Holocaust Lives* (Bloomsbury Publishing, 2017) 162

[529] See also Carla Ferstman, 'International Criminal Law and Victims' Rights' in William A. Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Taylor & Francis Group, 2010) 412

[530] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1. The study includes interviews with 622 victims participating in various cases before the ICC.

and testimonial evidence to the Court.[531] The victims valued that the applications provided ample space for the victims to elaborate on their personal biography, and detail the individual and collective harms they had experienced.[532] They furthermore expressed that the applications were sufficient to make their stories known before an international court.[533] It appears that these application forms enabled the victims to express their interests in relation to the reparations proceedings as well as to recount their stories and harm suffered, thus constituting an important first vehicle for the victims to express their voice before the ICC.[534] In addition, despite the fact that several shortcomings might arise, as argued above,[535] the Court's practice appears to be adapting to challenges. As such, it can be noticed that in its subsequent practice, the Court adjusted the application forms according to the case at hand, limiting the number of pages,[536] as well as making available the forms in languages that the victims understand,[537] in order to facilitate this means of passing on to the Court the victims' voices.

Past the application stage, the practice of legal representation is the main modality through which victims participate throughout the ICC's reparations proceedings and express their voice. As the current research discovered, the practice of legal representation, as currently organized at the ICC, appears to pose several challenges to the victims' agency.[538] The first challenge concerns the victims' agency to narrate their own story. Despite the fact that the provisions of article 68 of the Rome Statute indicate that victims may be able to express their views and concerns directly before the Court, in practice, the victims could not avail themselves of this prerogative in any of the reparations proceedings conducted at the ICC.[539] Taking into account that the victims' voice in the ICC's reparations proceedings is exclusively narrated by their LRVs,[540] it is submitted that this exclusive system of legal representation might interfere with the victims' agency to narrate their own story before the Court and to express preferences with regard to reparations.[541] To this

[531] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 21

[532] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 21

[533] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 21

[534] See theoretical framework chapter; part 3.1.

[535] See also Independent Panel of Experts, *Report on Victim Participation at the International Criminal Court* (REDRESS, 2013) <https://www.refworld.org/docid/5232e6a64.html> accessed 3 February 2020

[536] Nowadays, the ICC provides elaborated explanation accompanying the application forms, to help the victims or the intermediaries in filling out the forms. See ICC, 'How to Complete the Application Form for Participation and/or Reparations' < https://www.icc-cpi.int/itemsDocuments/appForms-yn/ynAppFormIndInst_ENG.pdf> accessed 3 February 2020

[537] In recent cases, the victims' application form has been translated in more languages to facilitate this process for the victims. For instance, in Al Hassan Case, victims are enables to fill out forms in English, Français, Tamasheq, Songhai, Bambara languages. ICC, 'Al Hassan Case, ICC-01/12-01/18'< https://www.icc-cpi.int/mali/al-hassan> accessed 3 February 2020

[538] See e.g. Antony Pemberton, Pauline van Eck-Aarten, and Eva Mulder, 'Beyond retribution, restoration and procedural justice: The big two of communion and agency in victims' perspectives on justice' (2017) 23 Psychology Crime & Law 682

[539] As the negotiators of the Rome Statute have conceded, victim participation in ICC proceedings through legal representation was a necessary compromise to accommodate the large number of victims. Silvia Fernandez de Gurmendi, 'Elaboration of the Rule of Procedure and Evidence' in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 256

[540] Sperfeldt similarly stated in his dissertation that the intermediaries used by the Court to help victims fill in the application forms interpret and mediate the voices of victims, all the while acknowledging that without their crucial involvement few survivors would have ever known about the ICC or accessed its reparations scheme. See Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 136

[541] This is different from the trial proceedings, where a handful of victims had the opportunity to address the court and testify as victims-witnesses. However, the testimony related to the establishment of facts in view of the accused's conviction and did not concern the matter of reparations. See, for instance *Lubanga case* (Trial Chamber, Judgement pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) 10

holding, however, the findings of Cody and Koenig add a qualification. Interestingly, their study ascertained that in the context of the ICC, the victims generally preferred to have their voice passed on to the Court by their legal representative, with very few victims interested to express their views in the courtroom.[542] Victims generally believed that their appointed lawyers or ICC staff could adequately represent their stories before the Court, especially because they had already expressed their preferences by means of written testimonies.[543] Furthermore, Cody and Koenig posited that the victims' distance to the Court and the multitude of actions required to travel to The Hague (e.g. applying for visa) appeared a determinant in the victims' choice of expressing their voice through legal representation rather than oral testimony. [544] It appears that more research needs to be conducted to evaluate whether victims are satisfied with having their voice passed on to the Court exclusively by their LRV during the reparations proceedings, as Cody and Koenig's study focused on proceedings at the ICC in general. However, Cody and Koenig's findings do add a qualification to this study's claim that a system exclusively relying on legal representation interferes with the agency of victims to narrate their own story before the Court and to express preferences with regard to reparations. Instead, it appears that for some of the victims in the context of the ICC, legal representation might represent a satisfactory modality for expressing their voice, as long as it is done in familiar places that do not require extensive travelling.[545]

A second challenge to the victims' agency concerns the victims' choice of a legal representative. Although the ICC's legal framework gives priority to the victims' choice of legal representation and discusses the common legal representation as a possibility,[546] in the Court's practice, this entitlement appears diluted by the Judges' decisions to assign a common legal representative.[547] In the reparations proceedings investigated in the current research, the victims were represented as follows: in the Lubanga case, the victims were asked to organize common legal representation[548] and consequently, were divided into two legal teams V01 and V02, each with their LRV. In addition, the Office for the Public Counsel for Victims (OPCV)[549] was appointed at a later stage to act as the legal representative for unrepresented applicants, i.e. for other victims who submitted

[542] This study focused on 622 victims participating in ICC trials originating in four African countries–Democratic Republic of Congo, Ivory Coast, Kenya, and Uganda. See Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 17-18

[543] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 18

[544] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 18

[545] Admitedly, Cody and Koenig's findings must be understood bearing in mind the context in which the study was done and the cultural background of the participants of the study, which might not be as readily valid in other contexts. Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 18

[546] RPEs, Rule 90

[547] Former ICC judge Christine Van den Wyngaert argued: "Although it is theoretically possible for victims to appear individually, this would be totally impractical in view of the high number of victims, which tends to increase as time goes by and the Court becomes better known. For that reason, victims at the ICC are, in all cases, represented by common legal representatives". Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 480

[548] *Lubanga case* (Trial Chamber: Decision on the Applications by Victims to Participate in the Proceedings) ICC-01/04-01/06-1556 (15 December 2008) para 121

[549] OPCV is based in The Hague and was established pursuant to Regulation 81 of the Regulations of the Court. Its role is to assist victims or their LRV with legal research and advice, and to appear before a Chamber in respect of specific issues, usually relating to victims. It also engages in matters relating to case management, assistance in the courtroom, and representation in hearings that do not to justify a trip of the counsel from the field to The Hague. See Luc Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) 16 International Criminal Law Review 1016

reparations after the legal teams had been created as well as for potential future applicants.[550] Similarly, in the Katanga case, the victims were represented in the reparations stage by a common LRV.[551] Upon withdrawal of representation of 37 victims by the common LRV during the reparations proceedings for unclear reasons, these victims started to be represented by the OPCV for the purpose of the Appeals to the Order on Reparations.[552] In the Al Mahdi case, the victims were similarly represented by one common LRV.[553] In the Katanga case, the Court explained its rationale on legal representation; it admitted that although the victims are free to choose a legal representative, for different reasons including the extensive number of victims, this right can be subject to practical, financial, infrastructural, and logistical constraints faced by the Court.[554] As such, it is submitted that the ICC's approach appears to limit the victims' agency to define their own interests in the election of their own representatives.[555] In addition, it could be perceived as paternalistic; while the victims' voice with regard to the choice of LRV is surveyed within the application forms, ultimately, the LRV that is appointed to many of the victims might not be their choice, but one imposed by the Court.[556]

Furthermore, as the current analysis found out, in the fulfilment of their roles, the LRVs have an intermediary role between the victims and the Court, collecting the victims' voice on the ground and then presenting it in all the (reparations) proceedings at the ICC. As one former LRV put it in a scholarly article, by presenting the views and concerns of victims and their communities, the LRVs bring in some realities from the field in a judicial debate, and thus contribute to bridging the gap between the Court and the victimised populations.[557] In practice, the LRVs convey the victims' voice by engaging in two practices: consultations and legal submissions. To be precise, the LRVs carry out consultations with victims on the ground to gather their preferences and interests in relation to reparations, which are then passed on to the Judges by means of LRV submissions or filings. [558] These two practices will be discussed in turn.

[550] Lubanga case (Trial Chamber, Decision on the OPCV's Request to Participate in the Reparations Proceedings) ICC-01/04-01/06-2858 (5 April 2012)

[551] In the trial stage, there were two legal representatives, one represending the victims of the Bogoro attack and one representing the child soldiers. *Katanga and Chui case* (Registry: Désignation définitive de Me Fidel Nsita Luvengika Comme Représentant Légal Commun Du Groupe Principal De Victimes Et Affectation Des Victimes Aux Différentes Équipes) ICC-01/04-01/07-1488 (22 septembre 2009). However, as Katanga was not found guilty of using children under the age of 15 years to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute, child soldiers would not be entitled to reparations.

[552] See *Katanga case* (Trial Chamber: Decision on the Application made by the Common Legal Representative of Victims on 2 March 2017) ICC-01/04-01/07-3727-tENG (15 March 2017) para 14

[553] *Al Mahdi case* (Trial Chamber: Decision on Victim Participation at Trial and on Common Legal Representation of Victims') ICC-01/12-01/15-97-Red (08 June 2016)

[554] *Katanga and Chui case* (Trial Chamber: Order on the Organisation of Common Legal Representation of Victims) ICC-01/04-01/07-1328 (22 July 2009) paras 11-13

[555] For instance, in the Katanga case, the victims were initially represented by four teams of legal representatives; subsequently, the Court decided that the victims must be organized under common legal representation, which would consist of one or maximum two LRVs. *Katanga and Chui case* (Trial Chamber: Order on the Organisation of Common Legal Representation of Victims) ICC-01/04-01/07-1328 (22 July 2009) paras 11-13

[556] See also Heidy Rombouts, 'Importance and Difficulties of Victim-Based Research in Post-Conflict Societies' (2002) 10 European Journal of Crime, Criminal Law and Criminal Justice 216, 221; she is discussing the danger of having the reparations projects imposed on the victims by elites, but this idea can be applicable to common legal representation as well.

[557] Luc Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) 16 International Criminal Law Review 1016

[558] See also Assembly of States Parties, ICCASP/8/45, 10 November 2009, para 3; Luc Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) 16 International Criminal Law Review 1016

The practice of legal submissions entails that the victims' voice is generally communicated to The Hague by means of LRV submissions in a written form.[559] As this research posits, the downside of these submissions is that, firstly, it is not always clear whose voice these submissions represent and secondly, due to the large number of victims represented, it confirms previously echoed concerns whether these submissions are actually able to convey the voice and interests of hundreds of victims. On the first point, this analysis posits that the legal submissions purport to put forward and capture the victims' voice; however, they fail to elaborate on whose voice they exactly capture. Minimal details could include the number of victims whose voice the legal submission is representing, aggregated for instance by gender, age, type of crime suffered, and information on when the victims have joined the reparations proceedings.

To exemplify, in the Lubanga case, in the Decision Setting out Lubanga's Liability for Reparations, the Court explained that 473 victims had submitted applications for reparations.[560] However, a close analysis of the LRVs' submissions at several stages of the reparation proceedings highlights that it is unclear whose voice is actually included in these intermediary submissions, amid scarce information on whose voice is put forward in each of the submissions.[561] For instance, one submission put forward by V02 in Lubanga case generally mentioned what the Court should do in regard to reparations without detailing whose wishes these requests represent and how they relate to the victims' preferences:[562]

"[To] award only individual reparations would be poorly received by the community and could encourage other children (whether or not they have been soldiers before) to think that it is beneficial to be recruited by armed groups. Given that this phenomenon is again gaining ground in eastern DRC, these children risk (re-) enlisting for war.

It follows that collective reparations should also be awarded. In some villages, for instance, schools served as military camps for the UPC. So did some health centres."

[559] Of all the three cases on reparations at the ICC, the Judges have decided to exceptionally hold a two-day oral hearing, to clarify the scope of the collective reparations awarded in the Lubanga case. With this occasion, the LRVs for groups V01 and V02, as well as OPCV have put forward oral submissions representing their clients' views. *Lubanga case* (Trial Chamber: Reparations Hearing) 11 and 13 October 2016

[560] *Lubanga case* (Trial Chamber, Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable) ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017) para 190

[561] This statement draws on an analysis of six LRV submissions at three different reparation proceedings' stages, i.e. before the 2012 Decision on Reparations, in order to inform it; after this Decision, in order to appeal it; and finally, in order to inform the 2017 Decision setting out Lubanga's Responsibility for Reparations, only one V01 submission includes data on whose views the submission purports to represent (14 victims). *Lubanga case* (Legal Representatives of Victims: Observations on the Sentence And Reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10, ICC-01/04-01/06) ICC-01/04-01/06-2864-tENG (18 April 2012); For the purpose of Appeal to the 2012 Decision on Reparations, the legal team clarified that V01 submissions represent the voice of approximately 50 victims, V02 submissions the voice of approximately 216 victims, and OPCV submissions the voice of approximately 33 victims. *Lubanga case* (Legal Representatives of Victims, Observations on the Appeals against the Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2926-tENG (28 September 2012); *Lubanga case* (Legal Representatives of Victims: Corrigendum To the Observations Of The Vo2 Team Of Legal Representatives Of Victims In Accordance With Directions) ICC-01/04-01/06-2931-Corr-Teng (01 October 2012); In a later stage, the submissions for the purpose of the Decision Setting out Lubanga's Liability for Reparations again fail to indicate whose voice exactly they aim to convey. *Lubanga case* (Legal Representatives of Victims, Submissions on the Evidence Admitted in the Proceedings for the Determination of Mr Thomas Lubanga Dyilo's Liability for Reparations) ICC-01/04-01/06-3359-tENG (8 September 2017); *Lubanga case* (Legal Representatives of Victims: Observations of the V02 Team in Compliance with Order No. ICC-01/04-01/06-33452) ICC-01/04-01/06-3363-tENG (8 September 2017)

[562] *Lubanga case* (Legal Representatives of Victims: Observations of the V02 Group Of Victims On Sentencing And Reparation) ICC-01/04-01/06-2869-tENG (18 April 2012) para 34

The submissions in the Katanga case are characterized by the same ambiguity.[563] This is all the more problematic as the overview of the procedural history of the reparations proceedings leading up to the Order on Reparations indicate that several victims had passed away, several have decided to withdraw from the proceedings for personal reasons, and the LRV withdrew his representation of several victims.[564] While it is known that for the purpose of the Order on Reparations 341 victims participated in the proceedings, it is unclear whose voice exactly is represented in each LRV submission.[565] On this point, Emily Haslam and Rod Edmunds similarly highlighted that the LRV submissions tend to homogenize the victims' views, failing to take into account that victims within a group have different interests.[566] This is important because the submissions appear to put forward a generic victims' voice, failing to capture the variations in the victims' voice across time, which are inevitable given that the population of victims is changing throughout the reparations proceedings with victims submitting applications until the Judges allow it.[567]

Furthermore, the present analysis adds to the critique against (common) legal representation commonly echoed in the literature,[568] by illustrating skepticism towards the extent to which these submissions are truly representative of victims' voice and interests. It is true that the LRVs go into the field and carry out consultations with the victims to inform the submissions they submit before the Chamber.[569] However, it is physically impossible for one or two LRVs to listen to and then pass on to the Court the views of hundreds of victims.[570] As Zegveld wrote referring to the common legal representation organized at the ICC, this approach might not do justice to the stories of individual victims and accordingly, it has the potential to undermine an important goal of victim participation, which is to give victims a voice.[571] This statement can be confirmed by the present analysis of these submissions, which generally fail to capture different views and needs that the victims might have and instead appear to focus on the views of a small number of victims within the group. For instance, when efforts are made by the LRVs to illustrate the voice that underlines some of the submissions, the sample used to make a point is very small. In the Lubanga case, the LRV of group V02 used samples of two victims each to exemplify harm suffered by direct and

[563] See, for instance, *Katanga case* (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015); *Katanga case* (Legal Representatives of Victims: Observations of the Victims on the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/07-3555-tENG (15 May 2015)
[564] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) annex i: Procedural History
[565] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 168
[566] Emily Haslam and Rod Edmunds, 'Common Legal Representation at the International Criminal Court: More Symbolic than Real?' (2012) 12 International Criminal Law Review 871, 888
[567] See section above 5.1.1.
[568] See e.g. Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 Law and Contemporary Problems 235, 250. Also theoretical framework, section 3.3.1.
[569] See for instance *Al Mahdi case* (Legal Representatives of Victims: Submissions of the Legal Representative of Victims on the Principles and Forms of the Right To Reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) para 15; *Katanga case* (Registry: Report on Applications for Reparations in Accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) para 5; Lubanga case (Legal Representatives of Victims: Observations on the Sentence And Reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10) ICC-01/04-01/06-2864-tENG (18 April 2012)
[570] The LRV could be assisted by some assistants; see *Ntaganda case* (Pre-Trial Chamber: Decision Concerning the Organisation of Common Legal Representation of Victims) ICC-01/04-02/06-160 (2 December 2013) paras 10, 23
[571] Liesbeth Zegveld, 'Victims as a Third Party: Empowerment of Victims?' (2018) International Criminal Law Review 1, 16.

indirect victims. However, the V02 group consists of minimum 140 victims.[572] Similarly, in the Al Mahdi case, when the LRV purports to exemplify the victims' views on an issue, he mentions the phrase "several victims have said that on the subject", without delineating who these victims are or the percentage they constitute in the entire population of victims.[573] Comprehensive legal submissions showcasing how they capture all the victims' voice could include structured information on what each victim or at least categories of victims prefer structured, for instance, per category of reparations preferred or per category of victims.[574]

Another challenge that surfaced in the analysis of the LRV's submissions in the Katanga case concerns that extent to which the victims' interests are indeed represented by the LRV's submissions. In the early stage of the reparations proceedings in the Katanga case, the Judges ordered the VPRS together with the LRV to carry out consultations with the victims to identify their preference regarding reparations. According to the Report submitted by the Registry in the aftermath of these consultations, the victims stated clearly that individual reparations in the form of financial compensation would best respond to their situation resulting from the crimes incurred upon them.[575] However, in a later submission by the LRV on the modalities of reparations to be ordered by the Court, the LRV stated that in addition to collective reparations, the victims should receive a symbolic one euro for the moral harm that victims have suffered as a result of crimes.[576] Clearly, this latter submission goes against the victims' high preference for financial compensation. As the Report of the Registry put it:[577]

"*Despite this information [that Katanga was indigent], 58% of the victims maintained that they would prefer individual compensation to any of the examples posed with many asserting that compensation would put them in a position to address their most pressing needs themselves*."

Absent an argumentation of this difference in the victims' interests in the LRV's submission, this mismatch casts doubt as to whether some of the submissions truly represent the victims' interests, especially since the Judges in the end awarded reparations which are rather aligned with the Registry's results.[578] In addition, this situation sheds light on the ambiguities inherent in allowing 'others' to speak on victims' behalf, creating uncertainty as to what victims' preferences really

[572] *Lubanga case* (Team of Legal Representatives of V02 victims: Observations of the V02 Team in Compliance with Order No. ICC-01/04-01/06-3345) ICC-01/04-01/06-3363-tENG (8 September 2017)
[573] *Al Mahdi case* (Legal Representatives of Victims: Submissions of the Legal Representative of Victims on the Principles and Forms of the Right to Reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) para 44
[574] One example of a report capturing the victims' voice and preferences in a robust manner is the Registry's study surveying victims' preferences. *Katanga case* (Registry: Report on Applications for Reparations in Accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015)
[575] *Katanga case* (Registry: Report on Applications for Reparations in Accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) para 94. Interestingly, in a submission that the LRV put forward to clarify some of the aspects put forward by the Registry in its report, he explained that the victims indeed have a preference for financial compensation, especially the indirect victims who lost the breadwinner of the family (be it parent or child). See *Katanga case* (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015) para 17
[576] See *Katanga case* (Legal Representatives of Victims: Propositions Des Victimes Sur Des Modalités De Réparation Dans La Présente Affaire) ICC-01/04-01/07-3720 (8 décembre 2016) para 13
[577] *Katanga case* (Registry: Report on Applications For Reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) para 49
[578] *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 300

are.[579] Ultimately, it appears that the effectiveness of the LRVs to pass on to the Judges the victims' voices will largely depend upon the LRVs' ability to put forward the individual interests of victims, while representing their common interests before the Court.[580]

Furthermore, consultations with the victims appear to be the main tool that is used at the ICC to understand and gather victims' views and concerns relating to reparations. As identified, the consultations are mainly carried out by the LRVs in the execution of their role; however, they may also be employed by the VPRS, when ordered by the Judges or by the TFV at the reparations' implementation stage, as detailed below.

As far as the LRVs' consultations with the victims are concerned, they are an obligation in the fulfillment of their role as LRV, as per the Code of Professional Conduct for Counsel.[581] However, the Code does not provide further instructions as to the frequency of the meetings, which, according to the current analysis, results in an incoherent practice of consultations across cases. As inferred from the analysis of the LRVs' submissions, the LRVs carry out consultations with the victims at various stages of the proceedings as part of their legal representation. For instance, in the Lubanga case, there is evidence that the LRV of group V01 carried out consultations with 14 victims in preparation for an LRV submission in the early stages of the trial.[582] Similarly, the LRV in the Al Mahdi case detailed that he met with 106 victims, to gather evidence to support claims of harm against victims.[583] More extensive information is available in the Katanga case, as there are indications that the LRV held "various collective meetings and individual interviews […] with said victims".[584] Unfortunately, the frequency and/or the methodology of these consultations do not transpire from these submissions and, as such, this information remains largely unknown.[585] However, what transpires from the current analysis is that these consultations may be affected by security-related or practical challenges, as well as by financial limitations. For instance, the LRV in the Al Mahdi case expressed that unrest in Mali as well as the fact that some of the victims he represents are internally displaced make it difficult for him to carry out the consultations with the

[579] See Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 Social & Legal Studies 489, 499

[580] See also Megan Hirst, 'Legal Representation of Participating Victims' in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 111-169. Emily Haslam and Rod Edmunds, 'Whose Number is it Anyway? Common Legal Representation, Consultations and the 'Statistical Victim'' (2017) 15 Journal of International Criminal Justice 931; Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 138

[581] ASP, 'Code of Professional Conduct for Counsel' (2 December 2005) ICC-ASP/4/Res.1, art 14(2)(b) and art 15(1) <https://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf>

[582] See Lubanga case (Legal Representatives of Victims: Observations on the Sentence And Reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10) ICC-01/04-01/06-2864-tENG (18 April 2012) para 10

[583] *Al Mahdi case* (Legal Representatives of Victims: Submissions of the Legal Representative of Victims on the Principles and Forms of the Right to Reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) paras 15-16

[584] *Katanga case* (Trial Chamber: Observations of the victims on the principles and procedures to be applied to Reparations) ICC-01/04-01/07-3555-tENG (15 May 2015) para 12

[585] Empirical research with victims participating in several trials at the ICC indicates that only several participants (of a sample of 622 victims) reported that they had met with ICC representatives or legal representatives more than three times. Many said they had had only one meeting with a lawyer or member of the court. Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, 'The Victims' Court? A study of 622 Victim Participants at the International Criminal Court' (Berkeley: Human Rights Center, University of California, 2015) 72

victims. [586] Furthermore, as the representative of group V01 in the Lubanga case wrote in a scholarly article, "field missions must be justified and are not easily approved by the [Court]. The counsel fees and the compensation costs have already been reduced drastically."[587] Consequently, it appears that the practice and frequency of consultations between the LRV and victims remain largely at the discretion of the LRV.[588]

In addition to the LRVs' consultations with the victims, victims may engage in consultations with other ICC actors at different stages of the reparations proceedings. In the Katanga case, consultations with the victims were carried out by the Registry (i.e. VPRS) together with the LRV, as the Judges directed them to follow up with the victims and make complete the information provided in their initial application forms concerning reparations.[589] Specifically, the Judges looked to gather the victims' views and concerns, in order to inform their future Order on Reparations. Unfortunately, this appeared to be a discretionary act from the Judges' side, as it has not been repeated to date, neither in the Lubanga case nor in the Al Mahdi case. During these consultations, the VPRS and the LRV met with 305 of the 365 victims who had submitted applications. Of these, 223 victims also attended group meetings, wherein they could express their preferences regarding reparations.[590] Although Sperfeldt expressed that these consultations were guided[591] - in the sense that the VPRS influenced victims' answers by presenting them with examples of reparations that the Court could award rather than allowing them to freely express expectations regarding reparations - these consultations represent the most extensive effort to date led by the Court to gather the victims' views on reparations, beyond the client-attorney consultations. In addition, they offered firsthand input to the Judges regarding the challenges of making the highly technical vocabulary of the ICC understood by the victims. As reported by the Registry, challenges included the difficulty to make concepts (e.g. the different reparations measures) understood by the victims, to translate the legal concept of 'reparations' into languages spoken by victims, as well as to navigate emotions that the victims expressed during interviews and to shatter prior preconceptions held by the victims.[592]

In addition, consultations with victims are also conducted by the TFV, to decide on the specific reparations projects that fit the victims' needs, but only at the reparations' implementation stage.[593] To be precise, the TFV conducted extensive consultations in the Lubanga case, involving extensive

[586] See *Al Mahdi case* (Legal representative for Victims: Submissions of the Legal Representative of Victims on the Principles and Forms of the Right to Reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) paras 15-16

[587]Luc Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) 16 International Criminal Law Review 1016

[588] This has been confirmed by Megan Hirst, 'Legal Representation of Participating Victims' in Kinga Tibori-Szabó, Megan Hirst (eds), Victim Participation in International Criminal Justice: Practitioners' Guide (Springer, 2017) 164

[589] *Katanga case* (Trial Chamber: Order instructing the Registry to report on applications for reparations) ICC-01/04-01/07-3508 (27 August 2014)

[590] *Katanga case* (Registry: Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) para 1

[591] Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 143

[592] *Katanga case* (Registry: Report on Applications For Reparations in Accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) 11-14

[593] The TFV's prerogative to consult the victims in view of implementing reparations projects is included in the TFV's Regulation, however, as in the case of LRV, the legal provisions do not detail how the practice of consultations should be conducted. See TFV Regulations, para 49, para 70

numbers of victims, in 22 locations in Ituri.[594] In addition, TFV consultations with victims have also been carried out in the Al Mahdi case, however, only after the Court directed the TFV to do so in view of preparing an Updated Implementation Plan amid failure to conduct consultations at an earlier stage.[595] As with the LRV's consultations in the Al Mahdi case, the security situation on the ground might have limited the timeline and scope of these TFV consultations too.[596]

Overall, an important added value of the practice of consultations at the ICC is that they aim to gather the victims' voice and interests in regard to reparations. They can provide an opportunity and forum for the victims to tell their stories and express themselves and their preferences in relation to reparations, amounting thus what Godwin Phelps considered to be of symbolic importance for the victims.[597] A similar vision has been confirmed by the TFV, which revealed that it views these consultations as a means to empower victims to take a leading role in articulating their claims and defending their rights.[598] In addition, to the extent that these consultations center on listening to the victims, they may counter perceptions of ethical loneliness experienced by some victims amid a refusal by the external world to listen to their stories. [599] The consultations may convey to the victims that the LRV and other Court staff are there to listen to the victims' hardships and to understand their victimization and harm. In fact, research by Cody and Koenig confirmed the relevance of these consultations for the victims, as it revealed that, for the victims before the ICC, engaging in a local dialogue with court personnel by means of consultations amounted to having a voice.[600] Cody and Koenig found out that for some victims at the ICC, meaningful recognition of their suffering requires ongoing communication and face-to-face interactions with the LRV and court staff in their home countries.[601] Cody and Koenig's finding is important to understand what 'voice' means for the victims and how it can be bolstered. As discussed above as well, it appears that for some of these victims being given a voice during court proceedings is not that important. More important is to have their voice consulted in a dialogue, although as discussed above in relation to legal representation, the distance and other challenges in reaching the Court might influence this perception.[602] Consequently, these insights have implications for how the Court could focus its efforts to provide victims with voice before the ICC. Meaningful and consistent engagement with the victims in their familiar surroundings is very important.[603] This

[594] The exact number of victims is unclear, as the TFV's report mentions that it consulted 1340 victims, families of victims, and representatives of affected communities. *Lubanga case* (TFV: Filling on Reparations and DIP) ICC-01/04-01/06-3177-Red (3 November 2015) para 32

[595] *Al Mahdi case* (Trial Chamber: Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations) ICC-01/12-01/15-273-Red (12 July 2018)

[596] *Al Mahdi case* (TFV: Updated Implementation Plan) ICC-01/12-01/15-291-Conf-Exp (2 November 2018) para 31

[597] Teresa Godwin Phelps, *Shattered Voices Language, Violence, and the Work of Truth Commissions* (University of Pennsylvania Press, 2006) 111

[598] *Lubanga case* (Trust Fund for Victims: Draft Implementation Plan for Collective Reparations To Victims) ICC-01/04-01/06-3177-AnxA (3 November 2015) 201

[599] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 1

[600] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 18

[601] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 18

[602] As this empirical study explained, many of the respondents expressed concern about the potential costs involved in obtaining travel documents, traveling to national airports, or foregoing wages during their trip, even if the court paid for flights and accommodations to attend trial proceedings. Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 18

[603] The victims expressed that that they wished the consultations took place on a more regular basis. Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, 'The Victims' Court? A study of 622 Victim Participants at the International Criminal Court' (Berkeley: Human Rights Center, University of California, 2015) 5

can be done by various court personnel, but especially by the LRVs, who are the main link between the victims and the Court, and who can give victims a voice during consultations.

III. Interaction

This section aims to scrutinize the victims' interaction with the ICC during the reparations proceedings and discuss implications for victims. It will focus on victims' interaction with various actors as well as discuss three caveats of interaction, which came up in the analysis.

As this research discovered, the victims' interaction with the Court for the purpose of reparations takes place outside the courtroom and is limited to the victims' interaction with a handful of actors. During the reparations proceedings the victims mainly interact with the LRVs, and as such, the LRVs are not only paramount in conveying the victims' voice to the Judges but also play an essential role in the victims' indirect interaction with the Court. In addition, the victims' interaction might also entail meetings with other Court personnel on the ground, such as the VPRS and the TFV.

However, it appears that the interaction with victims is under the control of the LRVs or other ICC organs. First, the submissions analysed in this research do not mention whether the victims can actually call their lawyers to arrange meetings whenever they wish so. Similarly, the interaction with VPRS staff resulted from the exceptional consultations ordered by the Court, whereas the consultations whereby victims interact with the TFV at the implementation stage of reparations are initiated by the TFV. Consequently, as this research posits, the victims appear to be mere passive recipients of interaction, dependent on the availability of others to interact with them. Cody et al. have discovered similar findings. Therein, they found out that the victims valued the meetings with their lawyers; however, they wished that the interaction would take place on a more regular basis.[604] Taking into account the importance of interaction for the victims to reassert their story and victimisation,[605] the ICC's practice of consultations could have extensive benefits for the victims if organized on a regular basis.

Furthermore, according to the present research, several aspects appeared to be salient to interaction at the ICC, such as knowledge of the local dynamics, expectations management, as well as its propensity to become burdensome. As regards knowledge of local dynamics, it is undisputed that the situations under ICC investigations involve sensitive matters, ranging from political instability crippling the DRC for decades,[606] to challenges to the security situation in Mali.[607] This reality entails that it is necessary that the LRVs - as the main vehicle of interaction, but also the TFV, and others – understand the dynamics existent in the situations where they carry out the consultations. More importantly, the LRVs must handle the interactions with the victims with great sensitivity.

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[604] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, 'The Victims' Court? A study of 622 Victim Participants at the International Criminal Court' (Berkeley: Human Rights Center, University of California, 2015) 43

[605] See theoretical framework, part 3.2.

[606] See e.g. Ida Sawyer, 'Overview of the Political Crisis in DR Congo and the Human Rights, Security, and Humanitarian Consequences' (Human Rights Watch, 9 April 2018) <https://www.hrw.org/news/2018/04/09/overview-political-crisis-dr-congo-and-human-rights-security-and-humanitarian> accessed 24 February 2020. Importantly, the (international) conflicting interests in mining and natural resources are also an important source for the local instability and violence. See Ingrid Samset, 'Conflict of Interests or Interests in Conflict? Diamonds & War in the DRC' (2002) 93 Review of African Political Economy 463

[607] See e.g. 'Mali and other African High Level Representatives Reaffirm Support for the ICC and its Mandate at the Occasion of Major Congress in Bamako' (ICC website, 22 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=PR1499> accessed 24 February 2020

Taking into account that the scale and nature of suffering of victims are so acute, the LRV must be cognizant of the contextual background, especially since it may be politically and emotionally charged.[608] Several of these aspects have surfaced in the submissions put forward by the LRVs. For instance, in the submissions made by the LRV of group V01 in the Lubanga case, he highlighted the sensitivity of the situation at stake.[609] His acknowledgement of the divergent views and concerns of some of his clients as well as the potential negative implications of certain reparations for other communities highlighted awareness that certain aspects must be handled with care.[610] Similar concerns have been put forward by the LRV in the Al Mahdi case, particularly in regard with the security situation on the ground.[611] These examples highlight the importance of the LRVs' awareness of the challenges they need to navigate on the ground, in order to forge a sensible interaction with the victims. For these reasons, it may even be recommended that at least one of the LRVs representing a group of victims is from the situation or at least country where the victims are from, which is not always the case at the ICC.[612]

Next to this, expectation management appeared to be a challenging issue pertaining to interaction, as identified in the analysis of the VPRS staff's interaction with the victims in the Katanga case. As per the Chamber's instructions, the VPRS was advised that "it is critical that victims' expectations should be managed with extreme care as it is unclear at this stage which type and scope of reparations will be appropriate and feasible in the present case."[613] Consequently, the VPRS attempted to put the management of victims' expectations at the center of consultations.[614] Nevertheless, as reported by the VPRS, despite its efforts to explain to the victims the limitations of the Court in regard to individual reparations, more than half of the victims expressed that individual reparations would be the best response to their needs.[615] VPRS ended up including in the Report that the victims had some specific needs, which could not be ignored, regardless of expectations management efforts. This example unraveled a paradox that the Court staff must grapple with, especially during their interaction with victims:[616] on the one hand, the management

[608] Kieran McEvoy, Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' 22 Social & Legal Studies 489, 495

[609] Another study similarly highlighted the skills and the sensitivity required by the LRVs in the Lubanga case, especially in the situation of child soldiers who underwent gross abuses. As a result, many of them engaged with drugs, making it very difficult for the LRV to maintaining the interest of such victims in participating before the ICC. Kinga Tibori-Szabó, Barbara Bianchini, Anushka Sehmi and Silke Studzinsky, 'Communication Between Victims' Lawyers and Their Clients' in Kinga Tibori-Szabó, Megan Hirst (eds), Victim Participation in International Criminal Justice: Practitioners' Guide (Springer, 2017) 446

[610] Lubanga case (Legal Representatives of Victims: Observations on the Sentence And Reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10) ICC-01/04-01/06-2864-tENG (18 April 2012) paras 12 and 16.

[611] See *Al Mahdi case* (Legal Representative for Victims: Submissions of the Legal Representative of Victims on the Principles and Forms of the Right to Reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) paras 15-16

[612] For instance, Luc Walleyn, one of the LRVs in the Lubanga case, is known for his expertise in representing well-known cases relating to international crimes in Belgium, however, he is from Belgium and not from the DRC. Katharine Fortin, 'Interview with Luc Walleyn, victims' representative in the case against Martina Johnson' (Armed Groups and International Law, 7 October 2014) <https://armedgroups-internationallaw.org/2014/10/07/interview-with-luc-walleyn-victims-representative-in-the-case-against-martina-johnson/> accessed 24 February 2020

[613] *Katanga case* (Trial Chamber: Order instructing the Registry to Report on Applications for Reparations) ICC-01/04-01/07-3508 (27 August 2014) para 9

[614] *Katanga case* (Registry: Report on Applications for Reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) para 5

[615] *Katanga case* (Registry: Report on Applications for Reparations in Accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) para 49

[616] See also Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 126. He expressed that dealing with expectations was a major theme in all his 21 interviews with staff

of expectations to avoid negative impact on victims' experience with the Court,[617] and on the other hand, enabling victims to benefit from the interaction, by allowing them to express what they need. While it is important that the actors who interact with the ICC understand the necessity of expectation management, it cannot be used as a shield to deflect attention from what victims want from the Court.

Finally, the current analysis identified the propensity of interaction at the ICC to become burdensome, particularly when not handled with care for the victims. The practice around the Lubanga case will be used to illustrate the point. According to the data investigated in this research, victims participated in consultations and provided information regarding their victimization and preference to reparations several times. In the Lubanga case, the victims first provided information in their application forms for reparations, in the period leading up to the reparations proceedings. Then, as explained above, the victims were involved in consultations with their LRVs, which were carried out at several stages during the trial. Furthermore, according to the Appeals Chamber's initial approach, the applications for reparations would be screened by the TFV in the implementation stage, at which point the TFV approached again the victims for the consolidation of applications.[618] The frequency of interactions with the victims is not precisely know but it is clear that they spanned more than 5 years, without clear prospect as to whether these victims would actually be entitled to any tangible reparations. When given the opportunity to make oral submissions, the LRV of group V01 in the Lubanga case, stated clearly that his clients expressed exhaustion and anger at the prospect of being asked for information again:[619]

"*Once and once again they had to recount what had happened to them for the umpteenth time. And I must tell you that for some of them it is difficult, it's hard*."

This illustrates that while victims might appreciate frequent interactions with their lawyers or other actors, awareness of several aspects of interaction appears essential, as these interactions might have detrimental effects and/or instill fatigue with the Court's processes for some victims.[620] Especially since they are asked for the same information and need to recount victimizing experiences time and again.[621] This frustration of the victims is furthermore compounded by the

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of the ICC. He stated in his thesis: "an outreach officer confessed, "I would say this is the biggest challenge we have faced … how to communicate on the topic of reparations."

[617] See academic article by former ICC judge who expressed that the victims vest high hopes in the ICC, which, through its outreach programs, has created immense expectations. Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 494. See also Godfrey M Musila, *Between Rhetoric and Action: The Politics, Processes and Practice of the ICC's work in the DRC* (Published Monograph, 2009) 51. He found out that "victims viewed the Court with high expectations, expressing optimism that they would finally receive justice for atrocities suffered. It is noted that these expectations are rather high in view of the modest achievements that the Court may actually reach. It emerged that victims' inflated expectations do not seem to be managed at all through awareness campaigns, which thus far have been very limited."

[618] *Lubanga* case (The Trust Fund for Victims: Additional Programme Information Filing) ICC-01/04-01/06-3209 (7 June 2016) para 24.

[619] *Lubanga case* (Trial Chamber: Reparations Hearing) 11 October 2016, 45

[620] However, the same can be argued for the victims in the Katanga case, where multiple consultations across years have taken place, without any reparations awards in sight. *Katanga case* (Legal Representatives of Victims: Report on the implementation of Decision No. 3546, Including the Identification of Harm Suffered by Victims as a Result of Crimes Committed by Germain Katanga) ICC-01/04-01/07-3687-tENG (13 May 2016) para 18

[621] A footnote in the Registry's report indeed highlights some consideration to the danger of revictimizing the victims during the interviews. They explained that during the preparations of the questionnaire for the interview, the Registry and the LRV discussed "how to confirm with the victim the facts as described in the application form in such a way as to avoid as far as possible re-traumatising the victim". *Katanga case* (Registry: Report on Applications for Reparations in Accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) footnote 12. See also empirical research discussing the

element of time, discussed below, which keeps the victims in a state of waiting for a long time.[622] Moreover, while the Victims and Witnesses Unit aims to provide assistance and (psychological) support to testifying victims and witnesses,[623] the current analysis could not identify any measure in place at the reparations stage to manage the potential secondary victimisation of victims.[624] While it appears that the actors who interact with the victims are aware of their responsibilities towards victims, their interaction should prioritise consideration for the well-being of victims, both physical and psychological, and not be utilized to serve the various purposes of ICC actors.

IV. Information

This section is concerned with how information is provided to victims in relation to the reparations proceedings and its potential implications for victims. The importance of informing victims with regard to the reparations proceedings has been acknowledged by the Court in all of its cases.[625] However, as this research submits, there is a general lack of reporting throughout the different legal submissions on the information that the victims receive which results in a lack of clarity on how information is provided to victims.

The practice of consultations discussed above is also the main vehicle for providing information to the victims in relation to the reparations proceedings. This entails that, as with the other aspects of procedural justice, the LRVs play the most important role in providing victims with information regarding developments in the reparations proceedings. Even during the *ad-hoc* consultations conducted by the VPRS in the Katanga case, the effort to inform the victims regarding the goal of the consultations was led by the LRV and his team.[626] Information may also be provided to the victims by the TFV, during its consultations at the implementation of reparations stage. However, while there is evidence pointing to TFV consultations with the victims, the frequency of these consultations as well as how thorough the victims are informed with regard to reparations during these consultations is unknown.[627]

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effects of research fatigue, which can to occur when individuals and groups become tired of engaging with research. It manifests as reluctance toward continuing engagement with an existing project, or a refusal to engage with any further research. This can equally apply to the victims consulted at the ICC. Tom Clark, 'We're Over-Researched Here!'Exploring Accounts of Research Fatigue within Qualitative Research Engagements' (2008) 42 Sociology 953, 955-956. Finally, the request by the LRV in the Katanga case, to use the information provided during interviews with the Registry instead of asking victims to fill in new application forms is commendable, as it may have alleviated the risk of 'over asking'. See *Lubanga case* (Trial Chamber: Decision on the "Demande de Clarification Concernant La Mise En Œuvre de la Règle 94 du Règlement de Procédure Et De Preuve" and future stages of the proceedings) ICC-01/04-01/07-3546-tENG (8 May 2015)

[622] See Alina D. Balta, Manon Bax, Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System' (2019) 29 International Criminal Justice Review 221, 222

[623] RPEs, Rules 16-19

[624] See Chapter 2, 3.2. See also, for instance John D. Ciorciari and Anne Heindel who explain that recalling past abuses causes anguish to the victims of genocide, war crimes, etc., (i.e. referring to the victims of the Khmer Rouge regime). John Ciorciari and Anne Heindel,'Trauma in the Courtroom' in Beth Van Schaack and Daryn Reicherter (eds), *Cambodia's Hidden Scars* (Documentation Center of Cambodia, 2016) 126

[625] *Lubanga case* (Appeals Chamber: Annex to Order For Reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015) para 27; *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 306; *Al Mahdi case* (Trial Chamber: Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 29

[626] *Katanga case* (Registry: Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) para 5

[627] See e.g. TFV's Updated Implementation Plan in the Al Mahdi case, mentioning that the TFV carried out consultations with the victims and communicated with them, however, more details are not provided. *Al Mahdi case* (TFV: Lesser Public Redacted Version of "Updated Implementation Plan" submitted on 2 November 2018) ICC-01/12-01/15-291-Conf-Exp (14 October 2019) para 31 and 36

The Code of Professional Conduct for Counsel states in a general language that "Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation."[628] However, the current analysis of legal submissions and judgments could not indentify what type of information victims receive and how often. Details regarding the LRVs' work to inform the victims of the reparation proceedings were only submitted by the LRV in the Katanga case. He detailed that during one of his consultations with the victims: [629]

"*[T]he work consisted in discussing in detail each dossier with the applicant and explaining what the applicant was entitled to claim in the present proceedings*".

In addition, the LRV of one team in the Lubanga case revealed in one interview that his team strived to provide information on an 'individual and regular basis', but they also relied on telephone communication and intermediaries.[630] While this general lack of reporting on the extent of information that victims receive and frequency – or on the practice of consultations for that matter – might be justified on grounds of 'professional secrecy and confidentiality',[631] it may also result in underperformance on the LRVs' part. This is even more concerning as there is no monitoring mechanism in place at the ICC to monitor the LRVs' performance,[632] nor is there any mechanism in place that the victims may utilize to report their potential grievances.[633]

In fact, the concerns echoed in this study have been confirmed by several other sources investigating the matter. In one report issued in 2010, following its own assessment of victims' views on legal representation with the occasion of the Review Conference of the Rome Statute, the Registry submitted that the victims place a lot of importance on receiving information from their lawyers regarding developments in the cases.[634] However, as the Registry reported, the LRVs do not appear to deliver on their obligation to inform their clients. To illustrate the scarcity of information that victims receive relating to the cases in the DRC which were ongoing at that time, the Registry made reference to one statement by several victims who posited that they never met their lawyers:[635]

"*We have never met the lawyer we got appointed and since our requests to participate have been sent, this is the first time when we are face-to-face with someone who works for the court*."

[628] ASP, 'Code of Professional Conduct for counsel' (2 December 2005) ICC-ASP/4/Res.1, art 15(1)
[629] *Katanga case* (Legal Representatives of Victims: Report on the implementation of Decision No. 3546, Including the Identification of Harm Suffered by Victims as a Result of Crimes Committed by Germain Katanga) ICC-01/04-01/07-3687-tENG (13 May 2016) para 22
[630] Kinga Tibori-Szabó, Barbara Bianchini, Anushka Sehmi and Silke Studzinsky, 'Communication Between Victims' Lawyers and Their Clients' in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 446
[631] ASP, 'Code of Professional Conduct for Counsel' (2 December 2005) ICC-ASP/4/Res.1, art 8
[632] The Registry has suggested that a monitoring mechanism be established to assess the LRVs' performance, however, the proposal has not materialized so far. See 'Representing Victims before the ICC: Recommendations on the Legal Representation System' (REDRESS, April 2015) 24
[633] Megan Hirst, 'Legal Representation of Participating Victims' in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 164
[634] 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) 4
[635] Author's translation. 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

Similar findings have been put forward Cody et al., showcasing the victims' disappointment not only with their LRVs, but with the Court in general. Cody et al. discovered that the victims expected the judicial procedures to allow information to flow not only to the Court, but also back to local communities. In exchange to the information they provided, *inter alia*, in the application forms, they wished to receive updates and information from the Court; they wished information was a two-way street.[636] Furthermore, victims expressed that the long pauses in receiving information from the Court made some of them feel less valued over time. This also affected their trust in the judicial process and spurred concern that the trial was rigged against them.[637]

As apparent, more transparency is needed around the various actors' engagement with the victims and the practices employed to convey information. Providing information to victims throughout the trials, including ongoing updates about their cases, regardless of developments in the proceedings should be one of the priorities of those in contact with the victims. This is even more important taking into account the argument put forward above, explaining that victims may become exhausted with providing information to various court organs during consultations. Otherwise, the victims' role in the reparation proceedings is (at risk of) becoming instrumentalized – that is, victims are invited in consultations to provide information on the reparation measures when the Judges request it, however, the flow of information back to them is generally scarce.[638]

Finally, as far as outreach is concerned, at a first glance, it does not appear relevant for the victims at the reparations stage, as all outreach efforts on the ICC's part are mainly concentrated at earlier stages, as explained in section 3.3.1. However, as this study identified, on account of the Chambers' discretion, the TFV may engage in outreach to the victims even at the implementation of reparation stage. This situation was identified in the cases of Lubanga and Al Mahdi, and is rooted in the Court's understanding that the number of victims applying for reparations by the time the Court reached its reparations decisions does not reflect the real number of potential victims in the cases. As held in the Lubanga case, "those 425 victims are only a sample of the potentially eligible victims" and, as such directed the TFV "seek and identify victims" potentially eligible to receive reparations.[639] The same situation transpired in the Al Mahdi case.[640] Consequently, in order to discharge its attributions in both cases, TFV put together a plan according to which "reasonable efforts" must be taken for victim identification and outreach.[641] This approach by the Court and the TFV is commendable, as it has the potential to identify more victims who could benefit from reparations as well as bring about positive effects for the victims, found to be associated with outreach.[642]

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[636] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 21

[637] Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, 'The Victims' Court? A study of 622 Victim Participants at the International Criminal Court' (Berkeley: Human Rights Center, University of California, 2015)

[638] Similar instrumentalized role of victims as witnesses was deplored in the ICTY trials. Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 477

[639] *Lubanga case* (Trial Chamber: Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable") ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017) 111-112

[640] E.g. *Al Mahdi case* (TFV: Public redacted version of "Corrected version of Draft Implementation Plan for Reparations, With public redacted Annex I) ICC-01/12-01/15-265-Corr-Red (18 May 2018) paras 169-235

[641] *Lubanga case* (TFV: Observations in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018) ICC-01/04-01/06-3398 (21 March 2018) para 14. *Al Mahdi case* (TFV: Public redacted version of "Corrected version of Draft Implementation Plan for Reparations, With public redacted Annex I) ICC-01/12-01/15-265-Corr-Red (18 May 2018) para 73

[642] See chapter 2, section 3.3

V. Length of Proceedings

This final section aims to scrutinize the length of the reparations proceedings as an element of procedural justice and discuss its potential implications for victims before the ICC.

As this study identified, the process of obtaining reparations at the ICC is lengthy,[643] with the reparations measures awarded to the victims still in the process of being implemented. To be precise, in the Lubanga case, the reparations proceedings are ongoing for eight years, and the implementation of reparations measures is still ongoing. In a recent decision, the Trial Chamber II set a cut-off date (not available to the public) by which point all potential victims will have applied for reparations. The date corresponds to the date by which the implementation of the reparations programme is nearing its end.[644] Similarly, in the Katanga case the reparations proceedings are ongoing for six years, with the implementation of the reparations measures likely still ongoing.[645] Unfortunately, the state of implementation of reparations is not known to the public. In the Al Mahdi case, the TFV's Updated Implementation Plan (UIP) was approved in 2019, four years after the reparations proceedings commenced.[646] The UIP's approval signifies that the implementation of the reparations projects may start; however, as in the Katanga case, information on the state of implementation is not publicly available.

Furthermore, this study established that the lengthy process of obtaining reparations at the ICC is the result of a series of factors, both within and beyond the ICC's control. To begin with, the structure of the proceedings themselves, with different procedural steps, including at a minimum Trial Chamber and Appeals Decisions on Reparations, different legal submissions by the parties at different points in the trial, followed by the TFV's Draft Implementation Plan, bring about considerable length to the process of reparations. In addition, the process may also be extended by different strategies pursued by each of the ICC organs involved with reparations, such as prolonged debates between the Chambers and the TFV or new lengthy procedures proposed by the TFV at the implementation stage.[647] The absence of a timetable for the progress of reparations, including at the implementation of reparations stage, to which all the organs adhere and are held accountable further compounds this state of affairs.[648] Finally, beyond the ICC's control, the process may be impacted by the security situation on the ground, which may hamper the LRV or the TFV's access

[643] In the case of the ICC, since the reparations proceedings are carried out separately, their duration is measured since the moment that the trial judgment has been rendered.

[644] *Lubanga case* (Trial Chamber: Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations) ICC-01/04-01/06-3440-Red-tENG (4 March 2019) para 39 and para 42

[645] Last publicly available information relating to reparations in the Katanga case was dated 17 December 2018, when the implementation was still ongoing. Katanga case (Legal Representative for Victims: Communication du Représentant Légal Relative Aux Vues Et Préoccupations Des Victimes Bénéficiaires De Reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018)

[646] *Al Mahdi case* (Trial Chamber: Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red (4 March 2019)

[647] These debates are captured in section 4.3.3. III. on Collective Reparations. see also Alina D. Balta, Manon Bax, Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System' (2019) 29 International Criminal Justice Review 221

[648] See also 'No Time to Wait: Realising Reparations for Victims before the International Criminal Court' (REDRESS: January 2019) 61

to victims, and preclude the start of implementation of reparations. This situation arose in all three cases investigated in this study.[649]

At least two consequences detrimental to the victims have been identified to derive from the lengthy process of obtaining reparations at the ICC. The first one concerns the fact that, as reported, some of the victims pass away while they are still waiting to benefit from reparations. While the right to reparations is passed on to the relatives or the successors of the victim, this state of affairs is unfortunate, as the original beneficiaries could not benefit from the reparations they were entitled to.[650] Secondly, the victims grow frustrated with the ICC processes and reparations. As reported by the LRVs in the cases, these lengthy procedures bring the victims to the brink of exhaustion and disappointment,[651] making some of them to even disengage from the processes.[652] At this point, it must be recalled that in addition to the length of the reparations proceedings, the criminal proceedings in the cases have been ongoing for several years before the reparations proceedings have commenced. For the victims who submitted applications for reparations since the start of the trial, the waiting time now amounts to over 10 years in the Lubanga and Katanga cases,[653] and four years in the Al Mahdi case.[654] As the LRV in the Katanga case reported, the victims' anxiety is furthermore compounded by the security situation on the ground,[655] which remains unstable,[656] and is likely to increase, as both Lubanga and Katanga have reportedly been released.[657] It is unclear at this point what direction the reparations processes will follow moving forward, if and when they will be fully implemented; however, it appears clear that the length of the reparations proceedings may erode the victims' perception of the Court and its processes.

VI. Conclusion

At a normative level, the Rome Statute marked the move away from the exercise of a purely retributive justice function, which permeated international criminal justice institutions prior to the

[649] See e.g. *Lubanga case* (TFV: Observations in Relation to the Victim Identification and Screening Process pursuant to the Trial Chamber's Order of 25 January 2018) ICC-01/04-01/06-3398 (21 March 2018) para 8; Katanga case (Legal Representative for Victims: Communication du Représentant Légal Relative Aux Vues Et Préoccupations Des Victimes Bénéficiaires De Reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018) 6-8; *Al Mahdi case* (Legal representative for Victims: Submissions of the Legal Representative of Victims on the Principles And Forms Of The Right To Reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) paras 15-16

[650] See for instance, *Katanga case* (Legal Representatives of Victims: Demande de Reprise De L'action Introduite Par La Victime a/0280/09) ICC-01/04-01/07-3848-Red (13 janvier 2020)

[651] E.g. *Lubanga case* (Trial Chamber: Reparations Hearing) 11 October 2016, 45; Katanga case (Legal Representative for Victims: Communication du Représentant Légal Relative Aux Vues Et Préoccupations Des Victimes Bénéficiaires De Reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018) 7

[652] *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) annex i: Procedural History

[653] The criminal proceedings against Lubanga started on 26 January 2009, 'ICC First verdict: Thomas Lubanga guilty of conscripting and enlisting children under the age of 15 and using them to participate in hostilities' (ICC Website, 14 March 2012) <https://www.icc-cpi.int/pages/item.aspx?name=PR776> accessed 24 February 2020. The criminal proceedings against Katanga started on 24 November 2009, 'Opening of the trial in the case of Germain Katanga and Mathieu Ngudjolo Chui on 24 November, 2009' (ICC Website, 20 November 2009) <https://www.icc-cpi.int/pages/item.aspx?name=PR477> accessed 24 September 2020

[654] The criminal proceedings against Al Mahdi started on 22 August 2016.

[655] Katanga case (Legal Representative for Victims: Communication du Représentant légal relative aux vues et préoccupations des victimes bénéficiaires de reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018) 7

[656] As reported, newer groups are using excesive violence in the DRC since 2017. See European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations, 'ECHO Factsheet – The Democratic Republic of Congo' (Reliefweb, 27 March 2018) <https://reliefweb.int/report/democratic-republic-congo/echo-factsheet-democratic-republic-congo-last-updated-13032018>

[657] 'Two War Crimes Convicts Freed In Dr Congo' (JusticeInfo, 16 March 2020) <https://www.justiceinfo.net/en/live-feed/44022-two-war-crimes-convicts-freed-in-dr-congo.html> accessed 19 March 2020

establishment of the ICC,[658] to include the victims of international crimes as participants in the trial and provide them with several rights, such as participation and reparations.[659] As exposed above, the ICC's reparations regime bestowed upon victims identified as beneficiaries a multitude of process-related prerogatives. However, the analysis of the Court's potential contribution to procedural justice for the victims under the ICC jurisdiction highlighted that in practice, all of these prerogatives are subject to limitations and adjustments.

To begin, the population of victims 'benefiting' from procedural justice is fluid, and according to the data, it is nearly impossible to pinpoint who participates in what stage of the reparations proceedings. This is in large part influenced by the Chambers, who can either opt for more flexibility in the applications procedure (e.g. the Lubanga and Al Mahdi cases) or more stringency (e.g. in the Katanga case). According to this analysis, it is unclear which approach is better: for instance, the former approach might instill frustration for the victims who made efforts to participate in the reparations proceedings from the very beginning, while at the same time their voice might become conflated by that of other victims who joined the process later on.[660] On the other hand, the latter approach, in theory, offers more coherence regarding victims' voices throughout the reparations proceedings, however, it does not offer the possibility for other victims to join at later stages in order to benefit from reparations. Bearing in mind these different approaches, this section attempted to put forward a coherent analysis of the Court's potential contribution to procedural justice for victims in general, while highlighting some of the challenges transpiring in specific cases.

As far as voice is concerned, the analysis showcased that the written applications and legal representation are the main modalities for passing on to the Judges the victims' voice. As submitted, the applications represent an important modality for the victims to express their voice and recount their stories and experiences at the initial stages of the reparations proceedings, especially for the victims who are not interested in conveying their voice through oral testimonies. However, they also involve several complexities, which might affect how the victims' stories are collected and passed on to the Judges. In what regards the practice of legal representation employed at the ICC, this study highlighted the lack of possibility for the victims to express themselves through oral testimonies before the Court, despite the fact that the reparations regime includes it as an option for victim participation at the ICC. However, the research of Cody et al. highlighted that, especially due to the large distance to the Court, some victims appear generally satisfied with the legal representation as the main modality of expressing their voice.

[658] The ICC Statute features also a restorative justice function, which aims to affirm the status of victims and their rights. It seeks to take into account and consider the interests of the victim, the offender as well as the community. As such, it questions traditional retributive criminal justice, which is, *inter alia*, concerned with the punishment of the offender. Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012) 111; Howard Zehr, *Changing lenses: A new focus for crime and justice* (Herald Press, 1990) 181; see also Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010) 79; Eva Dwertmann, *The Reparation System of the International Criminal Court : Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010) 32; Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 492

[659] Silvia Fernandez de Gurmendi, 'Elaboration of the Rule of Procedure and Evidence' in Roy S. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 256

[660] For instance, the LRV for group V02 in the Lubanga case has pointed out that the victims who participated in the proceedings should be given priority when accessing reparations. See *Lubanga case* (Trial Chamber: Reparations Hearing) 11 October 2016, 60

Morever, the current study drew attention to the majority of victims' lack of choice in selecting their own LRV. Despite having this prerogative included in the legal provisions, in practice, the Court settled on common legal representatives to represent groups of victims. As far as how the practice of legal representation unfolded in practice, this study identified that it is manifested through legal submissions before the Court and consultations with the victims on the ground. The analysis of the legal submissions highlighted some of the perils of 'speaking for others' and confirmed previously echoed critiques across literature that they may fail to capture the multitude of voices and interests that the victims possess. While this is inherent in the endeavor to represent a multitude of victims, more clarity on the methodology of submissions and aggregation of common and dissenting opinions in a robust manner might contribute to collecting the victims' voices in a more organized and representative manner. As far as the practice of consultations is concerned, this study positively evaluated the various efforts by the LRV and the TFV (and exceptionally the VPRS). The consultations appear to be an important vehicle for the victims to tell their stories, express themselves and their preferences.

In addition, regarding the victims' interaction with the Court, the LRVs continue to be the main channel for interaction, although the victims might interact with other court personnel during the consultations, depending on who is organizing them. This research highlighted that there are several aspects that can influence the quality of interaction. Due to the nature of the crimes and the context where they take place, awareness of the local dynamics is paramount, especially in the interaction between the LRV and the victims. Next to this, expectation management is one important aspect of interaction – the presence of ICC staff on the ground might increase victims' expectations with the Court; however, it should not be used as a shield to deflect attention from what victims want from the Court. Finally, the current analysis identified the propensity of interaction at the ICC to become burdensome, if not handled with care for the victims.

Furthermore, as far as information is concerned, despite statutory provisions expressing the importance of providing information to victims, the current analysis identified a scarcity of details across the documents regarding the practices utilized by the LRVs to inform the victims as well as their frequency. This study underscored that this general lack of reporting may result in underperformance on the LRVs' part, especially since there are no mechanisms to monitor the LRVs' performance or to receive complaints from the victims. In addition, in what regards outreach - as an important modality to communicate with the victims , this study submitted that the majority of outreach efforts are concentrated before the reparations stage, and as such, their evaluation is not included in the current assessment. However, the study did identify that depending on Chambers' discretion, the TFV may carry out outreach activities at the implementation of reparations stage, which is likely to result in more victims being informed about the ICC and the reparations they might receive.

The final aspect of procedural justice investigated in this section concerns the length of the process of obtaining reparations. This study identified that the implementation of reparations is still ongoing in all three cases, although the reparations proceedings have already been ongoing for several years in all of the cases. While there are a series of factors that influence the length, both within and beyond the reach of the Court, this study submits that these protracted processes have important consequences for the victims. Two consequences include the death of some of the victims, as well as their increased frustration with the ICC processes, which result in dissatisfaction or disengagement with the Court.

To conclude, although more research is needed to evaluate the victims' experiences with the ICC's reparation proceedings, this study yielded important insights that might strengthen the understanding of the ICC's potential contribution to procedural justice. The ICC's choice to primarily involve the victims in the reparations proceedings on an indirect basis, through intermediaries and legal representatives, has practical perks (i.e. admittedly, it is challenging to engage with hundreds of victims). However, as highlighted, it generates important challenges and limitations to the victims' experience of voice, information, interaction and length, which in turn might undermine the victims' experience of procedural justice. Notwithstanding, it appears that in regard to the victims under ICC's jurisdiction the main challenge might not necessarily be 'speaking for others', to use insights by McEvoy and McConnachie, but how those in position to speak for others perform their tasks.[661] The actors that represent the victims or interact with them must perform their job with utmost integrity and respect for victims and their experiences. In addition, they must not to be paralyzed by the challenges arising on the ground but be informed by such dynamics and minimize them. According to the discussions in this section, a better performance of the LRVs must, at a minimum, involve efforts to make sure the submissions truly capture the multitude of voices and interests put forward by the victims. The diversity of victims' views as well as challenges encountered on the ground to capture their views must be accurately transmitted to the Judges, and not hid behind the shiny amour of highly technical and polished legal language, as is currently apparent in the LRVs' submissions. Furthermore, during and outside of these processes, emphasis must be placed on the victims' agency to define their own interests and express their voice.[662] In addition, those who interact with the victims must make sure that they do not instrumentalize the role of victims. This should include, at a minimum, an increased frequency of the meetings with the victims – especially by the LRVs - with a focus on bolstering their wellbeing and the amount of information they receive about their trials. Solutions must also be deployed to minimize the length of the proceedings.

3.3.3. Substantive Justice

I. Beneficiaries

Before moving forward to discuss the ICC's potential contribution to substantive justice for the victims under ICC's jurisdiction – by focusing on the outcome (i.e. tangible reparations) of the reparations proceedings in the three cases – it is important to clarify several aspects in relation to the beneficiaries of reparations. As discussed above in the section on procedural justice, the victims potentially benefiting from procedural justice might be different from those potentially benefiting from substantive justice, as these latter beneficiaries may still join the proceedings at the implementation stage.

To begin, the Judges' methodology for deciding who should benefit from reparations is different in each of the cases.[663] In the Katanga case, the Chamber limited the number of beneficiaries to

[661] Kieran McEvoy, Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' 22 Social & Legal Studies 489, 499

[662] See Diane Orentlicher, 'Settling Accounts Revisited: Reconciling Global Norms with Local Agency' (2007) 1 International Journal of Transitional Justice 10, 19; Although she refers to the victims' agency in relation to participation in national processes aimed at designing policies of transitional justice, I believe the idea is equally applicable here.

[663] For the exact number of applications for reparations see section 4.3.2. I. above.

the eligible victims who submitted applications by a certain date.[664] In the Lubanga case, the Chamber not only decided on the eligibility of victims who submitted applications by a certain date, but furthermore expanded the category of potential beneficiaries to "hundreds, and possibly thousands more victims" of the crimes Lubanga was convicted for. It also confirmed that other victims wishing to benefit from reparations would be screened by the TFV for eligibility at the implementation stage, using the methodology set forth by the Court.[665] In the Al Mahdi case, the Chamber decided not to screen for eligibility the 139 applications received during the reparations phase. It held that collective harm was suffered across Timbuktu (a city of approximately 70.000 people around the time of the attack), and directed the TFV to decide on the eligibility of other potential applications during the implementation of reparations.[666]

It seems that the Chambers' choice for each of the approaches is rooted within the discretion of the Chambers and no clear-cut rationale can be discerned. However, the Appeals Chamber in both the Lubanga and Al Mahdi cases did provide justification for the decision to delegate the screening of applications to the TFV in the implementation stage.[667] It reiterated that an order must either "identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted". As such, the Chambers set out the criteria for eligibility of beneficiaries in both the Lubanga and Al Mahdi cases, leaving it up to the TFV to apply these criteria in its screening of other potential applications at the implementation stage. However, in the Lubanga case, different from the Al Mahdi case, and similar to the Katanga case, the Judges went on to screen for eligibility the applications received by a certain deadline.[668] The Judges argued that the difference in the approach is justified by the type of reparations that is awarded, individual and/or collective.[669] When only collective applications are awarded, a Trial Chamber is not required to rule on the individual requests for reparations,[670] while at the same time, may do so upon its

[664] *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 168

[665] Lubanga case *(Trial Chamber:* Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable"*)* ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017) para 293

[666] *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 142

[667] The Chamber made reference to one of the five essential elements of an Order for Reparations under article 75 Rome Statute. As per Appeals Chamber in Lubanga case, "An order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted." *Lubanga case* (Appeals Chamber: Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) para 1, 7

[668] However, as mentioned above, this was not the initial approach taken in the Lubanga case, which was the same as in the Al Mahdi case. The Appeals Chamber in the Lubanga case explained the initial approach (while clarifying that future Chambers are not bound by this approach) as follows: "when only collective reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations." *Lubanga case* (Appeals Chamber: Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) para 152

[669] "The Appeals Chamber considers that the Court's legal texts provide for two distinct procedures for awards for reparations. The first, which relates to individual reparation awards, is primarily application ("request") based and is mainly regulated by rules 94 and 95 of the Rules of Procedure and Evidence. The second relates to collective reparation awards and is regulated in relevant part by rules 97 (1) and 98 (3) of the Rules of Procedure and Evidence." The rationale was first put forward by the Appeals Chamber in the Lubanga case, but also invoked by the Trial Chamber in the Katanga case, to justify its assessment of applications." *Lubanga case* (Appeals Chamber: Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) para 149; *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 33

[670] *Lubanga case* (Appeals Chamber: Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) para 152

discretion (as was eventually done in the Lubanga case). On the other hand, "the Appeals Chamber [in the Lubanga case] expressly left open" whether this also applied when individual reparations are awarded,[671] clarifying that "it is within a trial chamber's discretion to grant, or not to grant, individual reparations and that, therefore, victims do not have a right to an individual award as such."[672] One final hint was provided to understand when the Judges may screen the applications if individual reparations are provided (such as the Katanga case) – it depends upon the number of victims.[673] When there are more than a few victims, the Chamber will not attempt to decide on the applications of individual victims but only decide if the reparations are due (as in the Al Mahdi case) and then leave it up to the TFV to carry out the screening.[674]

As can be inferred from the above exposition of the different Chambers' rationale, there are several elements that appear to guide their decisions – the award of individual and/or collective reparations and the number of victims – however, it is clear that the decision to award reparations is a very complex and discretionary act from the Judges' side. The implications of the different approaches will be briefly reiterated here, however, they all indicate the complexity of decisions the Judges must take. Allowing more victims to submit applications at the implementation stage (e.g. the Lubanga and Al Mahdi cases) denotes a flexible approach by the Court, taking into account the massive proportions of crimes, and enabling more potential victims to benefit from tangible reparations. However, the potential victims selected later on by the TFV will not have participated at all in the reparations proceedings, hence, missing the opportunity to potentially 'benefit' from the various aspects leading to procedural justice, to the extent that victims experience it, given the caveats exposed in the previous section. In addition, the decision to award individual and/or collective reparations as well as the specific measures (e.g. compensation, satisfaction, etc.) is taken by the Chamber during the reparations proceedings. While indeed, the TFV holds consultations with all the victims, including those selected later on, to decide on the specific projects that fit the victims' needs,[675] the bottom line is that these projects must be within the scope of the Court's initial reparations decision, taken on the basis of applications it has reviewed itself. In other words, the victims selected by the TFV in the implementation stage will not be able to bring input relating to the reparations types and measures, with the risk of becoming beneficiaries of reparations that do not necessarily respond to their views and/or needs.[676] On the one hand, limiting the number of applications (e.g. as in the Katanga case) blocks the possibility of other

[671] *Lubanga case* (Appeals Chamber: Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) para 152; *Al Mahdi case* (Appeals Chamber: Judgement on the Appeal of the Victims against the "Reparations Order") ICC-01/12-01/15-259-Red2 (8 March 2018) para 66

[672] See also *Al Mahdi case* (Appeals Chamber: Judgement on the Appeal of the Victims against the "Reparations Order") ICC-01/12-01/15-259-Red2 (8 March 2018) para 66

[673] See also *Al Mahdi case* (Appeals Chamber: Judgement on the Appeal of the Victims against the "Reparations Order") ICC-01/12-01/15-259-Red2 (8 March 2018) para 64

[674] This rationale of the Chamber was inspired by discussions on this mater during the preparatory work on article 75. See Peter Lewis and Hakan Friman, 'Victims and Witnesses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 478

[675] See for instance proof of TFV consultations with the victims in the Lubanga and Al Mahdi cases at: *Lubanga case* (TFV: Filling on Reparations and DIP) ICC-01/04-01/06-3177-Red (3 November 2015) para 32. See also *Al Mahdi case* (TFV: Lesser public redacted version of "Updated Implementation Plan" submitted on 2 November 2018) ICC-01/12-01/15-291-Conf-Exp (14 October 2019) para 31

[676] This observation was also acknowledged by the Judges themselves in the Al Mahdi case; they held that the victims who applied for reparations in the reparations proceedings "provided information considered by the Chamber in tailoring the reparations award, giving them more influence over the parameters set in the present order. The applicants also continue to avail themselves of the assistance of the LRV, a Court appointed lawyer who receives legal assistance to represent their interests and advocate for them." *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) 79

potential victims to access reparations,[677] while on the other hand it removes the layer of screening of applications by the TFV, and speeds up the reparations process, including of implementation. In addition, the population of victims benefiting from substantive justice will overlap to a large extent with the population of victims benefiting from procedural justice. Hence, the reparations measures awarded by the Chamber are likely to be tailored according to the victims' requests for reparations submitted during the reparations proceedings, since no new victims will join in the implementation stage.

With this understanding in mind, the following sections will assess the Court's potential contribution to substantive justice, structured alongside the types of reparations under the ICC mandate, individual and collective reparations.

II. Individual Reparations

This section aims to assess the Court's potential contribution to substantive justice by means of individual reparations. It does so by reviewing the various Chambers' approaches to, and awards for, individual reparations, while taking into account the victims' requests, as well as the Court's reparations regime.

Despite the fact that the possibility of victims to receive individual reparations at the ICC is rooted within the reparations regime, their meaning was clarified for the first time by the Trial Chamber in the Katanga case, the first time also when the Court awarded individual reparations to the victims under its jurisdiction. In this case, the Chamber held that individual reparations are reparations:[678]

"*[W]hose benefit is afforded directly to an individual to repair the harm he or she suffered as a consequence of the crimes of which the person was convicted. Individual reparations confer on a victim a benefit to which the person is exclusively entitled; put differently, the benefit received is particular to the victim*."

One example of individual reparations, as provided by the Court, is "compensation paid directly into the bank account of the victim concerned".[679]

The Chambers awarded individual reparations in two of its three reparations cases, namely, the Katanga and Al Mahdi cases. In both cases, the measures of individual reparations provided consisted in compensation. Conversely, in the Lubanga case, the Chamber ordered only collective reparations, despite the applicants' preference for individual reparations. As will be seen below, the Chambers' decisions to award individual reparations indicate a recognition of the victims' individual harm suffered as well as acknowledgment of and respect for victims' preferences for individual reparations. At the same time, the Court appeared to be evaluate the victims' harm and preferences against contextual factors arising in the situation at hand. The same line of reasoning

[677] Despite the fact that it held that at least 800 civilians were living in Bogoro – the village where the attack in the Katanga case took place – at the time of attack. *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) 19

[678] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 271

[679] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 271

can also be identified in the implementation of reparations' phase, under the TFV. While some of the factors may warrant judicial decisions against the victims' preferences (e.g. Lubanga case), a lack of clarity as to when they can be compromised, and to what benefit, might incur the risk of deviating from the victims' preferences for trivial reasons as well. In what follows, the remainder of the section will discuss the Chambers and the TFV's approaches to individual reparations across the three cases and assess whether they take into account the victims' harm and preferences.

As far as the Katanga case is concerned, since VPRS's early consultations with the victims, they expressed a clear preference (99% of a sample of 305 victims) for reparations measures focused on economic/financial development, with compensation ranking high on victims' preferences (58%).[680] As explained by the LRV in his submissions:[681]

"*The strong preference of victims for measures economic and financial results directly from the state of needs resulting from crimes they suffered*".

As a result of the attack on the Bogoro village which claimed the lives of at least 60 people including elderly and children,[682] several victims lost the breadwinner of the family, and in addition, were deprived of property representing the main source of income.[683] Some victims also stressed that compensation would enable them to buy livestock, which is an important symbol to the Hema community;[684] while others hinted that it may help them to regain control over their own situation:[685]

"*[S]everal explained their request [for compensation] by indicating that they wish determine their own priorities*."

Notwithstanding victims' strong preference for compensation expressed in the majority of the LRV's submissions, it is striking to notice that in the LRV's final submission on reparations, the victims' requests for compensation consisted only in a symbolic one euro. As stated, this sum would recognize the victims' status as victims, as well as allow them to mourn those who have perished in the attack.[686] As can be noticed, the victims' motivation for compensation varied across time, from a dire need to rebuild their lives by means of monetary support (i.e. compensation in account of economic harm) to a symbolic value of acknowledging their victimization (i.e. compensation in account of moral harm). As this research posits, the variation might be explained by several factors: a change in the composition of the population of victims requesting

[680] *Katanga case* (Registry: Report on Applications for Reparations in Accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) paras 42- 55
[681] Author's translation. In Katanga case (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015) paras 17
[682] *Katanga case* (Trial Chamber: Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) 838
[683] *Katanga case* (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015) paras 17-18
[684] As explained, livestock can provide the dowry for marriage, be the source of income of the family as well guarantee a legacy to the children. *Katanga case* (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015) para 21
[685] *Katanga case* (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015) para 23
[686] *Katanga case* (Legal Representatives of Victims: Propositions des victimes sur des modalités de réparation dans la présente affaire) ICC-01/04-01/07-3720 (8 décembre 2016) para 10

reparations,[687] a change in victims' needs across time,[688] but also a questionable representation of victims' interests by the LRV.[689]

However, as can be inferred from the Trial Chamber's decision on reparations, in arriving to the awards for individual reparations in this case, it appears to have taken into account the initial preferences expressed by victims during consultations with the Registry.[690] The Trial Chamber awarded victims with compensation in amount of 250 USD, which "may provide some measure of relief for the harm suffered by the victims."[691] It furthermore held that the distribution of this sum "gives acknowledgment, in a personal and symbolic sense, of the harm done and suffering occasioned".[692] The Trial Chamber's subsequent elaboration on the reasons for making the award is commendable, as the award appears to respond to the most stringent concerns echoed by the victims. In addition, it places emphasis on victims' restoration of their sense of agency over their lives, an aspect that the victims expressed throughout their submissions. As the Trial Chamber explained, the sum is meant to be meaningful to the victims, but not to create tension within the community. The award aims to help victims become financially independent, as well as to enable them to take their own decisions on the basis of their needs.[693] In the case at hand, the Chamber appears to have taken a strategic decision. Given the victims' clear preferences for individual reparations, were the Judges to reject them and award only collective reparations, the Chamber's commitment to victims' interests and preferences would have been put under intense scrutiny. As such, the Court decided not to look away from what the victims wanted and used the opportunity to reassure its audiences that the award is meant to deliver justice to the victims: [694]

"[*T]he order for reparations would, for the most part, be missing its mark − delivery of justice to and reparation of the harm done to the victims as a result of the crimes committed by Mr Katanga − were it to disregard their almost unanimous preference […]*" for indidual reparations.
At the same time, the Court made the award on compensation with a view to taking into account the overall context as well, i.e. aiming to avoid tension within the community.

[687] As explained above in section 3.3.2 on Voice, the procedural history of the Katanga reparations proceedings indicates that several victims have passed away, several have decided to withdraw from the proceedings for personal reasons, and the LRV withdrew his representation of several victims. *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) annex i: Procedural History

[688] For instance, the Registry report surveying victims' preferences for reparations clearly states that "the crimes no longer have impact on village life", indicating how the consequences of the crimes might vary across time *Katanga case* (Registry: Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) para 40. See also Rianne Letschert, 'International Criminal Proceedings – An adequate tool for victims' justice?' in in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 57

[689] See section 3.3.2. above on Voice, explaining how the confusing LRV submissions might challenge the assumption that the LRVs properly represent victims' interests. Without further elaboration on the LRV's change of approach to compensation, it appears to be a clear deviation from the victims' clear preference for compensation for loss of income and property.

[690] The Court held that "in determination of the reparations most appropriate to the case, it is paramount, in the Chamber's view, to heed the expectations and needs voiced by the victims in the various consultation exercises." *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 266

[691] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 300

[692] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 298

[693] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 300

[694] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 339

In the Al Mahdi case concerning attacks by Al Mahdi against historic monuments and buildings dedicated to religion in Timbuktu, Mali, the victims expressed their wish to receive individual reparations consisting in compensation, equal in value to the harm incurred as a result of the crimes perpetrated by Al Mahdi. To be precise, according to the victims, the awards sought would alleviate the mental harm suffered due to damage to the spiritual link many victims had with the damaged buildings.[695] In addition, the awards would respond to the economic harm resulting from the loss of property affecting those victims who fled Timbuktu at the time of the destruction of the protected buildings or whose property was looted at the time. As expressed:[696]

"*[A]lmost all victims seek a financial award for relief. Awards are sought to alleviate the mental harm or the loss of property affecting those victims who fled Timbuktu at the time of the destruction or whose property was looted at the time. Such awards would also be conducive to helping the uprooted victims return*."

As apparent from the Order on Reparations, the approach of the Trial Chamber indicates that it took into account the victims' requests for individual reparations, and consequently, awarded compensation that would respond to both types of harm.[697] However, contrary to the LRV's extensive submissions, the Chamber awarded individual reparations to narrowly constricted categories of beneficiaries. [698] As expected, the Trial Chamber awarded individual reparations only to those victims who suffered harm a result of Al Mahdi's crimes, excluding extensive categories of victims (e.g. victims suffering bodily harm as a result of the attacks).[699] However, in addition to this requirement, the Chamber further limited the category of beneficiaries of compensation by adding the qualification that only those victims who suffered 'exceptional' economic and moral harm would receive compensation. Consequently, compensation for economic harm was awarded only to those victims whose livelihoods exclusively depended upon the protected buildings. As explained, an individualized response is more appropriate for these victims, as their loss relative to the rest of the community is more acute and exceptional.[700] In addition, the Chamber awarded compensation to address the mental pain and anguish suffered only by those victims whose ancestors' burial sites were damaged in the attack (the 'descendants of the saints'). As argued, these victims have a special emotional connection to the destroyed sites, compared to the rest of the Timbuktu population.[701] In addition, the Chamber ordered the TFV to give priority to individual applications at the implementation stage.[702]

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[695] *Al Mahdi case* (Legal Representative for Victims: Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) para 122; See also *Al Mahdi case* (Legal Representative for Victims: Final submissions of the Legal Representative on the Implementation of a Right to Reparations for 139 Victims under Article 75 of the Rome Statute) ICC-01/12-01/15-224-Corr-Red-tENG (14 July 2017) para 53

[696] *Al Mahdi case* (Legal Representative for Victims: Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) para 122; See also *Al Mahdi case* (Legal Representative for Victims: Final submissions of the Legal Representative on the Implementation of a Right to Reparations for 139 Victims under Article 75 of the Rome Statute) ICC-01/12-01/15-224-Corr-Red-tENG (14 July 2017) para 57

[697] The sum is not publicly available however; the Court eventually approved the TFV's proposal for a sum in regard to compensation. See *Al Mahdi case* (Trial Chamber: Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red (4 March 2019) 10-19

[698] *Al Mahdi case* (Legal Representative for Victims: Final submissions of the Legal Representative on the Implementation of a Right to Reparations for 139 Victims under Article 75 of the Rome Statute) ICC-01/12-01/15-224-Corr-Red-tENG (14 July 2017) see disposition at p 36 and paras 44-49

[699] *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 98 and 103

[700] *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 81

[701] *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 89

[702] *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 140

As can be inferred from the Chambers' practice on individual reparations, the victims' requests for individual reparations were largely granted, however, the category of beneficiaries of individual reparations differs on a case-by-case basis. In the Katanga case, the Chamber awarded compensation to all 297 eligible victims, regardless of the intensity or type of harm suffered. However, in the Al Mahdi case, the Chamber limited the beneficiaries to two categories – those whose living depended exclusively on the protected buildings as well as the 'descendants of saints', due to their exceptional loss relative to the rest of the Timbuktu population. The compensation awarded in the Katanga case is meant to be symbolic and acknowledge the victimization and harm endured, whereas in the Al Mahdi case it appears to respond to the harm of two narrow categories of victims. In addition, although compensation is generally awarded in regard to economic harm,[703] both Chambers chose to award it in regard to moral harm, save for the victims whose living was dependent on the protected buildings. While both cases are different as regards their context, it is commendable that the Chambers awarded in both cases individual reparations, thus responding to the victims' clear preferences. However, as explained above, in the Al Mahdi case not all victims who wished to benefit from individual reparations could do so.

The cases illustrate that victims' harm and their preferences are sometimes evaluated taking into account other complex considerations, which entails that Judges must take into account and balance victims' preferences in light of different factors. These factors might include the circumstances of the local context and feasibility of implementation, to name just a few. This finding is similar to Christoph Sperfeldt's remark that the Judges at the ICC are aware of the need to oscillate between more legalistic and more pragmatic practices. While they mediate these tensions, they show different degrees of responsiveness to institutional constraints or local demands.[704] This situation was made clear in the Al Mahdi case with the Judges' additional qualification that only those victims who suffered 'exceptional' harm should receive compensation. It is possible that this decision was taken due to the fact that most likely it would not have been financially feasible to award individual reparations to all "faithful and inhabitants of Timbuktu" declared potential direct victims.[705] However, adding new criteria for limiting reparations awards - i.e. 'exceptional' character of harm - not only disqualifies a multitude of victims from benefiting from compensation for their individual harm, but also seems to represent a narrow and *ad-hoc* interpretation of the concept of harm as a basis for reparations,[706] to the detriment of victims.

In the Lubanga case which concerns war crimes committed against child soldiers under the age of 15, the Court opted for a different approach. Despite the LRVs' submissions that the victims preponderantly preferred individual reparations in the form of compensation in respect of their individual harm,[707] the Trial Chamber awarded collective reparations with a community-based

[703] See Trial Chamber in Lubanga case, which provided an explanation on when compensation may be awarded: a) the economic harm is sufficiently quantifiable; b) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and c) the available funds mean this result is feasible. *Lubanga case* (Trial Chamber: Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) para 226

[704] Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 309

[705] *Al Mahdi case* (Trial Chamber: Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 51

[706] See Rome Statute, article 75. As per this provision, reparations are awarded in account of harm and not exceptional harm.

[707] In a submission of group V01, the LRV stated that 12 of 14 victims wanted compensation. *Lubanga case* (Legal Representatives of Victims: Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07,

approach asserting that they "would be more beneficial and have greater utility than individual awards, given the limited funds available".[708] This decision was informed by the TFV's submission for a community-based approach to reparations. In the words of TFV, a community-based approach to collective reparations is the guiding principle of national reparation programmes and it would address harm suffered at the level of individual victims and at the level of the affected communities, both those to which the former child soldiers belonged and those who were attacked using the child soldiers.[709] The victims, however, did not agree with a community-based approach, arguing that:[710]

"*Whilst from an objective standpoint, [their] community did suffer from the enlistment of its youth in the militia and the use of its children in hostilities; it also accepted this behavior for the most part and supported the leaders who engaged in it. Many even collaborated. An award for reparations to the Hema community as a whole would therefore not be reasonable and might be perceived as unjust by other communities*."

A review of the TFV's submission indicates that the Trial Chamber opted to give priority to social considerations at the local level over the victims' preferences for individual reparations.[711] Due to the complex status of child soldiers, the TFV argued against individual reparations.[712] In doing so, it took into account three considerations: avoidance of further harm to the child soldiers, reconciliation at a local level, as well as potential negative perceptions of these awards. As the TFV explained, these awards would lead to jealousy, even within families or amongst children used in combat and those not used, especially due to the circumstances of large-scale poverty and chronic insecurity permeating the situation. In addition, if awarded, these reparations would exacerbate conflict with other communities, as the members of opposing communities would not receive these reparations. Finally, compensation awarded to child soldiers might be perceived as a reward for their associated activities including severe crimes, with the risk of further deepening an existing lack of understanding of the crime of recruiting, conscripting and enlisting child soldiers within the affected communities.[713]

To a certain extent, the Trial Chamber's decision for community-based reparations is justifiable. Even though the victims' preferences did not prevail, the reasons put forward by the TFV, which then constituted the basis for the Trial Chamber's decision were informed by robust research on the ground illustrating the negative effects of individual reparations. In addition, amid the complexity of the situation, the Trial Chamber opted for a collective approach to harm, which

a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10) ICC-01/04-01/06-2864-tENG (18 April 2012) para 15.

[708] *Lubanga case* (Trial Chamber: Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) para 274

[709] *Lubanga case* (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06 (25 April 2012) 172, 154

[710] *Lubanga case* (Legal Representatives of Victims: Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10) ICC-01/04-01/06-2864-tENG (18 April 2012) para 16

[711] *Lubanga case* (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872 (25 April 2012)

[712] *Lubanga case* (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872 (25 April 2012) paras 137-152

[713] *Lubanga case* (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872 (25 April 2012) paras 140-141, 151

expanded to acknowledge and redress harm beyond that directly attributed to Lubanga, to include the harm of communities. On the other hand, this approach failed to acknowledge and attempt to redress the specific harm suffered by child soldiers (and the indirect victims) as a result of the crimes Lubanga was convicted for (their harm would have been acknowledged collectively only), which is the legal principle wherein reparations in the context of international courts are rooted.[714]

However, the Appeals Chamber modified the Trial Chamber's approach to reparations. The Appeals Chamber endorsed the Trial Chamber's decision for collective reparations without elaborating more on the decision to ignore the victims' expressed preference for individual reparations, but dropped the community-based approach.[715] The Appeals' Chamber decided to limit the category of beneficiaries to the child soldiers who suffered harm as a result of Lubanga's crimes (and the indirect victims)[716] excluding thus the child soldiers outside of the beneficiary category, the communties to which the beneficiary child soldiers belonged, or the other communities attacked using child soldiers. One implication of this approach is that it aims to acknowledge and to redress the specific harm suffered by child soldiers (and the indirect victims) as a result of the crimes Lubanga was guilty of. On the other hand, all the valid concerns articulated by the TFV with regard to the potentially negative consequences of reparations awarded in account of child soldiers and the indirect victims only remained unaddressed and may constitute a real risk at the implementation stage.[717] To address the potential risk, the Appeals Chamber suggested that the TFV consider the inclusion of members of the affected communities in the assistance programmes of its assistance mandate.[718]

As can be inferred, the Lubanga case and the various approaches to reparations constitute an important example of the complexities involved in affording justice to victims in situations of mass victimization. As illustrated, both Chambers dismissed the victims' clear preferences for individual reparations, likely triggering the victims' disappointment, by asserting that a collective approach would be more 'beneficial' for victims and have greater utility. It is likely that the Chambers opted for this approach amid the challenging status of child soldiers, especially before the ICC, where Dominic Ongwen is currently prosecuted for war crimes and crimes against humanity he allegedly committed as a child soldier.[719] At the same time, it is a clear example that the victims' harm and

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[714] E.g. see Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 452-453

[715] *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) paras 141-143.

[716] The harm of indirect vicitms includes:

"i. Psychological suffering experienced as a result of the sudden loss of a family member;

ii. Material deprivation that accompanies the loss of the family members' contributions;

iii. Loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime;

iv Psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities."

Lubanga case (Appeals Chamber: Annex to Order For Reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015) para 58(b)

[717] The Registry also drew attention in its report surveying victims' preferences for reparations in the Katanga case to the fact that in both Lubanga and Katanga cases the beneficiaries of reparation belong to the Hema community. As explained, the fact that only the victims from one side of the conflict will benefit from reparations might have negative consequences for the ethnic conflict and insecurity in the region. A community leader from a village expressed, "I've tried to explain to my people the benefits of both collective and individual – people are afraid that if the Lendu-Bindi see large collective projects done to foster development – they won't be happy with that and they will come to destroy them." *Katanga case* (Registry: Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) paras 77-79

[718] *Lubanga case* (Appeals Chamber: Annex to Order For Reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015) para 55

[719] See ICC, 'The Prosecutor v Dominic Ongwen, Case Information Sheet' <https://www.icc-cpi.int/CaseInformationSheets/OngwenEng.pdf>

preferences were evaluated taking into account other interests; however, the Court failed to make these interests explicit and instead merely expressed that they would be 'more beneficial'. Consequently, according to the Chambers, the collective approach to reparations appeared a more feasible alternative to acknowledge and tackle the harm suffered by child soldiers and indirect victims. This approach, however, brought about another conundrum. One choice entailed providing reparations that would attempt to redress the collective harm suffered via programs similar to national reparations schemes as well as to respond to other local complexities (e.g. aiming to avoid stigmatization of child soldiers or further conflict between communities) while failing to provide acknowledgment and redress to the specific harm flowing from Lubanga's crimes. The second choice was to provide reparations that would redress the specific harm flowing from Lubanga's crimes while failing to respond to other local complexities or worse, risking re-ignite conflicts across volatile communities. Given the role of reparations within the ICC, to repair harm connected to specific crimes linked to the guilt of the accused, the Appeals Chamber's approach to prioritize legal imperatives is justified. At the same time, it demonstrates the limited character of court-awarded reparations in the context of mass atrocities, which necessarily need to be complemented by assistance programs by the TFV to attempt to come to terms with mass victimization.

The final point of contention in this section concerns the implementation stage of individual reparations, where the TFV plays an essential role to draft the implementation plans as well as to make reparations a reality for the victims. Despite the TFV's general commitment to the victims' preferences in regard to reparations, several aspects have emerged as contentious in this analysis.

The first point refers to the TFV's apparent tendency to favor collective reparations, to the detriment of victims' clear preferences for both types of reparations. In its approach, the TFV appears motivated by a whole range of considerations but not by the victims' strongly expressed preference for individual reparations (potentially in addition to collective reparations). As illustrated above, in the Lubanga case, the TFV expressed from the outset its concerns with regard to individual reparations. Despite deviating from the victims' expressed preferences, the TFV robustly motivated its preference for collective reparations, elaborating on the complex situation of child soldiers and the individual reparations' potentially detrimental implications for the situation on the ground.[720] However, in the Katanga and Al Mahdi cases, the TFV's preference for collective reparations was rooted in different considerations, at a *prima facie* unrelated to the situation at hand or other compelling reasoning to warrant deviation from victims' preferences. In the Katanga case, the TFV first argued that according to its reading of the TFV Regulations, it statutorily had the ability to complement financially only collective reparations awards.[721] In addition, in its view, the restricted financial resources of the TFV made collective reparations in both cases more realistic.[722] In the Katanga case, it was after the TFV's Board of Directors lenient

[720] *Lubanga case* (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872 (25 April 2012) paras 140-141, paras 136- 151

[721] *Katanga case* (TFV: Observations on Reparations Procedure) ICC-01/04-01/07-3548 (13 May 2015) para 139. However, the matter was sent for consideration before the TFV's Board of Directors who eventually held that it is upon their discretion whether they decide to complement financial collective reparations, but also individual reparations. There is no indication in the TFV's regulations that individual reparations are forbidden, it is just a matter of discretion. See *Katanga case* (TFV: 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) ICC-01/04-01/07-3740 (17 May 2017)

[722] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 282. See also, for instance, Al Mahdi case, when upon explicit request from the Chamber to give priority to the

interpretation of its Regulations that the financial hurdle was overcome, not in the least due to generous financial support from the Netherlands, earmarked to cover individual reparations.[723] In the Al Mahdi case, despite the Court ordering that individual reparations should be provided to the victims before any other collective reparations are provided, the TFV, in its DIP held that it could not guarantee this approach. After the Court reasserted its order for priority of individual reparations and more than a year later, the TFV finally gave in and committed to implement the individual reparations. [724] Consequently, it appears that the TFV has a tendency to favor collective reparations over individual reparations, despite the victims' clear preferences for both types of reparations. Amid a lack of further elaboration on the TFV's rationale (especially in Katanga and Al Mahdi cases), it is unclear what constitute valid grounds for militating only for collective reparations and deviating from the victims' stated preferences. In the words of the Court, individual reparations are important because they provide benefits to each of the victims and acknowledge the harm suffered individually.[725] Amid the TFV's commitment to put victims at the centre of justice and reparations, as per its mandate,[726] clarifying the basis for its choices is important to ensure that reparations that aim to address the victims' harm are not downplayed by less than important reasons. The robust argumentation in the Lubanga case illustrating how individual reparations would not have been a good choice amid complex social considerations stands as an example of good practice.

In addition, when the Chambers delegate additional tasks to the TFV in regard to the implementation of reparations, such as e.g. administrative screening of victims' applications for reparations, the TFV's appears to approach some of them in a bureaucratic manner, creating unnecessary hurdles for the victims to benefit from reparations. As explained above, in the Al Mahdi case, the Court delegated to the TFV its responsibilities to screen for eligibility the individual applications. As such, upon instructions from the Court, the TFV submitted the design of a screening process that appears to be very cumbersome,[727] as it consists in various layers of review and entails lengthy deadlines for each of the steps. It appears that the TFV created an administrative screening process more complex than a judicial screening process. In addition, through its interpretation of the Court criteria for eligibility, TFV proposed a plan that would limit even more the category of beneficiaries of individual reparations, to the exclusion of several victims. Fortunately, upon submission of this plan to the Chamber, the Judges invited the TFV to revise significant parts of the DIP, and expressed "grave concern regarding the form and content". The Judges stressed that "the TFV owes it to the victims whose interests it serves to treat its

individual reparations in implementation of reparations, the TFV held that due to scarce resources, it cannot guarantee such priority. *Al Mahdi case* (TFV: Public Redacted Version of "Corrected version of Draft Implementation Plan for Reparations, with Public Redacted Annex I) ICC-01/12-01/15-265-Corr-Red (18 May 2018) para 37

[723] See *Katanga case* (TFV: 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) ICC-01/04-01/07-3740 (17 May 2017)

[724] Despite the Court ordering that individual reparations should be provided to the victims before any other collective reparations are provided, the TFV, in its DIP held that it could not guarantee this approach. After the Court reasserted its order for priority of individual reparations and more than a year later, the TFV finally gave in and committed to implement the individual reparations. See *Al Mahdi case* (TFV: Public Redacted Version of "Updated Implementation Plan", submitted on 2 November 2018, ICC-01/12-01/15-291-Conf-Exp) ICC-01/12-01/15-291-Red2 (22 November 2018) 11-21

[725] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 277

[726] TFV, 'TFV Strategic Plan 2014-2017' (2014) 11, 15-16

[727] *Al Mahdi case* (TFV: Public Redacted Version of "Corrected version of Draft Implementation Plan for Reparations, with Public Redacted Annex I) ICC-01/12-01/15-265-Corr-Red (18 May 2018) paras 169-235

submissions with outmost care and consideration".[728] In addition, upon contestation by the LRV that many of the decisions the TFV put forward above are detrimental to victims, the Court amended the cumbersome screening process, as well as directed the TFV to include in the category of beneficiaries those victims it had initially intended to exclude.[729] The fact that the Judges – who are already bound to be restrictive as a result of the application and interpretation of the reparations legal framework, as well as are involved in generating lengthy proceedings that already frustrate the victims[730] – amended grossly the TFV's DIP and deployed harsh language to remind the TFV that its goal is to serve the victims' interests is concerning. This example illustrates that bureaucracies around screening procedures in this case[731] appear to take priority over concerns for victims and their interests. As an organ independent from the Court and not bound by the same stringency as the Chambers, it would be expected that the TFV operates in a swifter way, subject to less procedural stringencies.[732] However, the analysis demonstrates that the victims have to put up with lengthy and cumbersome processes throughout their involvement with the ICC.

In the Katanga case, the TFV was only tasked with implementing the reparations and submitting a DIP, since the Chamber itself had screened for eligibility all the applications. However, the TFV's approach, as apparent from the DIP had the tendency to prolong unreasonably the implementation stage, and furthermore, some of the proposals it has put forward highlight a rather condescending approach.[733] For instance, the TFV proposed that in order to benefit from individual reparations, the victims would need to undergo an intake process at which point they will have the opportunity to discuss with a financial advisor how to use the 250 USD, and provided examples of how the victims could 'maximize the spending power' of this sum.[734] According to an LRV submission, the victims deplored the TFV's approach, indicating that its suggestions – to appoint a financial advisor, to set up a bank account, etc. – "risk putting the victims in a process of infantilization and will convey to them the idea that they do not have the ability to make their own choice without help or interference."[735] Unfortunately, further developments on how the Chamber responded to this situation are not available at the time of writing; however, as apparent in LRV's submission, the TFV's approach appears to frustrate the victims.

[728] *Al Mahdi case* (Trial Chamber: Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations) ICC-01/12-01/15-273-Red (12 July 2018) paras 10-11

[729] The TFV followed suit upon the Chamber's Decision, and amended the DIP to respond to the Chamber's criticism. See *Al Mahdi case* (TFV: Public redacted version of "Updated Implementation Plan", submitted on 2 November 2018, ICC-01/12-01/15-291-Conf-Exp) ICC-01/12-01/15-291-Red2 (22 November 2018) e.g. para 177

[730] For criticism on how, in the Lubanga case, different approaches to collective reparations led to long debates between the Chamber and the TFV, with the consequence that implementation of reparations is falling behind 7 years after the first decision on reparations was issued, see Alina D. Balta, Manon Bax, Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System' (2019) 29 International Criminal Justice Review 221

[731] See also section IIII, on the lengthy debate between the Chambers and the TFV in the Lubanga case, in regard to collective reparations.

[732] In its Strategic Plan, the TFV itself recognized that survivors of crimes under the ICC's jurisdiction have real and urgent needs, which would require swift intervention. TFV, 'TFV Strategic Plan 2014-2017' (2014) 8, 14

[733] *Katanga case* (TFV: Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March) ICC-01/04-01/07-3751-Red (25 July 2017)

[734] *Katanga case* (TFV: Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March) ICC-01/04-01/07-3751-Red (25 July 2017) paras 102-103

[735] *Katanga case* (Legal Representatives of Victims: Observations Relatives Au Projet De Plan De Mise En Œuvre Déposé Par Le Fonds Au Profit Des Victimes En Exécution De L'ordonnance De Réparation En Vertu De L'article 75 du Statut) ICC-01/04-01/07-3763-Red (12 September 2017) paras 43 and 56

Finally, it is important to mention that despite extensive legal developments in both cases, as illustrated throughout this section, there is no public information available on the status of implementation of the individual reparations awarded.[736]

III. Collective Reparations

This section aims to understand the Court's potential contribution to substantive justice for victims by means of collective reparations. It does so by reviewing the various Chambers' approaches to, and awards for, collective reparations while taking into account the victims' requests, as well as the Court's legal framework on reparations.

As in the case of individual reparations, an elaboration on the meaning of collective reparations within the ICC was provided within the case law. As such, collective reparations refer to awards that aim to address the harm victims suffered on an individual and collective basis.[737] This definition of collective reparations at the ICC was provided for the first time by the Appeals Chamber in the Lubanga case, however, an extensive elaboration on the concept was only provided by the Trial Chamber in the Katanga case. Relying on both external (e.g. UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence) as well as internal sources (such as the TFV and the LRV), the Trial Chamber explained that collective reparations refer to both their nature (the nature of goods distributed) and their recipients (collectivities or groups).[738] In addition, the Trial Chamber explained that two categories of collective reparations may be differentiated: those aiming to benefit the community as a whole and those focused on the individual members of the group.[739] Although the Trial Chamber conceded that the concept of collective reparations is an open concept, one important criterion to differentiate collective reparations from individual reparations is that the former confer on a group a benefit to which its individual members are not exclusively entitled, whereas in the case of the latter, the benefit belongs to each member of the group.[740]

Collective reparations were awarded in all three cases adjudicated to date. According to this analysis, collective reparations within the ICC context can be grouped into two types, namely, collective reparations that require the TFV's involvement and funding, and other measures that necessitate the involvement of the accused persons and/or of the State Parties. In what regards the first type, this research posits that the awards of collective reparations appear to be to a large extent a promising avenue to address the massive harm caused by the crimes under the ICC's adjudication from crimes against persons (e.g. in the Lubanga and Katanga cases) to crimes against cultural heritage (e.g. the Al Mahdi case). In regard to other measures beyond what the TFV can implement – i.e. the sentence of the perpetrator, apologies by the perpetrator, or the involvement of the State Parties, the analysis draws attention to the limited ability of the court to respond to these requests of victims. In addition, this research identified shortcomings in relation to the process of crafting

[736] According to information from several ICC officials, the $250 for individual reparations have already been paid out to the victims in the Katanga case, however, this information is not public (indeed, several submissions on reparations are either not publicly available or the sensitive information is marked in black).
[737] *Lubanga case* (Appeals Chamber: Amended Order for Reparations) ICC-01/04-01/06-3129 (3 March 2015) para 33
[738] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 273
[739] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 278
[740] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) paras 277-278

collective reparations at the ICC. Victims' requests and preferences represent the starting point of all the discussions on collective reparations at the ICC. Despite this, in the process of defining the content and characteristics of collective reparations in view of implementation, a web of actors within the ICC system (i.e. the Chambers, the TFV, and the LRVs) transform the process into long and cumbersome debates, featuring a clash of perspectives. As such, this study posits that these debates fail to take account of the victims and their interests with regard to the process too, with possible implications for the victims' overall assessment of collective reparations. The remainder of the section will discuss each of the findings, focusing on the awards of collective reparations, other measures, as well as the process of crafting collective reparations.

As this research posits, a *prima facie* analysis of the Court's awards of collective reparations in all three cases indicates that the awards appear to take into account and respond to the victims' harm and preferences in relation to collective reparations. These reparations require the TFV's involvement and funding. This will be illustrated below, by referring to the awards in all three cases.[741]

In the Lubanga case, in fulfilling the Appeals' Chamber order for collective reparations, the TFV elaborated in its DIP on two strands of collective reparations to be awarded to the victims: symbolic collective reparations and service-based reparations. Taken together, the overall objective of collective reparations in the Lubanga case was to afford redress to the former child soldiers and indirect victims (including family members victimized by Lubanga' crimes) and enable them to overcome the harm suffered through rehabilitation projects in an integrated collective reparations programme.[742] The symbolic collective reparations consist in measures of satisfaction that would foster awareness and acknowledgement within the affected communities about the crimes, reduce the stigma of child soldiers, as well as create ripple effects to create an enabling environment for the service-based reparations.[743] In addition, the service-based reparations consist in rehabilitation measures of three types: psychological rehabilitation through psychological counselling services and community engagement, socio-economic rehabilitation through various programs for economic empowerment, and physical rehabilitation focused on the physical health and mobility of victims.[744] It is important to note that, in addition to the Chamber endorsing the various projects put forward by the TFV,[745] the victims appeared to generally agree with these proposals too.[746] In addition, the Court appeared to adopt an expansive understanding of collective harm amid its

[741] Methodologically, it is important to remember that this conclusion is drawn by focusing on LRV submissions on behalf of victims during the reparations proceedings, indicating that the victims joining the process only at the implementation stage will likely not have their voice represented in their submissions.
[742] *Lubanga case* (TFV: Information regarding Collective Reparations) ICC-01/04-01/06-3273 (13 February 2017) para 81
[743] See *Lubanga case* (Trust Fund for Victims: Public Redacted Version of Filing regarding Symbolic Collective Reparations Projects with Confidential Annex: Draft Request for Proposals) ICC-01/04-01/06-3223-Red (19 September 2016) 15-16. See also pages 16-17 for detailed elaboration on the projects falling under symbolic collective reparations in the Lubanga case.
[744] For detailed elaboration on the projects falling under service-based collective reparations. *Lubanga case* (TFV: Information regarding Collective Reparations) ICC-01/04-01/06-3273 (13 February 2017) 31-46
[745] *Lubanga case* (Trial Chamber: Order Approving the Proposed Plan of the Trust Fund for Victims in Relation to Symbolic Collective Reparations) ICC-01/04-01/06-3251 (21 October 2016); see also *Lubanga case* (Trial Chamber: Order approving the proposed programmatic framework for collective service based reparations submitted by the Trust Fund for Victims) ICC-01/04-01/06-3289 (6 April 2017)
[746] See *Lubanga case* (Legal Representatives of Victims: Submissions on the Evidence Admitted in the Proceedings for the Determination of Mr Thomas Lubanga Dyilo's Liability for Reparations) ICC-01/04-01/06-3359-tENG (8 September 2017) paras 75-76; *Lubanga case* (Team of Legal Representatives of V02 victims: Observations of the V02 Team in Compliance with Order No. ICC-01/04-01/06-3345) ICC-01/04-01/06-3363-tENG (8 September 2017)

acknowledgment of the extended impact of crimes that include "hundreds, and possibly thousands more victims."[747]

Similarly, in the Katanga case, the Chamber's Order on Reparations, granted extensively the victims' requests for reparations, as inferred from Registry's Report and LRV's submissions.[748] In responding to the victims' preferences for collective reparations, the TFV designed a DIP alongside the Chambers' instructions, with the reparations measures grouped into four categories and responding to the victims' harm. As such, the measures amount to restitution and rehabilitation and concretely, consist in support for housing, income-generating activities, education for the children as well as psychological support.[749] As in the Lubanga case, the victims endorsed the projects put forward by the TFV almost in their totality.[750] Finally, in the Al Mahdi case, TFV's Updated Implementation Plan appears to largely respond to the victims' harm and requests for collective reparations. In fact, the plan adopts an expansive understanding of collective harm, in that it consists in measures that aim to address the types of harm suffered within the Timbuktu community in Mali, as well as harm suffered at the national and international levels, as per the Trial Chamber's Order on Reparations. As such, the reparations measures consist in rehabilitation of the protected buildings and guarantees of non-repetition measures, economic and moral rehabilitation for the victims of the Timbuktu community, as well as measures that amount to satisfaction, consisting in commemoration activities in which the victims would partake, and the symbolic award of one euro to the Government of Mali and UNESCO, respectively.[751] The plan was endorsed by the Trial Chamber,[752] and as apparent from the LRV's submission, it was largely accepted by all the victims.[753]

[747] *Lubanga case* (Trial Chamber: Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable") ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017) para 293

[748] *Katanga case* (Registry: Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015) paras 46, 48, 52, 61. Also, *Katanga case* (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015) paras 19-25

[749] *Katanga case* (TFV: Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March ICC-01/04-01/07-3751-Red (25 July 2017) 37-41

[750] *Katanga case* (Office of Public Counsel for Victims: Observations on the Trust Fund for Victims' Draft Implementation Plan Relevant to the Order for Reparations) ICC-01/04-01/07-3762-tENG (11 September 2017); *Katanga case* (Legal Representatives of Victims: Observations Relatives Au Projet De Plan De Mise En Œuvre Déposé Par Le Fonds Au Profit Des Victimes En Exécution De L'ordonnance De Réparation En Vertu De L'article 75 du Statut) ICC-01/04-01/07-3763-Red (12 Septembre 2017)

[751] *Al Mahdi case* (TFV: Public redacted version of "Updated Implementation Plan", submitted on 2 November 2018, ICC-01/12-01/15-291-Conf-Exp) ICC-01/12-01/15-291-Red2 (22 November 2018)

[752] *Al Mahdi case* (Trial Chamber: Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red (4 March 2019)

[753] *Al Mahdi case* (Le Représentant légal des victims: Observations du Représentant Légal Des Victimes Sur La Version Mise À Jour Du Plan De Mise En Œuvre Des Réparations Du Fonds Au Profit Des Victims) ICC-01/12-01/15-315-Red (15 janvier 2019)

As apparent from the exposition above, collective reparations awards at the ICC consist of restitution,[754] rehabilitation,[755] satisfaction [756] and guarantees of non-repetition,[757] and in large part take into account and respond to the victims' own requests and preferences in regard to collective reparations. In addition, if implemented across the three cases, they represent an important reparative effort that has the potential to respond to harm in a holistic manner, aiming to redress both the harm suffered individually by victims[758] and the harm suffered collectively.[759]

Next to these awards, other measures emerge out of the case law. They relate to the sentences against the accused persons, potential apologies from accused persons, as well as the involvement of States in reparations. They could be considered collective reparations, although they are not qualified as such in the judgment,[760] as according to the van Boven/ Bassiouni Principles, they amount to satisfaction measures. [761] As this research identified, several victims in the Katanga and Al Mahdi cases deplored the sentences meted out by the Chambers.[762] In the Katanga case, the victims expressed that the "reparative function of the judgment has not been met", as the 12 years' imprisonment sentence is insufficient and, in addition, more perpetrators should be prosecuted and punished.[763] In the Al Mahdi case, the victims expressed that the nine-year term of imprisonment is insufficient and that they hope the reparations awards will respond to the crimes committed in

[754] In the Katanga case, the reparations measures consist in support for rebuilding housing and reinstating education for children.

[755] In the Lubanga case, the service-based reparations consist of physical, economic, and psychological rehabilitation measures; in the Katanga case, the reparations consist of income generating activities as well as psychological support; in the Al Mahdi case, the reparations consist of measures to foster both the economic and moral resilience of victims. In addition, in the Al Mahdi case, the rehabilitation measures have also focused on the protected buildings.

[756] In the Lubanga case, the symbolic collective reparation consist of commemoration centers as well as mobile memorialization across selected communities, although they appear to have a forward looking function as they are aimed at reintegration and reconciliation. Interestingly, in the Katanga case, the victims rejected from the beginning measures amounting to satisfaction and truth seeking, and the LRV explained that this has to do with the social-cultural context of the victims (e.g. risk of new traumas, insecurity in the region, etc). The Chamber appeared mindful of the victims' request in this regard and did not order any satisfaction measures. Finally, in the Al Mahdi case, the reparations measures consisted in forgiveness ceremonies and memorialization, which would be designed in cooperation with the victims. In addition, these measures included also the symbolic payment of one euro each to the Government of Mali and UNESCO.

[757] Only the Al Mahdi case includes measures amounting to guarantees of non-repetition. *Al Mahdi case* (TFV: Public redacted version of "Updated Implementation Plan", submitted on 2 November 2018, ICC-01/12-01/15-291-Conf-Exp) ICC-01/12-01/15-291-Red2 (22 November 2018) paras 100-103. See also Alina Balta and Nadia Banteka, 'The Al-Mahdi Reparations Order at the ICC: A Step towards Justice for Victims of Crimes against Cultural Heritage' (Opinio Juris, 15 August 2017). <https://opiniojuris.org/2017/08/25/the-al-mahdi-reparations-order-at-the-icc-a-step-towards-justice-for-victims-of-crimes-against-cultural-heritage/> accessed 28 February 2020

[758] Bearing in mind the caveats discussed in the previous section.

[759] For elaboration on the importance of an approach that aims to tackle both individual and collective harm see Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 170

[760] Satisfaction measures are usually of a collective nature, unless they target the individual needs of victims. See e.g. Diana Itza Contreras Garduño, *Tensions and Dilemmas Between Collective Reparations and the Individual Right to Receive Reparations* (Intersentia, 2018) 89

[761] As per Van Boven/Bassiouni principles, satisfaction includes, amongst others, public apology, including acknowledgement of the facts and acceptance of responsibility and judicial and administrative sanctions against persons liable for the violations; Van Boven/Bassiouni Principles, para 22

[762] *Katanga case* (Trial Chamber: Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014); *Al Mahdi case* (Trial Chamber: Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016). For a discussion on whether punishment may amount to reparations and how victims perceive it, see Alina Balta, 'Retribution through Reparations? Evaluating the European Court of Human Rights' Jurisprudence on Gross Human Rights Violations from a Victim's Perspective' forthcoming in Laurens Lavrysen and Natasa Mavronicola (eds), Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR (Hart Publishing, 2020)

[763] *Katanga case* (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015) para 31

their totality.[764] As such, it appears that for these victims, tougher punishment by the Chambers might have resulted in increased victims' satisfaction with the Court, highlighting thus the relevance of the perpetrators' punishment for victims.[765] Interestingly, this finding is in line with empirical research by Cody and Koenig, who stated that the victims in their sample often scoffed at the idea that imprisonment could ever be sufficient punishment for the crimes committed by perpetrators and called for mob justice at the conclusion of proceedings.[766] Despite the victims' dissatisfaction with the sentences, they have been meted out after the evaluation of charges brought by the OTP and evidence in line with legal requirements of the Rome Statute and with due respect to the accused's rights.[767]

Next to the victims' dissatisfaction with the lenient sentences, this research furthermore identified their stance in regard to apologies by the accused persons. In the Katanga case, the Chamber directed the TFV to discuss the possibilities of Katanga contributing to reparations by way of a letter of apology, public apologies, or the holding of a ceremony of reconciliation once he served his sentence.[768] Similarly, in the case of Al Mahdi, the Court ordered the Registry to produce an excerpt of the video of Al Mahdi's apology and post it on the Court's website as well as directed the TFV to further disseminate the apology in Mali and abroad.[769] However, the victims had already dismissed previous public apologies of Katanga and Al Mahdi as being insincere.[770] Indeed, in both the Katanga and Al Mahdi cases, the victims expressed that a (symbolic) payment of a sum of money towards reparations by both accused would persuade victims much more of the accused's intentions for reconciliation.[771]

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[764] *Al Mahdi case* (Legal representative for Victims: Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) para 41

[765] This has been the case for instance in *Case 001* at the ECCC, whereby the civil parties became disappointed with a sentence against Duch. The sentence was reversed in the appeals to amount to life imprisonment, which was welcomed by civil parties. (For elaboraration see Chapter 4 on the ECCC). Moreover, in a previous publication, I argued that retributive responses, including the punishment of the accused is important for victims because it might contribute to the alleviation of the victims' harm, restoration of social standing and worth of victims, and restoration of shared values. Alina Balta, 'Retribution through Reparations? Evaluating the European Court of Human Rights' Jurisprudence on Gross Human Rights Violations from a Victim's Perspective' forthcoming in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020)

[766] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 20

[767] *Katanga case* (Trial Chamber: Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014); *Al Mahdi case* (Trial Chamber: Judgment and Sentence) ICC-01/12-01/15 (27 September 2016)

[768] *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 318

[769] *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 71

[770] *Katanga case* (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015) para 31; In the Al Mahdi case, the LRV reports that victims discuss the apologies of Al Mahdi in connection with forgiveness. He said that "many victims struggle to grant forgiveness and have questioned the sincerity of Mr Al Mahdi's apologies." *Al Mahdi case* (Legal representative for Victims: Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) para 44

[771] Payment of a small sum of money by Katanga is particularly important for the Hema community, where the accussed must first 'repair' the victim before asking for forgiveness. *Katanga case* (Legal Representatives of Victims: Observations Relatives Au Projet De Plan De Mise En Œuvre Déposé Par Le Fonds Au Profit Des Victimes En Exécution De L'ordonnance De Réparation En Vertu De L'article 75 du Statut) ICC-01/04-01/07-3763-Red (12 septembre 2017) para 90; In addition, as expressed in the Al Mahdi case, "Payment by the convicted person for some or all reparation would be of great symbolic value to the victims and may foster peace in Timbuktu." It is important to notice here that indeed, Al Mahdi has offered to pay for the cost of the door of the Sidi Yahia Mosque from his own pocket. *Al Mahdi case* (Legal representative for Victims: Submissions of the Legal Representative of Victims on the Principles and Forms of the Right to Reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) para 138

The Lubanga case is different in that the victims indicated their preference for this measure.[772] As early as the first reparations order, the Trial Chamber held that "any participation on his [Lubanga's] part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement. Accordingly, these measures will not form part of any Court order."[773] Furthermore, the TFV also stressed the importance of involving Lubanga in reparations, not only through apologies or public acceptance of responsibility, but also through other actions that would contribute to successful implementation of any symbolic reparations projects.[774] However, as far as Lubanga's stance on the matter is concerned, in 2016 he expressed his intention to apologize to the victims, but only after his release and during a traditional ceremony in which the victims would also have to participate.[775] However, as posited by the LRVs in 2017, Lubanga "has still not apologized to them, nor even expressed any understanding of their situation".[776]

It can be noticed that in cases where the accused persons wish to apologise, the Court appears willing to facilitate the dissemination of apologies through various means. However, in the situation when the accused does not appear willing to apologise, the Court's ability to act is limited, as it cannot force an apology from the accused persons. Moreover, even if the Court would do so in order to respond to the victims' requests, Lubanga's apologies would likely be considered as insincere by the victims, and would be devoid of any real acknowledgment of his criminal behavior and possible repentance.[777]

Furthermore, it is important to note that, as apparent in all three cases, the victims do not only discuss the involvement of the accused persons, but also the involvement of their own State. This is particularly prevalent in the DRC cases, where the victims are either looking for an apology from the Government for 'its failure to protect the children of Ituri'[778] or for concrete contribution, in the form of land, tax waiving, etc.[779] In the Al Mahdi case, however, the victims expressed reluctance at the prospect of involving Mali in the implementation of reparations.[780] Despite the victims' wishes, as already mentioned earlier in this chapter, the possibility of invoking the responsibility of the States in regard to reparations was purposefully excluded in the Rome negotiations and, as such, it is questionable whether the Court can do much in this regard. One

[772] See, for instance, *Lubanga case* (Trial Chamber: Reparations Hearing) 11 October 2016, 15

[773] *Lubanga case* (Trial Chamber: Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) para 269

[774] As the TFV explained, quoting the LRV, "the attitude of Lubanga, who continues to wield significant political influence in Ituri, and in particular within the Hema community, has and will have a direct impact on how the participating victims are perceived by their immediate communities, sometimes even by their own families." *Lubanga case* (Trust Fund for Victims: Public Redacted Version of Filing regarding Symbolic Collective Reparations Projects with Confidential Annex: Draft Request for Proposals) ICC-01/04-01/06-3223-Red (19 September 2016) para 58

[775] *Lubanga case* (Trial Chamber: Reparations Hearing) 11 October 2016

[776] *Lubanga case* (Legal Representatives of Victims: Non-Confidential Mail) ICC-01/04-01/06-3367-Anx1-Teng (27 September 2017)

[777] On the complexity of apologies for international crimes and/or gross human rights violations see Ruben Carranza, Cristián Correa, and Elena Naughton, '*More Than Words. Apologies as a Form of Reparation*' (International Center for Transitional Justice, 2015); Margaret Urban Walker, *Moral Repair Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006) 214

[778] See, for instance, *Lubanga case* (Trial Chamber: Reparations Hearing) 11 October 2016, 15

[779] *Katanga case* (Legal Representatives of Victims: Observations Relatives Au Projet De Plan De Mise En Œuvre Déposé Par Le Fonds Au Profit Des Victimes En Exécution De L'ordonnance De Réparation En Vertu De L'article 75 du Statut) ICC-01/04-01/07-3763-Red (12 septembre 2017) para 87. For the entire list of requests from the DRC Government see *Katanga case* (TFV: Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March) ICC-01/04-01/07-3751-Red (25 July 2017) para 70

[780] *Al Mahdi case* (Trial Chamber: Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red (4 March 2019) para 111

possible course of action for the Court is to diplomatically invite and encourage the States to facilitate the implementation of collective reparations,[781] but correspondent action by States is not warranted.

It thus becomes apparent that in regard to certain satisfaction measures, involving either the accused persons or the States, the Court appears to be limited in its ability to respond to victims' preferences - either because of the legal standards it is statutorily required to abide by or because they require external efforts over which the Court can have little to no influence.

Overall, the Court's awards on collective reparations appear to respond to a large extent to the victims' requests and preferences for collective reparations and have the potential to tackle both individual and collective harm, as long as they are linked to the TFV's involvement and funding. Notwithstanding their potential, the current research identified shortcomings in their process of coming into existence. The process appears to slide into complex and lengthy legal debates on different aspects of collective reparations, where various perspectives of the Chambers, the TFV, and sometimes the LRVs, clash. This study posits that these debates fail to take account of the victims and their interests with regard to the process, and have the potential to detract from the victims' overall assessment of collective reparations.

As discussed in the procedural justice section above, consultations with the victims are the main tool to gather the victims' preferences. In the process of designing the collective reparations projects in line with the Chamber's Orders for Reparations, it is the TFV that conducts consultations with the victims, both actual and potential beneficiaries, inviting them to express their preferences for reparations (granted that they fit the general criteria for reparations set forth by the Chambers in the respective case).[782] As such, the apparent bottom-up approach of the TFV,[783] to involve the victims to participate and have a say in the design of future reparations projects is one important justification why the collective reparations appear to respond to the victims' requests. This approach is commendable, as it enables the victims (although not all those potential victims benefiting from reparations) to have a say in the design of the reparations projects, which are after all designed for their benefit. This may also strengthen the victims' perception of agency over reparations, and make them feel involved in the process rather than be passive recipients of reparations that do not match their needs.[784]

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[781] Megret posits that the fact that the ICC can only order reparation against individuals, and not States, results in a substantial obstacle to the development of a symbolic reparation policy within the confines of the Court. Frederic Megret, 'The International Criminal Court Statute and the Failure to mention symbolic reparation' (2009) 16 International Review of Victimology 127, 134.

[782] For instance, as indicated by the TFV in the Lubanga case, the projects included in the DIP illustrate consultations with more than 1340 victims, family members, and other important figures (e.g. community leaders) in affected communities across 22 locations in Ituri, DRC. *Lubanga case* (TFV: Filling on Reparations and DIP) ICC-01/04-01/06-3177-Red (5 November 2015) para 32; see also *Lubanga case* (Trust Fund for Victims: Public Redacted Version of Filing regarding Symbolic Collective Reparations Projects with Confidential Annex: Draft Request for Proposals) ICC-01/04-01/06-3223-Red (19 September 2016) para 22; Evidence of consultations with a group of 120 victims can also be found in the Katanga case. *Katanga case* (TFV: Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March) ICC-01/04-01/07-3751-Red (25 July 2017) para 21; In the Al Mahdi case, however, it appears that the TFV has conducted consultations with the victims only at a later stage, with a view to draft the updated implementation plan, although no concrete information is available on the exact number. *Al Mahdi case* (TFV: Public redacted version of "Updated Implementation Plan", submitted on 2 November 2018, ICC-01/12-01/15-291-Conf-Exp) ICC-01/12-01/15-291-Red2 (22 November 2018) para 31

[783] For an explanation of a bottom-up approach see Theoretical Framework, section 1.2.

[784] This aspect has been emphasized, for instance, by the LRV in the Al Mahdi case, where it appears that for the preparations of the DIP, the TFV failed to even review thoroughly the applications submitted by the victims before the Chamber, not to mention the lack of involvement of other potential beneficiaries in the design of DIP. Consequently, in the LRV's impression, the majority of collective reparation project put forward in the DIP failed to take into account the victims' needs. *Al Mahdi case* (Le Représentant

However, once the victims' preferences are collected, the process of designing reparations appears to be sliding into complex and lengthy legal debates amongst actors at the ICC holding conflicting perspectives on different aspects of reparations. To exemplify this point, the cases of Lubanga and Al Mahdi will be discussed next. As already explained above, in the Lubanga case, due to the complex situation of child soldiers as victims, the Trial Chamber opted for community-based reparations, a proposal put forward by the TFV following its own assessment of the situation on the ground.[785] However, when the case reached the Appeals Chamber, the Judges redrew the boundaries of reparations. The Judges clarified that the community-based reparations are in fact collective reparations and are to benefit only the people who suffered harm as a result of the crimes for which Lubanga was convicted. All the argumentation the TFV put forward regarding reparations which should also take into account the communities and the harm visited upon them – both the communities to which the child soldiers belong and the communities they attacked[786] - and which the Trial Chamber endorsed, was quashed by the Appeals Chamber's reasoning. From this point onwards, a process of toing and froing between the Trial Chamber II - charged with overseeing the drafting of the TFV's DIP in accordance with the Appeals Chamber's requirements - and the TFV commenced. To be precise, this clash between the two parties was a manifestation of the divergence in the mandates of the two bodies, the Chambers guarding legal imperatives, whereas the TFV was informed by the complexity of the situation on the ground.[787]

It took almost one year for the TFV and the Trial Chamber II to finally agree on a common plan to move the design of the implementation plan forward, with the TFV insisting that the Trial Chamber II's legalistic approach[788] to have all the details regarding beneficiaries fleshed out before approving the DIP was detrimental to victims.[789] In this period, the LRVs joined the debate. The

légal des victimes: Observations du Représentant Légal Des Victimes Relatives Au Projet De Plan De Réparation Déposé Par Le Fonds Au Profit Des Victimes En Exécution De L'ordonnance De Réparation En Vertu De L'article 75 du Statut) ICC-01/12-01/15-271-Red (30 Mai 2018) for instance, paras 33, 34, 100, 107

[785] *Lubanga case* (Trial Chamber: Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) e.g. para 180

[786] *Lubanga case* (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872 (25 April 2012) para 154. This paragraph describes extensively the harm, arguing that "the harm suffered is not limited to the harm suffered at the level of individual victims but in addition, the crimes of enlisting and conscripting child soldiers have caused a specific harm at the level of the affected communities, both those to which the former child soldiers belong and those who were attacked by the UPC/FPLC using child soldiers."

[787] On the one hand, the TFV provided a DIP wherein in elaborated on the various collective reparations programs that would target the child soldiers and their families, but also focus on rebuilding the social ties with their communities, and foster acceptance, healing, and integration. *Lubanga case* (TFV: Filling on Reparations and DIP) ICC-01/04-01/06-3177-Red (5 November 2015) para 68; On the other hand, the Trial Chamber II vehemently refused to approve the DIP, insisting that the TFV provide a clear list of potential beneficiaries of reparations, their extent of harm, as well other details, impossible for the TFV to produce within the deadline imposed by the Chamber. *Lubanga case* (Trial Chamber: Order instructing the Trust Fund for Victims to supplement the draft implementation plan) ICC-01/04-01/06-3198-tENG (9 February 2016) paras 9-26. See also Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 226

[788] According to Judith Shklar, 'legalism' is a term used to explain the "ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules". Simply put, according to Shklar legalism consists in the attitude and attendant belief that complying with rules is a moral mode of being in the world. Judith Shklar, *Legalism*: Law, Morals, and Political Trials (Harvard University Press, 1986) 1; However, the use of the word legalism in this chapter refers to the strict adherence to pre-established rules, failing to grasp the complexities of the context. See John Czarnetzky and Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' 79 Notre Dame Law Review 55, 60

[789] The TFV criticized the Court's decision "to approach victim eligibility as a legal procedure prior to programme approval or implementation with eligibility determinations to be made by the Trial Chamber, requiring the compilation of individual victim dossiers, including both detailed victimization information and a harm assessment at the individual level, as well as informed consent by each victim to agree to have his or her identity revealed and challenged by the convicted person." TFV furthermore explained that this approach by the Court would result in fewer beneficiaries and in addition would exclude vulnerable victims. *Lubanga* case (The Trust Fund for Victims: Additional Programme Information Filing) ICC-01/04-01/06-3209 (7 June 2016) paras

LRV of group V01 appeared to side with the TFV, in that it argued that the information on the beneficiaries and reparations programs was detailed enough in the DIP. As the LRV put it:[790]

"*[T]housands of victims cannot be expected to recount their stories once again, to gather evidence of the harm that they suffered, in short, to devote time and energy to a collective reparations programme in difficult circumstances when the content of the programme is not yet established and they do not even know where or when it will be implemented*."

The final act of this saga, before the Court partially steered away from its initial approach, consisted in a public hearing on collective reparations held at the ICC, where the Court heard oral submissions of, amongst others, the TFV and the LRVs. By this point, the victims became seemingly exasperated with the reparations process, with the LRV explaining that:[791]

"*[T]he current situation for them is a new form of frustration. The fact that this TFV report [referring to the DIP] has existed for a year now, the fact that the TFV, after the first discussions, then suspended the entire process, the fact, in reality, that we are currently in a complete -- at a complete dead end*."

After the hearing, the Chamber approved the TFV's DIP, by now split into two parts – symbolic collective reparations and service-based reparations. Interestingly enough, at this stage, both the TFV and the Chamber appeared to finally understand the consequences this 'battle' had on the victims, with the Chamber endorsing in an 'urgent submission' the TFV's approach to "propose a way forward [in order to] permit the current proceedings to move [...] towards the realisation of reparations awards for the victims of Mr Lubanga".[792] The Trial Chamber opted to screen for eligibility only the applications available before it, leaving it up to the TFV to continue the screening during the process of implementation. At the same time, it reasserted that the beneficiaries of reparations would be the direct and indirect victims suffering harm as a result of the crimes for which Lubanga was convicted, closing the door to reparations for the people outside of this category.[793]

Furthermore, the Al Mahdi case illustrates similar dynamics. Following the Trial Chamber's Order on Reparations, the TFV was directed to draft the implementation plan that would match the criteria set forth by the Court. Interestingly, the Trial Chamber in the Al Mahdi case appeared to learn from the experiences in the Lubanga case. It reviewed the applications available before it in view of establishing criteria for the eligibility of beneficiaries, but did not decide itself on the applications, leaving it up to the TFV to design an administrative screening for this purpose. The problem at stake here is that the TFV submitted a DIP only 9 months later, fraught with errors and illustrating "repeated failures to comply with the most basic directions of the Reparations

15-17. More details on the differences of opinion between the Trial Chamber II and the TFV can be found in Alina D. Balta, Manon Bax, Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System' (2019) 29 International Criminal Justice Review 221, 232

[790] *Lubanga case* (Legal representatives of victims V01: Observations of V01 Group of Victims on the "Filing on Reparations and Draft Implementation Plan" filed by the Trust Fund for Victims) ICC-01/04-01/06-3194-tENG (1 February 2016) para 16

[791] *Lubanga case* (Trial Chamber: Reparations Hearing) 11 October 2016, 45

[792] *Lubanga case* (Trial Chamber: Order instructing the Trust Fund for Victims to Submit Information regarding Collective Reparations) ICC-01/04-01/06-3262 (8 December 2016) para 12

[793] *Lubanga case* (Trial Chamber: Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable") ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017) paras 253-259

Order".[794] The Chamber deployed condescending language and stressed that it approved some of the TFV's plans only because "it is in the interest of victims", and directed it to work on an Updated Implementation Plan (UIP). In doing so, the TFV was expected to liaise with the LRV to ensure "the expeditious and appropriate implementation of reparations".[795] In addition, to maintain strict oversight over the drafting of the UIP, the Chamber requested monthly reports from the TFV, which denotes a 'policing' attitude, given that in the Lubanga case, for instance, reports are submitted even after 7 months.[796] At the same time, the DIP was met with harsh criticism from the LRV too, who explained, amongst others, that the reparations projects largely failed to respond to victims' needs and preferences for collective reparations, as well as failed to take into account certain categories of victims as potential beneficiaries.[797] Eventually, the TFV submitted the UIP in a record time of five months, consisting in detailed collective reparations projects responding in large part to the Chamber's requirements as well as appearing tailored to the victims' needs. The LRV was in turn given the opportunity to make submissions on it. Although he endorsed the plan, several points of criticism were maintained, including for instance, the inappropriate allocation of budget for displaced victims, while budget was allocated to cover the travel expenses for a symbolic ceremony where UNESCO and Mali Government would each receive one euro.[798] One final point worth of attention here regards the Court's decision wherein it approved the UIP, with small amendments as per LRV's submissions. In reviewing the UIP and the LRV submission, the Chamber became annoyed with the level of detail sought by the LRV. Putting concern for victims at the center of its annoyance, the Chamber held that the LRV's arguments are excessive and "an assessment by the Chamber to the level of specificity sought by the LRV would be impractical, inefficient and ultimately impede the delivery of expeditious reparations to the victims."[799]

As this short immersion into the crafting process of collective reparations attempted to illustrate, designing reparations that respond to the victims' requests and preferences entails consultations with the victims as a starting point. However, the process then slips into a long and cumbersome battleground of different perspectives in relation to collective reparations. In the Lubanga case, the TFV went to great lengths to explain to the Chamber that its narrow focus on legalistic requirements is simply not feasible, whereas in the Al Mahdi case, the Chamber admonished the TFV's precarious implementation plan and later criticized the LRV for being too demanding. A lot of the information on the Katanga case is unfortunately not publicly available, although this case too illustrates how the LRV disagrees with the TFV's use of budget, very complex reparations projects given the limited number of beneficiaries, large numbers of implementing partners, which

[794] *Al Mahdi case* (Trial Chamber: Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations) ICC-01/12-01/15-273-Red (12 July 2018) paras 13-14
[795] *Al Mahdi case* (Trial Chamber: Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations) ICC-01/12-01/15-273-Red (12 July 2018) para 21
[796] See for example *Lubanga case* (TFV: Third Progress Report on the Implementation of Collective Reparations as per the Trial Chamber II orders of 21 October 2016 and 6 April 2017) ICC-01/04-01/06-3377 (15 November 2017), submitted almost 7 months after the second progress report.
[797] *Al Mahdi case* (Le Représentant Légal Des Victimes: Observations Du Représentant Légal Des Victimes Relatives Au Projet De Plan De Réparation Déposé Par Le Fonds Au Profit Des Victimes En Exécution De L'ordonnance De Réparation En Vertu De L'article 75 du Statut) ICC-01/12-01/15-271-Red (30 Mai 2018)
[798] *Al Mahdi case* (Le Représentant légal des victims: Observations du Représentant Légal Des Victimes Sur La Version Mise À Jour Du Plan De Mise En Œuvre Des Réparations Du Fonds Au Profit Des Victims) ICC-01/12-01/15-315-Red (15 janvier 2019) paras 56-57
[799] *Al Mahdi case* (Trial Chamber: Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red (4 March 2019) para 77

are ultimately paid from the reparations money, as well as the prolonged execution of reparations.[800]

What is worrisome is that all these actors purport to defend the interests of victims, without realizing in full the consequences that their actions have on the victims. It may be interesting for the Judges, the TFV, and the LRVs to conduct lengthy debates in the legal arena to flesh out concepts, uphold legalistic principles, and design audit-proof reparations projects, especially since these are the first cases ever brought before the ICC and involve many intricacies. However, not enough consideration appears to be paid to the situation of victims. Victims have made it clear through the LRVs submissions numerous times that they are growing frustrated with the ICC and they wish to receive reparations.[801] As highlighted several times in the Katanga case, the security situation and the passage of time in particular generate a sense of uncertainty, even abandonment and frustration for the victims.[802] It is true that the collective reparations appear to respond to the victims' preferences and harm, however, the ICC actors fail to take account of the victims' interests in relation to the process too. Understandably, it is difficult for victims living in volatile conflict situations to understand why the reparations they have been promised take so long to materialize. As such, it is paramount that consultations on the victims' preferences in relation to collective reparations equally capture their preferences in relation to the process. This would also help the different actors within the ICC to clarify their priorities in regard to collective reparations and inform the victims accordingly. As the LRV himself in the Katanga case posited, these considerations need to be acted upon, to maintain the utility and effectiveness of remedies,[803] else they will generate consequences that are more detrimental rather than beneficial to the victims.

Finally, despite all the detrimental consequences that the complex process of crafting collective reparations might have on the victims' evaluation of collective reparations, this section concludes by drawing attention to the important normative developments with regard to collective reparations currently taking place at the ICC. The body of knowledge generated at the ICC is very rich in content, but most importantly, illustrates progressive thinking and high-level of theorization on the content of collective reparations and their functions.[804] One example will be put forward to exemplify the above statement;[805] however, it is beyond the scope of this study to provide an in-depth analysis of the implications that these normative developments might have for collective reparations.[806]

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[800] *Katanga case* (Legal Representatives of Victims: Observations Relatives Au Projet De Plan De Mise En Œuvre Déposé Par Le Fonds Au Profit Des Victimes En Exécution De L'ordonnance De Réparation En Vertu De L'article 75 du Statut) ICC-01/04-01/07-3763-Red (12 Septembre 2017)

[801] E.g. *Lubanga case* (Trial Chamber: Reparations Hearing) 11 October 2016, 45; Katanga case (Legal Representative for Victims: Communication du Représentant Légal Relative Aux Vues Et Préoccupations Des Victimes Bénéficiaires De Reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018) 6

[802] E.g. Katanga case (Legal Representative for Victims: Communication du Représentant Légal Relative Aux Vues Et Préoccupations Des Victimes Bénéficiaires De Reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018) 6

[803] Katanga case (Legal Representative for Victims: Communication du Représentant Légal Relative Aux Vues Et Préoccupations Des Victimes Bénéficiaires De Reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018) 6

[804] This approach is very much similar to the expansive norm creation characterizing the period leading up to the establishment of the Rome Statute but on a much smaller scale, see above Section 2.1.

[805] For an analysis on how the inclusion of guarantees of non-repetition as a reparations measure in the Al Mahdi case could similarly be conceived as a normative development see analysis Alina Balta and Nadia Banteka, 'The Al-Mahdi Reparations Order at the ICC: A Step towards Justice for Victims of Crimes against Cultural Heritage' (Opinio Juris, 15 August 2017)

[806] See forthcoming PhD research of Manon Bax (PhD Candidate at the Vrije Universiteit, Amsterdam) focusing on the development of collective reparations across different fields of law.

As this study's systematic analysis showed, both the Chambers,[807] and more extensively the TFV,[808] discuss the potential of reparations to transform the societies where they are implemented, with a particular focus on addressing embedded (gender) inequality and the exclusion of women and girls.[809] In fact, as can be inferred from the TFV's Strategic Plan, reparations bringing about transformation in the communities where they are implemented constitutes one of the TFV's ambitions.[810] This ambition is infused into the TFV's reparations projects proposed in the Katanga and Al Mahdi cases, which the Trial Chamber endorsed. They include female-sensitive strategies,[811] or projects particularly aimed at enhancing the physical and emotional safety of women and girls.[812] From a normative point of view, this is a promising development because it illustrates an intention to evolve the understanding attached to collective reparations, in line with the contemporaneous debates on gender justice and transformative reparations. Taking into account Martha Finnemore and Kathryn Sikkink's elaboration on the evolution and influence of norms, attaching these novel understandings to collective reparations may be indicative of the phenomenon of 'norm emergence', the first step in the evolution and internalization of new concepts before they might become a lived reality.[813] However, this trend might also risk ringing hollow if the collective reparations' development and implementation continue in this protracted manner, as illustrated by the practice on reparations in the context of the ICC.[814] At this point, the TFV's assistance mandate in relation to reparations must be mentioned as it elicits a more fertile ground for materializing its transformative goals, although an analysis of this mandate was excluded from this thesis considering the scope of this research. As the TFV's assistance mandate is not linked to a criminal conviction and does not entail all the procedural complexities highlighted above, reparations under this mandate have a broader scope. They have the potential to provide benefits and respond to harm suffered by victims beyond that directly attributable to the accused persons, support the advancement of, in particular of women and children's human rights as well as focus on community reconciliation. According to the TFV's official records, nearly 300.000 victims have benefited under the TFV's assistance mandate, with women making up

[807] *Lubanga case* (Trial Chamber: Decision Establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904 (7 August 2012) e.g. para 57, para 62, para 222, para 236

[808] *Lubanga case* (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872 (25 April 2012) paras 72-76

[809] For an interesting academic work on the limitations of Court-ordered reparations for securing gender justice, let alone transformation, see Louise Chappell, 'The gender injustice cascade: 'transformative' reparations for victims of sexual and gender-based crimes in the Lubanga case at the International Criminal Court' (2017) 21 The International Journal of Human Rights, 1223

[810] TFV, 'TFV Strategic Plan 2014-2017' (2014) 25

[811] In the Katanga case for instance within the psychological rehabilitation project, trauma-based counseling includes gender-sensitive strategies to ensure the participation of female victims in both individual and group counseling. *Katanga case* (TFV: Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March) ICC-01/04-01/07-3751-Red (25 July 2017) para 131

[812] In the Al Mahdi case, for instance, "In line with the Trial Chamber's direction that "reparations must be implemented in a gender and culturally sensitive manner which does not exacerbate – and in fact addresses – any pre-existing situation of discrimination preventing equal opportunities to victims" the Trust Fund has endeavoured to consult with women to propose a reparation measure susceptible to address the specificity of the harm they suffered as the result of the Crime." *Al Mahdi case* (TFV: Public redacted version of "Updated Implementation Plan", submitted on 2 November 2018, ICC-01/12-01/15-291-Conf-Exp) ICC-01/12-01/15-291-Red2 (22 November 2018) para 148

[813] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization, 887, 895

[814] In a special edition devoted to 'transformative reparations for sexual violence post-conflict: prospects and problems, Andrea Durbach, Louise Chappell & Sarah Williams concluded that reparations can offer beneficial transformative outcomes if there is a confluence of a multitude of elements, including, "a commitment by relevant courts, tribunals and commissions to integrate a gender perspective and analysis across all aspects of their work, from investigation to prosecution and reparation, in particular in relation to conflict-related sexual and gender- based crimes". Andrea Durbach, Louise Chappell and Sarah Williams, 'Foreword: Special Issue on 'Transformative Reparations for Sexual Violence Post-Conflict: Prospects and Problems' (2017) 21 The International Journal of Human Rights 1185, 1190

approximately 50% of the number,[815] and projects focusing on victims of sexual and gender-based violence have already materialized in Northern Uganda, the Central African Republic and the DRC.[816] This highlights that the potential of collective reparations is constantly evolving, in regard to reparations linked to the guilt of the accused, but especially in regard reparations where the presence of this causal link is not required. At the same time, the existence of TFV projects under its assistance mandate may add to the complexity of collective reparations in the context of the ICC, since it is doubtful whether the distinction between court-awarded reparations implemented by the TFV under its reparations mandate and the projects under its assistance mandate is clearly delineated in practice.[817]

IV. Conclusion

The ICC's reparations regime in regard to the outcome of reparations proceedings does not provide any restriction in terms of content, enabling victims to potentially receive all possible forms and types of reparations. As such, victims may receive reparations of both individual and collective nature, consisting of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. However, as the present inquiry into the ICC's practice on reparations demonstrated, the Court's potential contribution to substantive justice for victims under the ICC jurisdiction is a complex matter. Reparations within the ICC context hold a significant potential to contribute to substantive justice for victims. Nonetheless, a multitude of dynamics arise in the process of crafting the reparations as well as implementing them, which appear to be detrimental to victims and their interests and might detract from the reparations' potential for substantive justice.

The first intricate aspect regards the beneficiaries of substantive justice. It is known that the beneficiaries of reparations will be those victims who suffered harm as a result of the crimes the accused person was convicted for. However, as this research unraveled, who exactly will benefit from tangible reparations is a matter under the Judges' discretion, differing from case to case. The beneficiaries can be limited to those victims who submitted applications for reparations by a certain deadline imposed by the Judges (the Katanga case), or can be a fluid category, expanding even during the implementation of reparations phase (the Al Mahdi case). As this research identified, the Chambers may opt for one of the two approaches or a mix between the two (the Lubanga case), depending on the Chamber's discretion, informed by the type of reparations provided (i.e. individual or collective), and the estimated number of potential beneficiaries. While all the approaches entail benefits and disadvantages, they also indicate the complexity of decisions the Judges must take.

In terms of individual reparations, materialized as compensation, the current research discovered that it is largely within the discretion of the Court or the TFV how to address the victims' harm and whether to take into account the victims' preferences for reparations, placing the victims in a weak position, subject to *ad-hoc* derogations. To be precise, the Court's decisions on individual reparations in the Katanga and in the Al Mahdi cases highlighted that the Court awarded

[815] 'TFV's Assistance Mandate' (ICC Website) <https://www.trustfundforvictims.org/en/about/two-mandates-tfv/assistance> accessed 28 February 2020

[816] TFV, 'Annual Report' (2017) <https://www.trustfundforvictims.org/sites/default/files/reports/Annual%20Report-2017_Online_1.pdf>; 'TFV Strategic Plan 2014-2017' (2014) 14

[817] See e.g. Peter Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2016) 10 International Journal of Transitional Justice 88

reparations that aim to address the victims' harm as well as respond to their victims' preferences. However, different from Katanga where individual reparations were awarded to all victims, in the Al Mahdi case the Court took a more restrictive approach, granting individual reparations only to beneficiaries in specific harm categories. In the Lubanga case, the Court completely rejected the victims' requests for individual reparations. As this research posits, in the cases where the Court granted the victims' requests the Court's approach is commendable, as it responds to the victims' harm and preferences and reiterates its commitment to the victims' interests and needs. However, the Al Mahdi and particularly the Lubanga cases illustrate the complexity of considerations that the Judges must juggle with in reaching their decisions, ranging from legal imperatives to local context, which do not always favor the victims. A similar tendency can be noticed in the TFV's work, at the implementation of reparations stage. For various justified and at *a prima facie* unjustified reasons, the TFV appears to be deviating from the victims' preferences. Consequently, this research highlighted that both the Court and the TFV appear to balance different interests when attempting to address the victims' harm; however, it is not always clear what these interests are. This is problematic because of the lack of transparency over which interests are evaluated and what the considerations which constitute the basis for the Court or TFV's approaches in different cases are. While some of considerations may warrant a more restrictive approach to the evaluation of harm or against the victims' preferences (e.g. Lubanga case), a lack of clarity as to when they can be compromised, and to what benefit, may result in practices defining harm in a narrow manner or deviating from the victims' preferences for trivial reasons as well.

The analysis revealed a similarly complex situation in regard to collective reparations. The victims' preferences in regard to collective reparations appear to be taken into account and granted in all three cases adjudicated before the ICC, constituting thus a promising avenue to address collectives' harm caused by the crimes under the ICC Statute. Furthermore, the Court's approach to collective reparations in the Lubanga and Al Mahdi cases elicit an expansive understanding of collective harm, amid the Court's recognition of the massive impact of crimes in both cases. However, the current research also identified the existence of other measures of reparations that the victims request from the Court, relating to the sentences of the accused persons, their apologies, as well as the involvement of the States Parties. This research submitted that in regard to these measures, the Court appears to be limited in its ability to respond to victims' preferences, either because of the legal standards it is statutorily required to abide by or because they require external efforts over which the Court can have little to no influence. Consequently, reparations at the ICC are limited to the reparations the TFV can implement, placing thus an immense responsibility on the TFV. Ultimately, it is possible that how the victims will perceive the TFV's work will be directly proportional with how they perceive the ICC. As regards the TFV itself, despite its constraints, it invests significant resources and time to conduct consultations with the victims and draft extensive implementation plans that detail projects in line with the reparations awarded by the Court. Finally, this research identified shortcomings with regard to the process of crafting collective reparations at the ICC. As submitted, consultations with the victims to survey their preferences represent a first starting point in this process, which then appears to slip into a long and cumbersome battleground of different perspectives in relation to collective reparations, failing to take account of the victims' interests in relation to the process too. Consequently, this might affect the collective reparations' positive implications for victims discussed above.

Against this background, the analysis highlighted that the Court might potentially contribute to substantive justice through tangible reparations for some victims. However, it also identified a

multitude of dynamics, particularly at the Chambers and TFV's levels, which might detract from the reparations' potential for substantive justice. As the analysis revealed, it is not always clear what the possible considerations for addressing the victims' harm and deviating from the victims' preference are, both at the Court and TFV's level. The ICC's practice on reparations is still emerging, and many of the dynamics identified above might dissipate in the next cases and the importance attached to victims and their preferences will become clearer. Although the tangible reparations that will eventually be awarded to victims have the potential to make a difference in the victims' situation (currently there is no information publicly available on the status of implementation of reparations), it is uncertain how the victims will perceive them, given all the hurdles outlined above.[818] After all, we have seen that many of the victims withdrew during the proceedings.[819] Against this background, the Court's potential contribution to substantive justice remains a challenging endeavor.

4. Final Considerations: Reparative Justice at the ICC

This section aims to put forward the final considerations of this chapter, bringing together the current research's findings and concluding on the ICC's potential contribution to reparative justice by means of its reparations regime.

As argued above, the ICC emerged as the jewel on the international criminal justice crown, featuring a multitude of advancements in international criminal law. One point of distinction in the creation of the ICC, compared to the previous international criminal law tribunals, is the underlying intention of its founders to escape the power politics characterizing the creation of the previous international criminal law tribunals.[820] The appeal of the ICC at its establishment was that it would be perceived as fair and legitimate by the rest of the world, and at the same time would be insulated from powerful States with complex interests at stake.[821] Another strong feature

[818] The NWO Vidi project 'What's law got to do with it? Assessing the contribution of international law to repairing harm' entails forthcoming empirical research with 30 beneficiaries of reparations in Katanga case and 30 non-beneficiaries. The empirical research is designed and coordinated by Mijke de Waardt, in cooperation with a local team in the DRC, coordinated by Pascal Kagoraki. Patrice Baguma has an advisory role. The local team also includes research associates whose names cannot be mentioned for security reasons.

[819] See e.g. *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) annex i: Procedural History

[820] As Bosco posits, negotiators of the Rome Statute wished to keep law outside the realm of politics, to avoid control of the ICC by the Security Council, as was the case with the Security Council established ICTY and ICTR. David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 51. See also Kenneth A. Rodman, discussing how the relationship between politics and law shaped many of decisions at the ICTY and ICTR. Kenneth A. Rodman, 'How Politics Shapes the Contributions of Justice: Lessons from the ICTY and the ICTR' (2017) 110 American Journal of International Law Unbound 234; for discussions on the Nuremberg and Tokyo tribunals and the allegations of victor' justice see Kirsten Sellars,'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 European Journal of International Law 1085. Carsten Stahn further argues: "in this sense, the project of the ICC reflects a certain democratisation in international relations. The Statute avoids clear lines of hierarchy and domination. The idea that justice rendered by the ICC is superior to other forms of justice was intentionally mitigated by the drafters of the Rome Statute through various mechanisms, such as the choice for complementarity rather than primacy, the lack of a firm statutory legal duty to implement core crimes into domestic jurisdictions (preamble), the conduct and process-based conception of admissibility (Article 17 and 20), the space left for variety of penalties at the domestic level (Article 80) or the possibility for the Court not to act 'in the interests of justice'." Carsten Stahn, Justice Civilisatrice? in Christian de Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 56

[821] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) 39. For a critical reflection on the Court's actual ability to realize these ambitions see generally e.g. Christian de Vos, Sara Kendall, and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015); For a discussion on whether the ICC could distance itself from allegations of victor's justice see William A. Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court' (2010) 43 The John Marshall Law Review

of the ICC, in contrast with the former tribunals performing mainly a retributive function, is the inclusion of victims and their rights within the Rome Statute, favored by the political climate of that time.[822] As scholars argued, the ICC's establishment fed off the decreasing popularity of States in the international legal order, and the increased appeal of human rights, overwhelmingly associated with justice at the individual level.[823] The inclusion of a reparations regime within the ICC Statute provides further appeal to the Court's functioning, hailed as cutting edge in normative development in international criminal justice.[824] Nonetheless, as the travaux préparatoires to the Rome conference illustrated, the inclusion of a reparations regime within the ICC Statute only materialized following intense negotiations and compromises. As such, the ICC's reparations regime features many constructive ambiguities concerning various procedural and substantive aspects, which the negotiators left up to the Judges to decide on, when deploying the reparations regime in specific cases before the ICC. [825]

Despite its turbulent negotiation history, a large spectrum of actors from both inside and outside the ICC infused into the ICC's reparations regime the ambition to deliver justice to victims. The ICC's ambition to deliver justice to victims through reparations is featured, *inter alia*, in the ICC's 'Strategy in relation to victims',[826] throughout the case law,[827] as well as in the Strategic Plan of the TFV.[828]

The ICC's reparations regime is mainly set forth in the Rome Statute and the RPEs. Reflecting its progressive approach in regard to victims and their rights, it entails expansive prerogatives bestowed upon victims in regard to the process and outcome of reparations process at the ICC. According to its legal basis, in the process of obtaining reparations at the ICC, the victims may benefit from protection and participation, may express their views and concerns as long as their interests are at stake, may submit applications for participation and reparations, may avail themselves of legal representation, as well as may receive information regarding all the developments in the cases of interest for the victims. In addition, the ICC's legal basis sets forth the existence of the VPRS, the VWU, and the OPCV, all specialized organs performing different functions to inform and assist the victims in the exercise of the aforementioned prerogatives. In

535; For a critical discussion on a questionable political independence of the ICC due to its relationship with the United Nations Security Council see Rosa Aloisi, 'A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court' in Dawn L. Rothe, James D. Meernik, Thordis Ingadóttir (eds), *The Realities of International Criminal Justice* (Brill/Nijhoff, 2013) 147

[822] Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 30. See above sections 2.1 and 2.2.

[823] See for instance Frederic Megret, 'The Politics of International Criminal Justice' (2002) 13 European Journal of International Law 1261, 1266; Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understading of Transitional Justice' (2007) 34 Journal of Law and Society 411, 418

[824] See Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 68; Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010) 2

[825] Christine Van den Wyngaert Hon., 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 486

[826] ASP, 'Court's Revised Strategy In Relation To Victims' (5 November 2012) ICC-ASP/11/38 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf > accessed 29 January 2020

[827] *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) para 71; *Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 15; *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 28. In addition, the same Chamber held that "Orders for reparations handed down by the Court cannot just be numbers on paper. Its restorative justice mandate depends on its awards being effective, even when a convicted person is indigent." *Al Mahdi case* (Trial Chamber: Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red (4 March 2019)

[828] TFV, 'TFV Strategic Plan 2014-2017' (2014) 14

terms of the outcome of the reparations processes, the legal basis underlying the reparations regime entitles the victims to a broad range of tangible reparations that the victims may receive, of individual and collective nature, and including all possible forms of reparations set forth in international law. The main criterion for the award of reparations is that the victims' 'damage, loss and injury' is a consequence of the crimes the accused persons were convicted of. In addition, the ICC's legal basis regulates the existence of the TFV, an organ whose mandate is to implement the reparations ordered by the Court, next to assisting victims of crimes under the ICC jurisdiction. Finally, in terms of who the beneficiaries of these process- and outcome- related prerogatives are, the ICC's legal basis is similarly expansive, enabling both natural and legal persons to benefit from reparations, as long as they prove the existence of direct and/or indirect harm.

Against this background, bearing in mind the drafting history of the Court in relation to victims and reparations, as well as its reparations regime, this chapter set out to empirically analyze how the ICC' reparations regime was transposed in practice and assess its potential contribution to reparative justice for the victims under its jurisdiction. Employing the operationalization of reparative justice as procedural justice and substantive justice, the analysis of the ICC's practice extensively focused on how the process- and outcome related prerogatives panned out in the ICC's practice. In doing so, the Judges' decisions, the TFV's documents submitted in the process of implementation of reparations, as well as the LRV submissions eliciting victims' wishes and preferences in regard to reparations were systematically analyzed.

The findings of the current empirical inquiry into the ICC's case law on reparations demonstrate that transposing the reparations regime to concrete cases brought before the ICC and consequently, contributing to reparative justice for victims is a very complex endeavor. Before elaborating on this statement, it is important to clarify that the focus of this study is on reparative justice for the victims under the ICC jurisdiction, consisting in the victims who participate in the reparations proceedings or who benefit from reparations at the implementation stage. However, as argued extensively above, several layers of selection are applied at the ICC, ranging from jurisdictional restrictions, limitations to outreach and information provided to the victimized populations, as well as the interpretation of the Rome Statute provisions by the Judges. Sara Kendall and Sarah Nouwen qualified this as the 'juridification of victimhood', explaining that victimhood as a legal category is much narrower than the massive base comprised of all victims harmed in the situations under ICC investigation.[829] Indeed, as is known, the ICC is concerned with the adjudication of international crimes, characterized by gross human rights violations, massive physical and psychological harm, and very complex dynamics.[830] By applying these layers of selection, a universe of victims is excluded from becoming potential beneficiaries of ICC-awarded reparations. While this is a limitation inherent in judicial adjudication,[831] it entails that the construction of victimhood at the ICC cannot fully grasp the complexities inherent in the international crimes under the ICC adjudication.[832]

[829] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 Law and Contemporary Problems 235, 241

[830] See e.g. Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339

[831] See also section 1.2. above for discussion on the challenges in conceptualizing victimhood in situations of mass victimization.

[832] Again, this chapter solely refers to the judicial reparations proceedings at the ICC and the consequences therein, excluding the TFV's assistance mandate and its potential to provide reparations to much broader categories of victims connected to a situation under the ICC's jurisdiction.

As this analysis illustrates, the Court's transposition of the reparations regime to concrete cases brought before the ICC results in variations in both the process- and outcome- prerogatives that the victims would be entitled to. As far as the process is concerned, despite an encompassing statutory role for victims in the reparations proceedings, in practice, victims benefit from a much restricted role and entitlements, due to their large numbers or to ensure that the accused's rights are not circumscribed. The victims' involvement with the reparations proceedings is indirect, mainly through common legal representation, and procedures such as legal submissions and consultations emerged as central to the materialization of the victims' role. In addition, a multitude of other actors, such as intermediaries, the VPRS, the TFV, and the Judges appear to exert influence throughout the victims' involvement with the process of reparations and consequently shape out the victims' experience with the Court. As far as the outcome is concerned, the Court appears to have fully maximized its reparations regime. Amid a lack of clarity in the legal basis, the Court elaborated at large on the meaning of individual and collective reparations and awarded all possible forms of reparations across its practice, responding to both individual and collective harm suffered by victims. In Lubanga and Al Mahdi cases, the Court deployed an expansive understanding of collective harm that appears to reflect an understanding of the complexities and massive impact of crimes under the ICC's adjudication. However, in regard to the Court's practice in individual cases, both the Chambers – via the case law - and the TFV – in the exercise of its reparations mandate- took a more restrictive approach, adjusting the awards on reparations and approaches towards the victims' harm and preferences depending on different factors arising in the situation at hand. Furthermore, the research also identified other measures across the Court's case law; although they relate to the accused persons or the States Parties, they may amount to reparations for victims due to their symbolic value for the victims. The research highlighted the Court's inability to act upon them, either because of the legal standards it is statutorily required to abide by or because they require external efforts over which the Court can have little to no influence. Overall, according to this analysis, the Court's practice elicited a variation of its approach towards victims and their rights, showcasing that it is still developing its understanding of the reparations' regime scope.

Consequently, the ICC's maneuvering of the reparations regime in practice is likely to impact the victims' evaluation of the ICC's reparations regime and its potential contribution to reparative justice for victims. In terms of procedural justice, the choices made by the Court and the influences of the various actors, as highlighted above, have the potential to influence the victims' perception of procedural justice. As apparent from this study, the victims' lack of opportunity to express themselves orally during the reparations proceedings and have an extensive say in the choice of a common legal representative may entail consequences for the victims' agency to tell their stories, express their preferences, and satisfy other potential intrinsic motivations. This finding, however, requires a qualification in that some victims may not always prefer to have their voice expressed orally during proceedings, as was shown by an empirical study with victims at the ICC. Furthermore, the common LRV constitutes the main vehicle at the ICC for passing on the victims' voice, facilitating the indirect interaction with the Court, and providing information to the victims. The procedures the LRV deployed in the fulfillment of its role have enabled the victims to put forward their views and preferences regarding reparations, likely to contribute to feelings of acknowledgement of and respect towards their stories and suffering. Nonetheless, they also revealed challenges inherent in the complexity of representing a multitude of victims' views as well as gaps in the frequency and quality of information and interaction that victims benefit from. While this responsibility primarily lays with the LRV, the activities of actors such as

intermediaries, the TFV, the VPRS in this regard have the potential to contribute to the victims' perceptions too. Finally, the length of the reparations proceedings at the ICC may also have an impact on the victims, as several victims passed away, while many others grew frustrated and exhausted with the ICC. Given that all the different implications illustrated above may influence the victims' perception of procedural justice, this research posits that ICC's potential contribution to procedural justice for victims is marred by important limitations.

In regard to substantive justice, the picture is equally complex. The Court awarded tangible reparations in all of its cases, on the basis of the harm suffered by the victims as a result of the crimes for which Lubanga, Katanga, and Al Mahdi were found guilty. To the extent that the Court awarded reparations that responded to the victims' preferences, as apparent in certain instances across its case law, their potential to contribute to substantive justice for victims is undeniable. However, several of the Chambers and TFV's decisions showed different approaches to addressing the harm and deviated from the victims' preferences, for various reasons. While navigating between legal imperatives and the local context, transparency over which interests are evaluated and what the considerations which constitute the basis for the Court or TFV's approaches in different cases are is paramount. Otherwise, they may deviate from the victims' harm and preferences for trivial reasons and consequently may weaken the protection of victims and their rights. In addition, condescending attitudes, elicited in some instances, might undermine the victims' agency over their choices, and further compound the victims' feelings of powerlessness and distrust in their competences.[833] Finally, decisions by the Chambers and TFV, especially in regard to the process of crafting collective reparations, fail to survey the victims' preferences in regard to the process and consequently, might result in the victims' frustration with the ICC and might downplay how victims perceive the reparations overall. Amid all the shortcomings exposed above, the Court's potential contribution to substantive justice for victims, despite promising, might end up being more limited.

To conclude, this chapter highlighted that the ICC's potential contribution to reparative justice for victims by means of its reparations regime entails numerous complexities. The inclusion of victims and victims' rights, as well as a reparations regime within the mandate of the ICC have all represented progressive developments in the international criminal justice arena. The 'justice for victims' narrative attached to its reparations regime constituted and still constitutes an important ambition of the Rome Statute's infrastructure. However, the current empirical analysis of the ICC's reparations regime and its potential contribution to reparative justice elicited that this ambition is yet to be fully realized. Hard choices, compromises, and unclear legal provisions, all permeating the Rome negotiations, have been carried into the reparations regime and currently loom over the Court's practice and its potential to contribute to reparative justice. The cases adjudicated before the ICC entail complex situations, large number of victims and highly volatile security situations on the ground. Amidst it all, the victims' harm and preferences in relation to reparations are one more imperative that the different actors at the ICC need to navigate, and as this analysis showcased, they are only now starting to learn how to do it. Reparative justice for the victims must be guided by consideration of victims, their suffering and their preferences, informed by needs and harm. Its attainment within the ICC context ultimately depends on how the actors that purport to provide reparative justice to victims enforce their mandates in relation to victims and reparations as well as on clearly defining what imperatives might detract them from their goals.

[833] As I highlighted above, in the Katanga case, the victims expressed throughout the submissions that they wished to retain their agency over the choice of reparations as well as modalities of implementation. See section 4.3.3. above.

Chapter 4: The Extraordinary Chambers in the Courts of Cambodia and its Reparations Regime: Reparative Justice for Victims of International Crimes?

Introduction

The following chapter entails an evaluation of the Extraordinary Chambers in the Courts of Cambodia's (hereinafter 'ECCC' or 'the Court) reparations regime and its potential contribution to reparative justice for civil parties under its jurisdiction. This chapter is divided into four sections. After the brief introduction, the first section will elaborate on the ECCC's negotiating history and evolution, as well as will detail the victims' role as civil parties and their rights in the context of ECCC. The focus of section two is on the ECCC's reparations regime, and will elaborate on how it came to be included within the ECCC's mandate. In addition, it will delve into the reparations regime's prerogatives statutorily bestowed upon victims in relation to the process and outcome of reparations at the ECCC as well as will detail who can be entitled to reparations at the ECCC. Section three will explain the methodological choices for analysing the ECCC's practice, followed by the core of this chapter: the results of analysis. To be precise, the sources of this chapter are the three cases adjudicated so far before the ECCC, namely, *Case 001*, *Case 002/01*, and *Case 002/02*. They consist of transcripts of trial days featuring oral testimonies of 120 civil parties during court proceedings, the Court's decisions, as well as the legal representatives' submissions on civil parties' behalf, eliciting their wishes and preferences in regard to reparations. By drawing on these sources, the chapter will then put forward the results of the analysis, illustrating how the ECCC's reparations regime is transposed in practice and discussing its potential implications for civil parties, structured alongside procedural justice and substantive justice sections. The final section will bring together the results and will elaborate on final considerations regarding the ECCC's potential contribution to reparative justice for victims by means of its reparations regime.

1. The Establishment of the ECCC
1.1. Institutional Evolution

The ECCC came into existence in 2007, as a result of protracted negotiations spanning from 1997 to 2005 between the UN and the Cambodian Government. The establishment of the ECCC, in contrast to that of the ICC – which converged normative developments in international criminal law and momentum in the political climate of that time - has at its core a devastating conflict. The Court was established as a reaction to the 1975-1979 conflict in Cambodia under the Khmer Rouge Regime (hereinafter referred to as the Cambodian conflict), where approximately 1.7 million people are estimated to have died, which amounts to 21% of the population of Cambodia.[834] The long process to establish the ECCC started with a request in 1997 from the Co-Prime Ministers of Cambodia asking for help from the UN Secretary General "in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979".[835] The UN responded to the request by setting up a group of experts to undertake a thorough investigation into the situation in Cambodia,[836] and consequently agreed to become involved in the creation of the ECCC.[837] However, this also marked the beginning of

[834] David P. Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prison* (University of California Press, 2000)
[835] UNGA, 'Identical Letters Dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council' (24 June 1997) A/51/930, S/1997/488
[836] UNGA, 'Resolution on the Situation of Human Rights in Cambodia' (27 February 1998), A/RES/52/135
[837] In June 1999, the UNSG and the Government of Cambodia officially entered negotiations over a potential tribunal of mixed composition, with a view to reaching agreement on how such a court would have to be organised and how it would have to function,

protracted negotiations between the two parties, marred with difficulties in reaching consensus regarding their conflicting visions over how the ECCC would be constituted and function.[838] To be precise, the UN representatives were concerned over the independence, impartiality and objectivity of a tribunal with majoritarian Cambodian involvement and instead advocated for international standards of justice and due process of law,[839] so that the "Cambodian people receive[d] justice and not a show trial".[840] On the other hand, the Cambodian Government insisted that the UN should play only an assistance role, and that trials should be carried out in accordance with national laws, with a majority of national involvement, and with due respect to the sovereignty of Cambodia.[841] The Cambodian counterpart also drew attention to the national process of reconciliation and the impact of a justice mechanism on Cambodia's need for peace,[842] arguing that if trials would be improperly conducted, they could create panic amongst former Khmer Rouge officers and possibly lead to a renewed war.[843] Tension between the two negotiating parties and disagreement over the law enabling the establishment of a court in Cambodia stalled the negotiation process until 2003,[844] when the UN and Cambodia finally cemented their commitment in an agreement laying the rules for the cooperation between the two parties.[845] This agreement resulted in the consolidation of the Law on the Establishment of the ECCC (hereinafter 'ECCC Law') which laid the basis and authority for the setting up of ECCC.[846]

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if the UN was to provide assistance and help it to function. 'Letter of Samdech Prime Minister Hun Sen to the Secretary General of the United Nations Kofi Annan on April 28, 1999' (Cambodia New Vision, April-May 99) <http://cnvorg.kh/cnv_html_pdf/cnv_17.PDF> accessed 19 March 2020

[838] See UNGA, 'Report of the Secretary-General on Khmer Rouge Trials' (25 November 2005) A/60/565 <http://www.refworld.org/docid/43f30fcf0.html> accessed 19 March 2020; UNGA, 'Khmer Rouge trials' (27 February 2003) A/RES/57/228 <http://www.unakrt-online.org/sites/default/files/documents/A-Res-57-228.pdf> accessed 19 March 2020; UN Secretary General, 'Report of the Secretary-General on the Khmer Rouge trials' (31 March 2003) A/57/769 <http://www.unakrt-online.org/sites/default/files/documents/A-57-769%281%29.pdf>

[839] For a more detailed overview see Cheryl White, *Bridging Divides in Transitional Justice: The Extraordinary Chambers in the Courts of Cambodia* (Intersentia, 2017) 124

[840] Mahmoud Cherif Bassiouni, *International Criminal Law: International Enforcement* (3rd edition, Brill | Nijhoff, 2008) 226.

[841] Documentation Center of Cambodia,'Searching for the Truth – How the Khmer Rouge Tribunal Was Agreed: Discussions between the Cambodian Government and the UN' (2001) <http://d.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm> accessed 19 March 2020. See Mahmoud Cherif Bassiouni, *International Criminal Law: International Enforcement* (3rd edition, Brill | Nijhoff, 2008) 235; Rupert Skillbeck, 'Defending the Khmer Rouge (2008) 8 International Criminal Law Review 423, 424-427; Nina Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar Publishing 2018) 23-26

[842] UNGA, 'Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135' (18 February 1999) < http://hrlibrary.umn.edu/cambodia-1999.html> accessed 19 March 2020

[843] Cheryl White, *Bridging Divides in Transitional Justice: The Extraordinary Chambers in the Courts of Cambodia* (Intersentia, 2017) 124

[844] Throughout 2002, the UN expressed that the ECCC's normative basis would not guarantee the international standards of justice required by the UN to continue discussions towards the establishment of the Court, which led the UN to withdraw from negotiations for a short period. See Mahmoud Cherif Bassiouni, *International Criminal Law: International Enforcement* (3rd edition, Brill | Nijhoff, 2008) 235-236

[845] '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 (UN-Cambodia Agreement)' < https://www.eccc.govkh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf> accessed 19 March 2020; As Helen Jarvis reported, the Agreement was signed on 6 June 2003 but was ratified two and a half years later, due to domestic political turmoil in Cambodia following the mid-2003 elections, followed by a slow process to secure funds for the establishment of the Court. Helen Jarvis, 'Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide' in Simon M. Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia, Assessing Their Contribution to International Criminal Law*' (Springer, 2016) 13-44

[846] 'Reach Kram' (27 October 2004) NS/RKM/1004/006 <https://www.eccc.govkh/sites/default/files/legal-documents/Kram_and_KR_Law_amendments_27_Oct_2004_--_Eng.pdf> accessed 19 March 2020

As the ECCC's negotiating history revealed, the ECCC's establishment was marked by tensions between its negotiating parties, with the Cambodian government fervently militating for majoritarian Cambodian involvement. David Scheffer, a facilitator to the negotiations as the US Ambassador for War Crimes, wrote that the negotations process was characterized by "nationalistic insularity of Cambodian officials locking horns with the stubbornness of UN lawyers and diplomats."[847]

Consequently, the dynamics permeating the negotiations, the compromises struck by the parties as well as the prevailing Cambodian influence over the functioning of the Court have been infused into the fabric and legal set up of the ECCC, which emerged as a hybrid or international(ized) court - a national court with international elements.[848] As such, the Court rules with a majority of national Judges, while the investigative and prosecutorial functions are distributed between a national and international Co-Investigating judge, as well as between a national and international Co-prosecutor.[849] In terms of proceedings, the ECCC particularly mirrors the Cambodian criminal proceedings, which are modelled after the French civil law's inquisitorial framework.[850] In addition, the Court's jurisdiction covers both national and international crimes. Consequently, the ECCC has jurisdiction over certain national crimes included in the 1956 Cambodian Penal Code,[851] in addition to its core mandate "to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979".[852] Finally, the Court functions on the basis of its Internal Rules, which were in their turn developed drawing primarily on Cambodian Criminal Procedure Law and secondarily on international law in case of a lacunae in the Cambodian law, lack of clarity about a rule, or inconsistency with international standards of justice.[853]

1.2. Development and Evolution of the Victims' Role and Rights at the ECCC

Notwithstanding the hybrid character of the ECCC, integrated within the Cambodian judicial system and thus ideally placed to take into account the local considerations due to its proximity to the location where the crimes took place as well as to the victims of the Cambodian conflict,[854] it is important to note that consideration for victims did not appear to be a major concern for the two negotiating parties. Indeed, despite the fact that both the UN and the Cambodian government made reference to justice for the Cambodian people and the need for national reconciliation during the negotiations,[855] the final form that the legal documents underlying the establishment of the ECCC

[847] David Scheffer, All the Missing Souls: A Personal History of the War Crimes Tribunals (Princeton University Press, 2013) 343.
[848] 'Is the ECCC a Cambodian or an International Court?' (ECCC Website, 20 July 2017) <https://www.eccc.govkh/en/faq/eccc-cambodian-or-international-court> accessed 19 March 2020
[849] UN-Cambodia Agreement, artts 3, 4, 5
[850] Brianne McGonigle, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles' (2009) 22 Leiden Journal of International Law 127; see also UNGA, 'Khmer Rouge trials' (27 February 2003) A/RES/57/228 <http://www.unakrt-online.org/sites/default/files/documents/A-Res-57-228.pdf> accessed 19 March 2020. See also 'Is the ECCC a Cambodian or an International Court?' (ECCC Website, 20 July 2017)
[851] ECCC Law, article 3 new
[852] ECCC Law, article 2 new
[853] ECCC Law, article 33
[854] See also Hanna Bertelman, 'International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia' (2010) 79 Nordic Journal of International Law 341, 34
[855] UNGA, 'Report of the Group of Experts for Cambodia Established pursuant to General Assembly resolution 52/135', 18 February 1999

took hardly mention the victims of the conflict. To be precise, the ECCC's founding documents acquiesce the existence of victims within the ECCC trials, however, in a succinct and ambiguous manner, indicating that victims may be questioned in the context of investigations,[856] that they may appeal the ECCC's decisions,[857] and that their protection during trial should be safeguarded by the co-investigating Judges, the co-prosecutors and the ECCC.[858]

However, given that the negotiators left it upon the newly elected Judges to draft the Internal Rules of the Court that would govern its work, further clarity on the role of victims was developed following the drafting of the rules.[859] Building on the ambiguous reference to victims in the Law on the Establishment of the Extraordinary Chambers and drawing on national law and, in case of inconsistency, on international law, the Judges took it upon themselves to carve out a role for victims within the trial as well as establish what rights the victims would have.[860] Drawing on the civil party participation system in the Cambodian Criminal Procedural Law Code, the Judges consequently established that the victims could participate as civil parties within the ECCC proceedings.[861] However, in fleshing out the victims' role as civil parties within the ECCC, the Judges started facing the challenging nature of their task, due to the intricacies of the Cambodian conflict, the large number of victims, as well as the complexities inherent to the crimes under the ECCC jurisdiction.[862] As Guido Acquaviva highlighted, the Cambodian law allowed the participation of victims in the proceedings on an individual and not a collective basis, which proved impossible in the ECCC context, given the large number of victims caused by the atrocities in Cambodia.[863] Despite the challenges the Judges had to grapple with, they ended up creating a unique victim-oriented system drawing on domestic practice and international trends, which also reflected the unique context of the Court.[864] Consequently, the victims were granted a role within the criminal proceedings as civil parties,[865] which entailed amongst others that they could participate in criminal proceedings against the accused by supporting the Prosecution, seek collective and moral reparations,[866] as well as benefit from protection.[867]

[856] ECCC Law, article 23 new
[857] ECCC Law, article 33 new
[858] UN-Cambodia Agreement, art 23; ECCC Law, article 33 new
[859] Cheryl White, *Bridging Divides in Transitional Justice: The Extraordinary Chambers in the Courts of Cambodia* (Intersentia, 2017) 144
[860] As Christoph Sperfeldt reported, a document called 'Livre Blac', prepared by French legal professionals and published by the French-Cambodian diaspora with support from international and local NGOs detailed the civil parties' participation and reparations model under civil law. This document is alleged to have circulated among the Judges that drafted the ECCC's Internal Rules. After the Judges drafted a first version of the Internal Rules, they released the document for comments especially to the academic and NGOs, who have followed suit. Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 105-106
[861] Cheryl White, *Bridging Divides in Transitional Justice: The Extraordinary Chambers in the Courts of Cambodia* (Intersentia, 2017) 160
[862] For more elaboration see Alina Balta, Manon Bax, Rianne Letschert, '*Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers* in the Courts of Cambodia' (2019) International Journal of Comparative and Applied Criminal Justice 1, 7
[863] Guido Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers' (2008) 6 Journal of International Criminal Justice 6 129, 140
[864] Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls' (2012) 12 International Criminal Law Review 375, 388
[865] ECCC, Internal Rules (12 June 2007), Rule 23(6)(a) <https://www.eccc.govkh/sites/default/files/legal-documents/IR-Eng.pdf> accessed 1 May 2020
[866] Internal Rules (2007), Rule 23
[867] Internal Rules (2007), Rule 23(6)(c)

Due to the legal innovations brought about by the Internal Rules, the ECCC was hailed as one of the few courts whose legal framework relating to victims made it stand out amongst international criminal courts,[868] providing victims with a unique role to participate in proceedings and benefit from reparations.[869] In addition, authors have characterized the ECCC as a court concerned not only with retributive justice, due to its primary concern to prosecute the most responsible for the mass atrocities perpetrated under the Khmer Rouge Regime, but also focused on restorative justice, due to the participatory rights for victims and focus on reconciliation and reparations.[870]

2. Legal Framework on Reparations

The section above provided a concise overview of the evolution and development of the ECCC and introduced one of its most important features, the role the victims of the Cambodian conflict acquired within the Court, to participate within trials as civil parties, as well as to benefit from a set of rights. Amongst these rights is the right to seek collective and moral reparations through the Civil Party action initiated by victims.[871] As discussed in the ICC chapter as well, enabling victims to apply for reparations against perpetrators in the context of international(ized) criminal courts is an important feature of the ECCC, as the victims' role within the international criminal trial had previously been restricted to their participation as witnesses.[872] This section will focus on the reparations' regime included in the ECCC's mandate; it will first explain how the right to reparations emerged within the ECCC context and then zoom in on the prerogatives bestowed upon victims in relation to the process and the outcome of reparations, as well as discuss who is entitled to become a beneficiary of reparations at the ECCC.

2.1. Travaux Préparatoires

The possibility of providing reparations to the victims of the Cambodian conflict has been first articulated by the experts commissioned by the UN General Assembly back in 1998 to investigate the situation in Cambodia following the request for help from the Co-Prime Ministers of Cambodia.[873] Under the heading 'Other Forms of Accountability', the report compiled by the experts discussed the possibility of setting up a truth commission within Cambodia, which could provide a form of 'spiritual reparation' to victims, by listening to and acknowledging them.[874] As suggested, the truth commission could also be complemented by reparations in the form of compensation, to be paid by the defendant to the victims.[875] Nonetheless, when the report was

[868] Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls' (2012) 12 International Criminal Law Review 375, 387
[869] Johanna Herman, 'Realities of Victim Participation: The Civil Party System in Practice at the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (2012) 16 Contemporary Justice Review 461, 462
[870] Brianne Mcgonigle, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles' (2009) 22 Leiden Journal of International Law 127, 129; Johanna Herman, 'Realities of Victim Participation: The Civil Party System in Practice at the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (2012) 16 Contemporary Justice Review 461, 462
[871] Internal Rules (2007), Rule 23(1)(b)
[872] See Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008) 59-60
[873] UNGA, 'Resolution on the Situation of Human Rights in Cambodia' (27 February 1998), A/RES/52/135
[874] UNGA, 'Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135' (18 February 1999) para 200
[875] UNGA, 'Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135' (18 February 1999) para 212

presented to the Government of Cambodia, this suggestion was not thoroughly considered,[876] as criminal trials at the national level was the mechanism of attaining justice preferred by the Co-Prime Ministers.[877] As such, it appears that the idea of reparations was completely ignored by the two parties during the negotiating process, as reference to reparations does not feature amongst the available documents resulting from negotiations.[878] This lack of interest in reparations was subsequently carried over into the legal instruments underlying the development of the ECCC, namely the UN-Cambodian Agreement and the ECCC Law which do not make any reference to the possibility of reparations for victims.

As it fell upon the Judges to draft the Internal Rules guiding the work of the Court, the inclusion of victims, their rights, as well as of their possibility to seek collective and moral reparations currently embedded within the Internal Rules is the Judges' merit. Nonetheless, as the drafting and negotiations over the Internal Rules of the Court took place in closed plenary sessions, there are no documents publicly available to be able to reconstruct the process and understand the Judges' reasoning for the inclusion of a reparations regime.[879] The only general explanation was provided in the 'Joint Statement by Judicial Officers' reporting on the plenary session wherein the Internal Rules were adopted. The document restated that the work of crafting the Internal Rules entailed integration of Cambodian law and procedure and the particular characteristics and structure of this court, while ensuring that international standards are upheld.[880] In relation to victims and reparations, the Joint Statement ascertained:[881]

"*One such complex issue has been how to ensure the rights and involvement of victims. 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*."

Against this background, it appears that the inclusion of a reparations regime within the Court's mandate is the result of a confluence of considerations, including the Cambodian law and procedure, the Cambodian conflict and its characteristics, as well as international standards. In addition, as Rachel Killean asserted, it is possible that the Judges who drafted the Internal Rules also utilized the ICC's approach to victims and the reparations framework as guidance,[882] adapting

[876] Cheryl White wrote that Hun Sen, one of the Prime Ministers of Cambodia, considered the possibility of a truth commission, however, he abandoned the idea after the Government of Cambodia managed to arrest Ta Mok, a senior figure within the Khmer Rouge regime. Cheryl White, *Bridging Divides in Transitional Justice: The Extraordinary Chambers in the Courts of Cambodia* (Intersentia, 2017) 122-123

[877] Secretary General, 'Report of the Secretary-General on the Khmer Rouge trials' (31 March 2003) A/57/769

[878] See also Christoph Sperfeldt's dissertation asserting that "it seems that both sides of the ECCC negotiations had ignored questions of reparations for victims of crime". He also contended that most of the negotiations between the two parties two place behind closed doors, and there are no minutes available documenting the negotiations. Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 102

[879] Stan Starygin, 'Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC): Setting an Example of the Rule of Law by Breaking the Law?' (2011) 3 Journal of Law and Conflict Resolution 20

[880] ECCC, 'Joint Statement by Judicial Officers: Plenary Session Unanimously Adopts Internal Rules' (13 June 2007) 1 <https://www.eccc.govkh/sites/default/files/media/Joint_Press_Statement__on_internal_rules_eng_fr_13_june_2007.pdf>

[881] ECCC, 'Joint Statement by Judicial Officers: Plenary Session Unanimously Adopts Internal Rules' (13 June 2007) 1

[882] Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 69

it to the context of the ECCC.[883] In what follows, the remainder of the section will elaborate on the reparations regime at the ECCC.

2.2. The ECCC's Reparations Regime

To date, the Internal Rules have been amended nine times (last time in 2015), in order to better clarify certain rules and/or to reflect procedural changes spurred by the dynamics of the trial. As such, drawing on the Internal Rules and their subsequent amendments, the section will introduce the prerogatives bestowed upon victims in relation to the process of obtaining reparations as well as the outcome of the process in the context of the ECCC. At this point, it is important to clarify that at the ECCC, the process of obtaining reparations does not entail separate proceedings as is the case of the ICC; instead, it is a segment of the criminal trial. In addition, the outcome of the process of obtaining reparations coincides procedurally with the outcome of the criminal trial, in that the Court's decision for tangible reparations is part of the same decision concluding the investigations and setting out the sentence in a criminal trial.

2.2.1. Process-related Prerogatives

According to the Internal Rules, the victims before the ECCC may benefit from a multitude of prerogatives in the process of obtaining reparations, which include their participation in the trial and submitting claims for reparations, legal representation, information, protection and assistance, all organized and facilitated by specialized organs within the ECCC. Nonetheless, due to the amendments to the Internal Rules since the ECCC first started its operations in 2007, the scope of several prerogatives has been adjusted or limited. Consequently, this section will introduce these prerogatives and discuss their evolution across time.

To begin with, as already introduced above, the victims of the Cambodian conflict can participate in Court proceedings, including in the reparations segment, by submitting a civil party action.[884] Through the civil party action, which must be submitted in writing, victims express their interest to participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the Prosecution as well as to seek collective and moral reparations.[885] The victims' civil parties claims are then reviewed by the Pre-Trial Chamber in view of deciding on their admissibility, and if found admissible, the victims will be enabled to participate in the trial and benefit from reparations as civil parties.[886] In order for a civil party action to be admissible, the civil party applicant must be clearly identified as well as "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 might be based".[887] Importantly, the victims may submit civil party actions throughout the investigation phase, however, once proceedings are opened before the Trial Chamber, they are precluded from doing so.[888]

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[883] As asserted by Appeals Chamber Judgment *Case 001* (Supreme Chamber Court: Judgement) 001/18-07-2007-ECCC/SC (3 February 2012) para 643
[884] Internal Rules (2007) (2015), rule 23
[885] Internal Rules (2007) (2015), rule 23 (1)
[886] Pursuant to Internal Rules (2010), rule 23 *bis* (3). Before this revision, the admissibility of civil parties applications was done during the trial, by the Co-Investigating Judges. Internal Rules (2007), Rule 23(3)
[887] Internal Rules (2007), rule 21 (2)
[888] ECCC, Internal Rules (16 January 2015), rule 23 bis (2)

After the civil party claims are declared admissible, the civil parties may participate in the criminal proceedings against those responsible for crimes within the jurisdiction of the Court by supporting the Prosecution.[889] The exact meaning of the civil parties' role to support the Prosecution was not clarified by the Internal Rules, and this provision constituted a reason of contention throughout the Court's first case.[890] Before the sentencing stage in *Case 001*, the Trial Chamber clarified that the civil parties' role within the trial may include questioning of witnesses and experts called to testify in relation to reparations. However, they may not pose questions regarding the character of the accused person or have an input in the sentencing, as they do not have general right of equal participation with the Co-Prosecutors.[891] Furthermore, the civil parties' participation in the trial can be materialized in several ways; they may testify in the context of court proceedings, without being under oath, in a similar manner as the accused,[892] and may benefit from a broad range of protective measures, including anonymity and in camera proceedings.[893] In addition, the civil parties may attend hearings, benefit from assistance and information,[894] submit appeals or be notified at the end of an investigation and make observations thereon.[895]

Importantly, during the trial, the civil parties may participate and exercise their rights through a lawyer.[896] However, the manner in which the system of legal representation played out at the ECCC changed across time. Initially, the Internal Rules which were applied in the first case before the Court - *Case 001* - provided that, for the purpose of an efficient representation system before the Court, the civil parties may be organized in groups and each group may be represented by a common lawyer (Co-Lawyer).[897] For the civil parties who lacked the means to pay for a common lawyer, the Internal Rules provided for the possibility that they seek assistance from the Court.[898] Amid criticism during *Case 001* relating to *inter alia,* lengthy proceedings[899] and an ineffective system of representation relying on the Co-Lawyers system,[900] the Internal Rules were amended for a better management of civil party representation in *Case 002*. Subsequently, the Judges put forward the possibility that "where the interests of justice so require", the Co-Investigating Judges or the Chambers may designate a common lawyer for the consolidated group of civil parties, in essence, a Lead Co-Lawyer over the Co-Lawyers.[901] The Internal Rules also elaborated on the attributions of each categories of lawyers, with the Co-Lawyers being in touch with the civil parties, and then the Lead Co-Lawyers foremost "seek[ing] the views of the Civil Party lawyers

<https://www.eccc.govkh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf> accessed 1 May 2020

[889] Internal Rules (2015), Rule 23

[890] For a detailed illustration see Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2014) 12 Journal of International Criminal Justice 81, 90-91.

[891] *Case 001* (Trial Chamber: Decision On Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character) 001118-07-2007/ECCCffC (9 October 2009) paras. 25 and 47

[892] Internal Rules (2015), Rule 23(4), Rule 91(1)

[893] Internal Rules (2015), Rule 29

[894] Internal Rules (2015), Rule 12bis

[895] Internal Rules (2015), Rule 66, Rule 74(4)

[896] Internal Rules (2007), Rule 23(7)

[897] Internal Rules (2007), Rule 23(8)

[898] Internal Rules (2007), Rule 23(8)(f)

[899] See Alain Werner and Daniella Rudy, 'Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law' (2010) 8 Northwestern Journal of International Human Rights 301, 304

[900] Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2014) 12 Journal of International Criminal Justice 81, 96-97

[901] Internal Rules (2015), Rule 23ter (3)(b). Previously Internal Rules (2007), Rule (23)(8)

and endeavor[ing] to reach consensus in order to coordinate representation of Civil Parties at trial".[902]

One final important aspect regarding the prerogatives bestowed upon victims in the process of obtaining reparations at the ECCC is the existence and role of the Victims Support Section (VSS). As can be inferred from the Internal Rules, the role of VSS expanded throughout the years,[903] as the first version of the rules enabled it to carry out a relatively small role within the Court.[904] However, pursuant to several amendments, the VSS developed to play an important function in the materialization of the civil parties' role and prerogatives before the ECCC. Nowadays, the VSS provides support for the victims to submit civil party complaints before the Court, information to the victims and subsequently to the civil parties, assistance and support to civil parties during Court hearings, and finally, it facilitates the legal representation of victims.[905]

2.2.2. Outcome-related Prerogatives

In addition to the process-related prerogatives bestowed upon victims, the ECCC's reparations regime entails also prerogatives bestowed upon victims in relation to the outcome. According to the Internal Rules, if an accused person is convicted, the civil parties may be awarded reparations, which in the context of the ECCC can be "collective and moral".[906]

Several clarifications appear essential to understand the tangible reparations that the civil parties are entitled to at the ECCC. Foremost, reparations at the ECCC are linked with the guilt of the accused person, which entails that the reparations may be awarded to civil parties only in account of the harm suffered as a consequence of the crimes for which the accused was found guilty.[907] Furthermore, while the Internal Rules specify that the reparations may be "collective and moral", the meaning of these two qualifications has not been elaborated within the rules. However, the Internal Rules did elaborate on the potential content of these reparations. To be precise, the first version of the Internal Rules provided several example of measures fitting these qualifications, explaining that such awards may take the following forms:[908]

"*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;
c) or other appropriate and comparable forms of reparation."

However, the experience in *Case 001* and in particular the indigence of the accused which resulted in minimal reparations for the victims spurred the Judges to amend the initial provisions regarding reparations.[909] Pursuant to amendments, the Internal Rules removed the abovementioned examples of possible reparations measures that the Court could award and instead only mentioned the two-

[902] Internal Rules (2015), Rule 12ter (3)
[903] Elaboration on how the role of the VSS developed throughout the Court's practice is provided in section 3.2.2. on Procedural Justice.
[904] Internal Rules (2007), Rule 12
[905] Internal Rules (2015, Rule 12 bis
[906] Internal Rules (2007), Rule 23 quinquies
[907] Internal Rules (2007), Rule 23 quinquies
[908] Internal Rules (2007), Rule 23 (12)
[909] *Case 002* (Trial Hearings, Trial day 215) 002/19-09-2007-ECCC/TC (16 October 2013) 138. Elaboration on how the tangible reparations have materialized across the ECCC's cases and the challenges therein is provided in section 3.3.3

fold purpose that the reparations awarded at the ECCC aim to serve. Namely, to acknowledge the harm of civil parties as well as to provide benefits to the civil parties which address this harm.[910] In addition, in order to provide the civil parties with more opportunities for reparations, the Internal Rules also introduced two potential modes of implementation of the reparations. As such, the Internal Rules stated that the Court could either:[911]

"*a) order that the costs of the award shall be borne by the convicted person; or*
b) recognize that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding."

Through this amendment, the Internal Rules maintained that the reparations awarded by the Court shall be borne by the convicted person, as envisaged by the Judges in the first version of the Rules. However, it also instructed an alternative mode of implementation of reparations involving the Lead Co-Lawyers and the Victims Support Section.[912]

2.2.3. Beneficiaries

The sections above elaborated on the potential prerogatives the civil parties are entitled to receive in relation to the process and outcome of reparations at the ECCC, according to the Internal Rules governing the functioning of the Court, which have been amended before *Case 002* commenced to take into account the lessons learnt from *Case 001*. In what follows, drawing on the Internal Rules, this section will elaborate on the categories of victims who can apply to become civil parties at the ECCC, and hence beneficiaries of reparations.

According to the glossary to the Internal Rules, the qualification as 'victim' at the ECCC refers to a "natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC".[913] Hence, there are two potential categories of beneficiaries at the ECCC: the natural persons and the legal entities. In regard to the natural persons, the Internal Rules mention that they must have suffered 'physical, material or psychological' harm directly,[914] however, they do not clarify whether the victims who have suffered as a result of the direct victims' harm such as the family members of the direct victims should also be considered beneficiaries. In addition, there is no reference to the potential of collectives or groups of victims to benefit from reparations, although the only measures of reparations that can be provided at the ECCC are of 'collective and moral' nature. Finally, the Internal Rules do not elaborate further on the meaning of legal entities.

It thus appears that the Judges drafting the Internal Rules choose to set out only the general categories of potential beneficiaries in the law, leaving the elaboration on subsequent details to the Judges applying these provisions in the specific cases.

[910] Internal Rules (2015), Rule 23 quinquies (1)
[911] Internal Rules (2015), Rule 23 quinquies (3)
[912] Internal Rules (2015), Rule 23 quinquies (3)
[913] Internal Rules (2007) (2015), glossary
[914] Internal Rules (2015), Rule 23*bis* (1)

3. Analysis and Results

The previous section aimed to elaborate on the background information to the inclusion of a reparations regime within the mandate of the ECCC, as well as set out the ECCC's reparations regime, focusing of the victims' prerogatives in relation to the process and outcome of reparations at the ECCC as well as identify the potential beneficiaries of reparations. As explained, the inclusion of a reparations regime is rooted in Cambodian law and procedure, the characteristics of the Cambodian conflict, as well as international standards. However, exact details on the reasoning followed by the Judges when drafting the Internal Rules are not publicly available. Furthermore, despite elaborating extensively on the role of victims as well as the prerogatives they may enjoy during the trial, the Internal Rules have maintained a considerable lack of clarity in respect to many aspects of the reparations regime, including the potential content of reparations as well as the categories of beneficiaries. Consequently, the Internal Rules have been amended nine times, to clarify certain points as well as to adjust the prerogatives bestowed upon victims in the aftermath of the first trial. It appears that the ECCC's reparations regime and its Internal Rules for that matter have been conceived as an ambiguous legal framework to be adjusted as the proceedings unfold and not one carved in stone. The adjustable nature of the civil party system was similarly acknowledged by an ECCC judge in an interview carried out by Rachel Killean, who characterized the system as an "experiment" or a "best try".[915] In what follows, this chapter aims to analyse how the reparations regimes and the prerogatives bestowed upon victims materialized throughout the ECCC's case law, and subsequently, evaluate whether they may contribute to reparative justice for victims. Before doing so, the next section will introduce the research question and methodology guiding the empirical inquiry of this chapter.

3.1. Methodological Aspects of the ECCC's Practice Analysis
3.1.1. Research Question and Methodology

The research sub-question guiding this chapter is:

Taking into account the ECCC's reparations regime and its practice on reparations for international crimes, how does the Court potentially contribute to reparative justice for civil parties under its jurisdiction?

In order to answer the research question, this chapter has been compiled in several steps, as will be explained below. It must be mentioned that the research sub-question guiding this chapter utilizes the term 'civil parties' instead of victims, due to different legal qualification that the ECCC's Internal Rules attribute to each of the terms. As in all the chapters, the focus is on the victims involved with the process and outcome of reparations in the context of international courts, which in the present chapter refers to the civil parties at the ECCC.

As such, in a first step, the ECCC's reparations regime was put forward, structured along prerogatives statutorily bestowed upon victims, in relation to the process and outcome of reparations at the ECCC.

[915] Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 97

Then, in order to establish how the ECCC's reparations mandate materialized across the Court's practice and how it may contribute to reparative justice for civil parties under its jurisdiction, the ECCC's practice was scrutinized. The practice refers to the ECCC's case law on reparations (both at Trial Chamber and Supreme Court Chamber levels), transcripts of all trial days (where available) as well as oral and written submissions by the legal representatives for victims (mainly in the English language but also in the French language when it was the only option available). Different from the other chapters, this chapter includes the transcripts of trial days across the ECCC's case law as a source for grasping how the Court may contribute to reparative justice. The analysis of the transcripts entailed review of transcripts of all trial days when approximately 120 civil parties across the ECCC's three trials provided oral testimony during Court proceedings. The reasons for including this source are two-fold:

1) at the ECCC the civil parties may have an active role within the trial, i.e. to testify, and as such, the transcripts provide important information regarding the victims' wishes in regard to the process and outcome of reparations as well as how the trial unfolds;

2) they are available on the Court's website.[916]

The practice was scrutinized along the procedural justice and substantive justice dichotomy and the elements that inform them, as elaborated upon in the methodology section of the Introduction chapter.

Finally, the ECCC's potential contribution to reparative justice was appraised, by assessing how the ECCC's reparations regime materialized across its practice on reparations ('what is'), taking into account the reparations framework (what 'ought to be') and its potential implications for victims, as established in the theoretical framework.

In what follows, this section will put forward the results of the analysis, however, before doing so it will describe the case law adjudicated by the ECCC. Importantly, the findings of the analysis and the overall assessment of the Court's potential contribution to reparative justice are complemented by empirical studies and secondary sources such as academic scholarship, to contextualize the findings to the actual victims and their expressed perceptions. Compared to all the other courts, a multitude of empirical studies exist assessing the civil parties' experiences with ECCC. When relevant to the current analysis, these studies' findings are incorporated in the analysis below.[917]

3.1.2. Case-law

So far, the ECCC has held or is in the process of holding four trials against seven "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international

[916] Despite the fact that some of the victims are able to testify at the IACtHR, the Court does not provide minutes or transcripts of the hearings as can be inferred from its website. See also Inter-American Commission, 'Relevant Information on Hearings' <https://www.oas.org/en/iachr/media_center/coverage.asp> accessed 19 March 2020

[917] The NWO Vidi project 'What's law got to do with it? Assessing the contribution of international law to repairing harm' entails forthcoming empirical research with 30 beneficiaries of reparations in *Case 001* and *Case 002/01* and 30 non-beneficiaries. The empirical research is designed and coordinated by Marola Vaes and Antony Pemberton, in cooperation with a local team in Cambodia, coordinated by Taing Sopheap. Sotheara Chhim has an advisory role.

conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979".[918] The cases are:

Case 001 with Kaing Guek Eav alias Duch, the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh, as the Accused;

Case 002 with Nuon Chea, former Chairman of the Democratic Kampuchea National Assembly and Deputy Secretary of the Communist Party of Kampuchea and Khieu Samphan, former Head of State of Democratic Kampuchea, as the Accused;

Case 003 with Meas Muth as the Accused;

Case 004 with Ao An and Yim Tith as the Accussed.

Of these cases, only the first three cases have been adjudicated and concluded at the ECCC, with cases 003 and 004 suffering from procedural delays and uncertainty since 2009, when the investigations first started.[919] Consequently, this chapter will only focus on cases which have already concluded.

In *Case 001,* Duch has been convicted to life imprisonment for his role as Chairman of Tuol Sleng, or S-21, a very important security centre of the Khmer Rouge regime.[920] Duch was found guilty of crimes against humanity and war crimes against no fewer than 12.273 men, women and children.[921] Before being systematically exterminated, the victims were subjected to forceful interrogation techniques and brutalization, aimed at extracting testimonies of "traitorous activities" allegedly committed by the victims.[922]

Concerning *Case 002*, following an initial hearing, the case has been severed into two separate trials – *Case 002/01* and *Case 002/02* - both concerning the same accused persons, but different crimes, as set forth in the Indictment.[923] *Case 002/01* has been concluded, convicting Nuon Chea and Khieu Samphan to life imprisonment for crimes against humanity.[924] In their roles of Chairman of the Democratic Kampuchea National Assembly and Deputy Secretary of the Communist Party of Kampuchea, and Head of State of Democratic Kampuchea, respectively, they orchestrated the forcible evacuation of the city's entire population, predominantly civilian, to rural areas (the so-called 'Movement of the Population: Phase One') on 17 April 1975. In addition, they moved thousands of people between September 1975 and 1977, across the country (the so-called 'Movement of the Population: Phase Two'). Although an exact number of victims cannot be established, the Court held that at least several thousand people died during the transfer of the population from Phnom Penh to the countryside. Among the victims were babies, young children,

[918] Internal Rules (2007) preamble
[919] See 'Case 003' (ECCC website) <https://www.eccc.govkh/en/case/topic/287> on case 003; and 'Case 004' (ECCC website) <https://www.eccc.govkh/en/case/topic/120> on Case 004
[920] See *Case 001* (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) partly supported, partly quashed by the Appeals Chamber Judgment *Case 001* (Supreme Chamber Court: Judgement) 001/18-07-2007-ECCC/SC (3 February 2012)
[921] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) para 141
[922] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) para 150
[923] *Case 002* (Office of the Co-Investigating Judges: Closing Order) 002/19-09-2007-ECCC-OCIJ (15 September 2010)
[924] *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) party supported, party quashed by the Appeals Chamber Judgment *Case 002/01* (Supreme Chamber Court: Appeal Judgement) 002/19-09-2007-ECCC/SC (23 November 2016)

sick and elderly people.[925] The accused were also found guilty of crimes against at least 250 Lon Nol soldiers who were executed at execution site Tuol Po Chrey.[926]

Case 002/02 concerns the same accused as the first segment of the case. The Judges in Case 002/02 similarly convicted Nuon Chea and Khieu Samphan to life imprisonment, for crimes against humanity, war crimes, and genocide, committed within the territory of Cambodia between 17 April 1975 and 6 January 1979 through their acts and omissions. The crimes against humanity conviction related to a multitude of counts, including extermination, deportation, enslavement, imprisonment, torture, forced marriage and rape in the context of forced marriage. The war crimes conviction included various grave breaches of the Geneva Conventions, including wilful killing, torture and inhuman treatment. Finally, the genocide conviction focused on the killing of members of the Vietnamese and Cham group with the intension to destroy them.[927] In *Case 002/02*, the Chamber took into consideration the life sentences imposed on Nuon Chea and Khieu Samphan in *Case 002/01* and merged the sentences in *Cases 002/01* and *002/02* into a single term of life imprisonment.

3.2. Mapping the ECCC's Potential Contribution to Procedural justice and Substantive Justice for Victims under its Jurisdiction: Analysis and Assessment

After having established the parameters of the analysis as well as the jurisprudence assessed for this purpose, the remainder of this section aims to put forward the results of the analysis and the assessment of the Court's potential contribution to reparative justice for the civil parties under the ECCC jurisdiction. It will first focus on the procedural justice dimension – grasping how the various components pertaining to the process of obtaining reparations unfold in practice and assessing how they may contribute to procedural justice. Then, it will focus on the substantive justice dimension, by scrutinizing the actual reparations measures that civil parties are entitled to receive according to the Court's decisions against what the civil parties' preferences are. Before doing so, however, the next section will explain how victims' access to justice at the ECCC is subject to certain layers of selection, which subsequently influence the population of beneficiaries of reparative justice before the ECCC. As in the case of the ICC, these layers emerged in the process of scrutinizing the Court's practice on reparations, and as such, they appear relevant to put in perspective the Court's potential contribution to reparative justice for civil parties.

3.2.1 Access to Justice

As in the case of the ICC, the victims' access to the ECCC is influenced by several layers of selection which can either be attributed to the legal architecture of the ECCC or to the manner in which the different organs of the Court exercise their mandates. However, in the case of the ECCC, the layers appear to be further compounded by other influences relating to the Internal Rules' ambiguous nature, local politics, and lack of funding.

The first layer relates to the jurisdiction of the Court, which inherently excludes from adjudication the crimes and victims falling outside its limits. As such, in contrast to the ICC, which has a *ratione*

[925] *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) para 521
[926] *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) para 687
[927] For all the crimes for which the two accused were found guilty see *Case 002/02* (Trial Chamber: Judgment) No. 002/19-09-2007/ECCC/TC (16 November 2018) 2230-2231

temporis jurisdiction linked to the entry into force of the Rome Statute, the ECCC is mandated to adjudicate crimes that took place under the Khmer Rouge regime during the period from 17 April 1975 to 6 January 1979.[928] In addition, the ECCC has a territorial jurisdiction limited to the territory of Cambodia as well as a *ratione materiae* jurisdiction which includes both national and international crimes,[929] in contrast with the ICC which has an (almost) universal jurisdiction but over international crimes only. Moreover, while both courts prosecute those "most responsible" for perpetrating international crimes, the ECCC is a fully-fledged court embedded within the existing Cambodian court system,[930] whereas the ICC is a court of last resort with jurisdiction complementary to national courts.[931]

The second layer relates to the powers that the different Court organs have, such as the Co-Prosecutors and the Co-Investigating Judges, the VSS, and the Chambers, to employ and interpret the Internal Rules according to their mandates, which inevitably results in the inclusion as well as exclusion of victims from the beneficiary category. In addition, this layer appears to be compounded by other influences relating to the Internal Rules' ambiguous nature or local politics. To begin with, at the investigation stage of cases, the role of the Co-Prosecutors and Co-Investigating Judges, one national and one international, is essential to determine which situations will come before the Judges for trial proceedings. The Co-Prosecutors have the important role of selecting the cases which may be adjudicated before the Court, while the Co-Investigating Judges have to power to dismiss or send the case for consideration either to the Pre-Trial or Trial Chambers.[932] Consequently, in exercising their roles, both the Co-Prosecutors and the Co-Investigating Judges take decisions which influence which victims may come before the Court's jurisdiction.

In addition, the victims' access to justice is influenced by the role of the VSS and the Public Affairs Section. The VSS is mandated to conduct outreach activities and inform the victimized population pertaining to the cases to be adjudicated by the Court about the existence of the Court and their possibility to submit civil party applications and exercise their rights.[933] The Public Affairs Section has the duty to disseminate information to the public regarding the ECCC.[934] The importance of VSS for the victims' access to justice can be inferred from the experience in *Case 001* versus *Case 002*. Although the VSS's establishment was set forth in the Internal Rules since the Court was established, as Helen Jarvis, former Chief of the VSS recounted, the VSS was set up "with such a late start, and with woefully inadequate funds".[935] In *Case 001* the VSS operated with budget allocated from unspent funds from other budget lines, which impacted heavily the quality of its

[928] ECCC Law, article 1

[929] The ECCC is enabled to adjudicate "the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia". ECCC Law, article 1

[930] ECCC Law, article 2 new

[931] See Rome Statute, article 17 on Issues of Admissibility

[932] Internal Rules, Rule 49(1) posits that: "1. Prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint." In addition, the Co-Investigating Judges, after carrying out their investigations of the situations brought to their attention by the Co-Prosecutors, "shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case." Internal Rules, Rule 67(1). The Pre-Trial Chamber's core role is to settle disputes between the co-prosecutors and/or the co-investigating judges. Rules 71-72

[933] As per Internal Rules (2007), Rule 12bis (1)(i), outreach activities are to be carried out by the VSS and the Public Affairs Section.

[934] As per Internal Rules (2015) Rule 9(4)

[935] Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 Genocide Studies and Prevention: An International Journal 19, 22

work, including in relation to outreach, information to the victims, as well assistance in filling out civil party applications.[936] Amid a scarcity of capacity by the VSS, before *Case 001* took place, the VSS established a working relationship with a number of NGOs that had already been involved or were ready to establish programs to provide outreach to the victims.[937] Consequently, in *Case 001*, the effort to inform the Cambodian population about victim participation at the ECCC as well as to carry out functions within the mandate of the VSS was led by many Cambodian NGOs that played the role of intermediaries.[938] However, in 2008 and through 2012,[939] the German and French Governments, as well as the European Union awarded the ECCC significant grants to strengthen its capacity, with a focus on the VSS,[940] which made it possible for the VSS to expand and strengthen its support to victims in *Case 002*. The reduced outreach capacity of the VSS in *Case 001* was consequently reflected in the number of civil party applicants in *Case 001* versus *Case 002*, the latter accommodating nearly 40 times more civil parties than the former.[941]

Furthermore, the victims' access to justice before the ECCC is also influenced by the Chambers and the decisions they take in relation to the admissibility of civil parties claims that the victims pertaining to a case put forward. However, in the case of the ECCC, the Chamber's interpretation of the admissibility criteria was further compounded by the ambiguity embedded in the Internal Rules, which led to variations in their interpretation, with consequences for who was admitted as civil party in *Case 001* and *Case 002*. As such, in *Case 001*, according to Rule 100(1), it fell upon the Trial Chamber to rule on the admissibility and substance of civil parties claims against the Accused at the end of the trial, through its final judgment. In exercising this function, the Trial Chamber adopted a gradual approach, in that it first carried out an initial assessment of the civil party applications deploying a lenient interpretation of the admissibility criteria and allowing the majority of the civil parties to participate in proceedings.[942] In applying these criteria, it enabled 93 civil parties to participate throughout *Case 001*.

However, in the final decision wherein the Trial Chamber ruled on the substance of the civil party applications, it deployed a more restrictive interpretation of the admissibility criteria.[943] To be precise, it reiterated that the civil party applications must establish the causal link between the existence of wrongdoing, attributable to the accused, and an injury personally suffered by the civil party. In addition, it established the categories of beneficiaries of reparations before the ECCC,

[936] See also Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 135
[937] As reported by Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 Genocide Studies and Prevention: An International Journal 19, 22
[938] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 515
[939] Duch was indicted in August 2008, and following an Initial Hearing in February 2009, the substantive part of the trial commenced on 30 March 2009.
[940] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 516. See also Christoph Sperfeldt, 'Cambodian Civil Society and the Khmer Rouge Tribunal' (2012) 6 International Journal of Transitional Justice 149, 153; Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 Genocide Studies and Prevention: An International Journal 19, 22
[941] In *Case 001*, 99 civil parties were admitted to participate, whereas *Case 002* included 3867 victims. Admittedly, the charges brought in *Case 002* are significantly broader in scope than *Case 001* which focused only on the prison S-21, however, given that the VSS has expanded its functions with *Case 002* to conduct outreach and inform the victims about the ECCC is undoubtedly also reflected in the number of civil parties in *Case 002*.
[942] To be precise, the Trial Chamber initially interpreted that the civil parties could participate in the proceedings as long as they were 'victims of a crime coming within the jurisdiction' of the ECCC, and that their injury was 'physical, material or psychological' and 'the direct consequence of the offence, personal and have actually come into being'. As per Internal Rules (2007), rule 23(2)(a)
[943] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) 222-229

holding that they may be victims who suffered the harm directly (i.e. direct victims) and immediate family members of direct victims (i.e. indirect victims). It also conceded that family members of the extended family may also be considered indirect victims, as long as they prove the alleged kinship and the existence of circumstances giving rise to special bonds of affection or dependence on the direct victims.[944] As a result of deploying this interpretation, the Trial Chamber quashed the civil party status of nearly 23 civil parties, on grounds that they failed to meet the "required standard".[945] The Trial Chamber's decision consequently restricted the victims' access to the tangible reparations measures as well as denied the victims' allegations of the harm, which is likely to have induced secondary victimisation for these victims who likely developed expectations of reparations.

In fact, the victims subsequently submitted appeals to the Supreme Court Chamber challenging the Trial Chamber's decision and pointing out that by exercising their rights and obligations in the trial proceedings, and being stripped of their status at a later stage resulted in "effectively traumatising the [appellants] once again".[946] In its decision, the Supreme Court Chamber maintained the Trial Chamber's reasoning and final interpretation of the admissibility criteria.[947] However, it also conceded that due to the novel character of the civil party framework before the ECCC and the conceivable lack of clarity, the civil party appellants may be enabled to submit further evidence of their harm. Therefore, on the basis of the new evidence submitted before the Supreme Chamber Court, 10 more civil parties were granted civil party status as indirect victims and access to reparations, however nine were denied.[948] The experience in *Case 001* led to amendments to the Internal Rules, as to bestow upon the Co-Investigating Judges the task to decide on the admissibility of civil party applications, thus avoiding the potentially negative consequences for victims to be denied the civil party status after being engaged with the trial for years.[949]

Notwithstanding this amendment, the victims' access to justice in *Case 002* remained on shaky grounds, with the Judges continuing to be divided in the interpretation of the admissibility criteria. Initially, the Co-Investigating Judges issued closing orders on the admissibility of victims who had submitted applications to become civil parties[950] and determined that 2.123 civil party applications were admissible, while rejecting 1.747 applications.[951] In rejecting such a large number of applications, the Co-Investigating Judges adopted the Trial and Supreme Court Chambers interpretation in *Case 001*, in that the harm alleged by victims must be the direct consequence of the crimes charged to the accused.[952] However, the Co-Investigating Judges' decision was appealed at the Pre-Trial Chamber,[953] which adopted yet another reasoning in rendering its decision. the Pre-Trial Chamber expanded the scope of civil party applications beyond the locations chosen to be investigated by the Co-Prosecutors and the Co-Investigating Judges, holding

[944] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) 220-221
[945] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) 222-229
[946] *Case 001* (Supreme Chamber Court: Judgement) 001/18-07-2007-ECCC/SC (3 February 2012) 212
[947] *Case 001* (Supreme Chamber Court: Judgement) 001/18-07-2007-ECCC/SC (3 February 2012) 233-234
[948] *Case 001* (Supreme Chamber Court: Judgement) 001/18-07-2007-ECCC/SC (3 February 2012) 252
[949] See Internal Rules (2015), Rule 23*bis* (1)
[950] *Case 002* (Pre-Trial Chamber: Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) 002/19-09-2007-ECCC/OCIJ (24 June 2011) para 19
[951] *Case 002* (Office of the Co-Investigating Judges: Closing Order) 002/19-09-2007-ECCC-OCIJ (15 September 2010) para 12
[952] *Case 002* (Office of the Co-Investigating Judges: Closing Order) 002/19-09-2007-ECCC-OCIJ (15 September 2010) para 12 See also e.g. *Case 002* (Office of the Co-Investigating Judges: Order on the Admissibility of Civil Party Applicants from Current Residents of Kep Province) D392 (25 August 2010) para 7
[953] *Case 002/01* (Trial Chamber: Judgement's Annex I - Procedural History) 002/19-09-2007/ECCC/TC (7 August 2014) para 7

that such crimes extended for the 'whole of Cambodia', and admitted all applications as long as their injury related to any of the crimes alleged against the accused.[954] Importantly, the Pre-Trial Chamber interpreted the existence of psychological harm taking into account the social and cultural context of victimisation in Cambodia which expanded the understanding of victimisation in the context of mass atrocities. As such, the Pre-Trial Chamber interpreted the category of indirect victims to include not only the direct relationships of dependency but also "the relationship of people within knit village communities, where people know each other well and placed reliance upon each other in many ways in order to live and survive".[955] In adopting this reasoning, the Pre-Trial Chamber adopted a presumption of collective victimization viewed in an expansive manner,[956] embedded in awareness of the complexities inherent in mass atrocities and their consequence for the victims. The Pre-Trial Chamber eventually declared all of these appeals admissible and overturned most of the orders of the Co-Investigating Judges, granting further 1.740 individuals civil party status.[957]

A final influence to the victims' access to justice at the ECCC is the interference by local politics and lack of funding, elicited in *Cases 003* and *004*. While these cases do not fall under the current research's scope as they are yet to be adjudicated, it is important to draw attention to this factor pertaining to Cambodian context as it has the potential to influence access to justice of a multitude of victims. As such, *Cases 003* and *004* have been lingering in the ECCC's docket since 2009, when the international Co-Prosecutor filed two Introductory Submissions, requesting the Co-Investigating Judges to initiate investigation of five additional suspected persons.[958] However, ever since, the adjudication of these cases has been plagued by an open resistance from the Government of Cambodia to continue with the cases,[959] disagreement between the national and international Judges,[960] as well as threats over lack of funding to continue with the cases.[961] At the time of writing, *Case 003* is pending decision by the Pre-Trial Chamber whether there are sufficient charges to indict the accused in *Case 003* for the crimes alleged.[962] *Case 004* is still struggling at

[954] *Case 002* (Pre-Trial Chamber: Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) 002/19-09-2007-ECCC/OCIJ (24 June 2011) paras 76-78

[955] *Case 002* (Pre-Trial Chamber: Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) 002/19-09-2007-ECCC/OCIJ (24 June 2011) para 86

[956] In line with Rama Mani, who held that in situations of mass victimization the "conflict or repression is often so widespread and traumatising that the entire society is victimised, and there is a need to redefine victims as the entire society''. Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict,' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 68

[957] Judge Marchi-Uhel attached a separate and partially dissenting opinion to the Pre-Trial Chamber's decision on Appeals, agreeing with the majority that the appeals were admissible, but finding that the *de novo* review on appeal undertaken by the majority was unwarranted. In *Case 002* (Pre-Trial Chamber: Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) 002/19-09-2007-ECCC/OCIJ (24 June 2011). The Pre-Trial Chamber initially rejected the applications of 12 applicants; however, it revered its decision in a subsequent reconsideration. *Case 002* (Pre-Trial Chamber: Decision on the Reconsideration of the Admissibility of Civil Party Applications) 002/19-09-2007-ECCC/OCI (1 July 2011)

[958] 'Case 003' (ECCC Website) <https://eccc.govkh/en/case/topic/287> accessed 19 March 2020

[959] As an Open Society Justice Initiative Report contended, the Cambodian Prime Minister Hun Sen allegedly told the UN Secretary General Ban Ki-moon in 2010 that "Case 003 will not be allowed…[t]he court will try the four senior leaders successfully and then finish with *Case 002*." In addition, this statement is reportedly part of a series of public comments made by senior Cambodian government officials bearing the same message that the ECCC would shut down after *Case 002* was completed. 'The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia October' (Open Society Justice Initiatives Report, 2012) 2 <https://www.justiceinitiative.org/uploads/20fe99cf-bc19-4299-813a-d81055c30d22/eccc-report-cases3and4-100112_0.pdf>

[960] See research by Rachel Killean delving extensively into the disagreements between the national and international judges. Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 50-51

[961] Andrew Nachemson and Erin Handley, 'Staying Khmer Rouge Tribunal Cases Mulled' (Phnom Penh Post, 8 May 2017) <https://www.phnompenhpost.com/national/staying-khmer-rouge-tribunal-cases-mulled> accessed 15 April 2020

[962] See 'Pre-Trial Chamber Concludes Three Days of Hearings in Case 003' (ECCC Website)

the Co-Investigating Judges stage, with the international Co-Investigating judge resigning upon completion of his investigation of Case 004,[963] in a chain of subsequent resignations by international staff alleging political interference by the Government of Cambodia officials in *Case 003* and *Case 004*.[964] Furthermore, as reported by the international Co-Investigating Judge, since the opening of the judicial investigation in *Case 003* and Case *004*, 646 and respectively 2.014 victims submitted applications to become civil parties.[965] The situation in these two cases appears to be detrimental to thousands of victims who wish to access justice at the ECCC, yet are waiting in uncertainty for over 10 years. Consequently, a decision to stop the proceedings in both case will likely result in disappointment from the victims as well as feed into their distrust in justice at the national level.[966]

3.2.2. Procedural Justice

As the section above elicited, the victims' access to justice in the context of ECCC is subjected to several layers of selection, attributed to the ECCC's jurisdiction and the manner in which the different organs of the Court exercise their mandates. This latter layer is further compounded by other influences relating to the Internal Rules' ambiguous nature as well as the local politics and lack of funding. As showcased above, these layers yield a significant impact over who can have access to justice at the ECCC, thus influencing the population of beneficiaries of reparative justice at ECCC. While acknowledging the layers of selection that limit the population of civil parties who participate in the ECCC's reparations proceedings, this chapter's focus is on reparative justice for the civil parties who do gain access to the ECCC's reparations proceedings. In what follows, this section aims to assess the ECCC's potential contribution to procedural justice for the civil parties in the process of obtaining reparations – evaluated in terms of voice, interaction, information, and length. As can be recalled, 93 civil parties participated in *Case 001*[967] and a total of 3.869 civil parties participated in *Case 002*. Although *Case 002* was split into two smaller cases, *Case 002/01* and *Case 002/02*, the 3.869 civil parties formed a consolidated civil party group which participated as such in both cases.[968]

I. Voice

This section consists of an illustration of how voice is materialized in the process towards obtaining reparations at the ECCC as well as an assessment of its potential implications for the civil parties. According to the analysis, the modalities through which civil parties may express their voice in

<https://eccc.govkh/en/articles/pre-trial-chamber-concludes-three-days-hearings-case-003> accessed 15 April 2020

[963] 'International Co-Investigating Judge resigns upon completion of Case 004' (ECCC Website) <https://eccc.govkh/en/articles/international-co-investigating-judge-resigns-upon-completion-case-004> accessed 15 April 2020

[964] 'Statement by the International Co-Investigating Judge' (ECCC Website) <https://www.eccc.govkh/en/articles/statement-international-co-investigating-judge> accessed 15 April 2020

[965] *Case 003* (The Co-Investigating Judges, Order on Admissibility of Civil Party Applications) 003/07/09/2009-ECCC-OCIJ (28 November 2018) para 2; *Case 004* (The Co-Investigating Judges, Order on Admissibility of Civil Party Applications) 004/07/09/2009-ECCC-OCIJ (28 June 2019) para 2

[966] In line with Rachel Killean's statement in her research, that "many of the civil parties interviewed spoke of the importance of ethicality and neutrality, as well as their belief that the national side could not be trusted". Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 53

[967] *Case 001* (Trial Chamber: Judgement) 001/18-07-2007/ECCC/TC (26 July 2010) para 637

[968] The number of civil parties in the consolidated group varies slightly between *Case 002/01* and *Case 002/02*, as during the adjudication of the two cases some of the civil parties withdrew while some civil parties passed away. See *Case 002/02* (Trial Chamber: *Case 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018) para 4407. More details on the consolidated group are provided in the section below on Voice.

the process of obtaining reparations at the ECCC entail written applications, oral testimony during Court proceedings, as well as legal representation. They will be explored in turn.

In order to participate in the ECCC's proceedings and benefit from reparations at the ECCC, all victims must fill in application forms. As such, the application forms constitute the means for capturing the victims' voice in the initial stages of the victims' involvement with the Court. They provide the victims with the opportunity to elaborate on the crimes they have been subjected to, the physical, moral, and material injury, loss or harm suffered, the types of collective and moral reparations sought, as well as to choose the means of contact, which can include lawyers, intermediary organisations, victims' association or individuals acting on the applicants' behalf.[969] In addition, as per the Internal Rules, the VSS is to carry out outreach to inform the victims of the possibility of submitting application forms as well as assist the victims in filling in these forms.[970]

However, as the current research revealed, the victims' possibility to fill in applications forms across the ECCC's cases was severely influenced by the VSS's (lack of) capacity to perform its functions, as well as by the activities carried out by NGOs. As already explained above, the VSS's outreach and assistance functions varied in *Case 001* versus *Case 002*, which subsequently influenced the number of victims submitting applications in the two cases. This influence was also indirectly acknowledged by the civil parties' lawyers in *Case 001*, who drew attention to the small numbers of civil parties. The lawyers attributed their small number to the civil parties' lack of familiarity with the ECCC and its effectiveness, as well as their fear of repercussion by former members of the Khmer Rouge who were thought to regain power in the future.[971] Subsequently, this situation led to NGOs in Cambodia becoming involved with victims and leading the effort to inform the Cambodian population about victim participation at the ECCC as well as developing a system for collecting and managing the written applications put forward by victims.[972] Despite the VSS becoming financially sustainable starting with 2008 due to funding from donors,[973] it was reported that the NGOs maintained their role in helping out victims with the applications in *Case 002*,[974] with around 84% of the application forms being submitted through intermediary NGOs.[975] Eventually, in *Case 001*, close to 93 victims submitted written applications, in contrast with *Case 002*, where written applications were submitted by 3.869 victims.

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[969] As per victim application forms available on the ECCC's website. 'Forms' (ECCC Website) <https://www.eccc.govkh/en/forms> accessed 15 April 2020

[970] Internal Rules (2007), Rule 12(2)(c) and (h)

[971] *Case 001* (Trial Hearings, Trial day 73) 001/18-07-2007-ECCC/TC (23 November 2009) 39, 104 <https://www.eccc.govkh/sites/default/files/documents/courtdoc/E1_78.1_TR001_20091123_Final_EN_Pub.pdf> accessed 15 April 2020

[972] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 515

[973] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503. See also Christoph Sperfeldt, 'Cambodian Civil Society and the Khmer Rouge Tribunal' (2012) 6 International Journal of Transitional Justice 149, 153

[974] Clara Ramírez-Barat, 'Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice' (International Center for Transitional Justice, 2011) 6; Lyma Nguyen, Christoph Sperfeldt, 'Victim Participation and Minorities in Internationalised Criminal Trials: Ethnic Vietnamese Civil Parties at the Extraordinary Chambers in the Courts of Cambodia' (2014) 14 Macquarie Law Journal 97

[975] See also Christoph Sperfeldt, 'Cambodian Civil Society and the Khmer Rouge Tribunal' (2012) 6 International Journal of Transitional Justice 149, 151. Similar results have been stated in a baseline study in 2013. Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 18

The role played by NGOs in ensuring that victims would benefit from the possibility to pass on their voice through written testimonies is commendable, as they enabled victims to express their voice in the initial stages of proceedings amid shortages at the ECCC level. As John Corciari and Anne Heindel wrote, the efforts of local NGOs are all the more commendable against a backdrop of skepticism regarding the victims' participation, fueled by the initial scarce support for the VSS, lack of vision on how the scheme would work in practice, and feeble support by the Court's staff in ensuring the victims' participation.[976] However, as also argued in the case of the ICC, having the majority of victims express their voice through intermediary NGOs entails the risk that their voice is distorted or presented in a different manner than intended by the victims. Nonetheless, the NGOs' involvement at the initial stages of the ECCC's proceedings appeared to be a good compromise to ensure that the victims' voice is captured through written submissions and passed on to the Judges.

Next to the written applications, the victims may express their voice through oral testimony during Court proceedings;[977] across three trials, ECCC enabled over 120 civil parties, both direct and indirect victims, to testify. To be precise, 22 civil parties provided oral testimony in *Case 001*, 31 in *Case 002/01*, and 66 in *Case 002/02*.[978] As explained by Lars Olsen, Legal Communications Officer at the ECCC, the civil parties testifying before the Court were selected by the Judges based on a list of civil parties proposed by their lawyers. The list was compiled on the basis of evidence the civil parties provided on suffering, the relationship between the evidence and the crimes tried and the diversity of impacts (suffering) represented.[979] Furthermore, as inferred from the systematic analysis of transcripts, during hearings, the civil parties were offered the possibility to opt between providing a statement on the impact of the crimes on their lives or being interrogated on their suffering through structured questioning by their lawyers.[980] Importantly, in *Case 002/01*, the Judges decided to hold separate 'victim impact hearings' spanning across five trial days, for the purpose of "assessing the gravity of the crimes, placing them in their proper context, and determining the appropriateness of the reparations claimed to remedy these harms."[981]

As the systematic analysis of transcripts in particular revealed, the civil parties' opportunity to testify before the ECCC was appraised differently by the civil parties. As such, several civil parties across the three cases expressed that they valued the opportunity to finally speak out and express their suffering before a judicial setting,[982] with many civil parties mentioning that they have been

[976] John D. Ciorciari, Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia (Law, Meaning, and Violence)* (University of Michigan Press, 2014) 205
[977] As per Internal Rules (2015), Rule 23(4), Rule 91(1)
[978] This has been done following a selection by the Bench. *Case 001* (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) paras 637-639
[979] Lars Olsen, 'The purpose of hearing victims' suffering' (ECCC Website, 6 July 2013) <https://www.eccc.govkh/en/blog/2013/06/07/purpose-hearing-victims-suffering> accessed 15 April 2020
[980] See e.g. *Case 002/02* (Trial Hearings, Trial day 9) Nº 002/19-09-2007-ECCC/TC (26 January 2015) 32-33 <https://www.eccc.govkh/sites/default/files/documents/courtdoc/2015-02-02%2011:55/E1_252.1_TR002_20150126_Final_EN_Pub.pdf > accessed 15 April 2020
[981] Lars Olsen, 'The purpose of hearing victims' suffering' (ECCC Website, 6 July 2013) <https://www.eccc.govkh/en/blog/2013/06/07/purpose-hearing-victims-suffering> accessed 15 April 2020
[982] Several examples from *Case 001* include Civil Party, Martine Lefeuvre, indirect victim, mentioned: "I have tried to sue for damages in France. It's very very difficult. Cambodia is a real tense place back then, and then I start learning about the creation of a hybrid Khmer UN Court and I follow the very slow elaboration of - constitution of this Court, but I believe in it, but I really -- because I said to myself that such atrocities cannot and must not remain unpunished. In 2008, therefore, I meet the lawyers of the Avocats sans Frontières organization and the case begins. This is why I'm very proud to be before you today."; Civil Party Robert Hamill, indirect victim, mentioned: "Duch, at times I've wanted to smash you -- to use your words -- in the same way that you smashed so many others. […] I have wanted you to suffer the way you made Kerry and so many others. […] However, while part

waiting for the ECCC[983] and the opportunity to finally speak out for the past 30 years.[984] For instance, civil party Chum Mey, one of the few survivors of the Tuol Sleng prison testified:

"*Mr. Lawyer, my feeling, after I received the summons to appear before this Chamber, was so exciting, so happy. I was so clear in my mind that I would testify to shed light before this Chamber, to tell the truth. I felt so relieved. If I were not able to come before this Court to testify before your Honours and Mr. Lawyer, my mind was so disturbed, so bothering, and I wanted to get it out of my chest.*"[985]

In addition, several civil parties expressed that providing an oral testimony during Court proceedings represented a good opportunity to talk overtly about their emotional problems, including the difficulty to talk about past[986] and the struggle to move on with life and cope with the traumas.[987] Another civil party mentioned that he was long searching for an avenue to express his suffering,[988] while other civil parties exposed extensively their victimising experience under the Khmer Rouge regime.[989] For several civil parties, coming forward to testify before the ECCC

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of me has a desire to feel that way, I am trying to let go and this process is part of that. Thank you for that. Today in this courtroom, I am giving you all that crushing weight of emotion -- the anger, the grief and the sorrow."; Civil Party Ou Savrith, indirect victim, mentioned: "The effort that I made before you today is very great, but it is a necessary effort, and for me it is through this testimony that a certain form of reparation begins to be born. I know today that the accused in the first place, but also the international community taken as a whole, are aware of the horror that I have experienced, just like the thousands of families of victims of S-21." *Case 001* (Trial Hearings: Trial days 59 and 62) Nº 001/18-07-2007-ECCC/TC (17 and 20 August 2009) <https://www.eccc.govkh/sites/default/files/documents/courtdoc/E1_63.1_TR001_20090817_Final_EN_Pub.pdf> and <https://eccc.govkh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E1_66.1_TR001_20090820_Final_EN_Pub.pdf> accessed 15 April 2020. Civil Parties in *Case 002* include: Ms. Toeng Sokha, Mr. Em Oeun, Ms. Yim Sovann, Ms. Lay Bony, Ms. Mom Sam Oeurn, Mr. Meas Saran, Ms. Pech Srey Phal, Mr. Kim Vanndy, Mr. Pin Yathay, Mr. Chau Ny, Ms. Sou Sotheavy, Mr. Aun Phally, Mr. Yos Phal, Ms. Huo Chantha, Mr. Nou Hoan, Mr. Yim Roumdoul, Ms. Bay Sophany, Ms. Seng Sivutha.

983 E.g. Civil Parties in *Case 002/01*: Mr. EM Oeun, Mr. Pin Yathay, Ms. Sou Sotheavy, Mr. Nou Hoan.

984 Civil Parties in *Case 002/02* include Ms. Lay Bony, Ms. Denise Affonço.

985 *Case 001* (Transcripts of Hearings, Trial day 36) Nº 001/18-07-2007-ECCC/TC (30 June 2009) <https://www.eccc.govkh/sites/default/files/documents/courtdoc/E1_40.1_TR001_20090630_Final_EN_Pub.pdf> accessed 15 April 2020

986 For instance, Civil Party in *Case 001*, Lay Chan (direct victim) mentioned: "Even for my children at present time, I never tell them anything related to my past emotional experience or talking to anybody else regarding that experience. I never talk about my past experience."

987 For instance, Civil Party in *Case 001*, Phung Sunthary (indirect victim) mentioned: "We tried to survive. Although we survived from that regime we have now to face the challenge of being survived in such a situation. At that time there was no social assistance or no psychological assistance from any organisation. We both tried to comfort ourselves in order to survive and my mother wanted to comfort us so that we could study and should find our future." *Case 001* (Transcripts of Hearings, Trial day 61) 001/18-07-2007-ECCC/TC (19 August 2009) https://www.eccc.govkh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E1_65.1_TR001_20090819_Final_EN_Pub.pdf

988 E.g. Civil Party in *Case 002/01*, Mr. Em Oeun.

989 Two direct victims described the way the victims were treated at S-21, and the strategy of perpetrators to incur the dehumanization of victims, in stark contrast with the benefits of the accused, to stay in front of a tribunal and be treated with fairness. Civil Party Chum Mey, direct victim, mentioned: "When I was tortured I was not a human being; I was an animal. And I saw the ammunition box they gave us to relieve ourselves and put us to sleep on the bare floor, and I could smell the excrement and urine, and they sprayed water on us twice a week." As mentioned by Civil Party in *Case 001*, Antonya Tioulong, indirect victim: "I believe that the accused is fortunate. He is standing here in front of a tribunal, an international tribunal for a fair trial. His victims did not have that chance. Had his victims been fortunate enough to come before real judges, to sleep on a mattress, to be fed and clothed normally, to not be mistreated; the accused sleeps every night on a good mattress, is dressed adequately, is fed adequately, has an adequate life, and is probably going to spend the rest of his life in a comfortable surrounding. His victims were martyrs and suffered as such and so never, never, will I forgive him." *Case 001* (Transcripts of Hearings, Trial days 36 and 60) 001/18-07-2007-ECCC/TC (30 June 2009, 19 August 2009) <https://www.eccc.govkh/sites/default/files/documents/courtdoc/E1_40.1_TR001_20090630_Final_EN_Pub.pdf> and <https://www.eccc.govkh/sites/default/files/documents/courtdoc/%5Bdate-in tz%5D/E1_64.1_TR001_20090818_Final_EN_Pub.pdf>

represented an opportunity to express their suffering with the hope that people would understand what they had been through,[990] as well as to convey the truth as to what happened during the Khmer Rouge regime.[991] For several civil parties testifying before the ECCC entailed an opportunity to express their frustration with the Cambodian authorities and the international community's lack of or delayed response to atrocities for several decades.[992] Finally, for a handful of civil parties the establishment of the ECCC as well as the testimony giving experience triggered their pain and negative memories and induced an overall negative experience.[993]

As can be inferred, providing civil parties with the opportunity to testify before the ECCC represented an important experience for the majority of them. However, it must be mentioned that while the number of civil parties testifying in *Case 001* amounted to almost 29% of the total number of civil parties in the case, in *Case 002*, the number of civil parties testifying amounted to approximately 2%. As such, it is commendable that the Judges in *Case 002* devoted entire trial days to 'victim impact hearings', enabling thus civil parties to express their stories extensively, albeit the underlying reason might have been instrumental, to gather as much evidence as possible given the small number of civil parties allowed to testify. Regardless of the Court's reasoning, providing oral testimonies bestowed upon nearly 120 civil parties the opportunity to convey their stories before a judicial setting in accordance with their wishes, be it in the narrative form or through questioning. In the ECCC context, this experience can be deemed all the more important amid the well documented policy of silence which manifested itself during the Khmer Rouge regime and the years that followed, which precluded civil parties from expressing themselves out of fear of repercussions.[994] As such, many victims broke for the first time this policy of silence by testifying before the ECCC.[995]

In addition, as elicited above, the experience of testifying before the Court satisfied different intrinsic motivations that the civil parties had. As far as this research revealed, the experience of testifying in court was generally perceived to be beneficial by the civil parties, with other empirical

Four civil parties in *Case 002/02* overtly expressed that their victimization amounted to dehumanization. For instance, see civil party Ms. Chum Samoeurn.

[990] See e.g. Civil Parties in *Case 002/02*, Ms. Sou Sotheavy, Say Sen.

[991] See e.g. Civil Parties in *Case 002/01*, Mr. EM Oeun, Mr. Yos Phal.

[992] For instance, Civil Party in *Case 001*, Martine Lefeuvre, indirect victim, mentioned: "Until today we still haven't found the body. We do not have any kind of restitution. There has not been any tomb. I have no documents from the Cambodian authorities and the result for me is complete human failure." See also Civil Party in *Case 002/01*, Mr. Pin Yathay.

[993] E.g. Civil Party in *Case 002/01* Mr. Chau Ny. As also expressed by their Co-Lawyers, for some other Civil parties, the testimony session has been a negative experience. In addition, they felt that the Trial Chamber was not receptive to their suffering, particularly when asked by the judge to control their emotions. They mentioned that the proceedings did not contribute to the healing process. *Case 001* (Transcripts of Hearings, Trial day 73) 001/18-07-2007-ECCC/TC (23 November 2009) 80 <https://www.eccc.govkh/sites/default/files/documents/courtdoc/E1_78.1_TR001_20091123_Final_EN_Pub.pdf> accessed 15 April 2020

[994] Elisa Hoven and Saskia Scheibel, ''Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance?' (2015) 21 International Review of Victimology 161, 176; Carol Kidron, 'Alterity and the particular limits of universalism: Comparing Jewish Israeli holocaust and Canadian-Cambodian genocide legacies' (2012) 53 Current Anthropology 723; Susan Dicklitch and Aditi Malik, 'Justice, Human Rights, and Reconciliation in Postconflict Cambodia' (2010) 11 Human Rights Review 515. As research reported, from 1975 to 2007, the deceased had to be commemorated in private, and the victims as well as the perpetrators of the Khmer Rouge regime were instructed to keep silent, forget the past, and conceal their victim identity. C Carol Kidron, 'Alterity and the Particular Limits of Universalism: Comparing Jewish Israeli Holocaust and Canadian-Cambodian Genocide Legacies' (2012) 53 Current Anthropology 723, 737

[995] As explained by Patrick Hein, 'The Multiple Pathways to Trauma Recovery, Vindication, and National Reconciliation in Cambodia' (2015) 7 Asian Politics and Policy 191, 193

studies supporting these findings.[996] Admittedly, the experience was not perceived uniformly by all civil parties, not in the least because their suffering is individual, and hence, it is not possible to generalize whether their oral testimony was considered beneficial across all the civil parties who testified.[997] As expressed above, a minority of civil parties did view the experience as negative, and this has been confirmed by subsequent empirical studies with civil parties testifying before the ECCC.[998] As such, to quote the conclusion of Stover et al. in regard to the act of giving testimony at the ECCC (and not only), it can be evaluated as "a multifaceted experience, fraught with unexpected challenges and emotional swings, rather than one that is wholly cathartic", and the perception varies not only from civil party to civil party, but also from one case to another.[999]

A final modality for civil parties to express their voice at the ECCC is through legal representation, which is the main modality at the ECCC for the civil parties to exercise their rights past the pre-trial stage.[1000] Despite providing in the Internal Rules for the possibility of legal representation for victims, Helen Jarvis pointed out that the ECCC did not initially provide any financial support for the legal representation, in sharp contrast with the defence that was financially supported from UN budget.[1001] The lawyers representing the civil parties in *Case 001* were mostly funded from foreign governments through intermediary organizations and offered their legal services on a *pro bono* basis.[1002] Consequently, the legal teams that emerged in *Case 001* did so not on the basis of the civil parties' interests, but on the basis of the lawyers' relationship to the intermediary organizations which had facilitated the collection of civil party applications.[1003] In *Case 001*, the civil parties were assembled in four groups,[1004] and each group was represented by a Cambodian and an international Co-Lawyer.

Amid shortcomings relating to the organisation of legal representation in *Case 001*,[1005] as well as the Trial Chamber's growing interest in ways to ensure effective legal representation for civil parties without jeopardizing the efficient functioning of the Court, especially in view of the large

[996] This finding is supported by other studies into civil parties' court experience in *Case 001*: Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 530; Elisa Hoven and Saskia Scheibel, ''Justice for Victims' in Trials of Mass Crimes: Symbolism ir Substance?' (2015) 21 International Review of Victimology 161, 176

[997] Patrick Hein, 'The Multiple Pathways to Trauma Recovery, Vindication, and National Reconciliation in Cambodia' (2015) 7 Asian Politics and Policy 191

[998] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 529; Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean, 'After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia' (Human Rights Center, University of California, Berkeley, 2011) 30; Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2007) 16

[999] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 530

[1000] As per Internal Rules (2015), Rule 23(3)

[1001] Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 Genocide Studies and Prevention: An International Journal 19, 22

[1002] Christoph Sperfeldt, 'From the Margins of Internationalized Criminal Justice Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia' (2013) 11 Journal of International Criminal Justice 1111, 1117-1120

[1003] Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 Genocide Studies and Prevention: An International Journal 19, 22

[1004] As per Internal Rules (2007), Rule 23(8)

[1005] See ECCC, '7th plenary session of the ECCC concludes' (Press release, 9 February 2010) <https://www.eccc.govkh/sites/default/files/media/Press_Release_Conclusion_7th_Plenary_Session_%28ENG%29.pdf> accessed 28 February 2020

number of civil parties in *Case 002*, the Internal Rules were amended.[1006] Consequently, in *Case 002*, the legal representation of 3.869 civil parties assembled into a consolidated group as per the amended Internal Rules was ensured by one national and one international Lead Co-Lawyer, supported by almost two dozen of civil party Co-Lawyers.[1007] The amendments brought about by the Internal Rules basically introduced a new layer in the organisation of legal representation - the two Lead Co-Lawyers - to interact with the Court and represent the victims' voice by seeking the views of the civil party Co-Lawyers, who in their turn would seek the view of the civil parties.[1008] In addition, these amendments weakened the agency of civil parties over who would represent them in Court, as the nomination of Lead Co-Lawyers pertains to the Judges.[1009]

As the current analysis elicited, conveying the civil parties' voice through legal representation entailed that the Co-Lawyers played an intermediary role between the civil parties and the Court, collecting the victims' voice on the ground and then presenting it before the Court (until *Case 002* where it was the Lead Co-Lawyers presenting it). Generally, the Co-Lawyers pass on to the Judges the civil parties' voice through oral and written submissions, which is collected through meetings and discussions with the civil parties. Due to differences in the Internal Rules governing the legal representation practice in *Case 001* versus *Case 002*, voice through legal representation materialized differently across both cases, and presented challenges unique to each case. They will be discussed in turn.

In exercising their role, the Co-Lawyers pass the civil parties' voice on to the Judges by means of oral and written submissions. As the current analysis elicited, the oral and written submissions proved instrumental for the Co-Lawyers to put forward the civil parties' voice as well as their related needs and interests in an elaborated manner, especially since not all civil parties were granted the opportunity to do so themselves during proceedings. As such, as explained above, *Case 001* included four teams of two Co-Lawyers each, representing approximately 93 civil parties. As the review of Co-Lawyers' final submissions revealed, they painted a comprehensive picture of the civil parties' voice in *Case 001*, restating what some of the civil parties had already said during oral testimonies,[1010] or putting forward additional expectations by the civil parties.[1011] However, as reported, the oral and written submissions in *Case 001* triggered the frustration of Judges, as they were faced with a multitude of submissions coming from four teams of lawyers, which furthermore elicited little coordination amongst the different teams and endangered the efficiency of the trial.[1012] In addition, other authors criticized the performance of the Co-Lawyers in *Case 001*, arguing that they were not sufficiently familiar with the cases, which in turn impeded communication and restricted their opportunity to understand and represent their clients'

[1006] Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 Genocide Studies and Prevention: An International Journal 19, 23

[1007] Pursuant to Internal Rules, rev 6, 17 September 2010, Rule 23 (3). A submission by lead Co-Lawyers elicited that *Case 002* features 21 Co-lawyers. See *Case 002/02* (Civil Party Lead Co Lawyers: Amended Closing Brief in *Case 002/02*) 002/19/09/2007-ECCC-TC (2 October 2017) 1-2

[1008] As per Internal Rules (2015), Rule 12 ter (3)

[1009] As per Internal Rules (2015), Rule 12 ter

[1010] E.g. On behalf of the Civil Party Group 1, the national representative highlighted the importance for Civil parties to be present in the ECCC proceedings. Furthermore, the Civil Party Group 3 submitted, via the international representative that "the most valuable reparation is probably their [Civil parties] very presence here". *Case 001* (Transcripts of Hearings, Trial day 73) 001/18-07-2007-ECCC/TC (23 November 2009) 12, 80

[1011] For instance, on behalf of the Civil Party Group 3, the Co-Lawyers submitted that again the needs of Cambodian people - of rehabilitation, national reconciliation and the restoration of the damage done to the victims, which cannot be done without ECCC. *Case 001* (Transcripts of Hearings, Trial day 73) 001/18-07-2007-ECCC/TC (23 November 2009) 96-101

[1012] Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 82-83

interests.[1013] This appears to be a likely scenario, especially since these lawyers operated with limited funding and on a *pro bono* basis.

With the amendments to the Internal Rules and enhanced resources, many of the challenges to legal representation were tackled in *Case 002*. However, since it fell on the Lead Co-Lawyers to put forward the civil parties' voice in singular written and oral submissions on behalf of the consolidated group of civil parties, rather than multiple submissions representing each of groups, this necessarily entailed a compression of the different needs and interests of civil parties. As can be inferred from the final submissions by the Lead Co-Lawyers, they appear to capture the different crimes the civil parties' experienced and their subsequent suffering; however, they do not do so in a systematic manner to showcase how the submissions cover all the civil parties' needs and interests (or at least groups of civil parties).[1014] This concern has similarly been echoed by authors pointing out to the risk that the individual needs of civil parties as subdued to the collective needs, due to the large number of civil parties, and the absence of a mechanism in the Internal Rules governing disputes between Co-lawyers and civil parties.[1015]

Finally, in exercising their role, the Co-Lawyers engage with the civil parties and collect their voice, although this obligation is not specifically stated in the Internal Rules.[1016] As such, meetings and discussions as well as forums with the civil parties appear to be the main tools that the Co-Lawyers use to understand and gather the civil parties' voice in the context of ECCC. As can be inferred from the current analysis, the frequency and quality of these gatherings is unclear, although more details are prevalent in *Case 002*, in comparison with *Case 001*. In their submission in *Case 001*, the lawyers merely explained that they were involved in "meetings and discussions" with their clients to gather their views in relation to reparations.[1017] In contrast, in *Case 002* the lawyers reported that:[1018]

"*1.265 civil parties were consulted for their views on the design of reparation projects for their benefit at Civil Party Forums organized by the Victims Support Section "VSS", 609 civil parties were consulted at VSS Reparations Consultations Information Forums on Case 002 Proceedings and 68 civil parties were consulted at Information and Consultation Sessions on Case 002 proceedings*."

[1013] E.g. Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2014) 12 Journal of International Criminal Justice 81, 98

[1014] For instance, the submissions include statements such as "Several Jarai and Tumpun civil parties speak of their suffering, often dwelling on the trauma of being forbidden to revere the spirits of the forest" however, it is unclear what the total of these civil parties is and what other groups of civil parties there are. ECCC (Civil Party Lead Co-Lawyers: Closing Brief To *Case 002/01* With Confidential Annexes 1-4) 002/19-09-2007-ECCC/TC (26 September 2012) para 200

[1015] John D. Ciorciari, Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia (Law, Meaning, and Violence)* (University of Michigan Press, 2014) 221-222

[1016] The Internal Rules vaguely mention that "The Civil Party Lawyers shall endeavour to support the Civil Party Lead Co-Lawyers in the representation of the interests of the consolidated group. Such support may include oral and written submissions, examination of their clients and witnesses and other procedural actions." ECCC, Internal Rules (11 September 2009), Rules 12 *ter* (6) <https://www.eccc.govkh/sites/default/files/legal-documents/IRv4-EN.pdf> accessed 1 May 2020

[1017] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009) para 11

[1018] *Case 002/02* (Civil Party Lead Co Lawyers: Final Claim for Reparation in *Case 002/02* with Confidential Annexes) 002/19-09-2007-ECCC/TC (30 May 2017) para 6. See also *Case 002/02* (Civil Party Lead Co Lawyers: Amended Closing Brief in *Case 002/02*) para 18

Against this background, these public forums appear to constitute an important modality for the civil parties to express their voice in the context of the ECCC, however, the data analysed in this study does not provide extensive information on how they were conducted.

Useful in this regard are secondary sources which shed light on how the Co-Lawyers' engagement with civil parties materialized in practice. As Sperfeldt explained in his study, as the majority of the Co-Lawyers lacked funds to visit their clients, they started relying on the public forums increasingly organised by the VSS in *Case 002* to have meetings with the civil parties.[1019] In addition, the Co-Lawyers also utilized the already established network of intermediary NGOs, and as such, relied to a large extent on intermediary NGOs to communicate with the civil parties.[1020] Notable in this regard is one scheme by the intermediary NGO Cambodian Human Rights and Development Association (ADHOC). Within this scheme, civil parties met in provinces across the country and elected staff of ADHOC as representatives who would regularly meet with the civil party lawyers, and then return to the provinces to distribute the information back to the civil parties.[1021]

Against this background, it appears that the civil parties' voice through legal representatives in the context of the ECCC materialized through their (scarce) communication through their lawyers, but most importantly, through communication with representatives working for NGOs, who then passed the victims' voice on to the Co-Lawyers. The efforts to establish auxiliary methods to enable victims to express their voice are commendable. In the same vein, it is interesting to note that a study interviewing 292 civil parties in *Case 002* elicited that 97.3% of the civil parties were satisfied with the system of NGOs representation,[1022] but conceded that they would prefer meeting with their lawyers only (59.9%).[1023] While it is positive that the majority of victims appeared satisfied with voicing their preferences either to representatives of NGOs or to their lawyers, this system inevitably involves having the civil parties' voice presented and re-presented by various actors, with the risk that the initial intentions and preferences of victims are lost along the chain of communication.[1024]

II. Interaction

This section is focused on the civil parties' interaction with the ECCC in the process of obtaining reparations at the ECCC and to this end, it entails an elaboration on how it is materialized across

[1019] Indeed, as Sperfeldt explained, the funding secured by the VSS throughout the first case enabled it to organise the aforementioned forums, which were also used as a platform to facilitate the lawyer-civil parties meetings. Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 178

[1020] Kinga Tibori-Szabó, Barbara Bianchini, Anushka Sehmi and Silke Studzinsky, 'Communication Between Victims' Lawyers and Their Clients' in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 440

[1021] Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 26

[1022] Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 29

[1023] Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 26

[1024] This concern has also been posited in the ICC chapter. See Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 Social & Legal Studies 489, 499

the ECCC's practice and its potential implications for civil parties. According to the current analysis, the civil parties' interaction with the ECCC is materialized in different modalities, namely, through direct interaction with the Court and its actors when the civil parties provide oral testimony during Court proceedings, indirectly, through interaction with the Co-Lawyers, VSS staff and intermediary NGOs, and finally, through attendance of hearings at the ECCC.

As far as the direct interaction with the Court is concerned, as discussed, approximately 120 Civil Parties have had the opportunity to provide oral testimonies and hence interacted with various actors in the Courtroom. Relevant to interaction during oral hearings at the ECCC, according to the analysis, is the Judges' management of the civil parties' interaction with the Court, as well as the civil parties' opportunity to approach the accused person present during proceedings. As far as the analysis highlighted, the experience of providing testimony induced overwhelm and emotions for some civil parties - some started to cry or feel emotional, and some got angry.[1025] In reaction to the civil parties' emotional outburst occasioned by the testimonial experience, the Judges noted the distress and allowed time for the civil parties to recompose themselves. For instance, during an oral testimony, the President of the Chamber expressed:

"*Uncle Meng, please try to recompose yourself so that you would have the opportunity to tell your story. […] So please try to be strong, recompose yourself so that you are in a better position to recount what they did on you […].*"[1026]

In addition, it is important to note that psychological assistance by counsellors was made available to all civil parties testifying before the ECCC, and the President of the Chamber made appeal to their support whenever needed during testimonies.[1027] As reported by Christoph Sperfeldt, counselling was offered by the Transcultural Psychosocial Organization, which through a Memorandum of Understanding with the ECCC was commissioned to offer psychological support services to civil parties and witnesses since the beginning of the proceedings.[1028] Their services include not only support during the oral testimony, but also psychological preparation before participating, on-site support and follow-up care.[1029] This is commendable, as it elicits respect for the victims' plight as well as awareness of the importance of support to the civil parties during the stressful encounters with the Court, especially given that they have suffered severe victimisation.

Furthermore, the civil parties' interaction with the courtroom includes their confrontation with the accused, as well as their opportunity to pose questions to him/them.[1030] According to the analysis,

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[1025] E.g. Civil Parties in *Case 002/02*: Mr. Chum Sokha, Mr. Em Oeun, Romam Yun, Ms. Denise Affonço, Mr. Aun Phally, Ms. Po Dina. Also, during the Civil Party Bou Meng's testimony in *Case 001*, the judges noted: "Regarding the survivors of the regime, we note that they have been very emotional and yesterday, after having examined how we could control the witness when he or she is very emotional and we also checked to see whether there are doctors or psychiatrists on standby, then the Court would seek their assistance to help that witness before we proceeded further" and "If your emotion overwhelms you, then it's unlikely that we have another time to hear your account because the Chamber has scheduled other witnesses to provide the testimonies and they had gone through similar experiences […]."

[1026] *Case 001* (Transcripts of Hearings, Trial day 37) 001/18-07-2007-ECCC/TC (1 July 2009) 13-15 <https://www.eccc.govkh/sites/default/files/documents/courtdoc/E1_41.1_TR001_20090701_Final_EN_Pub.pdf> accessed 15 April 2020

[1027] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 516

[1028] Christoph Sperfeldt, 'From the Margins of Internationalized Criminal Justice Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia' (2013) 11 Journal of International Criminal Justice 1111, 1120

[1029] Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 130

[1030] As per Internal Rules (2015), rule 90(2)

four civil parties in *Case 001*, 11 in *Case 002/01*, and 25 in *Case 002/02* took the opportunity to address the accused present in court, by asking him/them questions or making statements. The civil parties experienced the encounter differently;[1031] however, as Patrick Hein mentioned, asking questions to the accused may have been for some of the civil parties the only opportunity in their lifetime to question the accused about the whereabouts of loved ones, and the facts which led to the commission of the crimes.[1032] The encounter between civil party Robert Hamill and the accused in *Case 001* is a powerful testament to the importance of such encounters for some:[1033]

"*Duch, at times I've wanted to smash you -- to use your words -- in the same way that you smashed so many others. At times, I've imagined you shackled, starved, whipped and clubbed viciously - viciously. I have imagined your scrotum electrified, being forced to eat your own faeces, being nearly drowned, and having your throat cut. I have wanted that to be your experience, your reality. I have wanted you to suffer the way you made Kerry and so many others*."

Overall, it appears that the civil parties' direct interaction within the courtroom entailed important consequences for the civil parties, expressing long stored emotions with support from specialized help as well as confronting their tormentors. This finding was also confirmed by a plethora of empirical research with civil parties in *Case 001* and *Case 002/02*, which highlighted that the civil parties included in these studies experienced interaction in a positive manner and concluded that the civil parties' experience of being in the Court was satisfying and respectful.[1034]

As far as the civil parties' interaction outside the courtroom is concerned, it entails meetings with their Co-Lawyers, the VSS's staff and intermediary NGOs during meetings and forums. As already expressed above, this situation elicits a unique system, wherein the interaction between the Co-Lawyers and the civil parties suffered from limitations, and instead, became replaced by an intermediary representation system led by NGOs. As reported, due to lack of resources, the lawyers and civil parties could not afford to travel. As such, the intermediary NGOs and their staff constituted the link to overcome these obstacles by ensuring more frequent communication between both parties, during provincial forums but also during individual meetings or phone calls.[1035] While the creative efforts channeled to ensure the civil parties' interaction in the context of the ECCC are commendable, especially since they were perceived positively by a multitude of civil parties,[1036] they also reveal important limitations in the ECCC's capacity to ensure a functioning legal representation system that interacts with their clients.

[1031] For instance, one civil party mentioned that if the accused is not willing to answer her questions, then she is also not open for the forgiveness the accused might ask for. Other have mentioned that they could not even look the accused in the eye.

[1032] Patrick Hein, 'The Multiple Pathways to Trauma Recovery, Vindication, and National Reconciliation in Cambodia' (2015) 7 Asian Politics and Policy 191, 200

[1033] *Case 001* (Transcripts of Hearings, Trial day 59) 001/18-07-2007-ECCC/TC (17 August 2009) 104 <https://www.eccc.govkh/sites/default/files/documents/courtdoc/E1_63.1_TR001_20090817_Final_EN_Pub.pdf>

[1034] See e.g. Rachel Killean's research interviewing 27 civil parties. Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 20. Also Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 533

[1035] Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 9, 27

[1036] See e.g. Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 27

One final point in regard to the civil parties' interaction with the Court is relevant to this section and refers to the initiative by the VSS and NGOs to bring civil parties to attend hearings at the Court during every hearing. This also entailed cooperation with other NGOs, such as the Documentation Center of Cambodia (DC-Cam), to facilitate the transportation of Cambodians back and forth to the proceedings in Phnom Penh.[1037] As reported, this initiative started with *Case 001* and continued throughout both segments of *Case 002*, and materialized due to the VSS and NGOs' joined efforts to ensure that the seats reserved for the civil parties were filled every day during trial hearings.[1038] In their turn, as studies revealed, the civil parties valued these opportunities, as they enabled the civil parties to see the city of Phnom Penh where the Court is located, the building of the Court, and the accused in person.[1039] In addition, being brought to the Court, and provided with food and accommodation made the civil parties feel respected and acknowledged.[1040] Finally, this initiative is commendable for its symbolic value, as it provided the civil parties with the unique opportunity to witness the historical trials of the 'most responsible' under the Khmer Rouge regime.

III. Information

This section consists of an illustration of how information is materialized in the process towards obtaining reparations at the ECCC as well as an assessment of its potential implications for the civil parties. According to this analysis, there are two modalities for the civil parties to receive information at the ECCC, namely, in the context of civil parties' testimonies during the trial proceedings, and during the meetings, discussions and provincial forums involving the Co-Lawyers and intermediary NGOs.

As the current analysis revealed, during trial proceedings, the civil parties may be provided with information by the Judges, which mainly entails information regarding the various prerogatives and rights that the civil parties can avail of. They include, for instance, information regarding how the trial works, the roles as civil parties during proceedings,[1041] the right to join the trial as a civil party and seek reparations,[1042] the right to express suffering before the Court, particularly in relation to emotional and physical damage,[1043] the right to be heard, and the right to pose questions to the accused.[1044] While providing information to civil parties during proceedings is commendable, the analysis also revealed that equally important is the civil parties' understanding of this information and rights. At times, it appeared that civil parties lacked understanding of what

[1037] David Scheffer, 'What Has Been 'Extraordinary' About International Justice in Cambodia?' (United Nations Assistance to the Khmer Rouge Trials, 25 February 2015) 1, 10
[1038] Elizabeth A. Turchi, 'Victims' Attendance in the Courtroom to Observe Proceedings' in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 349
[1039] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 20
[1040] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 20
[1041] *Case 002/01* (Transcripts of Hearings, Trial Day 12) 002/19-09-2007-ECCC/TC (10 January 2012)
[1042] E.g. *Case 001* (Transcripts of Hearings, Trial Day 41) 001/18-07-2007-ECCC/TC (9 July 2009) 57
[1043] E.g. *Case 001* (Transcripts of Hearings, Trial Day 60) 001/18-07-2007-ECCC/TC (18 August 2009) 58
[1044] E.g. *Case 002/01* (Transcripts of Hearings, Trial Day 183) 002/19-09-2007-ECCC/TC (23 May 2013). See also the testimonies of the following Civil Parties: Ms. Sou Sotheavy, Mr. Yos Phal, Ms. Thouch Phandarasar, Ms. Chan Socheat, Ms. Huo Chantha, Mr. Nou Hoan, Mr. Yim Roumdoul, Ms. Bay Sophany, Mr. Soeun Sovandy, Ms. Seng Sivutha.

the legal implications of their standing as civil parties before ECCC were.[1045] In addition, in the large majority of cases, the civil parties did not even engage with the question regarding reparations posed by the Judges, simply stating that they leave it up to their lawyers; however, later on in the testimony they did express their expectations from the Court in regard to reparations. The typical dialogue between the Court and the civil parties was as follows:[1046]

"*The Court: In this case, you have applied as a civil party. Are you seeking reparations by yourself or you will waive these rights to your lawyer to act on your behalf?*

Civil Party: I will leave it to my lawyer to seek reparations."

Furthermore, the majority of civil parties receive information during meetings, discussions and forums with the Co-Lawyers and representatives of intermediary NGOs. With regard to the Co-Lawyers, they are bound by the Code of Ethics for Lawyers Licensed with Cambodia's Bar Association, which contains general provisions requiring lawyers to respect the obligations of their oath and the principles of conscience, humanity, and tact; however, the Code does not feature any provision regarding the communication between lawyers and victims.[1047] Additionally, as already explained above, the interaction between the civil parties and the Co-Lawyers are rather limited due to scarce resources, which is also likely to influence the frequency and quality of information the civil parties receive.

Consequently, the various meetings between civil parties and representatives of intermediary NGOs remain the main modality for the civil parties to receive information.[1048] As other studies reported, during the meetings between representatives of intermediary NGOs and the civil parties, they exchange information, and the representatives update all civil parties on developments taking place in the ECCC trials.[1049] However, as in the case of the civil parties' voice, this situation entails important consequences, because the information that the civil parties receive travels across several channels of communication and might be influenced by the level of understanding of those involved. In addition, it is important to note that despite the efforts of representatives of intermediary NGOs, empirical studies with civil parties in *Case 002* revealed gaps in their knowledge of the ECCC's trials, which furthermore triggered their frustration.[1050] For instance,

[1045] This finding has been confirmed by Killean who asserted several civil parties that she interviewed found the proceedings hard to understand. Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 20. But see research asserting that the civil parties' informational needs appeared to have been fulfilled, Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 544

[1046] During the testimony of Martine Lefeuvre, civil party in *Case 001*. *Case 001* (Transcripts of Hearings, Trial Day 59) 001/18-07-2007-ECCC/TC (17 August 2009)

[1047] As reported by Kinga Tibori-Szabó, Barbara Bianchini, Anushka Sehmi and Silke Studzinsky, 'Communication Between Victims' Lawyers and Their Clients' in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 435

[1048] As per Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 8

[1049] As per Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 9

[1050] E.g. Elisa Hoven and Saskia Scheibel, ''Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance?' (2015) 21 International Review of Victimology 161; Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil

one study with 12 civil parties revealed that they had a very low understanding of their role in the ECCC proceedings,[1051] while another study with 27 civil parties concluded that important information regarding developments in the trial failed to reach the civil parties, triggering the irritation of the civil parties.[1052] However, these findings appear to contrast the findings of a study with 21 civil parties in *Case 001*, which concluded that "NGOs and lawyers paid attention to the informational, psychological, and cultural needs of civil parties […]".[1053] It is likely that the difference in the studies' results is due to the large number of victims in *Case 002* versus *Case 001*.

One final point relating to information which merits focus in this section is the outreach carried out at the ECCC. As already explained above, the different resources devoted to the VSS in *Case 001* versus *Case 002* have influenced whether the victims have received information about the possibility of becoming a civil party in the trial in the first place, which in turn influenced the number of civil parties in the trials.[1054] The outreach efforts have mainly been carried out by the NGOs, in both *Case 001* and *Case 002*.[1055] However, as empirical research with civil parties revealed, additional sources played a more important role in outreach. As such, it appears that the local media – the TV and the radio – represented the main source of information regarding the existence of the ECCC and its mandate, with nearly half of the civil parties interviewed attributing their knowledge to these channels of information.[1056] As John Ciorciari and Anne Heindel concluded, as a consequence of resource constraints at the ECCC level, of the millions of victims who might have chosen to participate in the ECCC proceedings, only a small fraction were informed of this right, resulting in many lost opportunities.[1057] However, it is equally important to acknowledge the role played by the additional sources of outreach, such as the NGOs or the media, to complement the scarce outreach functions of the Court, which eventually bore fruit in *Case 002*.

IV. Length of proceedings

This final section looks at the length of the reparations proceedings as an element of procedural justice and discusses its potential implications for the civil parties before the ECCC.

As this analysis revealed, the cases adjudicated before the ECCC, which include also the reparations proceedings, have a duration of three to four years at the Trial Chamber level and two

Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 20

[1051] Elisa Hoven and Saskia Scheibel, ''Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance?' (2015) 21 International Review of Victimology 161, 172

[1052] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 23

[1053] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 544

[1054] See e.g. Phuong N. Pham, Patrick Vinck, Mychelle Balthazard, Judith Strasser, 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3 Journal of Human Rights Practice 264, 273

[1055] Phuong N. Pham, Patrick Vinck, Mychelle Balthazard, Judith Strasser, 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3 Journal of Human Rights Practice 264, 273

[1056] Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 34

[1057] John D. Ciorciari, Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia (Law, Meaning, and Violence)* (University of Michigan Press, 2014) 206-207

years at the Supreme Court Chamber level.[1058] To be precise, the accused in *Case 001* – Duch - was indicted in 2007, the Trial Chamber has rendered its decision in 2010, and the Supreme Court Chamber in 2012.[1059] *Case 002* has issued its indictment against the accused Nuon Chea and Khieu Samphan (together with Ieng Sary and Ieng Thirith who later passed away) in 2010. With the severing of the case into two segments, *Case 002/01* started immediately after 2010, and the Trial Chamber rendered its decision in 2014, whereas the Supreme Court Chamber decided in 2016.[1060] Finally, *Case 002/02* started its hearings only after the Trial Chamber's decision in *Case 002/01* in 2014, and the Trial Chamber rendered its decision in 2018.[1061] This decision has been appealed by the Co-Prosecutors in 2019, and is pending consideration before the Supreme Court Chamber.[1062]

In addition to the length of the trials, it is important to notice that the implementation of reparations at the ECCC does not expand the time the civil parties need to wait until they receive the reparations measures, as in the case of the ICC. In *Case 001*, the reparations measures awarded by the Trial Chamber and confirmed by the Supreme Court Chamber are rather symbolic and do not require extensive implementation efforts;[1063] they consist in the inclusion of the names of civil parties in the judgment,[1064] as well as the compilation and publication of all statements of apology made by Duch throughout the trial.[1065] In addition, in the two segments of *Case 002*, pursuant to the amendment of the Internal Rules, the majority of reparations measures were compiled with the help of Lead Co-Lawyers and the VSS,[1066] and their majority were already implemented before the Chamber rendered its decisions.[1067]

Although the length of the trials is shorter, especially when compared with the ICC, and the reparations measures are already implemented by the time of the judgment was issued, research with the civil parties before the ECCC revealed consequences similar to those for victims at the ICC. To be precise, Rachel Killean's research with civil parties in *Case 002* held that "although the Civil Parties had declared their general support and approval for the Court, it was evident that the longer *Case 002* took, the more frustrated they grew, and the less inclined they felt to participate in its work".[1068] In addition, several civil parties passed away during the adjudication of cases, which is unfortunate, as they did not live to see the end of the trials.[1069]

[1058] Since at the ECCC level the reparations proceedings are part of the trial proceedings, their duration is measured since the indictment is issued by the Co-Investigating judges, which roughly corresponds with the moment when the civil parties may also submit they civil parties claims. Internal Rules, Rules 23bis*(*2)

[1059] As per '*Case 001*' (ECCC Website) <https://www.eccc.govkh/en/case/topic/90> accessed 15 April 2020

[1060] As per '*Case 002/01*' (ECCC Website) <https://www.eccc.govkh/en/case/topic/1295> accessed 15 April 2020

[1061] As per '*Case 002/02*' (ECCC Website) <https://www.eccc.govkh/en/case/topic/1298> accessed 15 April 2020

[1062] *Case 002* (Co-Prosecutors: Notice of Appeal of the Trial Judgement in *Case 002/02*) E465/2/1 (21 June 2019)

[1063] The name of the civil parties was included in the Trial Chamber Judgment and the compilation of apologies by Duch has been compiled in 2012. See 'Compilation of statements of apology made by Kaing Guek Eav alias Duch during the proceedings' (ECCC Website) <https://www.eccc.govkh/sites/default/files/publications/Case001Apology_En_low_res.pdf> accessed 15 April 2020

[1064] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 240

[1065] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 240

[1066] As per Internal Rules (2015) Rule 23*quinquies*(3)(b)

[1067] This point will be discussed at length in section 3.2.3. Substantive Justice.

[1068] Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 23

[1069] As reported by the lead Co-Lawyers in *Case 002*: "Since the commencement of proceedings 181 civil parties have died". *Case 002/02* (Civil Party Lead Co Lawyers: Amended Closing Brief In *Case 002/02*) 002/19-09-2007-ECCC/TC (2 October 2017) para 7

Against this background, it is likely that the frustration of civil parties with the length of trials in the context of the ECCC is exacerbated by the time elapsed since the crimes took place, over 40 years, the time it took for the Cambodian government to provide a reaction to the atrocities,[1070] and the advanced age of the accused and victimised persons. Illustrative of this point is the latest passing away of one of the accused persons in *Case 002* on 4 August 2019 (others had already passed away before the trial had started), leading to a series of 'urgent' submissions from different parties in the trial, including from the Lead Co-Lawyers regarding the consequences for the victims.[1071] However, the Supreme Court Chamber clarified that Nuon Chea's death does not affect the awards of reparations to the Civil Parties.[1072] While this holding is positive for the victims, this analysis elicits that the length of the trials, especially when compounded by additional elements, may have important consequences for the civil parties and their perception of the ECCC and its trials.

V. Conclusion

Since its establishment, the ECCC operated under its Internal Rules, which were crafted drawing primarily on Cambodian Criminal Procedural Law and secondarily on international law, adjusted then to respond as much as possible to the complexities of the Cambodian conflict. As a result, the Internal Rules emerged as a legal instrument attempting to govern the workings of a hybrid Court, yet also susceptible to amendments, due to its experimental nature. Consequently, the Internal Rules enabled the victims to play an important role in the trial as civil parties, and bestowed upon them extensive prerogatives that they can avail of in the process of obtaining reparations at the ECCC. As the current analysis of the Court's potential contribution to procedural justice for the civil parties under the ECCC's jurisdiction highlighted, the prerogatives bestowed upon victims materialized extensively across the cases, however, not only because of the ECCC, but also because of concerted efforts stemming from external sources. In addition, these prerogatives have been continuously adapted throughout the Courts' practice, which resulted in unequal opportunities for the civil parties across different cases.

To begin with, as far as voice is concerned, the current analysis showcased that the ECCC enabled the civil parties to exercise their entire palette of prerogatives, from written applications to the oral testimony of several civil parties and legal representation. However, in practice, passing the victims' voice through written applications and legal representation was heavily circumcised amid a scarcity of funds allocated by the Court to the actors mandated to make these prerogatives a reality, such as the VSS or the legal representatives. Consequently, this led to shortcomings in the execution of functions, especially in *Case 001*, which affected the number of civil parties submitting written applications as well as the quality of their legal representation, which consisted in lawyers paid through different organisations and working on *a pro-bono* basis. Importantly, this situation also led to the emergence of auxiliary structures to enable the realization of the civil parties' prerogatives, through intermediary NGOs that filled in important gaps in outreach, interaction, and information vis-à-vis the civil parties. In *Case 002*, amid the amendment of the Internal Rules and incoming funding from donors, many of the shortcomings elicited in *Case 001*

[1070] For instance, Civil Party in *Case 001*, Martine Lefeuvre, has echoed this. *Case 001* (Transcripts of Hearings, Trial Day 59) 001/18-07-2007-ECCC/TC (17 August 2009)
[1071] *Case 002/02* (Civil Party Lead Co Lawyers: Response to Nuon Chea's Urgent Request Concerning the Impact on Appeal Proceedings of Nuon Chea's Death Prior To The Appeal Judgement) 002-19-09-2007 ECCC/SC (26 August 2019)
[1072] *Case 002/02* (Supreme Court Chamber: Decision on Urgent Request concerning the Impact on Appeal Proceedings of Nuon Chea's Death prior to the Appeal Judgement) 002-19-09-2007 ECCC/SC (22 November 2019) para 86 (vii)

improved, however, the auxiliary structures continued to exist and work alongside the Court's actors. While all the efforts deployed ensured that the voice of the majority of civil parties was collected and communicated to the Court, one important consequence is that due to the several channels of communication it had to travel, via NGOs, Co-Lawyers and eventually Judges, it runs the risk of being distorted and subjected to external influences. Furthermore, the ECCC enabled a select sample of 120 civil parties to express their voice orally during Court hearings. The ECCC's approach to enable the oral testimony either in narrative or questioning form is commendable, as the oral testimonies provided these civil parties with the unique opportunity to satisfy their intrinsic motivations for testifying. Overall, the testimony giving experience was appraised as multifaceted, because while it did have important benefits for many civil parties, it was also perceived negatively by a handful of civil parties.

As far as interaction is concerned, it materialized during oral testimonies before the Court, as well as during meetings, discussions, and public forums, which entailed interaction with Co-Lawyers and representatives of intermediary NGOs. As the analysis revealed, the interaction during oral testimonies enabled the victims to express long stored emotions as well as to benefit from specialized counselling, which elicited respect for the civil parties' plight as well as awareness of the importance of support for civil parties in the context of testimony giving. In addition, it also enabled the civil parties to engage with the accused persons; while this was experienced by the civil parties differently, it also provided important benefits, due to their unique chance to question the accused about the whereabouts of their loved ones, and the facts which led to the commission of the crimes. In addition, the civil parties that did not testify interacted with Co-Lawyers during meetings and discussions; however, the scarcity of resources reportedly affected these interactions, resulting in differences between *Case 001* and *Case 002*. Nonetheless, the gap was filled by representatives of intermediary NGOs. They complemented the Co-Lawyers' functions and operated as a link between the Co-Lawyers and the civil parties, organising group and individual meetings with the civil parties. While the support of NGOs proved essential in materializing the civil parties' indirect interaction with the ECCC and, as the same time, resulted in positive assessment by civil parties, this situation also revealed gaps in the ECCC's capacity to ensure a functioning legal representation system. Finally, it is important to acknowledge the efforts of an *ad-hoc* practice which emerged at the ECCC, due to efforts by the VSS and NGOs, to bring civil parties before the Court to witness every hearing. This initiative is commendable, as it resulted in feelings of respect and acknowledgement by the civil parties, as well as provided them with the opportunity of witnessing the historical trials of the Khmer Rouge leaders.

In terms of information, the means of interaction elaborated upon above equally constituted the means whereby the civil parties received information regarding the trials. As explained, during Court hearings, the Judges informed the victims of the extensive rights they could exercise; however, it remained unclear whether the civil parties equally understood the information they received. Furthermore, the majority of civil parties received information mainly during meetings with the representatives of the intermediary NGOs, and auxiliary, during meetings with the Co-Lawyers. Nonetheless, despite these efforts to provide information to civil parties, studies revealed gaps in their knowledge regarding developments in the trials, with differences between *Case 001* and *Case 002*, which in turn induced irritation in several civil parties. Finally, as far as outreach is concerned, amid scarce resources at the ECCC level which resulted in differences between *Case 001* and *Case 002*, this study has revealed the critical role of NGOs and media, with studies reporting them as the civil parties' main channels of information.

The final aspect of procedural justice investigated in this section concerns the length of the process of obtaining reparations. According to this study, the perception of the duration of trials might be compounded by other factors, including the time elapsed since the crimes took place, the (late) reaction of national authorities to the crimes, and the advanced age of the accused. A confluence of these factors appear have consequences for the civil parties and their perception of length.

Against this background, the ECCC's potential contribution to procedural justice for the civil parties under its jurisdiction is an intricate matter. In one significant step in international(ized) criminal justice, the ECCC enabled a sample of civil parties to share their stories, narrate their suffering, and express expectations in relation to the Court and reparations, in the context of international criminal trials. This approach is likely to contribute to procedural justice for civil parties, as it acknowledged the importance of testifying for civil parties, and enabled the materialization of the different intrinsic motivations that these civil parties had. This is particularly relevant in comparison with the ICC, which is hailed for its state-of-the-art approach to victims and their rights, yet it fails to enable victims to express their suffering and requests for reparations through testimonies during proceedings. The location of the Court is thereforely likely to influence how the participation of victims is realized. Furthermore, the ECCC's potential contribution to procedural justice was also influenced to a large extent by its priorities in distributing the resources for the adjudication of cases. This in turn led to the introduction of auxiliary structures to perform a multitude of functions which statutorily lied with the Court actors. As a consequence, the realization of the civil parties' voice through written submissions and legal representation, their interaction, as well as information in the context of the ECCC relied to a large extent on auxiliary structures. This can be appraised as a reasonable compromise, as the civil parties benefitted from the important prerogatives bestowed upon them, although to a larger extent in *Case 002* versus *Case 001*. On the other hand, it also resulted in additional layers added to the exercise of these prerogatives, which likely influenced the quality and authenticity of both information flowing from and to the civil parties. It is unclear to what extent the Court's potential contribution to procedural justice for the civil parties is the merit of the Court or of concerted efforts external to it, which proved critical throughout the cases. While this analysis revealed important limitations in the overall capacity of the Court to contribute to procedural justice, it is ultimately because of creative initiatives and support from both within and outside the Court that it performed as far as it did.

3.2.3. Substantive Justice

In what follows, this section will focus on the Court's potential contribution to substantive justice for civil parties under the Court's jurisdiction by means of the tangible reparations it awards. In doing so, the section will discuss the collective and moral reparations measures awarded by the Court under Rule 23 *quinquies*, elaborate on the Court's approaches across its three cases and assess whether the measures take into account the civil parties' preferences. Next to these measures, the current analysis identified additional requests put forward by civil parties outside of Rules 23 *quinquies* and which, as this research posits, may amount to reparations. Consequently, this section will also include an elaboration on these measures and an assessment of the Court's practice in this regard.

I. Collective and Moral Reparations

This section aims to establish how moral and collective reparations materialized across the ECCC's practice and assess whether they respond to the victims' harm and preferences in this regard. It does so by establishing the Court's different approaches to, and awards for, reparations, while taking into account the victims' preferences, as well as the Court's reparations regime.

Despite the fact that the Internal Rules mandated the Court to provide collective and moral reparations to the civil parties under its jurisdiction, the meaning of these qualifications was firstly elucidated by the Supreme Court Chamber (equivalent of the Appeals Chamber) in *Case 001*. Therein, the Court clarified that the qualification as 'moral' denotes the reparations' aim to repair moral damages rather than material ones, whereas the qualification as 'collective' confirms the unavailability of individual financial awards.[1073] In addition, the Chamber clarified that as long as the award is available for victims as a collective, moral reparations may also entail individual reparations for the members of the collective.[1074] As the current analysis revealed, the Court awarded moral and collective reparations in all its three cases, however, as will be seen, there are extensive differences between the awards granted to victims, especially between the awards in *Case 001* and the two segments of *Case 002*. The main reason for this difference is the legal basis under which the reparations were awarded, which in turn influenced many of its characteristics, including their content and sources of funding.

Case 001 represented the first opportunity for the Trial Chamber to interpret the statutory provisions regarding tangible reparations and to award collective and moral reparations to the victims of the Khmer Rouge regime. As the current analysis elicited, the Judges adjudicating in *Case 001*, both at the Trial and Supreme Court Chamber levels, opted for a restrictive interpretation of the legal basis for awarding reparations, rejecting the large majority of requests for reparations put forward by the civil parties via the Co-Lawyers' submissions and limiting the reparations awards to two symbolic measures.

According to the Joint Submission on Reparations put forward by the Co-Lawyers on behalf of the civil parties in *Case 001*,[1075] the civil parties put forward requests for reparations grouped in four clusters. The first cluster included 'Outreach, publication and dissemination of information' as part of collective healing process, contributing toward uncovering the truth about past events and those responsible for the violations as an important goal of reparation for victims and their families.[1076] This measure also included requests for a compilation of apologetic statements of Duch made throughout the trial.[1077] Furthermore, the second cluster related to 'Physical and psychological medical care', to rehabilitate civil parties by assisting them and their families to confront and process trauma and abuse.[1078] The third cluster consisted in 'Education programs',[1079] through books to reflect the 'historical truth' and education programs to raise awareness of human

[1073] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) 292
[1074] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) 292
[1075] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009)
[1076] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009) 7
[1077] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009) 8
[1078] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009) 9
[1079] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009) 9

rights in the Cambodian society.[1080] The last cluster of reparations related to 'Memorialisation', consisting in the establishment of religious buildings, funeral ceremonies, and memorials, to foster worship and remembrance.[1081] Importantly, the Co-Lawyers also touched upon the funding of reparations. Given that Rule 23(11) stated that reparations should be borne by the accused, but the accused was found indigent, the submission also proposed that the Court could either encourage the Cambodian Government to set up a 'State Funded Reparation Program' or explore the possibility of setting up an independent and voluntary Trust Fund, such as the ICC's TFV.[1082]

In rendering its decision on reparations, the Trial Chamber granted only two symbolic reparations measures and rejected the large majority of reparations requests put forward by civil parties, a decision that was fully endorsed by the Supreme Court Chamber later on.[1083] The Trial Chamber reiterated the link between the reparations awards and the guilt of the accessed, which entails that the reparations measures are to be borne exclusively by the accused.[1084] After confirming the indigence of the accused, the Trial Chamber went on to grant the civil parties' request to include the names of civil parties and their relatives who died in the judgment, stressing the considerable 'symbolic significance' of this measure, for the victims.[1085] In addition, the Trial Chamber granted the civil parties' request for the compilation and publication of all statements of apology made by Duch throughout the trial, as they may provide some 'satisfaction' to victims.[1086] However, the Trial Chamber rejected all the other measures put forward by civil parties, reasoning either that it is beyond the scope of reparations at the ECCC to order the establishment of a Trust Fund,[1087] or that the Court does not have any competence to compel the Government of Cambodia to engage in reparations measures.[1088] In fully endorsing the Trial Chamber's holdings, the Supreme Court Chamber further held that given the limitations regarding its reparations powers, "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".[1089] At the same time, the Supreme Court Chamber endorsed the majority of reparations requests put forward by the civil parties as potentially fitting on a theoretical level the 'collective and moral' reparations characterization.[1090] In addition, it encouraged national authorities, the international community, and other potential donors to provide financial and other forms of support to develop and implement these appropriate forms of reparation.[1091]

As elicited above, both Chambers in *Case 001* rejected the majority of reparations requests on the basis of the accused person's indigence as well as the absence of expansive prerogatives within the Court's mandate to establish a Trust Fund or to compel the Government of Cambodia to take measures. According to the current analysis, in rendering their decisions, the Chambers displayed

[1080] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009) 10
[1081] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009) 11-12
[1082] *Case 001* (Civil Parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009) 14
[1083] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012)
[1084] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 238
[1085] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 240
[1086] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 240
[1087] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 241
[1088] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 242
[1089] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) 296
[1090] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) 315, 319
[1091] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) 319

a restrictive interpretation approach, opting to reject the large majority of requests due to pragmatic considerations, rather than to take into account the harm suffered by civil parties. Indeed, both Chambers acknowledged that the civil parties suffered harm as a direct consequence of the crimes for which the accused was convicted.[1092] Furthermore, the Supreme Court Chamber articulated the link between harm and reparations, holding that:[1093]

"*[A]s concerns the form of reparation […] its relation with the harm lies in the form of reparation being aimed at, and suitable to, removing the consequences of the criminal wrongdoing, as well as restoring, to the extent possible, the prior lawful status*."

However, when making the tangible reparations awards, the Chambers deviated from the findings on the harm suffered and instead chose to reject the large majority of requests due to their low likelihood of being implemented. By taking this approach, instead of granting reparations measures based on the harm suffered by the civil parties, the Judges chose to circumvent these measures and award only what was realistically feasible. Consequently, it is likely that the Judges avoided later disappointment of civil parties caused by a likely lack of implementation. At the same time, it elicited a view of reparations rooted in the Judges' concerns about limited resources, rather than informed by the harm suffered by victims,[1094] which is the underlying principle of reparations. In addition, the Judges also passed on the chance to engage in a proactive behavior, to grant these measures and then exert pressure to engage the Government of Cambodia or call for support from external donors in the realisation of the reparations.

Furthermore, according to the current analysis, the two Chambers explained their approach justified by consideration of limited resources in different manners, which not only reveals their view of reparations but may also have potential consequences for subsequent cases. As such, in its decision, the Trial Chamber justified its restrictive approach by making recourse to the limitations inherent in the Internal Rules and suggesting amendments to circumvent them: [1095]

"*The Chamber is nonetheless constrained in its task by the requests before it and type of reparations permitted under its Internal Rules. Limitations of this nature cannot be circumvented through jurisprudence but instead require Rule amendments*."

However, the Supreme Court Chamber employed another reasoning, by making appeal to the underlying goals of the ECCC; in doing so, it aimed to put into perspective the role of reparations within the ECCC context. It explained that the Court's aim is to punish those most responsible and to contribute to the process of national reconciliation through a reparations scheme "and not [be] 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."[1096] As such, the Trial Chamber explained that its choice to root its reparations awards in pragmatic considerations was justified by limitations to its mandate, implying that it would have granted the reparations requests had there been resources to contribute

[1092] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) para 682; *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) para 699
[1093] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) para 699
[1094] As also acknowledged by Carla Ferstman, 'Reparations, Assistance and Support' in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 403
[1095] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) para 662
[1096] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) para 655

towards their realisation. On the contrary, the Supreme Court's reasoning implies that the reparations it awarded, albeit limited, are a rather anticipated consequence of the Court's mandate, which cannot be expected to respond to "utopian expectations". While both decisions yielded similar results and appeared rooted in similar considerations, the Chambers' different approaches to reparations ultimately carry consequences for the subsequent practice, which, as will be seen below, developed under a different legal basis to respond to the austere reparations awards in *Case 001*.

Furthermore, as explained above, the Chambers' decisions elicit a significant departure from the civil parties' harm and preferences for reparations as they rejected all the civil parties' requests for physical and psychological care, education, and memorialisation. The Chambers only granted two symbolic reparations measures under the outreach cluster, relating to the inclusion of names of civil parties and their families within the judgment and a compilation of statements of apology by the accused. Consequently, this holding failed to acknowledge and provide relief to the harm suffered by the civil parties, resulting in quashed hopes for the civil parties that their suffering will be addressed in a robust manner. Indeed, as reported by other scholars, the Court's awards have resulted in disappointment for the civil parties,[1097] while NGO reports held that the reparations awards "were unable to meet the vast majority of victims' requests, due to the inadequacy of the applicable internal rules that the Judges had established."[1098] John Ciorciari wrote that the civil parties had a good ground for disappointment, while acknowledging that "the Trial Chamber should have been much more creative on the issue of reparations."[1099] Overall, as Ray Nickson put it, reparations in *Case 001* became a widespread source of disappointment for the civil parties, inducing dissatisfaction with the Court.[1100]

Amid criticism and the Judges' own acknowledgement of the limitations associated with the tangible reparations in *Case 001*, before *Case 002* commenced, the Judges amended the reparations provisions in the Internal Rules as to add an alternative method of implementation.[1101] In addition to reparations borne by the accused person, Rule 23 *quinquies* (3)(b) included the possibility that the awards consist in projects designed and identified by the Lead Co-Lawyers and the VSS, 'in liaison with governmental and non-governmental organisations'.[1102] The project must have secured external funding by the time they come before the Court for consideration, and the Court's role is limited to endorsing or 'judicially recognizing' the projects as long as they fulfil the legal requirements of reparation at the ECCC.[1103] Due to the amendment of the Internal Rules, the reparations measures awarded in the two segments of *Case 002* differ significantly from the awards in *Case 001*, as they include a whole range of reparations measures acknowledging the different categories of harm and responding to the majority of the civil parties' requests. In what follows,

[1097] Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 88; Mariana Pena, 'The Role of Intermediaries and Third Parties in Victim Participation', in Kinga Tibori-Szabó, Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 93

[1098] 'Justice for Victims: The ICC's Reparations Mandate (REDRESS, 2011) 22

[1099] John Ciorciari, 'The Duch Verdict' (Cambodia Trial Monitor, 28 July 2010) 1-2 <http://www.cambodiatribunal.org/2010/07/28/the-duch-verdict/> accessed 15 April 2020

[1100] Ray Nickson, 'Unmet Expectations and the Legitimacy of Transitional Justice Institutions: the International Criminal Tribunal for the Former Yugoslavia and the Extraordinary Chambers in the Courts of Cambodia' in Chrisje Brants anf Susanne Karstedt (eds), 'Transitional Justice and the Public Sphere Engagement, Legitimacy and Contestation' (Hart Publishing, 2017) 195–218

[1101] See 'Eight ECCC Plenary Session Concludes' (ECCC Website) <https://www.eccc.govkh/en/articles/eight-eccc-plenary-session-concludes> accessed 28 February 2020. See also *Case 002/02* (Trial Chamber: *Case 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018)

[1102] Internal Rules (2015), Rule 23 quinquies (3)(b), Rule 12 bis (3)

[1103] Internal Rules (2015), Rule 23 quinquies (3)(b)

the Court's practice in both segments of *Case 002* will be discussed jointly, as the judgments share the same legal basis and reasoning.

As such, in *Case 002/01*, the Lead Co-Lawyers submitted on civil parties' behalf requests for reparations consisting in 13 projects classified in three clusters: commemoration and memorialization; rehabilitation; documentation and education.[1104] The first cluster included four projects which aimed to restore the honor of victims as well as commemorate them.[1105] The second cluster included two projects which aimed to empower the civil parties to discuss their trauma and discuss their feelings in safe spaces, during testimonies with professional help or in self-help groups.[1106] Finally, the third cluster included seven projects aiming to impart knowledge regarding the Khmer Rouge crimes with future generations through various modalities as well as provide outreach to build understanding regarding the Court and the role of civil parties.[1107] In addition to the concrete projects, the submission also stated that the Court's decision should also elicit further purposes such as: officially recognize the suffering and the damage suffered by the civil parties; respond to the individual harm of each of the civil parties by giving them the feeling that the collective and moral reparations address their personal injuries; and take into account the local context, whereby almost 40 years have elapsed since the end of the Khmer Rouge regime, and it

[1104] *Case 002/01* (Les Co-Avocats Principaux pour les Parties Civiles: Demande Definitive De Reparations Des Co-Avocats Principaux Pour Les Parties Civiles En Application De La Regle 80bis Du Reglement Interieur Et Annexes Confidentielles) *002/19-09*-2007-*CETC/CPI* (8 Octobre 2013) 25-49

[1105] 1) National Commemoration Day - with the aim of restoring the honor of the victims who died during the Khmer Rouge regime and enabling survivors to remember their sufferings. It may give rise to ceremonies, conferences, performances or any other event connected with the commemoration, and it may benefit not only the civil parties in the trial but enable Cambodian population at large to gather and organize the religious ceremonies together;
2) Initiative for Public Memorials - which will collect the ashes of the deceased under the Khmer Rouge regime. Thus, civil parties, victims, relatives, and the general public will have the opportunity to burn incense and to organize, in a lasting and collective manner, religious festivals to pay homage to the victims;
3) Building a memorial site for the victims, in the memory of the tragic events of 17 April 1975 – it will also benefit not only the civil parties, but the Cambodian population at large;
4) Building a memorial for the victims of the Khmer Rouge regime for the Cambodians living in France – a stupa could be set up in Paris, to pay tribute to the memory of all the victims of the regime.

[1106] 5) Therapeutic testimony – in this project, with professional help, the civil parties will be invited to discuss their trauma, recall their sufferings, all of which will be captured in a written document called "Testimony". These testimonies would be read out loud during public ceremonies organized across Cambodia, and afterwards, hard copies would be handed out to the civil parties;
6) Self-help groups which would consists of voluntary gatherings of people who share the common wish to overcome their sufferings and better understand them; they would be organized in three localities of Cambodia, with the participation of selected civil parties in the *Case 002*.

[1107] 7) Permanent exhibition in five regional museums – with the aim to relieve the experience of the past, understand it, and especially to convey to the public the civil parties' experiences. It also aims to impart knowledge with future generations, contribute to reconciliation, and enable civil parties and other victims to establish, share, and deepen their knowledge of the Khmer Rouge;
8) Mobile exhibition – which would be developed in two stages: the first one would include the design of the exhibition, production of documentaries, installation of posters, production of multimedia, awareness, communication; and the second one would include the activities of the project, such as public forums, seminars, theatrical or musical shows, religious ceremonies, slide projections, and the realization of a film on this exhibition;
9) Drafting of a specific chapter on the transfer of persons and the execution site Tuol Po Chrey which would be added to a school manual for teachers – it aims to facilitate official, national and permanent recognition of the history of the Democratic Kampuchea regime and the stories of victims as well as education on historical facts;
10) Building a peace learning center – it would represent a place for documentation, dissemination and training, debating, education, memory and remembrance;
11) Booklet on facts adjudicated in *Case 002/01* and civil party participation - in order to present to the Cambodian population, in a comprehensive manner, the proceedings before the ECCC;
12) Publishing and disseminating the Judgment in full and in summary – with the aim of building awareness and understanding of the trial, this project will effectively facilitate the process of national reconciliation and the fight against the reoccurrence of these kind of crimes;
13) Inclusion of Civil Party names on the ECCC website, which aims to enhance the value of civil parties participation before the Chamber.

is thus difficult to quantify or assess precisely each individual injury, physical, material or psychological.[1108]

Similarly, in *Case 002/02*, the Lead Co-Lawyers put forward requests for reparations consisting in 18 projects grouped in five clusters: general measures of guarantees of non-repetition; guarantees of non-repetition benefiting specific groups of civil parties and victims; satisfaction; rehabilitation; and other projects. The first cluster includes three projects which aim to prevent and monitor social conflicts as well as promote their peaceful resolution.[1109] The second cluster includes three projects and aim to provide benefits to civil parties for harm incurred in specific context, namely, the treatment of the Cham minority, the treatment of Vietnamese, and the victims of forced marriage.[1110] The third cluster entails four projects that aim to provide memorialization, commemoration, as well as opportunities to share experiences through truth-telling activities.[1111] The fourth cluster includes one project which aims to foster the mental and physical health care of civil parties.[1112] The final cluster includes seven distinct projects, of which one is supported only by the international Co-lawyer and aims to target minority civil parties;[1113] one is focused on promoting the health and mental well-being of vulnerable older people;[1114] one aims to foster public education;[1115] one is focused on raising awareness about the Cambodia's indigenous

[1108] *Case 002/01* (Les Co-Avocats Principaux pour les Parties Civiles: Demande Definitive De Reparations Des Co-Avocats Principaux Pour Les Parties Civiles En Application De La Regle 80bis Du Reglement Interieur Et Annexes Confidentielles) *002/19-09*-2007-*CETC/CPI* (8 Octobre 2013) 49-51

[1109] 1) App Learning on Khmer Rouge History - in order to make this information accessible through an innovative multimedia application that incorporates contemporaneous audio visual materials and civil party accounts;
2) Khmer Rouge History Education through Teacher and University Lecturer Training and Workshops – aims to educate Cambodia's youth about Khmer Rouge history and civil party experiences in order to prevent the future recurrence of crimes;
3) The Turtle Project Innovative Cross Media Project promoting historical awareness and civil courage in Cambodia – whereby the civil parties have the opportunity to engage with the younger generations and share their experiences during the Democratic Kampuchea regime.

[1110] 4) Community Media Project The Cham People and the Khmer Rouge – aims to educate the public about the experiences of the Cham community during the Khmer Rouge regime;
5) Phka Sla Kraom Angkar – entails intergenerational dialogue in order to promote public discussion and awareness on forced marriage during the Khmer Rouge regime;
6) Voices from Ethnic Minorities Promoting public awareness about the treatment of ethnic Vietnamese and Cham living in Cambodia during the Khmer Rouge regime – aims to document and present the experiences of the Cham and Vietnamese civil parties by providing opportunities for intergenerational dialogue about their treatment during the Khmer Rouge regime;

[1111] 7) The Unheard Stories of Civil Parties Participating in *Case 002* 02 at the ECCC – consists in a book of accounts of civil parties who experienced the range of crimes and topics addressed during *Case 002* 02;
8) A Time to Remember Songwriting Contest 2016 Involving youth in the creating of Cambodia's Song of Remembrance – aims to acknowledge the experiences of survivors by fostering intergenerational dialogue between civil parties and the younger generation in order to communicate about the suffering civil parties experienced as result of the crimes tried in *Case 002/02*;
9) Memory Sketches of Kraing Ta Chan – entails an exhibition of memory sketches of a security centre with university students and in consultation with civil parties;
10) Access to the Judicial Records of the Khmer Rouge Trials and Civil Party Materials at the Legal Documentation Center related to the ECCC (LDC) – entails a repository of publicly available documents free of charge related to proceedings and civil party participation at the ECCC.

[1112] 11) Healing and Reconciliation for Survivors of the Khmer Rouge Regime – aims to provide trauma healing to civil parties and survivors of the Khmer Rouge Regime in 15 provinces.

[1113] 12) Legal and Civic Education for Minority Civil Parties – aims to foster the minority civil parties' understanding their legal status in accordance with Cambodian law.

[1114] 13) Improving Health and Mental Wellbeing and Reducing the Risk of Poverty and Social Exclusion of Some Civil Parties and other Vulnerable Older People in Cambodia – aims to assist aging civil parties by increasing their access to physical and mental health care services.

[1115] 14) Public Education Forums & Permanent Exhibitions on the History of the Democratic Kampuchea – aims to develop permanent and mobile exhibitions on the history of the Khmer Rouge regime in five provinces and will focus on the historical narratives of alleged crimes.

communities during the Khmer Rouge;[1116] one aims to foster outreach regarding the historical archives of the regime;[1117] one relates to outreach in relation to the judgment;[1118] and the last one aims to provide satisfaction to civil parties by creating a safe space for them.[1119] Six of the seven projects in this final cluster could not secure funding by the time the Lead Co-Lawyers made the submission for reparations before the Court, wherein they also acknowledged the dependency of projects on financial resources. Consequently, in a supplemental submission, the Lead Co-Lawyers provided proof of secured funding for two of the projects (projects 13 and 15) and withdrew the rest of the projects lacking funding from the final cluster, bringing the total number of projects to 14.[1120]

In rendering its decisions in both segments of *Case 002*, the Trial Chamber endorsed the majority of reparations requests put forward by the civil parties.[1121] As such, in both judgments of *Case 002*, the Trial Chamber clarified the newly included Rule 23*quinquies*(3)(b) and held that civil parties' reparations requests must either be based on the model applied in *Case 001* (against the accused) or through the option of projects. It further acknowledged that availing of both reparations avenues is not legally permissible (but only one or the other) and moved forward to consider the reparations requests under Rule 23*quinquies*(3)(b) since both accused in *Case 002* had been declared indigent.[1122] Thereafter, the Trial Chamber reviewed extensively the harm suffered by victims in both segments of *Case 002* and concluded that the victims suffered "immeasurable harm which includes physical suffering, economic loss, loss of dignity, psychological trauma and grief arising from the loss of family members or close relations".[1123] Consequently, in *Case 002/01*, the Trial Chamber endorsed 11 of the 13 reparations projects, whereas in *Case 002/02*, it endorsed 13 of the 14 reparations requested by the civil parties. The Trial Chamber held that 11 projects in *Case 002/01* and 13 projects in *Case 002/02* fit the 'collective and moral' requirements of reparations and may address the harm suffered by the victims. The Trial Chamber did not endorse two projects in *Case 002/01*, namely the Initiative for Public Memorials and a Memorial for the victims of the Khmer Rouge regime for the Cambodians living in France.[1124] While it acknowledged that the projects might address the harm suffered and fit the collective and moral reparations requirements, they did not secure sufficient external funding, which is a condition of Rule 23*quinquies*(3)(b).[1125] Similarly, the Trial Chamber did not endorse one project in Case

[1116] 15) Cambodia's Indigenous People and Pol Pot – aims to document and share through documentaries and videos the experiences of Cambodia's indigenous minorities during the Khmer Rouge regime.
[1117] 16) Access & Dissemination of Legal & Historical Archives related to the Khmer Rouge – entails four legal and historical educational resource centers set up across provinces in Cambodia.
[1118] 17) Publication and Distribution to Civil Parties of the *Case 002* 02 Trial Chamber Judgement in Full and Summary Form - seeks to satisfy the right of civil parties as participants in the proceedings to be informed of and understand the outcome of the case.
[1119] 18) Phnom Sampeou Community Peace Learning Center and Treatment of Buddhists during the Khmer Rouge regime – aims to create a peace learning center at Phnom Sampeou mountain in order to create safe space for civil parties and community members for intergenerational dialogue truth- telling and commemoration.
[1120] *Case 002/02* (Civil Party Lead Co-Lawyers: Supplemental Submission on Funding Issues Related to Reparation Projects in *Case 002/02* and Request for Guidance with Confidential Annexes) E457/6/2/4 (30 November 2017) para 3
[1121] The Trial Chamber's decision is final as none of the appeals grounds concerned the matter of reparations. See *Case 002/01* (Appeals Chamber: Appeal Judgement) 002/19-09-2007-ECCC/SC (23 November 2016). The Appeals Chamber Judgment is therefore not relevant to the subject matter.
[1122] *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) para 1124; see also *Case 002/02* (Trial Chamber: *Case 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018) para 4416
[1123] *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) para 1150; *Case 002/02* (Trial Chamber: *Case 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018), para 4453
[1124] *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) paras 1161-1164
[1125] *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) para 1161

002/02, namely the Cambodia's Indigenous People and Pol Pot project, as it found that the harm suffered by indigenous people was unrelated to the crimes charged to the two accused.[1126]

Against this background and amid the amendment of the Internal Rules, the Trial Chamber's approach in both segments of *Case 002* is significantly different from *Case 001* in that it granted the large majority of civil parties' reparations requests and linked the reparations awards to the harm suffered by the civil parties. Indeed, in comparison with *Case 001* wherein the Judges appeared to render decisions rooted in pragmatic considerations of feasibility and financial resources, in *Case 002* the Judges not only reviewed extensively the harm suffered by civil parties but also expressly held that the reparations projects it endorsed address the 'immeasurable' harm suffered. Through this change in approach, the Judges also acknowledged the immensity of harm suffered under the Khmer Rouge regime, in all its forms and for victims of various crimes, bringing about an important symbolic value for civil parties. [1127]

At the same time, although rooted in the harm suffered by civil parties, the Court's decisions on reparations in both segments of *Case 002* were dictated by the reparations projects that the Lead Co-Lawyers and the VSS managed to secure, in cooperation with Cambodian NGOs and due to external donors that funded the projects. In reality, the role of the Court in reparations in *Case 002* was to a large extent legally irrelevant; the Court resumed itself to reviewing the reparations projects and endorsing them as 'judicial reparations' as long as they fulfilled the legal requirements inscribed in Rule 23*quinquies*(3)(b).[1128] As such, through the amendment of the Internal Rules, the Court relinquished the important function of enforcing its reparations mandate as statutorily envisioned, and instead, placed this responsibility upon actors entrusted with support roles in the realization of reparations. Although this action was a necessary compromise, amid the scarce reparations awards in *Case 001*, to ensure that the civil parties in *Case 002* would receive some reparations, it also brought about at least two important consequences. First, it placed an enormous burden and responsibility upon the Co-Lawyers and the VSS. Not only did their job description expand to include responsibilities pertaining to project management and grants acquisition,[1129] but also made the reparations the civil parties would receive dependent on the performance of Co-Lawyers and VSS. This has been resented by the Lead Co-Lawyers themselves, with the national Lead Co-Lawyer discussing implications for civil parties: "it is unjust for the civil parties that they have to bear the blunt for the reparations awarded for them. They are entitled to reparations pursuant to their right to reparation and should not be responsible for designing and searching for funds for reparations."[1130] Second, it redesigned the concept of reparations, bringing it closer to reparations as part of developmental programs rather than reparations in the context of international courts.[1131] In the same line, it is questionable whether the measures awarded in *Case*

[1126] *Case 002/02* (Trial Chamber: *Case 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018) para 4467

[1127] For an analysis on the importance of judgment in *Case 002/02* for the victims of forced marriage see Alina Balta, 'Extraordinary Chambers in the Courts of Cambodia, Regulation of Marriage, and Reparations: Judgment in *Case 002/02* Under Review' (Opinio Juris, 20 November 2018) < https://opiniojuris.org/2018/11/20/extraordinary-chambers-in-the-courts-of-cambodia-regulation-of-marriage-and-reparations-judgment-in-case-002-02-under-review/> accessed 27 February 2020

[1128] As reported, as per Internal rule 80bis(4), the Court also directed the Co-Lawyers to submit early indications over the reparations projects "to ensure that all measures sought on such grounds were capable of realisation, with the support of donor assistance and external collaborators, and within a meaningful time-frame." *Case 002/02* (Trial Chamber: *Case 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018) para 4415

[1129] See also Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 250

[1130] *Case 002/01* (Transcripts of Hearings: Trial day 215) 002/19-09-2007-ECCC/TC (16 October 2013) 140

[1131] For a difference between the two see Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 470; see also section 1.2. above.

002 can actually be termed reparations, as they have a very weak link with the accused persons' responsibility.[1132]

Despite the new challenges brought about by the amended rules and the reparations awarded in *Case 002*, it is important to acknowledge that they enabled close to 4000 civil parties to benefit from tangible reparations measures in the context of the ECCC, ranging from rehabilitation, to satisfaction and guarantees of non-repetition measures. By engaging with the reparations projects, it is likely that the harm suffered by the civil parties will be addressed in a holistic manner. Additionally, these reparations measures were appraised positively by the civil parties.[1133] As reported, in the aftermath of *Case 002/01*, the national Lead Co-Lawyer expressed that "the participation of the Civil Parties [has been] a success" and "the reparations were very good for the victims", while the international Lead Co-Lawyer expressed that she sensed a "feeling of satisfaction" when she had debriefed around 100 Civil Parties who were present at the Court.[1134] A similar conclusion albeit more nuanced was also put forward by Williams et al.'s study with civil parties, which found that the civil parties were satisfied with the reparations measures and their positive impact on their community, as well as believed that their opinions were taken into consideration.[1135] However, Williams et al. also discovered that not all the civil parties that they interviewed were aware of the reparations they were entitled to.[1136]

II. Other Reparations Measures

Next to the moral and collective reparations awarded under Rule 23*quinquies*, the current analysis identified additional reparations measures that started to emerge in the context of the ECCC. They refer to measures that the civil parties requested during their oral testimonies but were not included in the Co-Lawyers submissions for reparations and to non-judicial reparations measures under Rule 12*bis*(4), introduced with the amendment of the Internal Rules prior to the commencement of *Case 002*. In what follows, these measures will also be considered, to understand the Court's practice in their regard.

As this research identified, the civil parties expressed during oral testimonies that they wished to benefit from certain measures that were not included in the Co-Lawyers' submissions for reparations on civil parties' behalf. It is unclear why the Co-Lawyers did not include these measures within their submissions on reparations,[1137] as according to the Van Boven/Bassiouni

[1132] At the same time, it can be argued that the fact that the reparations measures have been designed and implemented while the court was still in the process of rendering its decision may go against the 'presumption of innocence' of the accused persons.
[1133] See results of study by Christoph Sperfeldt, Melanie Hyde and Mychelle Balthazard, 'Voices for Reconciliation: Assessing media outreach and survivor engagement for *Case 002* at the Khmer Rouge trials' (USAID Report, February 2016) 11
[1134] Leonie Kijewski, 'Praise and Frustration: Appeal Judgment in *Case 002/01*' (Cambodia Trial Monitor, 26 November 2016) 5 <https://www.cambodiatribunal.org/2016/11/23/praise-and-frustration-appeal-judgment-in-case-00201/> accessed 15 April 2020
[1135] On the basis of surveys with 439 civil parties and a follow up of 65 in-depth interviews. Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018) 120
[1136] Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018) 120
[1137] It is likely that the Co-Lawyers did not include these measures in their submission because some do not fit the 'collective and moral' qualifications, such as the financial compensation, while the others would be already realized as by-products of the trials.

Principles, they could amount to compensation and satisfaction measures.[1138] The measures requested by civil parties can be grouped into four clusters, namely, justice for the civil parties and/or their families, the punishment of perpetrators, the truth about crimes and the fate of their beloved ones, and compensation.

As this research revealed, the majority of civil parties in all three cases expressed that they wished that the ECCC would deliver justice to them.[1139] Although the civil parties did not define what their understanding of justice was, it appears that to them the realization of justice entails justice for themselves, for their families, and for all the victims of the Khmer Rouge regime.[1140] Illustrative to this point is the testimony of civil party Chum Sokha:[1141]

"*I am grateful to this Court and I hope that you find justice both for me and for the Cambodian people -- that is, those victims and civil parties*."

Furthermore, a large number of civil parties expressed their wish that the ECCC finds out who was behind the heinous crimes and prosecutes them. Punishing the perpetrators, to the harshest degree possible and proportional with their wrongdoings, stood out as one important request of the civil parties.[1142] To this end, the testimony of civil party Pech Srey Phal is relevant:[1143]

"*Please, try to find and to force those senior leaders and those most responsible to acknowledge the crimes that they committed during the period of three years and eight months, and that they acknowledge their plans to devastate the country, to engage in the mass killing of the people. And I urge Your Honour to punish them severely, so that it can be used as an example for the younger generation - that no one will be spared when they commit a crime*."

[1138] The request for compensation speaks for itself, whereas the requests for punishment and truth fall under the 'satisfaction measures'. The request for justice is not a reparation measure as such, but a consequence of reparations. The Van Boven/Bassiouni Principles articulate that "Adequate, effective and prompt reparation is intended to promote justice […]". As per UNGA, 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 Res 60/147 (16 December 2005), para 15, para 22 (b) & (f). For a discussion on viewing the punishment as a form of reparations, see Alina Balta, 'Retribution through Reparations? Evaluating the European Court of Human Rights' Jurisprudence on Gross Human Rights Violations from a Victim's Perspective' forthcoming in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020)

[1139] Similar results were yielded by a study looking into Civil Parties' their main motivations to participate in the ECCC's 002 trial, Nadine Kirchenbauer, Mychelle Balthazard, Latt Ky, Patrick Vinck, Phuong Pham, 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia' (Cambodian Human Rights and Development Association and Harvard Humanitarian Initiative, 2013) 1, 11

[1140] Several examples in *Case 001* include Civil Parties Bou Meng, Martine Lefeuvre, Robert Hamill, and Nam Mon. Several examples in *Case 002* include Civil Parties Mr. Chum Sokha, Ms. Toeng Sokha, Ms. Yim Sovann, MS. Lay Bony, and Madam Chou Koemlan.

[1141] *Case 002/01* (Transcripts of hearings, Trial day 121) 002/19-09-2007-ECCC/TC (22 October 2012) 21 <https://www.eccc.govkh/sites/default/files/documents/courtdoc/2012-11-02%2012%3A40/E1_136.1_TR002_20121022_Final_EN_Pub.pdf> accessed 15 April 2020

[1142] Examples in *Case 001* include Civil Party, Martine Lefeuvre, indirect victim, mentioned: "I note that these individuals are involved in my husband's death. And when I see these terrifying faces, I can imagine how he himself was terrified and then I decide that this crime will not remain unpunished."; Civil Party Antonya Tiulong, indirect victim, mentioned: "A sentence must be handed down and I wish that the Tribunal -- and I beg the Tribunal to hand down the most fairest possible judgment which will be commensurate with the crimes committed by the accused". Other examples in *Case 002/01* include civil parties Mr. Chum Sokha, Ms. Pech Srey Phal, Mr. Kim Vanndy, Ms. Denise Affonço, whereas in *Case 002/02* Civil Parties Oum Vannak, Mean Loeuy.

[1143] *Case 002/01* (Transcripts of hearings, Trial day 135) 002/19-09-2007-ECCC/TC (5 December 2012) 76 <https://www.eccc.govkh/sites/default/files/documents/courtdoc/2012-12-12%2016%3A50/E1_148.1_TR002_20121205_Final_EN_Pub%5B1%5D.pdf> accessed 15 April 2020

In addition, several civil parties urged the Court to search for the truth as to why the perpetrators committed the crimes, what happened during the Khmer Rouge regime, and what happened with their beloved ones.[1144] For instance, civil party Sun Vuth inquired:[1145]

"I want to know the real truth. Why innocent people, like my parents who did nothing wrong, were killed?"

Finally, a handful of civil parties have indicated that they wished to receive compensation, due to their precarious financial situation.[1146] Importantly, some of them stated that no reparations could ever compensate the harm incurred by the crimes.[1147]

Since the reparations requests detailed above were not submitted via submissions, the Court did not expressly decide on them in its reparations decisions. Consequently, whether the Court took into account and responded to the reparations requests put forward by civil parties during oral testimonies can only be assessed indirectly, by drawing inference from the Court's practice and relying on secondary sources. In what concerns the victims' requests that justice be rendered, it is challenging to evaluate the Court's performance, since it is not clear what the different civil parties' conceptions of 'justice' were. This is even more challenging to assess since the civil parties' conceptions of justice differ from person to person and may have also changed over time.[1148] Results of empirical studies researching whether the civil parties believed that they received justice at the ECCC are relevant in this regard. As such, Stover et al. argued, pursuant to their analysis of interviews with 21 civil parties that testified in *Case 001*, that the civil parties thought the ECCC rendered justice, referring to their positive experience with the Court as well as the overall fairness of the process.[1149] In addition, research by Williams et al., aggregating results of 439 surveys with civil parties in all trials at the ECCC as well as 65 interviews, similarly found out that the majority of civil parties thought the ECCC provided justice to them. Interestingly, their perception of justice appeared more related to their involvement with the Court as civil parties than the tangible reparations it provided.[1150] However, another study by Elisa Hoven and Saskia Scheibel, aggregating results of interviews with 12 civil parties in Cases *001* and *002*, reached a rather different conclusion.[1151] They reported that the majority of civil parties interviewed thought 'there is still lack of justice'. To inform their perception was their participation in the trials and the fact that the accused were punished; however, the civil parties reportedly resented the good

[1144] Examples in *Case 001* include Civil Party Chum Sirath; in *Case 002/01* Ms. Lay Bony, Meas Saran, Ms. Huo Chantha, whereas in *Case 002/02* Mr. Saut Saing.
[1145] *Case 002/01* (Transcripts of hearings, Trial day 169) 002/19-09-2007-ECCC/TC (31 March 2016) 69-71 <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2016-05-31%2017:28/E1_412.1_TR002_20160331_Final_EN_Pub.pdf> accessed 15 April 2020
[1146] Examples in *Case 002/02* include Civil Party Ms. Doung Oeurn, Civil Party Tak Sann, Mr. Thann Thim.
[1147] Examples in *Case 001* include Chhin Navy, whereas in *Case 002/02* Ms. Sou Sotheavy, Mr. Yos Phal, Ms. Huo Chantha, Mr. Nou Hoan.
[1148] For an elaboration on justice for victims in the context of international crimes See Alina Balta, Manon Bax, and Rianne Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System' (2019) 29 International Criminal Justice Review 221, 223
[1149] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 541
[1150] Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018) 42
[1151] Elisa Hoven and Saskia Scheibel, ''Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance?' (2015) 21 International Review of Victimology 161

imprisonment conditions the accused were held in as well as the scarce reparations.[1152] Unfortunately, this study did not differentiate between the civil parties' perceptions in *Case 001* versus *Case 002*, and neither did it clarify how many of the civil parties pertain to each case, to grasp whether the lack of tangible reparations in *Case 001* skewed the civil parties' perceptions of reparations. However, drawing on the results put forward by these studies, it appears that the Court managed to contribute to justice for the majority of civil parties; however, justice appears to be more connected with their status as civil parties and engagement with the Court rather than the tangible reparations.

Furthermore, as far as the civil parties' requests to see the accused punished are concerned, there is no doubt that all the accused have been punished to the harshest degree possible. Since the Court delivered the highest sentences against all three accused - life imprisonment – it can be contended that the civil parties' wishes and expectations were fulfilled. This conclusion is also supported by other studies that found that the life imprisonment sentence brought about the positive reaction of the majority of civil parties.[1153] Additionally, the relevance of these high sentences for the civil parties was elicited in *Case 001,* where the Trial Chamber initially convicted the accused to 35 years' imprisonment,[1154] spurring the civil parties' disappointment and anger.[1155] However, the sentence was reversed by the Supreme Court Chamber, sentencing the accused to life imprisonment,[1156] and consequently, bringing relief to the civil parties.[1157] Against this background, it can be asserted that the Court – through the sentences it rendered and the positive evaluation of victims – satisfied the civil parties' requests in this regard.

As far as the civil parties' requests for truth are concerned, as with their requests for justice, it is challenging to evaluate whether the Court may have satisfied their wishes, as the concept of 'truth' can have different meanings across civil parties.[1158] Admittedly, through the investigative processes, the trials, and finally, through the judgments, the Court attempted to establish the truth as to what has happened during the Khmer Rouge era and to the victims.[1159] This view was also articulated by the Supreme Court Chamber in *Case 001*; while acknowledging the limited tangible reparations in that case, it nonetheless held that the Court's work may have reparative value for victims, "achieved through the verification of the facts and full and public disclosure of the

[1152] Elisa Hoven and Saskia Scheibel, ''Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance?' (2015) 21 International Review of Victimology 161, 173-174

[1153] The results of a study with 101 civil parties in *Case 002* utilizing surveys as research method reported that ""most respondents were satisfied with the sentence but were not ready to forgive or to reconcile with the accused. Christoph Sperfeldt, Melanie Hyde and Mychelle Balthazard, 'Voices for Reconciliation: Assessing media outreach and survivor engagement for *Case 002* at the Khmer Rouge trials' (USAID Report, February 2016) 55

[1154] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 679

[1155] As reported by study of Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in *Case 001* at the Extraordinary Chambers in the Courts of Cambodia' (2011) International Review of the Red Cross 503, 540

[1156] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) disposition

[1157] As reported by John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press, 2014) 261

[1158] See also discussion on truth in the context of international criminal proceedings (ICC), wherein it is posited, "Either way, the 'truth' that is presented may not be the 'truth' to which others are receptive." Sofia Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity' (2015) 13 Journal of International Criminal Justice 973, 993

[1159] However, there is an entire literature arguing that there is a difference between the truth established by courts as they focus only on specific events i.e. judicial truth versus the historical truth, which adopts a holistic view on events. E.g. Robert Summers, 'Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases' (1999) 18 Law and Philosophy 497. Mina Rauschenbach, 'Individuals Accused of International Crimes as Delegitimized Agents of Truth' (2018) 28 International Criminal Justice Review 291

truth".[1160] In addition, it can also be argued that enabling the civil parties testifying in Court to address and ask questions to the accused might have been an attempt by the Court to contribute towards bringing the civil parties closer to the truth.[1161] Furthermore, some of the reparations measures awarded to civil parties in *Case 002* might bring further contribution to truth finding for victims.[1162] However, as far as how the civil parties themselves perceive the Court's approach in this regard, further insights are provided by empirical studies. In her study, Racher Killean investigated how the victims perceived the truth in the context of ECCC. She held that for several civil parties in *Case 001*, the accused person's cooperation and truth telling were of some value and consequently, they praised the Court for establishing a historical record and allowing the accused to provide a direct account of what happened.[1163] However, the civil parties were not as positive in *Case 002*, as the accused refused to acknowledge their guilt and assume responsibility for their crimes, which consequently reflected in anger and disappointment for the civil parties.[1164] Furthermore, other studies found that despite the fact that the Court rendered its decisions and sentences, the civil parties are still interested in finding the truth, through other mechanisms such as a Truth and Reconciliation Commission.[1165] Consequently, it appears that the ECCC did not manage to adequately respond to the civil parties' requests for truth. Admittedly, this is a common finding in regard to the international(ized) courts' role in finding the truth for victims,[1166] as foremost, these Courts do not have the mandate nor the capacity to establish what happened with each victim and as such, cannot fully satisfy the victims' requests in this regard.

Finally, as far the civil parties' requests for compensation are concerned, the Court could not satisfy them. As is known, the Court cannot award compensation to civil parties due to limitations inherent in its reparations mandate, which allows only for awards fitting the 'collective and moral' qualifications. This limitation was also acknowledged by the Supreme Court Chamber in *Case 001*, which compared the ECCC with the ICC and held that an institution similar to that of the Trust Fund for Victims was not foreseen by the drafters of the Internal Rules. Consequently, reparations at the ECCC were limited to providing moral rather than material benefits.[1167] Additionally, as studies reported, this resulted in disappointment for civil parties, as they generally thought that compensation would be the most helpful for them to deal with the Khmer Rouge past.[1168] Rachel Killean furthermore attributed the civil parties' disappointment to a failure of

[1160] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) 661

[1161] While the accused generally failed to recount the information the civil parties asked for in relation to the fate of their relatives, potentially resulting in the disappointment of civil parties, at times, they did provide more details on the crimes and general context, which might have been satisfactory for civil parties. See e.g. *Case 001* (Transcripts of Hearings, Trial Day 59) 001/18-07-2007-ECCC/TC (17 August 2009) 44-45

[1162] E.g., The measure in *Case 002/02* called 'Phnom Sampeou Community Peace Learning Center and Treatment of Buddhists during the Khmer Rouge regime' which entails truth-telling activities.

[1163] Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 179

[1164] Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 179

[1165] As per Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018) 119; Christoph Sperfeldt, Melanie Hyde and Mychelle Balthazard, 'Voices for Reconciliation: Assessing media outreach and survivor engagement for *Case 002* at the Khmer Rouge trials' (USAID Report, February 2016) 56

[1166] See also Elisa Hoven and Saskia Scheibel, ''Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance?' (2015) 21 International Review of Victimology 161, 180

[1167] *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) paras 657-660.

[1168] As found out by Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018) 12

expectation management in regard to the types of reparations available at the Court.[1169] It can be concluded that, due to the limitations embedded in the Court's legal basis,[1170] the Court could not satisfy the victims' request for compensation.

Before concluding this section, one other type of reparations measures emerging within the ECCC's context will be discussed, namely the 'non-judicial measures'. Pursuant to the amendment of the Internal Rules prior to the commencement of *Case 002*, the VSS was entrusted with "the development and implementation of non-judicial programs and measures addressing the broader interests of victims."[1171] As the Judges explained, they bestowed upon the VSS the mandate of developing non-judicial reparations 'outside of formalized court proceedings' in order to address the broader interests of victims. "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" and furthermore, "this creates the possibility to develop more ambitious programs than would otherwise be achievable within the ECCC's existing capacities and resources."[1172] The non-judicial measures included within the VSS's mandate are not linked with the accused's guilt, and as such, they may benefit all victims of the Khmer Rouge regime regardless of their admission as civil parties before the ECCC. In addition, the development and implementation of these reparations necessitates the "collaboration with governmental and non-governmental organisations external to the ECCC'"[1173] Consequently, it can be argued that the non-judicial measures resemble the assistance mandate of the ICC's TFV, which similarly does not require a link with the accused's guilt and which is funded by States.[1174]

In practice, the VSS's new mandate resulted in several non-judicial measures,[1175] including a national reconciliation event, Community Peace Learning Centres, a Victims Foundation, the construction of a stupa at Tuol Sleng,[1176] and a project titled 'Promoting Gender Equality and Improving Access to Justice for Female Survivors and Victims of Gender-Based Violence under the Khmer Rouge Regime'.[1177] As the evaluation report to the latter project posited, it helped over 2.200 female civil parties and 240 male civil parties, as well as close to 800 non-civil parties,

[1169] Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 140
[1170] Admittedly, it is unclear whether the Court would have been able to deliver compensation to victims even if it was not statutorily limited.
[1171] Internal Rules, Rules 12*bis*(4)
[1172] ECCC, '7th plenary session of the ECCC concludes' (Press release, 9 February 2010) <https://www.eccc.govkh/sites/default/files/media/Press_Release_Conclusion_7th_Plenary_Session_%28ENG%29.pdf> accessed 28 February 2020
[1173] Internal Rules, Rules 12*bis*(4)
[1174] But see research showcasing the differences between the two, with the TFV providing an institutional infrastructure and more clarity on what the assistance mandate's modalities and structure for reparations. Christoph Sperfeldt, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia' (2012) 12 International Criminal Law Review 457
[1175] As there is no official report of the VSS detailing all the non-judicial reparations it has engaged it, the list provided by Killean is useful in this regard. See Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 142
[1176] 'Inauguration of the Memorial to Victims of the Democratic Kampuchea Regime at Tuol Sleng Genocide Museum' (ECCC website) <https://www.eccc.govkh/en/node/32138> accessed 28 February 2020; for a detailed elaboration on the controversy surrounding this non-judicial reparation measure see Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 277
[1177] 'Victims Support Section of the ECCC secures funds from UN Trust Fund to End Violence against Women' (ECCC website) < https://www.eccc.govkh/en/node/36426> accessed 28 February 2020. Also 'Mobile Exhibition on "Forced Marriage during the Khmer Rouge Regime" and Intergenerational Dialogue' (ECCC website) < https://www.eccc.govkh/en/articles/mobile-exhibition-forced-marriage-during-khmer-rouge-regime-and-intergenerational-dialogue> accessed 28 February 2020

through psychological treatment, outreach, and educational activities as well as training on gender sensitivity to hundreds of lawyers, legal officers, and NGO staff.[1178]

Against this background, it appears that the non-judicial measures managed to reach and provide benefits to more victims of the Khmer Rouge regime, regardless of their status as civil party before the Court. In addition, they were beneficial to the wider Cambodian society and tackled important topics, for instance, the gender-based violence against men, whose suffering was undermined in the *Case 002/02* judgment.[1179] As such, these measures entail an acknowledgement of the collective harm suffered across the country, regardless of who is facing trials and who is legally entitled to 'collective and moral' reparations. At the same time, the development of non-judicial measures appeared to overlap with the 'moral and collective' reparations within ECCC trials. Indeed, as can be inferred from the VSS and Lead Co-Lawyers' Reparation Program 2013-2017, there is no difference between non-judicial measures and moral and collective reparations.[1180] While they are labelled differently in the Reparation Program, as conceded, "to ensure the implementation of the complete ECCC Reparation Program 2013-2017 independent from Judges' approval of granting Reparations, the requested reparations could also be implemented as Non-Judicial Measures once funding has been secured".[1181] Indeed, the difference between the collective and moral reparations awarded in *Case 002* and the non-judicial measures lies in their symbolic endorsement by Judges.[1182] As Sperfeldt reported, the endorsement by the Judges was considered important in practice, with the projects with potential of being endorsed by Judges being considered more 'worthy' than other non-judicial measures providing assistance to victims, and also attracting more funds from donors.[1183] While the non-judicial measures did provide some benefits to more victims, in practice, they acquired a lower relevance in the Court's jurisprudence in comparison to the moral and collective reparations.

III. Conclusion

According to the ECCC's Internal Rules, reparations at the ECCC may only be of collective and moral nature. As this analysis identified, these reparations materialized differently across the ECCC's practice, due to the Court's interpretation of its legal basis as well as the changes to the

[1178] Julian Poluda, Sineth Siv, Sotheary Yim, 'Final Evaluation Report Promoting Gender Equality and Improving Access to Justice for Female Survivors and Victims of Gender-Based Violence under the Khmer Rouge Regime: Final Evaluation of the ECCC Non-Judicial Gender Project' (Phnom Penh, Cambodia: United Nations Trust Fund to End Violence against Women, Victims Support Section of the Extraordinary Chambers in the Courts of Cambodia, Transcultural Psychosocial Organization Cambodia, September 2019)
<https://eccc.govkh/sites/default/files/reports/UNTFVAW_Cambodia_VSS_TPO_Final%20Evaluation%20Report%207Oct2019.pdf > accessed 28 February 2020

[1179] As held, "the Chamber, while acknowledging that men were subjected to sexual violence that was contrary to human dignity, is unable to reach a finding on the seriousness of the mental and physical suffering suffered by these men." ECCC (Trial Chamber: *CASE 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018) para 3701

[1180] VSS and Lead Co-Lawyers, 'ECCC Reparation Program 2013-2017 for the Victims of the Khmer Rouge Regime 1975-1979' (Phnom Penh, 14 January 2013) < https://vss.eccc.govkh/images/stories/2014/Reparation.pdf > accessed 28 February 2020

[1181] VSS and Lead Co-Lawyers, 'ECCC Reparation Program 2013-2017 for the Victims of the Khmer Rouge Regime 1975-1979' (Phnom Penh, 14 January 2013) 16

[1182] As Sperfeldt wrote, the difference between the two is not as clear even within the VSS, including in his dissertation paragraphs from an interview he held with a Cambodian ECCC officer working on victim issues. As he reports, the officer wondered, "why do you have two? One is reparations, and one is non-judicial measures; both of them are actually reparations projects." In Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 292

[1183] Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Unpublished dissertation, Australian National University, 2018) 294

Internal Rules, which in turn displayed different responses to the civil parties' harm and preferences for reparations across time. In addition, the analysis also identified additional measures that started to emerge in the context of the ECCC and which may amount to reparations for civil parties. As such, this section will recall the results of the analysis and elaborate on the Court's potential contribution to substantive justice to civil parties under its jurisdiction.

As this research found, as far as the collective and moral reparations awards in *Case 001* are concerned, the Court rejected the majority of civil parties' requests, limiting the awards to two symbolic reparations measures. The analysis posited that the Court displayed a restrictive approach to the interpretation of the Internal Rules, rooted in pragmatic and legal considerations (i.e. the indigence of the accused and its inability to place orders upon the Government of Cambodia), rather than informed by the harm suffered by civil parties or their preferences for reparations. However, in *Case 002,* the Court changed its approach; amid acknowledgement of the limited reparations measures awarded in *Case 001*, it amended its Internal Rules as to introduce a new avenue for civil parties to benefit from reparations at the ECCC – through reparations projects secured by the Lead Co-Lawyers and the VSS. Consequently, due to the efforts of the Lead Co-Lawyers and the VSS, in liaison with local NGOs and with funding from external donors, the reparations measures awarded in the two segments of *Case 002* responded to nearly all the civil parties' requests for reparations, taking thus into account their harm and preferences. Contrary to *Case 001*, the Court's approach to reparations in the two segments of *Case 002* was rooted in consideration of the civil parties' harm, whose acknowledgment brought about an important symbolic value for civil parties. At the same time, since these reparations were not direct against the accussed, by adopting this approach, the Court undermined the underlying scope of reparations within a judicial context and their link to the criminal responsibility of an accused. The Court resumed itself to reviewing the reparations projects and endorsing them as judicial reparations as long as they fulfilled the legal requirements inscribed in the newly amended Internal Rules.

In addition, next to the collective and moral reparations awarded by the ECCC, the analysis identified additional reparations measures that started to emerge in the context of the ECCC, namely, measures that the civil parties requested during their oral testimonies before the Court and the non-judicial measures. As such, amid requests by civil parties across the three cases clustered into requests for justice, punishment, truth, and compensation, the analysis identified that the Court appeared to partly satisfy the civil parties' requests in this regard. While the Court appeared to satisfy the civil parties' requests for justice and punishment, it did not satisfy their requests for truth and compensation. However, as held, the failure on the Court's side is due to limitations inherent in the Court's legal framework and its functioning. Furthermore, as far as the non-judicial measures are concerned, the analysis revealed that they have the potential to provide benefits to more victims beyond the civil party population, and respond to harm incurred to victims beyond the harm established by the Court in its judgment, such as, for instance, the harm to male victims of sexual violence. At the same time, as the analysis revealed, the non-judicial measures did not establish themselves as a robust practice within the ECCC's context, as *in concreto*, they are very much similar to the collective and moral reparations awards and consequently, they result in a competition over which ones are more 'worthy' or should receive funding from donors.

Against this background, the ECCC's potential contribution to substantive justice through the tangible reparations it awards is a complex matter. Amid the Court's limited practice on reparations in *Case 001*, which failed to a large extent to respond to the civil parties' requests and preferences

for reparations, in *Case 002*, the Court enabled the civil parties to benefit from extensive reparations measures which responded to their requests and preferences. However, in doing so, the Court relinquished its responsibility to potentially contribute to substantive justice for civil parties and instead placed this responsibility upon actors entrusted with support roles in the realization of reparations. Admittedly, this appeared as a necessary compromise, to overcome its statutory limitations and to enable close to 4000 civil parties to benefit from tangible reparations at the ECCC. Indeed, due to the financial requirements clause included by the Internal Rules, the majority of the reparations awards had already been implemented or were in the process of being implemented by the time the Court rendered its decisions.[1184] In addition, as studies revealed, the civil parties generally appraised positively the reparations awards, underlying thus the relevance of the Internal Rules' amendment, albeit with some limitations due to alleged gaps in the civil parties' knowledge regarding the existence of these measures, which indicate limitations that need to be addressed to ensure a functioning reparations regime at the ECCC. As such, while it can be argued that the reparations awarded in the context of the ECCC may contribute to a large extent to substantive justice for civil parties at the ECCC, as this research posits, it is hardly the sole merit of the Court. Instead, as with procedural justice, substantive justice for civil parties at the ECCC appears to be the outcome of ceaseless efforts by actors from both inside and outside the Court, which adapted their working methods across time to respond as much as possible to the shortcomings of the ECCC system as well as to the civil parties' needs and preferences.

4. Final Considerations: Reparative Justice at the ECCC

The ECCC came into existence in 2007, to prosecute those most responsible for the crimes committed under the Khmer Rouge regime. Twisted between instating international standards in a country already grappling with massive trauma, poverty, and corruption, and responding to a people's calls for justice, the ECCC seemed to many as the last hope to provide closure and deliver justice to the Cambodian society.[1185] As the ECCC's negotiating history shows, it emerged as a result of protracted negotiations spanning nearly 20 years, and was riddled with political interference, compromises, and skepticism. The UN representatives were concerned over the independence, impartiality and objectivity of a tribunal with majoritarian Cambodian involvement and instead advocated for international standards of justice and due process of law. On the other hand, the Cambodian Government insisted that the UN's role should be limited to providing assistance, and that trials should be carried out in accordance with national laws, with a majority of national involvement, and with due respect to the sovereignty of Cambodia.

The ECCC emerged as a hybrid or international(ized) Court, embedded within the national court system, and operating under its Internal Rules. One significant feature of the ECCC's legal basis is its progressive approach to victims and their rights, enabling victims to participate as fully fledged civil parties within international criminal trials and enabling them to benefit from rights

[1184] In both segments of *Case 002*, by the time the Court issued its decisions, the civil parties' representatives and the VSS had already safeguarded funds for the implementation of the awarded measures. In addition, H.E. Kranh, an acting Director of ECCC stated that most of the eleven reparations requests granted by the Court in *Case 002/01* were funded and implemented successfully throughout the country. See 'Results of Forum on Developments of ECCC's Proceedings and Reparations in *Case 002/02*' (ECCC Website, 30 June 2016)
<https://www.eccc.govkh/sites/default/files/media/Press%20Release%20forum%20VSS%2030%20June.pdf> accessed 15 April 2020. See also section 3.2.2. on Length.

[1185] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (University of Michigan Press, 2014) 8

such as the rights to protection, information, and reparation.[1186] Importantly, the Internal Rules' progressive approach to victims and their rights is due to the rules' crafting by the newly elected Judges of the Court. Amid scarce reference to victims in the Court's constituting documents, the Judges created the Internal Rules drawing on national and international law while incorporating the characteristics of the Cambodian conflict - mass crimes and a large number of victims.
The Internal Rules also provided for a reparations regime to be enforced by the Court. The reparations regime is an important source for the ECCC's praise,[1187] and it derives from the important work on the Internal Rules by the Court's Judges.[1188] Pursuant to the ECCC's reparations regime, victims can avail themselves of a multitude of prerogatives in relation to the process of obtaining reparations as well as the outcome of the process. As such, in the process of obtaining reparations at the ECCC, the victims may participate in the trial as civil parties and submit claims for reparations, as well as benefit from legal representation, information, and assistance. Furthermore, in regard to the outcome, the victims may receive tangible reparations of collective and moral nature. Importantly, these prerogatives are all organized and facilitated by specialized organs within the ECCC, of which notable are the VSS and the Public Affairs Section.

This chapter set out to empirically analyze how the ECCC' reparations regime was transposed across the three cases it adjudicated and to assess its potential contribution to reparative justice for the victims under its jurisdiction. Employing the operationalization of reparative justice as procedural justice and substantive justice, the analysis of the ECCC's jurisprudence extensively focused on how the process- and outcome- related prerogatives materialized across the ECCC's practice. In doing so, this chapter analysed a variety of judgments and documents pertaining to its three cases, *Case 001*, *Case 002/01*, and *Case 002/02*. They consist of the transcripts of trial days featuring oral testimonies of 120 civil parties during Court proceedings, the Court's decisions, as well as the legal representatives' submissions on civil parties' behalf, eliciting their wishes and preferences in regard to reparations.

The findings of the current inquiry demonstrate that transposing the reparations regime to concrete cases adjudicated before the ECCC and consequently contributing to reparative justice for civil parties is a deeply intricate matter. To begin with, as in the case of the ICC, the victims' access to ECCC is limited by several layers of selection. They consist in jurisdictional limitations embedded in the Court's legal architecture as well as manner whereby various organs of the Court, such as the Co-Prosecutors, the Co-Investigating Judges, the VSS, and the Chambers exercise their respective mandates. In addition, these layers are compounded by the Internal Rules' ambiguous nature as well as local politics, resulting in a reduced number of victims accessing the Court, especially when compared to the 1.7 million victims estimated to have perished in the Cambodian conflict.[1189] Despite these limitations, this analysis focused on the Court's potential contribution to justice for these victims who did gain access before the ECCC, the so-called civil parties.

[1186] E.g. Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 Genocide Studies and Prevention: An International Journal 19. Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011) 221-223
[1187] E.g. Brianne McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls' (2012) 12 International Criminal Law Review 375, 387. Johanna Herman, 'Realities of Victim Participation: The Civil Party System in Practice at the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (2012) 16 Contemporary Justice Review 461, 462
[1188] Stan Starygin, 'Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC): Setting an Example of the Rule of Law by Breaking the Law?'(2010) 3 Journal of Law and Conflict Resolution 20
[1189] David P. Chandler, Voices from S-21: Terror and History in Pol Pot's Secret Prison (University of California Press, 2000)

The ECCC's transposition of its reparations regime to concrete cases revealed shortcomings as well as constant adjustments in relation to the Court's approach to victims and their process- and outcome- related prerogatives across its cases, which consequently yielded implications for civil parties and influenced the Court's potential contribution to procedural justice and substantive justice. In regard to procedural justice, voice, information, and interaction materialized in the Court's first case mainly because of initiatives from local NGOs, as well as the *pro-bono* work by civil parties' lawyers. In *Case 002*, they strengthened as a result of the Internal Rules' amendment by Judges and due to external funding by donors, which enabled Court organs and actors such as the VSS and the legal representatives to pursue their statutory functions. Overall, the Court's potential contribution to procedural justice has been appraised as intricate. Whereas *Case 001* elicited the Court's questionable approach towards victims and the realisation of their prerogatives, *Case 002* marked a departure from this approach, as the victims appeared to become an important concern for the Court while the realisation of the victims' prerogatives flourished due to efforts from both inside and outside the Court. Taking into account the Court's practice as well as its positive evaluation by civil parties, it can be asserted that the ECCC managed to have a relatively positive impact with regard to procedural justice for the civil parties under its jurisdiction. However, the ECCC's potential contribution to procedural justice is not as much the sole merit of the Court but of concerted efforts internal and external to it, which proved critical throughout the cases.

Furthermore, as far as substantive justice is concerned, the tangible reparations awarded in *Case 001* differed significantly from those in *Case 002*. In addition, while the awards in *Case 001* generally failed to respond to the civil parties' requests for reparations as well as take into account the harm suffered by civil parties, *Case 002* responded to the majority of civil parties' requests and took into account and acknowledged the immeasurable harm suffered by them. The Court's potential contribution to substantive justice, which mainly benefitted the civil parties in *Case 002* than *Case 001*, is owed to the amendment of Internal Rules by the Judges, which expanded the ECCC's reparations regime, to introduce a new avenue of reparations to benefit the civil parties. However, it resembles much more reparations as developed in the context of developmental programs. At the same time, this amendment also entailed a trade in responsibility for reparations, with the burden for reparations placed on the VSS, Lead Co-Lawyers and other external actors. As such, the Court's potential contribution to substantive justice is not the sole merit of the Court. It is rather the outcome of ceaseless efforts by actors from both inside and outside the Court, which adapted their working methods across time to respond as much as possible to the shortcomings of the ECCC system as well as the civil parties' needs and preferences.

To conclude, evaluating the ECCC's potential contribution to reparative justice by means of its reparations regime is a challenging endeavor; while reparative justice for civil parties in the context of the ECCC has certain positive attributes, the merits cannot be singularly attributed to the Court. Instead, as the analysis revealed, reparative justice emerged as a result of concerted efforts of actors from both inside and outside the Court, eliciting a proactive approach to tackling limitations relating to financial resources, Court capacity, legal framework and the implementation of reparations. The involvement and work carried out by local NGOs, the *pro-bono* work by lawyers, the amendment of Internal Rules by Judges to respond to criticism after the first trial, as well as the expansion and successful enforcement of the VSS and the Lead Co-Lawyers' mandates are all examples of proactive efforts, eliciting commitment to the civil parties' cause and the realisation of their rights. Reparative justice for civil parties in the context of the ECCC has a unique quality,

as it is shaped in the space between challenges and solutions unique to the Cambodian context, and importantly, was appraised positively by a large number of civil parties.

At the same time, the ECCC's work in relation to reparative justice marked important milestones in international criminal justice. In a historical endeavor in the context of international criminal trials, the ECCC enabled civil parties to narrate their stories during proceedings, as well as allowed over 4000 civil parties to participate and benefit from reparations. Consequently, the ECCC brought an important contribution to the development of international criminal justice,[1190] demonstrating that the involvement of victims of mass crimes within international criminal trials can be realised, as well as has the potential to bring important benefits for victims.[1191] However, it also elicited the difficult role of reparations within international criminal trials, with a focus on the causal link between tangible reparations and the guilt of the accused. As the ECCC case illustrates, the indigence of accused persons as well as a lack of a mechanism to fund reparations rendered the link between reparations and the accused's responsibility futile in practice. To be precise, in *Case 001*, the causal link and its narrow interpretation by the Judges resulted in almost no reparations for civil parties, whereas in *Case 002*, the only prospect for civil parties to benefit from reparations was for the Judges to weaken the causal link through the Internal Rules' amendment. On the one hand, the first case illustrates that the inclusion of reparations in the context of international criminal law, on the premise that individuals should be held responsible for the criminal acts they perpetrated,[1192] appears a fallacy, rendering the victims' chances of receiving reparations from the harm suffered highly unlikely. At best, it may have symbolic value. On the other hand, the second case elicits immediate benefits for victims, in that they receive tangible reparations for the harm suffered, but it also results in a dilution of the role of reparations within international criminal trials. Indeed, placing the responsibility for reparations outside the link between harm and the accused's guilt positions the reparations in the sphere of developmental programs rather than of international courts.[1193] In addition, it undermines the progress made of including victims as fully-fledged parties and attempting to safeguard their rights in the context of international criminal justice.[1194] As such, the ECCC example illustrates a conundrum regarding the role of reparations within international criminal trials. Individual criminal responsibility remains a relevant principle in relation to reparations in the context of international courts, due to its symbolic importance for victims, in that the perpetrators of crimes are punished for their

[1190] See also Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 Genocide Studies and Prevention: An International Journal 19, 25

[1191] Admittedly, as demonstrated in this chapter, the large number of civil parties participating before the ECCC, especially in *Case 002* resulted in limitations to the process-related prerogatives; this concerns, for instance, the situation when the Lead Co-Lawyers were instated as representatives of civil parties in the context of proceedings, and not the lawyers they personally chose. See section 3.2.2. I. Voice. See also article by Elisa Hoven discussing the challenges to the accused's rights "Balancing the rights of civil parties and the guarantee of procedural fairness for the accused proved to be one of the ECCC's most significant challenges." Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2014) 12 Journal of International Criminal Justice 81, 97

[1192] See also at the ICC, Peter Lewis and Hakan Friman, 'Victims and Witnesses' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International, 1999) 478

[1193] For a difference between the two see Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 454. See also Ruben Carranza, 'Relief, Reparations and the Root Causes of Conflict in Nepal' (ICTJ, 2012)

[1194] See criticism of former international ad-hoc tribunals for failing to acknowledge victims and their rights. Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?' (2013) 7 The International Journal of Transitional Justice 518. See also research appraising the evolution of victims from a forgotten to a fully-fledged party in criminal justice. Antony Pemberton, 'Respecting victims of crime' in in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge Research, 2014) 32

criminal acts[1195] and may attempt to repair the harm caused. In addition, the victims' harm suffered because of those criminal acts is acknowledged and recognized in the context of international criminal trials.[1196] However, the premise that the individual can assume (financial) responsibility for perpetrating international crimes does not appear to have relevance in practice. To make reparations for victims of mass atrocities a reality, the inclusion of additional mechanisms within international criminal courts' mandates, such as the ICC's TFV, appears essential to the realisation of reparations.

[1195] As argued at length above, the accused' punishment, to the harshest degree possible, appeared one important request by the civil parties.

[1196] See section 3.2.2. on procedural justice, eliciting how victims appreciated their involvement with the ECCC, through oral testimonies, legal representation, and through attendance of Court hearings.

Chapter 5: The European Court of Human Rights and its Reparations Regime: Reparative Justice for Victims of Gross Human Rights Violations?

Introduction

This chapter aims to assess the European Court of Human Rights' (hereinafter 'the ECtHR' or 'the Court') potential contribution to reparative justice for victims by means of its reparations regime. In doing so, this chapter is divided into four sections. After the brief introduction, the first section will provide an immersion into the establishment of the Court, focusing on its institutional evolution as well as how the role of individuals before the Court evolved. The second section will provide a detailed overview of the Court's reparations regime, delving into how reparations for victims became incorporated into the ECtHR's mandate and consolidated as a reparations regime. Furthermore, it will detail the reparations regime's prerogatives statutorily bestowed upon victims in relation to the process and outcome of the reparations proceedings, as well as who can be entitled to reparations at the ECtHR. The third section will explain the methodological choices for the selection of cases analyzed in the current chapter, followed by the core of this chapter, the results of the analysis of how the ECtHR's reparations regime is transposed in practice and its potential implications for victims, structured alongside procedural justice and substantive justice sections. By analyzing 74 cases adjudicated by the ECtHR involving gross human rights violations in Europe, this section will paint a comprehensive outlook of how the ECtHR's reparations regime is materialized in practice. Furthermore, by drawing on the ECtHR's jurisprudence as well as insights from the theoretical framework, this section will also provide an assessment of how the ECtHR, through its reparations regime, may potentially contribute to reparative justice for victims. Particularly, this section will elaborate on how the elements that inform the victims' perception of procedural justice and substantive justice pan out in practice, what implications they have for the victims, and how the victims might perceive them. The final section will put forward final considerations of the ECtHR's potential contribution to reparative justice for victims by means of its reparations regime.

1. The Establishment of the ECtHR

1.1. Institutional Evolution

The ECtHR was established in 1959, with the mandate to, *inter alia*, deliver legally binding and enforceable judgments denouncing States' violations of human rights.[1197] The Court's founding document is the European Convention on Human Rights (hereinafter 'ECHR' or 'the Convention'), which entered into force on 3 September 1953 under the auspices of the Council of Europe (CoE).[1198] The ECHR emerged as the first legally binding instrument worldwide committed to the maintenance, realization, and enforcement of human rights and fundamental freedoms.[1199] It was hailed as the most successful manifestation of the Universal Declaration of

[1197] Elisabeth Lambert Abdelgawad, 'The Execution of Judgments of the European Court of Human Rights' (Council of Europe Publishing, 2008) 7 <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf> accessed 15 April 2020. In doing so, it applies the ECHR and the Rules of the Court.

[1198] The ECHR was signed on 4 November 1950 in Rome and it entered into force after ratification by Luxembourg, the 10th State to do so. The founding states of the CoE are Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. See 'Founding fathers' (CoE Website) <https://www.coe.int/en/web/about-us/founding-fathers> accessed 15 April 2020

[1199] 'European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4,

Human Rights's aspirations, creating the most effective system of international protection of human rights in existence.[1200] Next to the European Court of Human Rights,[1201] the ECHR also established the European Commission on Human Rights – dissolved with the entry into force of Protocol 11 in 1998[1202] - and the Committee of Ministers, which is the decision-making body of the CoE, invested with the power of overseeing the execution of the ECtHR's judgments.[1203] In addition, the ECHR also laid the basis for the first international procedure of petitions,[1204] employed to denounce the States' failure to guarantee the human rights embedded in the Convention or its Protocols to individuals within their jurisdiction.[1205]

Historically, the European human rights system emerged in a critical moment for the European and world history, right after the Second World War. As such, its founding fathers, a handful of Western European States, were motivated by a clear goal: "to come up with a human rights document enshrining its ardent belief in human rights and democracy".[1206] Despite their ambitions, the negotiation process was characterized by competing visions and compromises, as it became clear that a number of States were opposed to a human rights convention that would threaten their sovereignty with the creation of a Court or other bodies, which individuals would use against governments.[1207] As Ed Bates articulated, in its final form, the Convention was an ambivalent instrument. Amid fears of installation of totalitarian or communist regimes in Europe, the ECHR was instilled with the hope that it will be a collective pact against totalitarianism, while others hoped that it would become a constitutional instrument for the 'new' Europe, a European Bill of Rights.[1208] In regard to the Court, the drafters envisioned that it would fulfill four functions. First, it would be the expression of 'an abstract constitutional identity' prescribing limits, in terms of human rights, to the exercise of public power in European liberal democracies committed to the rule of law. Second, it would be an early warning device for States to report on other States' unlawful behavior that risked slipping into authoritarianism. Third, it would preserve democracy in Europe and prevent war, and fourth, it would make Western Europe a more cohesive unit in the Cold War, with a clear sense of collective purpose in case of escalation.[1209]

Amid initial optional clauses on the individual petition system and the Court's jurisdiction, due to the States' reluctance to be subjected to scrutiny, the relevance of the ECtHR did not transpire

6, 7, 12, 13 and 16' (CoE, 4 November 1950) <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=>

[1200] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 3

[1201] Jonathan L Black-Branch, 'Observing and Enforcing Human Rights under the Council of Europe: The Creation of a Permanent European Court of Human Rights ' (1996) 3 Buffalo Journal of Internatonal Law 1, 7

[1202] 'Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby' (CoE, 1 November 1998) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/155> accessed 15 April 2020

[1203] 'Statute of the Council of Europe' (CoE, 5 May 1949) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001> accessed 15 April 2020

[1204] Antoine Buyse, *Post-Conflict Housing Restitution: the European Human Rights Perspective with a Case Study on Bosnia and Herzegovina* (Intersentia, 2008) 18

[1205] ECHR, art 1; the present day content of the ECHR is amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, which throughout time amended the structure and content of the ECHR and its institutions.

[1206] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 5-6

[1207] See e.g. Steven Greer, 'What's Wrong with the European Convention on Human Rights?' (2008) 30 Human Rights Quarterly 680, 681

[1208] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 5-6

[1209] Steven Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006) 56-57

until early 1970s, when it finally started deciding on more cases, including high profile cases.[1210] For instance, it adjudicated *Tyrer v. UK Case*, wherein the Court famously held that the Convention is a 'living instrument' that 'must be interpreted in the light of present-day conditions'.[1211] This method of interpretation then became a hallmark of the ECtHR's jurisprudence and influenced its subsequent cases. Furthermore, since the ECHR's membership entailed for a long time democratic States with the rule of law engrained in their legal culture, the Court's jurisprudence initially entailed isolated and distinct cases of human rights violations relating to relatively minor deficiencies in the States' internal law.[1212] However, the European human rights system of protection changed dramatically starting with 1980s and through the 1990s, with increased ratification of the ECHR by more States as well as their unanimous acceptance of the Convention's optional clauses on individual petition and Court jurisdiction.[1213] Subsequently, this increased both the number of cases reaching the ECtHR, through the then referral system via the Commission, as well as the importance attached to the position of individuals before the Court.

1.2. Development and Evolution of the Individuals' Role within the ECtHR System

Nowadays, the individuals' role before the ECtHR, to bring individual petitions before the Court alleging human rights violations and to claim reparations, lies at the heart of the ECtHR protection system.[1214] However, this was a gradual development, spanning several decades. In-depth research relating to the position of the individual in the ECHR system elicits that the role of individuals before the Court remained an afterthought for the States Parties, inasmuch as it took almost 40 years to provide individuals with a legal standing, albeit limited, before the Court.[1215] Initially, the ECHR drafters wished that the Convention included a 'collective guarantee' mechanism involving a procedure of inter-State and individual complaints to be adjudicated by a court and a commission with investigation and conciliation powers.[1216] However, division in opinions amongst the negotiating States led to an initial protection system where the Court's jurisdiction and the individual petition system retained an optional character, remaining up to the States whether they accepted to subject themselves to their scrutiny. The system entailed that States would report other States' unlawful conduct and individuals would not have a right of individual petition before the Court.[1217] As such, the original purpose of the ECHR protection system was not to provide justice at the individuals' level.[1218]

[1210] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 19

[1211] *Tyrer v United Kingdom* (1978) Series A no 26

[1212] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 18

[1213] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 19

[1214] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 239

[1215] For a comprehensive overview of the evolution of the individual's legal standing before the ECtHR see Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (Oxford University Press, 2018) 168-193. She explained that the Commission and the Court had a pivotal role in the enhancement of the individual's status before the ECtHR. Both organs contended that not giving the individual a standing before the Court goes against the 'equality of arms' principle as well as the spirit of the ECHR. See also the article underpinning a section in her book: Astrid Kjeldgaard-Pedersen, 'The Evolution of the Right of Individuals to Seize the European Court of Human Rights' (2010) 12 Journal of the History of International Law 267

[1216] Egbert Myjer, Leif Berg, Peter Kempees, Giorgio Malinverni, Michael O'Boyle, Dean Spielmann, Mark E. Villiger, Jonathan Sharpe, 'The Conscience of Europe: 50 Years of the European Court of Human Rights' (Third Millennium Publishing, 2010) 19

[1217] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 239

[1218] Mikael R Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) 32 Law and Social Inquiry 137, 139-140; Janneke H. Gerards,

However, as reported, the role of individuals before the Court has started to slowly develop across time, due to the Court's expansion of its own procedures.[1219] In the first cases before the Court, the individuals did not even have a standing; the parties to the case were the Commission – defending the public interest – and the respondent State concerned.[1220] Nonetheless, the Court slowly enabled the Commission to present the individuals' views before the Court and then allowed the individuals, through their lawyers, to intervene before the Court, initially to only assist the Commission, but then to advocate before the Court on their own behalf.[1221] The Court's Revised Rules of 1982 officiated the role of individuals to participate before the Court via a lawyer who could bring applications, legal submissions, and requests for just satisfaction on the individuals' behalf.[1222] Acceptance of the individuals' role before the Court further cemented with the States Parties accepting the individual petition system, acknowledging the individuals' right to bring petitions before the Court,[1223] and then with the adoption of Protocol 9 in the early 1990s. Through Protocol 9, the applicants' access to the Court through the former European Commission of Human Rights was abolished and instead it empowered individuals to have recourse to the Court by themselves as long as the Commission had not declared their application inadmissible.[1224]

The entry into force of Protocol 11 in 1998 changed dramatically the ECHR landscape regarding the individuals' right to bring petitions and claim just satisfaction, both in terms of norms and practice.[1225] The ECtHR gained the status of a full time Court,[1226] the Commission was abolished,

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Lize R. Glas, 'Access to justice in the European Convention on Human Rights system' (2017) 35 Netherlands Quarterly of Human Rights 11, 17

[1219] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 403

[1220] See *Lawless v Ireland* (no 1) (1960) Series A no 1

[1221] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 403

[1222] ECtHR, Revised Rules of the Court (24 November 1982), Rules 30-31 <https://www.echr.coe.int/Documents/Library_1982_RoC_Revised_Nouveau_BIL.PDF> accessed 15 April 2020. This change also entailed that the Commission's role was not to represent the applicant anymore, but to remain the defender of the public interest. Paul Mahoney, 'Developments in the Procedure of the European Court of Human Rights: the Revised Rules of the Court' (1983) 3 Yearbook of European Law 127, 130

[1223] Steven Greer, 'What's Wrong with the European Convention on Human Rights?' (2008) 30 Human Rights Quarterly 680, 682

[1224] See 'Explanatory Report to the Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome' (CoE, 6 November 1990) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5dd> accessed 15 April 2020. However, the amendments brought forward by Protocol 9 remained rather limited, due to its optional character.

[1225] As the explanatory report to protocol 11 explains, "The reform proposed is thus principally aimed at restructuring the system, so as to shorten the length of Strasbourg proceedings. There is need for a supervising machinery that can work efficiently and at acceptable costs even with forty member States and which can maintain the authority and quality of the case-law in the future." 'Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby' (CoE, 11 May 1994) para 23 <https://rm.coe.int/16800cb5e9> accessed 15 April 2020

[1226] At its inception, the Court struggled to maintain narrow legal authority; its limited influence resulted from two reasons: the small caseload during the first fifteen years of operation and the reality that key member states of the ECHR, such as France and the United Kingdom, were unwilling to accept the Court's jurisdiction out of fear that it would interfere in the decolonization struggles of the period. See Mikael Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 Law and Contemporary Problems 141, 142. For an overview of the former human rights protection system, consisting of the now abolished European Commission of Human Rights and the European Court of Human Rights, see Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 7. Before the entry into force of Protocol 11, the Committee of Ministers detained a different function too, which in addition to today's political attributions relating to the implementation of Court's judgments, consisted in a quasi-judicial function. Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 14

and the right to individual petition became compulsory for all States Parties to the CoE.[1227] Accordingly, individuals who fulfilled the admissibility criteria set out by article 35 ECHR could file complaints directly with the ECtHR,[1228] alleging violations of human rights. Subsequently, the applicants could also make claims for reparations for their human rights violations, under article 41 ECHR, labeled as 'just satisfaction' (former article 50 before the entry into force of Protocol 11).

Prior to the entry into force of Protocol 11, the Court's decisions on just satisfaction were limited, although the Court retained such prerogatives since it started its operations. For instance, the Court issued its first decision on just satisfaction in 1972, a case in which it rejected the claims for moral and material damages as ill founded,[1229] although it had found an article violation.[1230] In another emblematic judgment concerning a violation of the applicant's right of access to a court and respect for correspondence, the Court held that the finding of a violation amounts by itself to just satisfaction,[1231] establishing thus the controversial practice of 'declaratory judgments'.[1232] However, with the geographical expansion of the CoE, as to include States from the Eastern bloc and the reforms brought about by Protocol 11,[1233] the Court started receiving a rapidly growing number of applications and subsequently, started expanding its jurisprudence considerably. Importantly, many of the cases the Court started to receive involved gross human rights violations in the context of internal armed conflicts, as several States joining the CoE in the late 1990s presented challenging internal situations.[1234] Until that time, the Court's case law on gross human rights violations was limited;[1235] however, these changes entailed that the ECtHR started to expand its jurisprudence to include gross human rights violations cases and reparations tailored to such cases.[1236]

[1227] Discussions about granting individuals a locus standi in the Court system date back to 1948, but became possible with the entry into force of Protocol 9 in 1994. However, the practical relevance of Protocol 9 can be challenged on grounds of its optional character, which left a considerable margin of appreciation for the States in this regard. See 'Explanatory Report to the Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome' (CoE, 6 November 1990); 'Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (CoE, 6 November 1990)

[1228] 'Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby' (CoE, 11 May 1994)
<https://www.echr.coe.int/Documents/Library_Collection_P11_ETS155E_ENG.pdf> accessed 15 April 2020

[1229] Despite the fact that the term 'damage' is encountered across ECtHR's terminology rather than 'harm' (encountered previously across ICC and ECCC's terminology), in practice, the ECtHR is using them interchangeably and there is no difference between them. See also Szilvia Altwicker-Hàmori, Tilmann Altwicker, Anne Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights' (2016) 76 Heidelberg Journal of International Law 1, 7

[1230] *De Wilde, Ooms and Versyp v Belgium* (Article 50) (1972) Series A, no 14, paras 24-25

[1231] *Golder v the United Kingdom* (1975) Series A no 18, para 46

[1232] The Court's practice was, for instance, criticized by Judge Bonello. See dissenting opinion of Judge Bonello in Nikolova v Bulgaria [GC], no. 31195/96, ECHR 1999-II. See also Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 195

[1233] See Mikael Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 Law and Contemporary Problems 141, 143

[1234] See Christine Evans, *The Right to Reparation in International Law for Victims of Armed* (Cambridge University Press, 2012) 64

[1235] See Pietro Sardaro highlighting that the situation in South East Turkey was one of the first situations involving gross human rights violations that the Court has dealt with, in Pietro Sardaro,'Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court' (2003) 6 European Human Rights Law Review 601. Similarly, see also Menno T. Kamminga who develops on situations of gross human rights violations brought to the Court's attention by means of Inter-State complaints, in Menno T. Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations' (1994) 12 Netherlands Quarterly of Human Rights 153

[1236] For the purpose of this study, it is worth noting that the ECHR does not include provisions on gross human rights violations or international crimes as such. However, the Court, in its jurisprudence, has held that several human rights violation, including inter

2. Legal Framework on Reparations

Individuals claiming to have been victims of human rights violations have the right to submit claims before the ECtHR as well as to request reparations under article 41 on just satisfaction. By looking at the Court's legal framework on reparations, this section will establish the prerogatives that individuals enjoy at the ECtHR, in relation to the process of obtaining reparations and the outcome of the process, as well as who can potentially benefit from reparations before the ECtHR. The next section will delve into the travaux préparatoires of the reparations regime, to understand the initial intentions underlying its drafting.

2.1. Travaux Préparatoires

The inclusion of a reparations regime within the Court's mandate emerged following intense negotiations and compromises. According to the travaux préparatoires, the negotiations which led to the adoption of the ECHR included discussions about a compensatory mechanism to tackle the consequences of potential human rights violations by States, that the Court could enforce.[1237] The initial draft of the ECHR endowed the ECtHR with more extensive powers in the aftermath of a finding of a violation. As proposed, the Court "may either prescribe measures of reparation or it may require that the State concerned shall take penal or administrative action in regard to the persons responsible for the infringement, or it may demand the repeal, cancellation or amendment of the act".[1238] However, this proposal spurred intense debates and the prevailing attitude was against offering prerogatives to the Court to interfere with the internal affairs of States and force upon them changes at the national level.[1239] There were also supporters of these expansive prerogatives, especially on the French side, positing that the Court should be a mechanism for the individuals' protection from a potential dictatorship.[1240] What was needed, according to the French, was not a Court dealing with small judicial errors by a State but a Court with powers over the legislative, judicial and executive acts of a State. Despite this enthusiasm, the drafters settled on bestowing upon the Court a much limited reparations mandate, the power to award 'just satisfaction' to the injured party, all the while emphasizing that the primary obligation to remedy violations by means of reparations pertained to the States. As one negotiator explained, by enabling the Court to order reparations, the list of rights included in the ECHR is endowed with "not only moral and philosophical, but also legal" value.[1241] In addition, the negotiations also revealed the aim of 'just satisfaction', inferred from the negotiators' understanding that in most cases the damage incurred by human rights violations cannot be fully restored, but rather compensated for.[1242] As agreed upon, 'just satisfaction' would include indemnities to victims, damages and

alia, violations of the right to life, prohibition against torture, and the right to freedom, amount to gross human rights violations. See e.g. Abakarova v Russia App no 16664/07 (ECtHR, 15 October 2015). This matter will be discussed extensively in section 3.1.

[1237] William A. Schabas, The European Convention on Human Rights: A Commentary (Oxford University Press, 2015) 830

[1238] William A. Schabas, The European Convention on Human Rights: A Commentary (Oxford University Press, 2015) 830.

[1239] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 86

[1240] William A. Schabas, The European Convention on Human Rights: A Commentary (Oxford University Press, 2015) 832

[1241] William A. Schabas, The European Convention on Human Rights: A Commentary (Oxford University Press, 2015) 832

[1242] See also Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 16

interests, and would exclude prerogatives to amend or annul unlawful laws or to impose a certain line of conduct at the State level.[1243]

2.2. Reparations Regime

The ECtHR's reparations regime is set forth in the ECHR and the Rules of the Court, which provide further clarification to the ECHR and the Court processes.[1244] The core of the reparations regime is article 41 ECHR on just satisfaction, which enables the Court to award reparations to 'injured parties', victims of violations of the human rights included in the ECHR and its protocols.

Article 41 reads:[1245]

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

The process of obtaining reparations at the ECtHR is closely connected with a trial on the merits,[1246] in that an award on just satisfaction under article 41 is a consequence of a Court's decision that a State has violated human rights included in the ECHR or its protocols.[1247] For just satisfaction to be awarded, a clear causal link must be established between the damage claimed and the violation alleged by the applicant. As explained in the Rules of the Court, the purpose of the award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation and it is not intended to punish the responsible State Party.[1248] In addition, the award of just satisfaction is not an automatic consequence of a finding of a violation,[1249] and will be awarded, according to the subsidiarity principle, only if domestic law does not allow (complete) reparation to be made, and even then only if necessary.[1250] While this requirement appears to entail that even after the Court established the existence of a right's violation, just satisfaction will be provided only if the domestic law does not allow (complete) reparation, the Court clarified this provision in the case of *Papamichalopoulos and others v. Greece*. The Court held that "requiring [the victims] to exhaust domestic remedies [a second time] in order to be able to obtain just satisfaction from the Court would prolong the procedure instituted by the Convention in a manner scarcely in keeping with the idea of the effective protection of human rights [Author's addition]."[1251] Ever since, the Court awards just satisfaction as long as it is established that the

[1243] 'Report of the sitting of the Consultative Assembly' (CoE, 14 August 1950) 216, 248. It has been asserted that challenges to legislation would not be suitable for a Court's judgment but rather came exclusively within the political sphere. In addition, States expressed extreme reluctance towards a court interfering with their internal affairs, see Mikael Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 Law and Contemporary Problems 141

[1244] See here the ECtHR's Rules. ECtHR, Rules of the Court (14 November 2016) <https://www.echr.coe.int/Documents/Library-2016-RoC_ENG.pdf> accessed 15 April 2020. As per 1 January 2020, the rules of the Court have been amended, however, they have not been considered in the current chapter.

[1245] ECHR, art 41

[1246] Unless the Parties decide to drop the trial and engage in a friendly settlement under article 39 of ECHR.

[1247] ECHR, art 41

[1248] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 9

[1249] In practice, article 41 is applied in connection with a finding of an article 13 violation, which refers to the individual's right to an effective remedy at the national level. Detailed explanation into the application of article 13 in relation to article 41 was first provided in case *Aksoy v Turkey* (1996) Reports of Judgments and Decisions 1996-VI, paras 95-100

[1250] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March) para 1

[1251] *Papamichalopoulos and Others v Greece* (Article 50) (1995) Series A no. 330-B, para 40; also at the Grand Chamber level in case Jalloh v Germany [GC] App no 54810/00 ECHR 2006-IX, para 129

applicant exhausted domestic remedies (which is also a requirement for the application's admissibility) and if it finds the State in violation of the applicant's rights.[1252] Finally, the Court will only award satisfaction that is 'just' (*équitable* in the French text), and depending on the particular features of each case.[1253] In an earlier case, the former Commission clarified that 'just' satisfaction does not necessarily mean 'complete' satisfaction.[1254]

Bearing in mind these caveats, the following sections will draw on the ECHR and the Rules of the Court to introduce the ECtHR's reparations regime – structured along prerogatives bestowed upon potential victims in relation to the process of obtaining reparations and the outcome of the process, as well as an elaboration on who can benefit from these prerogatives.

2.2.1. Process-related Prerogatives

As explained above, the prerogatives bestowed upon individuals in the process of obtaining reparations at the ECtHR correspond to the individuals' involvement with the trial on the merits, unless the just satisfaction proceedings take place separately.[1255]

Individuals claiming to have been the victim of a human rights violation may avail themselves of a number of prerogatives before the Court. Foremost, they may initiate a case before the ECtHR by submitting a written application before the Court.[1256] The application must set out the facts of the case, the individual's complaints, as well as explanations as to the compliance with the admissibility criteria detailed in article 35 ECHR.[1257] Necessary documents to support the claims or reasons regarding the impossibility to do so must be appended.[1258] Furthermore, if an applicant wishes to obtain an award of just satisfaction under Article 41, he or she must make a specific claim to that effect, appending all the characteristics of reparations claims and any relevant supporting documents.[1259] In addition, after the Court's finding of admissibility of the application and throughout the trial, including at the reparations stage if it takes place separately, the alleged victims need to take legal representation which will represent them throughout the trial, including at the just satisfaction stage, unless decided otherwise by the President of the Chamber.[1260] For the individuals who do not have the necessary means to cover the costs of legal representation, the President of the Chamber may grant free legal aid in connection with his or her case. According to the Rules of the Court, the legal representatives may represent the victims though written pleadings,[1261] unless the Chamber presiding over a case decides to hold an oral hearing, in which

[1252] The approach was also upheld at the Grand Chamber level in case *Jalloh v Germany* [GC] App no 54810/00 ECHR 2006-IX, para 129
[1253] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 2
[1254] *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) Series A no. 301-B, para 79
[1255] According to rule 75, if the Chamber finds that there has been a violation of the Convention or the Protocols thereto, it shall give in the same judgment a ruling on the application of Article 41 unless the question is not ready for decision. Rules of the Court (2016), rule 75
[1256] ECHR, art 34
[1257] Article 35 sets forth the admissibility criteria for a claim, which include, amongst others, the condition of exhaustion of all domestic remedies at the national level, according to the generally recognized rules of international law, and the six-month prescription period from the date on which the final decision was taken. See Rules of the Court (2016), rules 45-47
[1258] Rules of the Court (2016), rules 45-47
[1259] Rules of the Court (2016), rule 60
[1260] Rules of the Court (2016), rules 36 and 54. The applicants may also receive free legal aid, either upon request or when the President of the Chamber decides so. Rules of the Court (2016), rule 105
[1261] Rules of the Court (2016), rule 38

case the lawyers may also provide oral pleadings.[1262] Finally, since the beginning of the case and until its completion, the individuals have the right to be informed about developments in the case. The prevailing rule at the ECtHR is that communications or notifications addressed to the agents or lawyers of the parties to the trial are considered to have been addressed to the parties.[1263]

2.2.2. Outcome-related Prerogatives

In addition to the process-related prerogatives bestowed upon victims, the ECtHR's reparations regime entails also prerogatives relating to the outcome, i.e. potential tangible reparations that successful applicants may be entitled to. Article 41 ECHR does not provide much clarification as to the content of 'just satisfaction'. However, as elaborated upon in the Rules of the Court, just satisfaction that the victims may receive usually takes the form of awards for pecuniary and non-pecuniary damage, as well as reimbursement of costs and expenses of the lawyer.[1264] As the Court elaborated, the rationale of pecuniary damage awards is to achieve *restitutio in integrum* (or restitution), which is to place the applicant, as far as possible, in the position in which he or she would have been had the violation not taken place. If restitution is not feasible, compensation may be awarded for both loss actually suffered (*damnum emergens*) and loss, or diminished gain, to be expected in the future (*lucrum cessans*).[1265] Depending on the (scarcity of) facts at its disposal, the Court may decide on an 'equitable basis' to award less than the full amount of the loss requested by the applicants.[1266] In regard to non-pecuniary damage, the Court's awards are intended to provide compensation for non-material harm, such as mental or physical suffering. However, due to the nature of non-pecuniary damage, it does not lend itself to precise calculation, therefore here too, if the existence of such damage is established, the Court may make a monetary award on an equitable basis, having regard to the standards that emerge from its case law.[1267]

2.2.3 Beneficiaries

According to article 41, the beneficiary of just satisfaction is the 'injured party', i.e. an applicant who showed that she or he has been a victim of a human rights violation.[1268] The existence of an 'injured party' for the purpose of just satisfaction is connected to the *ratione personae* admissibility criteria set out in article 34 ECHR. Accordingly, any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the States Parties of the rights set forth in the Convention or the Protocols thereto may submit individual applications before the Court, and benefit from just satisfaction. The States Parties undertake not to hinder in any way the effective exercise of this right.[1269]

[1262] Rules of the Court (2016), rules 63-70
[1263] Rules of the Court (2016), rule 37
[1264] Costs and expenses usually refer to remuneration for activity undertaken in the scope of legal representation before the Court and is excluded from the current analysis.
[1265] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 10
[1266] The principle of equity has been widely used in the decision making of the International Court of Justice. In the case *Continental Shelf case*, the ICJ explained that justice based on equity is justice according to the rule of law and furthermore, the application of equity should entail consistency and a degree of predictability: "what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules". *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3 para 88
[1267] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 13-15
[1268] See also Szilvia Altwicker-Hàmori, Tilmann Altwicker, Anne Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights' (2016) 76 Heidelberg Journal of International Law 1, 15
[1269] ECHR, art 34

The Court may accept applications from individuals who claim to be direct victims, indirect victims (relatives of persons who have been killed or disappeared) or potential victims of human rights violations (i.e. those who face a significant risk of being directly affected).[1270] For a direct victim to be recognized as such, the applicant must be able to show that he or she was "directly affected" by the measure complained of.[1271] If the alleged victim of a violation died before the introduction of the application, it may be possible for the person with the requisite legal interest to introduce an application raising complaints related to the death or disappearance of his or her relative. In such cases, close family members, such as parents or next of kin of a person whose death or disappearance is alleged to engage the responsibility of the State can themselves claim to be indirect victims of the alleged violation.[1272] Indirect victims may also allege moral harm under article 3 (freedom from torture) due to the disappearance of the direct victim for an extended period of time.[1273] Furthermore, in order for potential victims to claim to be a victim in such a situation, an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient.[1274]

It is also worth noting that, according to article 33, States may also refer to the Court any alleged breach of the Convention by another Contracting Party, in the so-called inter-State cases.[1275] There is no requirement for States to claim victim status, because their prejudice is normally of a legal nature, in the form of a breach of an international treaty.[1276] However, States may submit applications on behalf of groups of persons claiming to have been victims in the context of alleged large-scale violations of the Convention as well as request just satisfaction on their behalf.[1277] In inter-State cases, the process- and outcome- related prerogatives exposed above are retained, although the procedural requirements for the written applications are slightly altered.[1278]

3. Analysis and Results

The section above elicited the initial intentions permeating the adoption of the ECtHR's reparations regime as well as elaborated on the reparations regime itself, relying on the legal instruments underlying its establishment and functioning. In addition, drawing on the legal instruments, the section also clarified the prerogatives bestowed upon potential victims of human rights violations, in the process of obtaining reparations and in relation to the outcome of the process. In what follows, the chapter will delve into an analysis of how the reparations regime is transposed in the ECtHR's practice, in order to then assess the ECtHR's potential contribution to reparative justice for the victims under its jurisdiction.

[1270] 'Practical Guide on Admissibility Criteria' (European Court of Human Rights, 31 August 2019) <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 15 April 2020

[1271] 'Practical Guide on Admissibility Criteria' (European Court of Human Rights, 31 August 2019) para 17

[1272] For instance, *Şemsi Önen v Turkey* App no. 22876/93 (ECtHR, 14 May 2002); *Ibragimov and Others* v Russia App no. 34561/03 (ECtHR, 29 May 2008)

[1273] For instance, see *Janowiec and Others v Russia* [GC] App nos. 55508/07 and 29520/09, ECHR 2013; *Association "21 December 1989" and Others v Romania* App nos. 33810/07 and 18817/08 (ECtHR, 24 May 2011)

[1274] 'Practical Guide on Admissibility Criteria' (European Court of Human Rights, 31 August 2019) para 29

[1275] ECHR, art 33

[1276] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 87

[1277] Such as case *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014; *Georgia v Russia (I)* [GC] App no. 13255/07, ECHR 2014 concerning arrest and deportation from Russia of Georgian nationals from September 2006 to January 2007, etc.

[1278] Rules of the Court (2016), Rule 46

Since its establishment in 1959, the ECtHR has issued approximately 21.651 judgments,[1279] with 24.10% involving cases on article 6 (right to a fair hearing), 18.04% on article 3 (prohibition of torture and inhuman or degrading treatment), 16.34% on article 5 (right to liberty and security), 11.55% on article 13 (right to an effective remedy), 8.59% on Protocol 1-1 (protection of property), 3.17 on article 2 (right to life), and 18.21% on other violations.[1280] The next section is split into two main subsections, the methodological aspects of the analysis, geared towards understanding how the current case-law analysis was realized, as well as the results of the analysis, expounding the ECtHR's potential contribution to reparative justice for victims under its jurisdiction.

3.1. Methodological Aspects of the ECtHR's Case-Law Analysis

In order to understand how the current case-law analysis was conducted, the section will first elaborate upon how gross human rights violations have been approached by the ECtHR, then put forward the methodology employed for the case-law selection, and finally, introduce several general characteristics of the cases analyzed in this thesis following the aforementioned selection.

3.1.1. Gross Human Rights Violations at the ECtHR

The ECHR does not include provisions on gross human rights violations or international crimes, in contrast to the statutes of the ICC or the ECCC, which operate under a different legal basis (i.e. international criminal law, different from international human rights law underlying the ECtHR's functioning). Furthermore, instances of gross violations reported at the ECtHR have been rather limited in the first decades of its operation, although several such instances have been documented.[1281] However, with the enlargement of the CoE and the entry into force of Protocol 11, which virtually opened the possibility of submitting individual applications to millions of European citizen, the case-law of the ECtHR in the area of gross human rights violations, and not only, started to grow exponentially.[1282] Consequently, in the 1990s, more than 30 years after its establishment, the ECtHR was called upon to apply its legal basis to decide on cases which can be considered as involving gross human rights violations.[1283] This is in stark contrast with its Inter-American counterpart which concerned itself with large-scale and gross violations of human rights

[1279] 'The ECtHR in fact and figures' (ECtHR, 2019) 5 <https://www.echr.coe.int/Documents/Facts_Figures_2018_ENG.pdf> accessed 15 April 2020

[1280] 'The ECtHR in fact and figures' (ECtHR, 2019) 7

[1281] See for instance, Menno T. Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations' (1994) 12 Netherlands Quarterly of Human Rights 153, 154. He develops upon cases concerning torture in Greece following the military coup d'état in 1967, torture in Northern Ireland during the early 1970s, political killings and 'disappearances' in Cyprus following the military invasion of the island by Turkey in 1974; and torture in Turkey since the military coup d'état there in 1980.

[1282] Philip Leach, 'What is justice? Reflections of a practitioner at the European Court of Human Rights' (2003) 4 European Human Rights Law Review 392, 393; Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 234

[1283] As per definition of gross human rights violations in introduction. For instance, in early 1990s the Court started receiving numerous cases relating to the conflict in South-East Turkey, following Turkey's acceptance of the Court's compulsory jurisdiction in 1990. E.g. *Aksoy v Turkey* (1996) Reports of Judgments and Decisions 1996-VI

since its establishment.[1284] By comparison, the ECtHR generally examined gross human rights violations in cases with limited number of victims[1285] and with individual orientation.[1286]

As such, several situations involving gross human rights violations on the territory of Europe in the past decades were brought before the ECtHR for adjudication, mainly by means of individual petitions from individuals alleging to have been victims of rights violations. These situations include, but are not limited to, the situation in south-east Turkey,[1287] the two Chechen wars,[1288] the armed conflict in the former Yugoslavia, as well as other cases involving human rights violations which can be considered gross.[1289] The conflict Cyprus-Turkey is also an emblematic example of gross human rights violations on the territory of Europe and complaints were brought before the Court both by means of an inter-state complaint and individual complaints.[1290] All these cases cover gross human rights violations such as large-scale enforced disappearances/missing persons,[1291] large-scale unlawful killings by actors of the State,[1292] war crimes,[1293] and large-scale human rights violations set against a backdrop of inter-State issues.[1294] In order to establish the Court's potential contribution to reparative justice for the victims under its jurisdiction, the current chapter consists in an analysis of the ECtHR's jurisprudence and corresponding awards of reparations in cases covering the above-mentioned situations.

3.1.2. Research Question and Methodology

This chapter's underlying research sub-question is:

[1284] See also Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 18

[1285] There are of course, exceptions, such as the inter-state case *Cyprus v Turkey*, where claims for human rights violations have been put forward on behalf of thousands of people.

[1286] 'What amounts to 'a serious violation of international human rights law'? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty' (Geneva Academy Briefing no. 6, 2014) 22. In comparison with the IACtHR, the reparations regime of the ECtHR is limited to individual persons, as opposed to the IACtHR which may decide upon reparations awards for collectivities.

[1287] Pietro Sardaro,'Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court' (2003) 6 European Human Rights Law Review 601

[1288] Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: the Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies 275

[1289] See also the qualification as 'gross' due to the particularly serious threat they pose to the very essence of the protection of human rights as a whole by Pietro Sardaro,'Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court' (2003) 6 European Human Rights Law Review 601

[1290] Alexia Solomou, 'Cyprus v Turkey' (2015) 109 American Journal of International Law 393, 395. The Court's jurisprudence on inter-state cases is very limited, as the States appear to be reluctant to denounce other States' unlawful behavior. For an overview of inter-state cases at the ECtHR level see 'Background Paper for Seminar Opening of the Judicial Year: International and National Courts Confronting Large-Scale Violations of Human Rights - Genocide, Crimes against Humanity and War Crimes –' (European Court of Human Rights, 2016) <https://www.echr.coe.int/Documents/Seminar_background_paper_2016_part_1_ENG.pdf> accessed 15 April 2020

[1291] The situation is prevalent in the cases against Russia, involving applicants residing the Chechen Republic). See *Kaykharova and Others v Russia* App nos. 11554/07 and 3 others (ECtHR, 1 August 2013); *Abakarova v Russia App* no 16664/07 (ECtHR, 15 October 2015; *Dzhabrailov and Others v Russia* App nos. 8620/09 and 8 others (ECtHR, 27 February 2014); *Gakayeva and Others v Russia App* nos 51534/08 and 9 others (ECtHR,10 October 2013); but also *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014; *Varnava and Others v Turkey* [GC] App nos. 16064/90 and 8 others, ECHR 2009

[1292] For instance, see *Association "21 December 1989" and Others v Romania* App nos. 33810/07 and 18817/08 (ECtHR, 24 May 2011)

[1293] For instance, see *Jelić v Croatia* App no 57856/11 (ECtHR, 12 June 2014)

[1294] For instance, see *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017); *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014

Taking into account the ECtHR's reparations regime and its practice on reparations for gross human rights violations, how does the Court potentially contribute to reparative justice for victims under its jurisdiction?

In answering the research sub-question, this chapter was compiled in several steps.

Firstly, drawing on the ECtHR's legal basis, the ECtHR's reparations regime was put forward, to understand how the process of obtaining reparations and outcome of the process ought to be.

Secondly, the ECtHR's jurisprudence was selected through both an inductive and deductive approach. As such, the Court's HUDOC database was examined bearing in mind,[1295] on the one hand, that this chapter is focused on cases concerning gross human rights violations and corresponding reparations and, on the other hand, the main conflicts taking place on the territory of Europe since the Court was established, as explained above.[1296] The selection of the case-law took place in several steps: first, by selecting the 'English' language and the type of document 'judgment (Merits and Just Satisfaction)' and 'judgement (Merits)'.[1297] In addition, in order to further narrow down the case-law selection, the Court's jurisprudence was scrutinized using key search terms such as 'gross human rights violations', 'armed conflict', 'genocide', 'international crimes', 'war crimes', 'war'.[1298] Consequently, approximately 300 cases were selected, which were then reviewed one by one to ensure they fit the scope of this research. As such, bearing in mind this chapter's focus on cases concerning gross human rights violations and corresponding reparations, the Court's case law was narrowed down further, taking into account the criteria elaborated upon in the Introduction section:

a. the serious character of the violation (minimum five victims);[1299]
b. the type of human rights violated, to include only the non-derogable human rights;[1300]
c. comparability to international crimes, which according to the Van Boven's list may include the following " genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender".[1301]

[1295] 'HUDOC' (ECtHR Website) <https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}> accessed 15 April 2020

[1296] Using a deductive approach to the case-law selection facilitated the navigation of the large quantity of judgments within the ECtHR's database.

[1297] Due to this chapter's focus on reparations, it is important that the selection includes cases the Court has already adjudicated and made awards for reparations.

[1298] The choice for these key terms is to select cases involving gross human rights comparable to international courts. In addition, it was necessary to navigate the case-law of the ECtHR's, which still entailed approximately 10.000 cases after the first step in the case-law selection.

[1299] However, cases with a fewer number of victims were considered too, as long as the Court established in its judgment that it was connected with a continuing human rights violation by the State, i.e. the human rights violations has been raised in similar cases brought before the Court. In such case, the chapter analysed several such cases concerning the same human rights violations, even though they involved less than five applicants.

[1300] Foremost, the search focused on violations of article 2 (right to life), article 3 (prohibition of torture), article 4 (prohibition of slavery and forced labor), as these are according to the Convention, non-derogable rights, even in times of war or other public emergency threatening the life of the nation. As per ECHR, art 15. Next to these articles, article 41 on just satisfaction was also an important criterion, since the thesis is concerned with reparations awarded to victims by the Court.

[1301] As per Theo van Boven, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (2 July 1993) E/CN.4/Sub.2/1993/8, para 13

Following a second scrutiny of this batch, 74 cases[1302] appeared to be relevant and were subjected to coding using qualitative data software Atlas.ti,[1303] to unravel how the Court interprets the reparations regime in practice. It has to be mentioned that this chapter's case-law selection does not aim to be exhaustive. Given the extensive number of the cases in the Court's database, the aim of the chapter was not to assess the Court's entire jurisprudence on gross human rights violations and subsequent awards on reparations. Instead, the chapter aimed to select a sample of the cases, in order to establish how the Court, through its reparations regime, may contributes to reparative justice for victims of gross human rights violations. In addition, the legal submissions put forward by lawyers on victims' behalf could not be analysed, as they are not available in the Court's database.

In a third step, the ECtHR's potential contribution to reparative justice was appraised, by assessing how the ECtHR's reparations regime materialized across its practice on reparations ('what is'), taking into account the reparations framework (what 'ought to be') and its potential implications for victims, as established in the theoretical framework. The findings of the analysis and the overall assessment of the Court's potential contribution to reparations justice, elaborated in section 3.2, are complemented by secondary scholarship, to contextualize where possible the findings to the actual victims and their expressed perceptions. In contrast with the other courts wherein empirical studies that scrutinize the victims' experience with courts exist, this study could not identify such studies in relation to victims of gross human rights violations involved with the ECtHR.[1304]

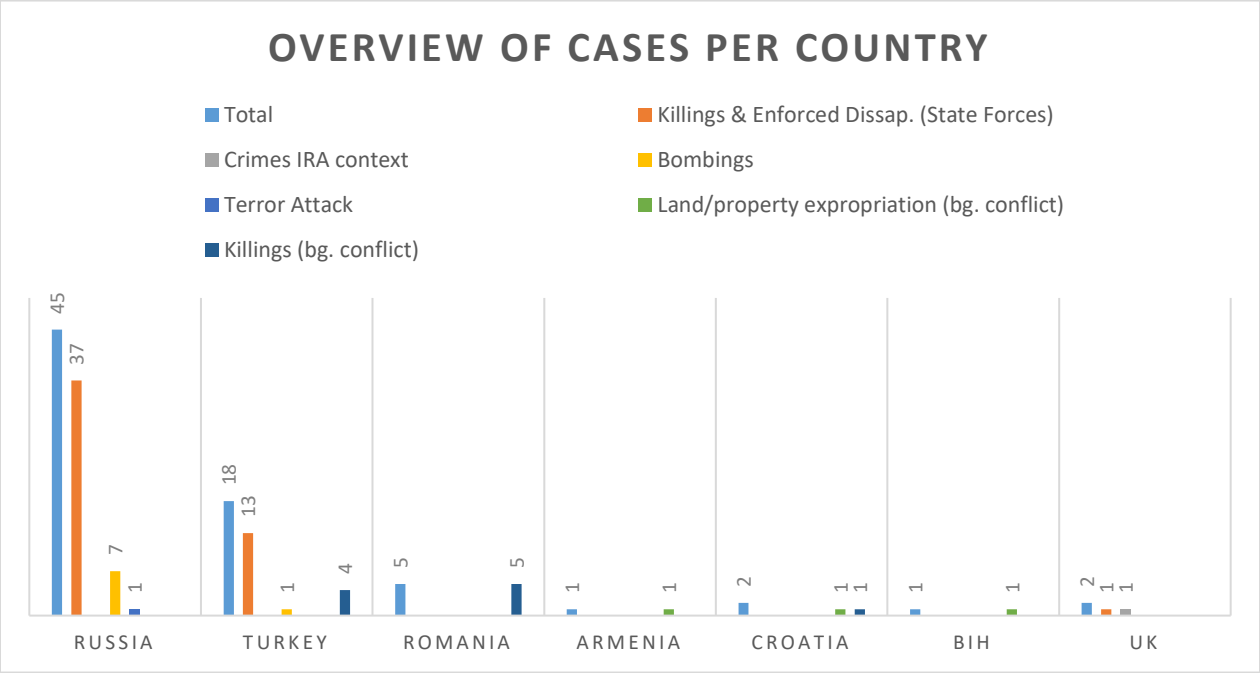
The final step will put forward final considerations regarding the ECtHR's potential contribution to reparative justice for victims through the reparations it awarded.

3.1.3. General Characteristics of Case-law

Before moving on to introduce the results of the analysis and the assessment of the Court's potential contribution to reparative justice for victims under its jurisdiction, structured along procedural justice and substantive justice, a short overview of the characteristics of the cases will be put forward. *In concreto*, the analysis covered 74 cases against eight countries, namely, Russia, Turkey, Romania, Armenia, Croatia, Bosnia and Herzegovina, and the UK.[1305] The cases investigated involve killings and enforced disappearances by State Forces (approximately 68%), followed by killings in the context of a bigger conflict (approximately 13%), such as the 1989 Revolution in Romania, the Kurdish–Turkish conflict in south-east Turkey, bombings by State forces (approximately 12%), a terror attack, linked with the Chechen war, crimes in the Irish Republic Army conflict, and land/property expropriation linked to the Nagorno-Karabakh conflict

[1302] The list of cases scrutinized for the purpose of this chapter is included in Annex 3.
[1303] The methodology for coding remained consistent across all the Courts analysed in this thesis, and is explained in the Introduction Chapter.
[1304] The NWO Vidi project 'What's law got to do with it? Assessing the contribution of international law to repairing harm' entails forthcoming empirical research with 30 beneficiaries of reparations in the Cyprus v Turkey case and 30 non-beneficiaries, including 15 Turkish Cypriots and 15 Greek Cypriots. The non-beneficiaries experienced other (gross) human rights violations that the ones recognized in the inter-State case. The empirical research is designed and coordinated by Mijke de Waardt, in cooperation with a local team in Cyprus, coordinated by Dora Georgiou and including Evren Celal and Andreas Michael. Charis Psaltis has an advisory role.
[1305] Due to the complexity of the cases, some of the judgements may encompass several applications that raise similar legal questions, sometimes covering as many as 409 applicants. E.g. *Tagayeva and Others v Russia* App nos 26562/07 and 6 others (ECtHR, 13 April 2017)

and the armed conflict in the former Yugoslavia. These characteristics are also represented visually below.



3.2. Mapping the ECtHR's Potential Contribution to Procedural Justice and Substantive Justice for Victims under its Jurisdiction: Analysis and Assessment

The upcoming section aims to elicit how the ECtHR's reparations regime was transposed and materialized across the ECtHR's practice as well as to assess how it may contribute to reparative justice for the victims under its jurisdiction. First, it will put the situation of victims benefiting from reparative justice at the ECtHR into perspective, by discussing the individuals' access to justice before the ECtHR.

3.2.1. Access to Justice

The individuals' access to justice before the ECtHR has witnessed a gradual evolution ever since the Court's establishment. As pointed out above, individual applicants did not have a standing before the Court until after the adoption of Protocol 9 and eventually, with the adoption of Protocol 11, the procedural capacity of the individuals further enhanced, enabling them to complain directly before the Court and claim reparations.[1306] As such, the individual's access to justice evolved from a process solely mediated by the former Commission, to a *locus standi* before the Court. Under the current system (article 34), applicants can submit their individual complaints before the Court alleging to have been victims of rights violations by a State Party. If the applicants wish to receive just satisfaction in case of a Court's finding of a human rights violation, a request may be made to

[1306] Pietro Sardaro,'Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court' (2003) 6 European Human Rights Law Review 601, 603; Astrid Kjeldgaard-Pedersen, 'The Evolution of the Right of Individuals to Seize the European Court of Human Rights' (2010) 12 Journal of the History of International Law 267, 301-303

that effect.[1307] These complaints must abide by certain admissibility criteria, set forth in article 35 ECHR. In addition, since the ECtHR system is subsidiary to national systems of protection and positions itself as justice of last resort, applicants can seek and access the ECtHR only after justice at the national level was denied.[1308]

As this research posits, the individuals' access to the Court entail a very complex situation, due to their circumscribed character, limited transparency regarding the application of admissibility criteria, and finally, hindrances at the national level in some cases. While these restrictions to the individuals' access apply to applications concerning all types of human rights violations included in the ECHR and its protocols, they nonetheless affect the applicants who are alleged victims of gross human rights violations too. To begin with, as apparent from the Court's statistics, the large majority of applicants that wish to have their cases adjudicated by the ECtHR have their claims denied due to alleged deficiencies in their applications (failure to meet admissibility criteria or are unfounded), or are pending consideration by the Court. To be precise, since its establishment, the Court examined around 841.300 applications, with judgments rendered in regard to 48.933 applications and covering a broad range of human rights violations.[1309] However, this means that of the total number of applications received by the Court, the large majority of applications (roughly 94%) were rejected.[1310] As can be inferred from the Court's website, there are two stages whereby applications are revised, the administrative stage which rejects claims for failure to abide by the requirements of rule 47 of the Rules of the Court on the contents of an individual applications and the stage before a 'judicial formation'.[1311] In addition to judgments, applications before a judicial formation result in either a decision of inadmissility or being 'struck out'.[1312] Although it is challenging to infer with accuracy how many applications are rejected at the administrative stage and how many at the judicial formation stage,[1313] statistics for year 2019 show that approximately 30% of applications are rejected at administrative stage,[1314] 55% of applications are rejected for failure to comply with the admissibility criteria and/or struck out, and only 3% of the applications result in a judgment.[1315] Furthermore, statistics at the end of year 2019 showcased that approximately 60.000 applications are currently pending before a judicial formation at the ECtHR, with 40.667 decided on in 2019 (2187 in judgment, 38480 rejected).[1316] Consequently, these statistics highlight that the individuals' access to the Court is largely circumscribed by the

[1307] Rules of the Court (2016), Rule 60
[1308] ECHR, art 35(1)
[1309] 'The ECtHR in fact and figures' (ECtHR, 2019) 5; 'Overview 1959-2018' (ECtHR, 2019) 5 <https://www.echr.coe.int/Documents/Overview_19592018_ENG.pdf> accessed 15 April 2020
[1310] 'The ECtHR in fact and figures' (ECtHR, 2019) 4; This is also in line with the courts' own statistics for 2019, whereby only 5% of the applications result in judgments:
In 'Annual Report 2019' (ECtHR, 2019) 131 <https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf> accessed 15 April 2020. See also Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6 Human Rights Law Review 403, 415
[1311] A judicial formation can be made up of one, three, seven, or 17 judges. The selection of a formation depends on the application's category and the type of procedure it follows. 'Understanding the Courts' statistics' (ECtHR, 2019) 6 <https://www.echr.coe.int/Documents/Stats_understanding_ENG.pdf> accessed 15 April 2020
[1312] 'Inadmisibility' refers to failure to meet the admissibility criteria for applications set forth in article 35 ECHR, whereas 'struck out' refers to the resolution of a case through friendly settlement or unilateral decision, in line with articles 37 and 39 ECHR. 'Understanding the Courts' statistics' (ECtHR, 2019) 9
[1313] Due to the fact that the court's statistics do not mention how many applications they receive on an annual basis. In addition, many of the statistics feature applications which are transferred from previous years, so the applications decided on in a certain year are not the same as the applications submitted in that year.
[1314] As explained, the reason why these applications are rejected are due to failure to comply with Rule 47 of Rules of Procedure.
[1315] Inferred from 'Annual Report 2019' (ECtHR, 2019) 127
[1316] 'European Court of Human Rights Statistics' (ECtHR, 2019)
<https://www.echr.coe.int/Documents/Stats_annual_2019_ENG.pdf> accessed 15 April 2020

admissibility criteria employed by the Court, while at the same time, showcase the colossal work the Court is carrying out on a yearly basis.

Further limitations to the individuals' access to the Court were generated by the adoption of Protocols 14 and 15.[1317] Protocol 14 introduced the 'significant disadvantage' notion as an additional criterion to the admissibility of applications, a term which, according to the Explanatory Report to Protocol 14, is "open for interpretation".[1318] In addition, Protocol 15 reduced the period of time for submitting applications from six months after a final decision was taken at the national level to four months.[1319] As such, while the Protocols aimed to tackle the Court's internal crisis caused by the overwhelming number of applications coming to the Court, they also subjected the admissibility of applications to even tighter standards, subjecting thus the individuals' access to the Court to further limitations. As reported by Steven Greer, this approach was severely criticized by NGOs who emphasized the perils of this amendment, to the effect that it may severely curtail the right of individual claims, and leave more victims of human rights violations without reparations.[1320]

What appears to be equally problematic, according to this research, is the Court's lack of transparency regarding the employment of the admissibility criteria and its subsequent decisions to adjudicate some cases and reject others. Alternatively, these judgments could situate themselves as landmark decisions for the furtherance of justice for victims in these cases and beyond. As this analysis identified, many cases concerning gross human rights violations were dismissed on grounds of lack of temporal jurisdiction. Emblematic examples include cases of enforced disappearances during the Francoist repression in Spain,[1321] or mass execution of Polish soldiers committed by Russian forces under Stalin.[1322] In cases raising issues of temporal jurisdiction, the Court is time barred from making findings on human rights violations in their substantive dimension (i.e. Spain or Russia could not be held liable for human rights violations perpetrated before the entry into force of the ECHR). However, it can decide on the State's procedural obligations concerning investigations of those crimes, provided that they extend into the period after the ECHR itself entered into force as well as after the period when the State Party became signatory the Convention, as held in *Case of Association "21 December 1989" and Others v. Romania*. The State's procedural obligations can be scrutinized by the Court if there is a 'genuine connection' between a triggering event and the entry into force of the Convention or alternatively, if the Court needs to ensure that the guarantees and the underlying value of the ECHR were protected in a 'real and effective way' (the so-called 'Convention values test').[1323] Despite these exceptions in some cases, the Court asserted that the applications concerning crimes during the Franco regime were filed out of time, while the application concerning the execution of Polish

[1317] Across time, several efforts have been carried out to tackle the workload of the Court, including the adoption of Protocol 11 in 1998, Protocol 14 in 2010, and Protocol 15 in 2013. 'Overview 1959-2018' (ECtHR, 2019) 10

[1318] 'Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention' (ECtHR, 13 May 2004) para 80 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f> accessed 15 April 2020

[1319] 'Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms' (ECtHR, 24 June 2013) article 4 <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084831> accessed 15 April 2020

[1320] Steven Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006) 168

[1321] *Antonio Gutierrez Dorado and Carmen Dorado Ortiz v Spain* App no. 30141/09 ECHR 2009

[1322] *Janowiec and Others v Russia* [GC] App nos 55508/07 and 29520/09 ECHR 2013

[1323] Tests developed in *Šilih v Slovenia* [GC], no. 71463/01 (ECtHR, 9 April 2009); and *Varnava and Others v Turkey* [GC] App nos. 16064/90 and 8 others, ECHR 2009

soldiers did not meet the 'genuine connection' test requirements because the events took place well before the entry into force of the convention itself.[1324] Although legal filtering is a given in a Court, these findings carry important consequences as they block the victims' hope for justice, particularly due to the last resort character of the Court.[1325]

Finally, this analysis revealed that in certain cases the applicants may be deterred from pursuing claims before the Court, by interference with the individuals' right to petition at the State level. As explained above, according to article 34, the individuals may submit individual application before the Court. In addition, article 34 also provides a connected obligation for the States Parties, not to hinder in any way the effective exercise of this right.[1326] However, as the practice in several cases showed, the individuals' right to bring or maintain claims before the ECtHR can be hindered by a State's attempts to dissuade or discourage the victims from initiating or pursuing Court proceedings.[1327] The matter was taken up by the Court itself in several cases, which made a finding of violation in this regard.[1328] For instance, in case *Tanrikulu v. Turkey*, the Court held that it "is of the opinion that a deliberate attempt has been made on the part of the authorities to cast doubt on the validity of the application and thereby on the credibility of the applicant".[1329] However, in other cases, the Court denied the applicant's allegation, holding that it does not have enough evidence to make a finding of article 34 violation.[1330] According to this analysis, these hindrances are directed against the applicant. However, other studies indicate that they may extend to the applicant's lawyer, in the form of intimidation and pressure to withdraw an application,[1331] or as stated in the case of Turkey, lawyers seeking to bring abuses of human rights of Kurds to the attention of the Court may even be subjected to criminal conviction and sentences under Anti-Terror Laws.[1332] Consequently, this research submits that interference with the individuals' right to submit applications is one real limitation to the individuals' access to the Court.[1333]

3.2.2. Procedural Justice

[1324] See 'Background Paper for Seminar Opening of the Judicial Year: International and National Courts Confronting Large-Scale Violations of Human Rights - Genocide, Crimes against Humanity and War Crimes –' (European Court of Human Rights, 2016) 5
[1325] Rosa Ana Alija Fernández and Olga Martin-Ortega, 'Silence and the right to justice: confronting impunity in Spain' (2017) 21 The International Journal of Human Rights 531. Grażyna Baranowska, 'The Right to the Truth for the Families of Victims of the Katyń Massacre' (Verfassungsblog, 6 January 2018) <https://verfassungsblog.de/the-right-to-the-truth-for-the-families-of-victims-of-the-katyn-massacre/> accessed 15 April 2020
[1326] ECHR, art 34
[1327] E.g. *Imakayeva v Russia* App no. 7615/02, ECHR 2006-XIII (extracts) para 205
[1328] For instance, in case *Tanrikulu v Turkey*, the Court held that Turkey has tried to undermine the credibility of the applicant, to the extent that it violated the individual's right to individual petition. *Tanrıkulu v Turkey* [GC] App no 23763/94 ECHR 1999-IV, para 132; On the contrary, in case *Aksoy v Turkey*, however, the Court did not have enough evidence to make a finding on article 34 violation, although it is alleged that the applicant was killed because of his application at the ECtHR. *Aksoy v Turkey* (1996) Reports of Judgments and Decisions 1996-VI, paras 34 and 106
[1329] *Tanrıkulu v Turkey* [GC] App no 23763/94 ECHR 1999-IV, para 106
[1330] *Imakayeva v Russia* App no. 7615/02, ECHR 2006-XIII (extracts) para 206; *Medova v Russia* App no. 25385/04 (ECtHR, 15 January 2009) para 137
[1331] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 62.
[1332] Louise Christian, Philip Kirkpatrick, Timothy Otty, 'The European Convention Under Attack: The Threats to Lawyers in Turkey and the Challenge to Strasbourg: A Report of Delegations to Turkey Between February and May 1995' (International Bar Association, 1995)
[1333] This has also been confirmed in research with representatives of victims before the Court, who confirmed that local intimidation is a major reason for applications' withdrawal, in extreme cases applicants being disappeared or killed. Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 312

As the section above elicited, the individuals' access to the ECtHR appears to entail important intricacies. However, once an application is admitted and as long as the applicant is not subjected to external pressures to withdraw the application, the victim becomes an official party to the process towards obtaining reparations. As explained, at the ECtHR, the process towards obtaining reparations overlaps with the trial on the merits. In what follows, this section will focus on the Court's potential contribution to procedural justice for these victims. In assessing the Court's potential contribution to procedural justice – defined in terms of voice, information, interaction, and length – the section will establish how the statutory prerogatives bestowed upon victims in relation to the process of obtaining reparations materialized across the Court's jurisprudence and assess how they may contribute to procedural justice for the victims under the Court's jurisdiction.

I. Voice

This section consists of an analysis of how voice is materialized in the process towards obtaining reparations at the ECtHR as well as an assessment of its potential implications for victims.

According to this analysis, the modalities through which the victims' voice is transmitted to the Court are written applications and the legal representation practice. In addition, in very rare situations, the applicants may convey their voice through oral testimonies. As is known, at the ECtHR, the start of a case is triggered by an individual application submitted before the Court by an alleged victim of human rights violations. As such, these individual applications constitute not only the means through which applicants commence their participation in a trial, when these applications are admissible, but also the initial opportunity for the individuals to detail the alleged violations that they have suffered.[1334] However, as apparent from their procedural requirements, the applications' main aim is to capture facts, alleged violations, as well as to state their compliance with the admissibility criteria. However, they do not attempt to document the harm suffered by the victims or provide space for them to recount their stories.[1335] The application forms can be submitted in the applicants' own language, which is commendable, as it does not create procedural burdens for the applicants at the initial stages.[1336] Against this background, the written applications utilized at the ECtHR appear to be serving the symbolic and instrumental purposes of submitting an application before an international court as well as conveying information on the facts; however, amid lack of empirical research with victims on this matter, it is unclear whether they might have supplementary benefits for the victims.

Once an application is declared admissible by the Court, the applicants need to take a lawyer,[1337] and as such, the legal representation practice constitutes the main vehicle through which the victims may pass on to the Judges their voice. The current analysis revealed that in the majority of cases (approximately 53%), the applicants were represented by lawyers of NGOs renowned at the international level, either EHRAC/Memorial Human Rights Centre, Stichting Russian Justice Initiative or Kurdish Human Rights Project.[1338] Alternatively, they were represented by lawyers practicing at the national level. The large representation by these NGOs is justified by the practice of strategic litigation, whereby international NGOs specializing in ECtHR litigation select and

[1334] Rules of the Court (2016), rule 47
[1335] Rules of the Court (2016), rule 47
[1336] However, after an application is admitted, the communication between the lawyers and the court are carried out in the official languages of the court –French and English. See Rules of the Court (2016), Rule 34
[1337] Rules of the Court (2016), rule 36
[1338] The defendant State in these cases was either Russia or Turkey.

initiate cases before the Court.[1339] To be precise, while in certain cases it is the applicants who instate the cases and take lawyers or NGOs to defend them,[1340] it was reported that some applicants lack awareness altogether of the legal remedies at their disposal.[1341] As Loveday Hodson put it, the idea that victims will seek out judicial remedies for their human rights violations is based on "lawyerly optimism rather than on sociological realism",[1342] in the sense that not all victims have the knowledge and resources to bring their claim at the international level, if at all. As such, the applicants' representation by NGOs and their lawyers is the result of concerted efforts; in litigating cases before the ECtHR, the international NGOs collaborate and work together with the applicants' national lawyers or with NGOs at the local level who are in contact with the applicants. Across time, this strategic litigation materialized in a large number of cases,[1343] which means that due to concerted efforts, expertise and strategic engagement with the Court, some applicants were more successful in having their cases successfully adjudicated at the ECtHR than they would have been otherwise.[1344] On the downside, for various reasons,[1345] these international NGOs have instated their own 'admissibility criteria' in order to select only cases that they think will have the highest rate of success, excluding thus applicants with less prominent cases.[1346]

As inferred from this analysis, the lawyers' modality for passing on to the Judges their clients' voice is by means of written submissions, and on an exceptional basis, they may provide oral submissions during oral hearings. However, in inter-State applications where the trial involves two opposing States, the victims are not even involved in proceedings and the applicant State makes all the claims on their behalf. As case *Cyprus v. Turkey* shows, some of the victims were not even identified at the moment of the Court decision, [1347] however, generic claims are made by Cyprus on 'victims' behalf'. For instance, it submitted that "there was no evidence that the authorities of the respondent State [Turkey] had carried out searches for the dead or wounded, let alone concerned themselves with the burial of the dead [Author's insertion]"[1348] without clarifying exactly on whose behalf these claims were made.

[1339] See e.g. 'Implementation and Advocacy' (European Human Rights Advocacy Center (EHRAC) Website) <http://ehrac.org.uk/about-our-work/human-rights-litigation/implementation/> accessed 15 April 2020

[1340] E.g. *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (ECtHR, 13 November 2012). See also testimony of victim of enforced disappearance in Chechenia recounting how she came to be represented by EHRAC, "I was running to different organisations for help. When they took my husband they also took all our money. I lost everything. I wrote to the Red Cross, the United Nations, Putin, and the ombudsman, Vladmir Lukin. Seven years have now passed and I still don't know anything for sure. But in the end Memorial HRC and EHRAC helped me." In 'Annual Report 2010' (EHRAC, 2010) 15 <http://ehrac.org.uk/wp-content/uploads/2014/10/EHRAC-AR-2010.pdf> accessed 15 April 2020. Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 304

[1341] See detailed account in Loveday Hodson, *NGOs and the Struggle for Rights in Europe* (Hart Publishing, 2011) 86-88

[1342] Loveday Hodson, *NGOs and the Struggle for Rights in Europe* (Hart Publishing, 2011) 86

[1343] For instance, EHRAC's website reports its involment in 163 cases adjudicated at the ECtHR. 'Our cases' (EHRAC Website) <http://ehrac.org.uk/about-our-work/human-rights-litigation/cases/> accessed 15 April 2020

[1344] As expressed, in approximately 53% of the cases analysed in this study the applicants have benefited from international NGOs representation and have had their cases succesfully adjudicated before the Court.

[1345] For instance, these international NGOs provide their services on a pro-bono basis, and they do no have capacity to cater for all the possible applicants.

[1346] Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 310

[1347] See *Cyprus v Turkey* (just satisfaction) [GC] App no. 25781/94, ECHR 2014, para 12, for concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić.

[1348] *Cyprus v Turkey* [GC] App no. 25781/94 ECHR 2001-IV, para 124

In regard to written submissions, their role is to provide the Judges with information and evidence, relating to the facts of the cases and the just satisfaction claims.[1349] In fact, since the trial and subsequent decision on just satisfaction at the ECtHR take place in the majority of cases in writing,[1350] the written submissions are an essential means for the lawyers to build their case and convey to the Judges the victims' story. As the Court itself established, failure by either the victims or the opposing State to submit written submissions, evidence, or to participate effectively in the proceedings provide ground for the Court to draw inferences regarding the parties' effective participation.[1351] Despite their importance, the current analysis revealed that passing on to the Court the applicants' voice through the written submissions entails a reduction of the victims' stories. Throughout the cases, the lawyers' submissions aim to present the facts, for instance, in the form:[1352]

"*[T]he applicant Larisa Barshova submitted to the investigators a handwritten note, allegedly given to her by a man who had been released from prison and who had identified her son*."

This entails that before the ECtHR, the victims' voice is translated into legal language and articulated by their lawyers in a way that it can come across to the Court. However, despite the fact that the judgments do not provide any information on the manner in which the lawyers collect their clients' voice, it can be assumed that in their meetings in view of preparing the submissions before the Court victims might express views, concerns, or emotions.[1353]

Next to written submissions, oral submissions put forward by lawyers during oral hearings may also represent an opportunity to pass on to the Judges the victims' voice. Nonetheless, as with the written submissions, the lawyers' interventions during hearings generally focus on clarification of legal facts, and not on detailing the victims' stories.[1354] In addition, the oral hearings take place on an exceptional basis, and are convened by the Court on its own discretion, although they originate in requests by the parties or in own motions.[1355] It is up to the President of the Chamber to organise and conduct the hearings and any Judge may pose questions to any person appearing before the

[1349] Rules 58-59. In some cases, the judges make the decision on the admissibility and merits jointly, for instance *Gakayeva and Others v Russia* App nos 51534/08 and 9 others (ECtHR, 10 October 2013) or *Gekhayeva and Others v Russia* App no. 1755/04 (ECtHR, 29 May 2008), rule 54 A. In other cases, the Court provides a decision on just satisfaction only, at a later stage. For instance *Cyprus v Turkey (just satisfaction)* [GC] or *Chiragov and Others v Armenia* (just satisfaction) [GC]

[1350] This fact is acknowledged on the website on the Court itself, in the section devoted to scheduled hearings. 'Calendar of hearings' (ECtHR Website) <https://www.echr.coe.int/Pages/home.aspx?p=hearings/calendar&c=> accessed 15 April 2020

[1351] Rules of the Court (2016), rule 44 C

[1352] E.g. *Aslakhanova and Others v Russia* App nos. 2944/06 and 4 others (ECtHR, 18 December 2012) para 27

[1353] See also section below on interaction.

[1354] *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (Grand Chamber hearing, 02 October 2013) <https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=1086509_02102013&language=en&c=&py=2013> accessed 15 April 2020

[1355] All hearings at the ECtHR are public, unless the Chamber or the Grand Chamber decides exceptionally to call for different arrangements. Rules of the Court (2016), rule 58(2) and rule 59(3)

Chamber.[1356] In the cases analyzed in this research, hearings were held only in a minority of cases (approximately 9%),[1357] most of them in decisions rendered by the Trial Chamber.[1358]

In addition, during these oral hearings, the victims may exceptionally address the Court. Of the cases scrutinized in the current analysis, it was only in the case of *Mocanu and others v. Romania* that one of the applicants, Mr. Maries, addressed the Court directly.[1359] Mr. Maries was a party to the case on behalf of his legal entity supporting victims of the violent crackdown on the anti-government demonstrations, which took place in Bucharest in June 1990, and alleged that no effective investigation had taken place in Romania with regard to those events.[1360] The applicant's intervention during the trial represented an exception and was requested by his lawyer on the spot, during the hearing. The President of the Grand Chamber decided to grant the request, although he did admit that "the Court does not usually allow for the applicants to take the floor during proceedings".[1361] The Court's approach in this case is commendable, as it enabled the victim to express himself, upon his own request and say his version of the story. In his very brief intervention, Mr. Maries discussed some of the events of June 1990, and alleged that the representatives of the Government in the case rendered a distorted representation of facts. He also asked the Court to do its utmost to establish the truth regarding the events in that period. Unfortunately, public hearings represent an exception to the Court's conduct of proceedings, and interventions by applicants are a rarity, which entails that the overwhelming majority of applicants do not have any opportunity to address the Court, except through their lawyers.

Next to the oral hearings discussed above, which are typically carried out at the seat of the Court, the analysis identified another practice existent at the ECtHR that provides the applicants with the opportunity to express themselves by means of oral testimonies in the context of hearings carried out in their own countries.[1362] This refers to the practice of fact-finding, bestowed upon the Court by means of article 38 ECHR, which provides that the Court may undertake an investigation to clarify the facts of the case.[1363] As the cases analyzed in this research reveal, fact-finding missions entail oral hearings, which aim to gather evidence by interrogating the applicants or other witnesses.[1364] These fact-finding missions and the chance of victims to provide oral testimony enables victims to recount their story and harm suffered, although in one cases the applicant failed to show up to the hearing due to fear of repercussions by the State in case of testimony.[1365] In addition, this oral testimony may have symbolic value for the victims, feeling acknowledged,[1366]

[1356] Rules of the Court (2016), Rule 64 (2)
[1357] *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (ECtHR, 13 November 2012); *Kelly and Others v the United Kingdom* App no. 30054/96 (ECtHR, 4 May 2001); *Varnava and Others v Turkey* [GC] App nos. 16064/90 and 8 others, ECHR 2000; *Isayeva and Others v Russia* App nos. 57947/00 and 2 others (ECtHR, 24 February 2005); *Aksoy v Turkey* (1996) Reports of Judgments and Decisions 1996-VI; *Al-Skeini and Others v the United* Kingdom [GC] App no. 55721/07, ECHR 2011; *Doğan and Others v* Turkey (just satisfaction) App nos. 8803/02 and 14 others (ECtHR, 3 July 2006).
[1358] *Kelly and Others v the United Kingdom* App no. 30054/96 (ECtHR, 4 May 2001); *Isayeva and Others v Russia* App nos. 57947/00 and 2 others (ECtHR, 24 February 2005); *Aksoy v Turkey* (1996) Reports of Judgments and Decisions 1996-VI; *Doğan and Others v Turkey* (just satisfaction) App nos. 8803/02 and 14 others (ECtHR, 3 July 2006)
[1359] *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (ECtHR, 13 November 2012) para 10
[1360] *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (ECtHR, 13 November 2012) para 3
[1361] *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (Grand Chamber hearing, 02 October 2013)
[1362] For instance, hearings were held in Ankara in cases against Turkey. E.g. İpek v Turkey App no. 25760/94, ECHR 2004-II (extracts) para 8
[1363] ECHR, art 38; Rules of the Court (2016), Rule A1
[1364] E.g. *Timurtaş v Turkey* App no. 23531/94, ECHR 2000-VI, para 39
[1365] *Kaya v Turkey* (ECtHR, 9 February 1998) Reports of Judgments and Decisions 1998-I, para 76
[1366] See Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 359

especially because they testify in front of international Judges who travelled to their country to hear their testimonies. Philip Leach, a renowned professor as well as legal representative of some applicants summoned to testify in the context of fact-finding missions explained the importance of testimonies for these victims:[1367]

"[I]t seemed me to be an indispensable and profound exercise in the provision of justice—it was the first time that these families (many of whom were illiterate farmers from tiny hamlets in south-east Turkey) had ever been able to tell their stories properly to officialdom—and not just to judges, but to international judges. In a very high proportion of cases those families were believed, in stark contrast to the blustering members of the security forces who turned up to give evidence, their cases in Strasbourg were successful."

However, these fact-finding missions appear to be carried out on an exceptional basis;[1368] they were deployed in only 8% of the cases under the current analysis, all adjudicated before 2000,[1369] with all but one case focusing on the conflict in south-east Turkey between 1992 and 1996.[1370] Philip Leach argued that the limited number of fact-finding missions since the Turkey cases is due to the amendments brought about by Protocol 11 and the subsequent increased workload of the Court.[1371] Regardless, the lack of fact-finding missions nowadays fails to provide the victims with a chance to convey their stories and thus potentially contribute to their experience of procedural justice. The Court's selective approach to these missions was particularly criticized in relation to the cases concerning the Chechen wars (i.e. the majority of cases against Russia analyzed in this study), especially because the Court had to establish critical facts on the basis of the written evidence (without cross-examining a single witness) and other documents provided by the parties.[1372]

Except for the rare opportunities when the applicants were allowed to convey their stories, the applicants' chance to express their voice before the ECtHR is limited to written and oral submissions by the legal representatives. Consequently, it is not clear whether the ECtHR's proceedings might have important benefits for the victims in this regard, beyond the symbolic benefits associated with having the case considered before an international judicial body.[1373]

II. Interaction

[1367] Philip Leach, 'What is justice? Reflections of a Practitioner at the European Court of Human Rights' (2003) 4 European Human Rights Law Review 392, 394

[1368] An article analyzing the rational for fact-finding missions explained that "it not possible to identify one single, decisive criterion leading the Court to decide for, or against, fact-finding. Instead, its decision-making is influenced by an amalgamation of factors, both related and unrelated to the particular case in question." Philip Leach, Costas Paraskeva and Gordana Uzela, 'Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads' (2010) 28 Netherlands Quarterly of Human Rights 41, 49

[1369] It is important to mention that in all but one of the cases involving fact-finding missions analysed in this study, it was the commission that carried out this mission, and not the court, despite it being a Court prerogative according to article 38 ECHR.

[1370] *Kaya v Turkey* (ECtHR, 9 February 1998) Reports of Judgments and Decisions 1998-I; Timurtaş v Turkey App no. 23531/94, ECHR 2000-VI; *İpek v Turkey* App no. 25760/94, ECHR 2004-II (extracts); *Tanrıkulu v Turkey* [GC] App no 23763/94 ECHR 1999-IV; *Şemsi Önen v Turkey* App no. 22876/93 (ECtHR, 14 May 2002); and *Cyprus v Turkey* [GC] App no. 25781/94 ECHR 2001-IV

[1371] Philip Leach, Costas Paraskeva and Gordana Uzela, 'Human Rights Fact-Finding. The European Court of Human Rights at a Crossroads' (2010) 28 Netherlands Quarterly of Human Rights 41, 77

[1372] Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: the Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies 275, 279

[1373] E.g., see work of Annette Wieviorka, *The Era of the Witness* (Cornell University Press Ithaca And London, 1998) 84; see also theoretical framework chapter, section 3.1.

This section aims to scrutinize the victims' interaction in the process of obtaining reparations at the ECtHR and provide an assessment of its potential implications for victims.

According to the current analysis, except for the *ad-hoc* and exceptional situation when the victims might interact directly with the Court, the legal representatives represent the main vehicle for the applicants' interaction at the ECtHR. As already explained above, applicants in a select number of cases had the opportunity to convey their oral testimonies and interact with Judges of the Court in the context of fact-finding missions, which have resulted in potential benefits for the victims. However, these interactions are the exception rather than the rule, as they were temporarily and geographically limited to a specific situation.[1374] Of the majority of cases, the analysis revealed that it was only in the case of *Mocanu and Others v. Romania* that the applicant had the opportunity to interact with the bench or other parties present in the courtroom during proceedings. On an *ad-hoc* basis, the applicant was allowed to talk for three minutes on the clock, which represented an opportunity for him to express his grievances with the national Government in the case. Next to this situation, it is possible that in the cases where the Court decided to hold oral hearings at its seat, some of the applicants attended the hearings and were able to unofficially interact with the Court, however, the judgments analyzed in this case do not state any information in this regard. Despite these instances, the overwhelming majority of the cases analyzed in this research do not provide any details of further interaction between the applicants and the Court and its actors, but only put forward the legal representatives' submissions on victims' behalf.[1375] In addition, it is important to notice that the ECtHR does not provide for any procedure or facilities to support the applicants, neither during the oral testimonies carried out in the cases in Turkey, nor for the victims during the trial (for instance, to cover for travel expenses for victims to participate in the trial during hearings).[1376] Consequently, this elicits a lack of understanding on the Court's side of the risks associated with testifying (e.g. in the cases in Turkey)[1377] or the potential negative consequences that might ensue during the applicants' involvement with the trial.[1378]

The applicants' interaction at the ECtHR is limited to their interaction with the legal representatives. This finding was also confirmed by a study involving 34 semi-structured interviews with lawyers representing applicants in cases adjudicated by the Court, who described their role as one of intermediary between victims and the Court.[1379] Therein, the lawyers conveyed their sensitive task of communicating information to and from the Court, which according to them entails a back and forth translation of the ECtHR language. As they expressed, the management of

[1374] In theory, the Court may still carry out fact-finding missions, however, the Court appear reluctant in using this function. As expressed above, in the 74 cases investigated in this research, the Court has carried out fact-finding missions in five cases in Turkey and in the case Cyprus v Turkey.

[1375] E.g. *Kaykharova and Others v Russia* App nos. 11554/07 and 3 others (ECtHR, 1 August2013) para 10

[1376] Applicants and witnesses (and their representatives and advisers) taking part in hearings before the Strasbourg Court are subject to a 1996 Council of Europe Convention, the European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights, which guarantees immunity from legal process and free movement and travel (article 2, article 4.1.a.). Beside that, there is no other provision or process at the Court to deal in any more detail with the issue of witness protection.

[1377] In contrast with, for instance, international criminal law courts which have in place systems for the protection of victims who are testifying before the court. See Rome Statute, article 68(1): "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".

[1378] For instance, the lack of interest from the Court in hearing the victims' story may result in detrimental effects for the victims, feeling their suffering and story is unacknowledged. Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 359

[1379] Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 317

expectations plays a big role in their relationship with the victims, with many of the applicants anxiously hoping that the ECtHR procedures would bear fruits (e.g. in cases of forced disappearances, the applicants hope that the case before the Court will help find their disappeared relatives).[1380] They summarized that in performing human rights adjudication, they need to engage in an act of weighting between the needs and feeling of the applicants and the ECtHR's procedures.[1381]

On the downside, the fact that the victims' interaction with the Court is limited to their interaction with the legal representatives might place the applicants in a situation of dependency towards their lawyers. Since the victims' legal representation scheme is not part of the Court system, consequently, there is no Code of Conduct nor any redress mechanism in place at the ECtHR level to supervise the client-attorney relationship,[1382] and as such, the frequency and quality of interaction remain mainly in the hands of their lawyers. This might be challenging for the applicants whose lawyers are connected with international NGOs, because they might have their own goals and might not set as priority the interaction with the applicants but rather the successful litigation of the case. As Freek van der Vet reported in his study, these NGOs and their lawyers are interested in addressing wider human rights issues and advance the human rights litigation, however, they move from one conflict area to another once they have established a successful precedent in one case.[1383] Similarly, Loveday Hodson in her study of NGOs and human rights litigation in Europe noticed that in extreme situations, some NGOs representing victims before the Court fail to be in touch with the applicants at all.[1384] She expressed that the struggle for rights at the Court level appears to take place without the close involvements of those intended to benefit the most, risking to overlook the real needs and concerns of the applicants.[1385] While what the victims themselves think of their interaction with the lawyers cannot be explored in the current study amid lack of empirical data, it is important to draw the attention to the risks inherent to limiting the victims' interaction in the context of Court adjudication to the interaction with their lawyers only.

III. Information

This section consists of an illustration of how information is materialized in the process towards obtaining reparations at the ECtHR as well as an assessment of its implications for victims.

In cases of gross human rights violations, as those under current investigation, the applicants' prerogative of being informed gains particular importance. These cases involve most of the time a State violation of the procedural aspects of article 2 on the right to life or article 3 on freedom from torture, which refers to the failure of an adequate investigation at the national level.[1386] In these

[1380] Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 316
[1381] Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 319
[1382] There exists a document at the ECtHR level with Questions & Answers for Lawyers; however, it is of purely informative nature. 'Questions & Answers for Lawyers' (ECtHR, October 2018) <https://www.echr.coe.int/Documents/Q_A_Lawyers_Guide_ECHR_ENG.pdf> accessed 15 April 2020
[1383] Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 315
[1384] Loveday Hodson, *NGOs and the Struggle for Rights in Europe* (Hart Publishing, 2011) 159
[1385] Loveday Hodson, *NGOs and the Struggle for Rights in Europe* (Hart Publishing, 2011) 93
[1386] E.g. *Timurtaş v Turkey* App no. 23531/94, ECHR 2000-VI

cases, the denial of justice at the national level is pervasive, and it is precisely the protracted lack of information with regard to their cases that drives the applicants to file a case before the ECtHR.[1387] The Court itself acknowledged the importance of enforcing the right to information of victims at the national level in these situations. For instance, in case *Abakarova v. Russia*, referring to the shortcomings of the national investigation, the Court directed the State to ensure that the applicant is fully informed of all relevant procedural steps and provided with the necessary information and legal advice in a timely matter, to be able to effectively participate in proceedings.[1388]

According to this research, as with voice and interaction, the information that the applicants receive in the context of the ECtHR is limited to the information that they receive from their lawyers. Unfortunately, the judgements analysed in this study do not provide details on whether and the extent of information that the applicants receive from their lawyers, making it difficult to draw conclusions. However, some studies with lawyers working for international NGOs defending victims before the ECtHR tackled the issue. As such, interviews with lawyers elicit that they are aware of their important role; the lawyers do not appear keen to go in the field, however, they are aware that they need to do so, if they want to help victims and inform them of their rights.[1389] While these studies yield promising findings, entailing that the applicants are likely to be informed regarding to their case, the caveats exposed above in relation to interaction are similarly applicable here. With the lawyers being the only channel whereby victims receive information, this may make the victims fully reliant on them, which might result in disappointment and frustration on the victims' part if they fail in their task. This caveat is particularly salient in the cases where the victims are represented by lawyers working for the international NGOs, which juggle with several dozen cases at the same time.[1390]

Finally, in regard to outreach by the Court, which constitutes an important modality to communicate with the victims, the current research reports that the Court does not engage in outreach activities, to raise awareness amongst victimized population about its existence and about their right to bring their cases before the Court and request reparations.[1391] On the one hand, it may be argued that, given the large number of applications that reach the Court and which constitute already a burden for the system, as elicited above in section 3.2.1, outreach activities would appear to be an obsolete function of the Court. On the other hand, for victims in conflict situations outreach is an important modality to empower them to participate in different processes, provide them with information regarding their rights and options for participation, while at the same time creating realistic expectations.[1392] The victims' involvement with the Court is also important to make the victims' reality known to the Court so that its decisions respond to the extent

[1387] As reported by Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 316

[1388] *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015) para 113

[1389] Loveday Hodson, *NGOs and the Struggle for Rights in Europe* (Hart Publishing, 2011) 87; Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 320

[1390] For instance, EHRAC reports that "in collaboration with our partner organisations, we are currently working on around 300 cases against Russia, Georgia, Azerbaijan, Armenia and Ukraine at the European Court". 'Our cases' (EHRAC Website) <http://ehrac.org.uk/about-our-work/human-rights-litigation/cases/> accessed 15 April 2020

[1391] According to the Court's Annual Report of 2018, the Court is engaging in outreach activities, through the website and social media, videos on its YouTube channel explaining how the Court works and the issues it has to deal with. 'Annual Report 2018' (ECtHR, 2018) 158 <https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf> accessed 15 April 2020

[1392] Clara Ramírez-Barat, 'Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice' (International Center for Transitional Justice, 2011) 25

possible to their reality. Consequently, outreach activities appear to be a relevant issue for victims of gross human rights violations, such as the applicants in the cases analysed in the current research, and which the Court fails to provide.[1393] This is a missed opportunity for the Court to address gross human rights violations in many more situations across Europe and create a culture of respect for human rights.

IV. Length of Proceedings

This final section looks at the length of the proceedings as an element of procedural justice and discusses its potential impact on the victims before the ECtHR.

According to the current analysis, the average length of a trial from the moment when the application is submitted to the Court until the Court's decision, including also the decision on just satisfaction, is seven and a half years. The inter-State case of *Cyprus v. Turkey* is the outlier in this sample, with its length of 20 years.[1394] Furthermore, a decision by the Court does not mean that the reparations measures are implemented by the State immediately. According to article 46 ECHR, after a judgment is final, the States Parties undertake to abide by it and the Committee of Ministers shall supervise its execution.[1395] A clear estimation of how long the implementation lasts on average is beyond the purpose of this study. However, while studies indicate that the implementation of Court-awarded reparations varies depending on the reparations measures that the Court awards,[1396] the implementation will add an additional period of time until the victims may benefit from their reparations.[1397] Given that prolonged proceedings are known to result in mistrust in the proceedings of courts, frustration, and disappointment, especially when coupled with lack of interaction and information,[1398] it is similarly likely that the victims at the ECtHR have the same experience.

V. Conclusion

[1393] As explained above in the section on voice, many of victims in the cases adjudicated at the ECtHR and analysed in this chapter have benefitted from outreach from NGOs interested in adjudicating their cases. Loveday Hodson, *NGOs and the Struggle for Rights in Europe* (Hart Publishing, 2011) 86

[1394] In this case, the matter was referred to the Court by Cyprus in 1994, the judgment on the merits was issued in 2001, and only in 2014, the just satisfaction decision was released. When issuing its judgment in 2001, the Court found Turkey in violation of numerous violations of the ECHR, however, the Court held unanimously that the issue of just satisfaction was not ready for decision and adjourned its consideration, likely to encourage a political solution to the case. *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 4

[1395] ECHR, art 46 (1) and (2)

[1396] Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 Journal of International Law and International Relations 35

[1397] For instance, the implementation report in the case Cyprus v Turkey illustrates that Turkey has yet to pay just satisfaction to the victims in the case. *Cyprus v Turkey* App no. 25781/94 (Department for the Execution of Judgments of the ECHR, 1362 meeting (3-5 December 2019)) para 4 <http://hudoc.exec.coe.int/eng?i=004-37128> accessed 15 April 2020. In addition, the case Kaykharova v Russia was decided in 2013 and the report on the implementation of just satisfaction illustrates that just satisfaction has been paid three years later. However, other individual and general measures ordered by the Court appear to have the status 'pending'. *Kaykharova and Murtazova v Russia* App no 11554/07 ((Department for the Execution of Judgments of the ECHR, 1193 meeting) <http://hudoc.exec.coe.int/eng?i=004-15472> accessed 15 April 2020

[1398] Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1; Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 44; see also theoretical framework, section 3.4.

Despite the general enthusiasm regarding the adoption of the European Convention to ward off the installation of totalitarian or communist regimes in Europe,[1399] the negotiations over its content were characterized by compromises between States interested to render the protection of individuals' human rights a lived reality,[1400] and those States interested in preserving their own sovereignty.[1401] Consequently, these dynamics were reflected in the ECHR's text and its approach towards individuals and their role within Court proceedings. While the Convention marked a historical moment to enable individuals to bring claims against their own States before the Court, this feature remained for a long time optional and dependent upon States to accept it. Similarly, the prerogatives bestowed upon individuals in relation to the Court processes developed across several decades. According to the historical account of the ECtHR's development, the Court and its progressive interpretation of the ECHR in its first decades of existence played an important role in the evolution of the individuals' role within the ECHR system.[1402] While nowadays the individuals may bring claims directly before the ECtHR and claim reparations, the Court's legal basis and reparations regime maintain an instrumental role for individual within trials (i.e. participation through legal representatives), with efforts underway to put more strains on the individual complaints mechanism.[1403]

The current analysis looking into how the process-related prerogatives bestowed upon individuals developed within the ECtHR's jurisprudence as well as how they might contribute to procedural justice for victims elicited a limited approach on the Court's part towards individuals. The analysis unraveled a regress in regard to its approach towards individuals, from acknowledging to a certain extent their importance within the ECtHR trial to a view whereby the role of individuals within Court proceedings is purely instrumental, serving the purpose of litigating the case, through legal representation. Overall, the Court does not appear to acknowledge the role of Court proceedings in providing procedural justice to individuals.

As explained, the process through which victims access reparations at the ECtHR, observed from a procedural justice perspective, appears to be extremely limited. According to the analysis, the Court does not appear to acknowledge or to cater for the applicants' needs or wishes in relation to the process. Throughout the cases, the system of legal representation is enforced and victims do not normally participate in the trials on their own. The lawyers are the main vehicle for bringing forward the victims' voice, actualizing the victims' indirect interaction within the Court system, as well as maintaining the victims informed with regard to their cases. Exception to this finding are several cases adjudicated before 2000 and mainly focused on Turkey, whereby the Court enabled fact-finding missions to take place. As explained earlier, this practice is likely to have resulted in important benefits for the victims. In addition, it elicited an understanding on the Court's side of the importance of engaging with victims and enabling them to recount their stories in the context of oral hearings in the applicants' countries. However, this practice was the exception rather than the rule and with the Court's reluctance to deploy these missions in the

[1399] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 5-6

[1400] Schabas details how the French delegation was supportive of making the rights of individuals a reality, but was met with skepticism by other negotiators. William A. Schabas, The European Convention on Human Rights: A Commentary (Oxford University Press, 2015) 832

[1401] Mikael R Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) 32 Law & Social Inquiry 137

[1402] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 403

[1403] With the adoption of protocols 14 and 15, discussed above.

subsequent cases, the applicants in the majority of gross human rights situations brought before the Court have had their experience with the Court through the legal representatives.

As this research found out, in the majority of cases analyzed in this study (~53%), the lawyers that represent the applicants work for international NGOs that are specialized in strategic litigation before the ECtHR. As a consequence, this may guarantee a higher rate of success for the cases, and in addition, it may ensure the 'equality of arms' within the trial, since the opposing party is always a State, backed up by an entire team of lawyers. However, this situation may also place the victims in a position of dependency and vulnerability vis-à-vis their legal representatives. The victims may find themselves dependent upon their lawyers' diligence to express their views, interact with the victims, as well as provide information and updates with regard to their case. This situation may even restrict the extent to which victims can be said to have process-related prerogatives at all. It has to be conceded that the judgments analysed in this study are very scarce in details regarding the dynamics between the applicants and their legal representatives, making the assessment of the victims' perception of procedural justice at the ECtHR challenging. Notwithstanding these limitations, this research posits that having limited possibilities for procedural justice blocks the victims' opportunities to voice their needs and concerns, recount their stories and draw attention to the extent and impact of their victimization.[1404] In addition, the lengthy proceedings spanning on average seven and a half years, compounded by a slow implementation process by States is likely to have negative consequences for the victims, such as mistrust in the proceedings of courts, frustration, and disappointment, especially when coupled with lack of interaction and information.[1405]

Consequently, it can be contented that the ECtHR, with its processes and limited role it affords to the applicants, is missing an important opportunity to contribute to procedural justice for the victims under its jurisdiction. As explained extensively in the theoretical framework chapter, the victims' experience of procedural justice is as important as substantive justice,[1406] and failure to enact it may result in secondary victimization for the victims.[1407] The ECtHR's narrow focus on

[1404] The practice of the Court includes different other mechanisms which limit even more the procedural justice provided to victims by the ECtHR. For instance, 'friendly settlements' are provided for under Rule 62 of the Rules of Court and consists in confidential negotiations by the parties to a case, to a secure a friendly settlement. If the parties agree to the friendly settlement and the Court considers it has been reached having due regard to human rights standards, then the case may be struck out of the list of cases. Conversely, if a friendly settlement is not reached, the practice of 'unilateral declarations' under rule 62A of the Rules of the Court may be employed. In this case, the State may file a request with the Court, together with a declaration clearly acknowledging that there has been a violation of the Convention in the applicant's case together with an undertaking to provide adequate redress and, as appropriate, to take necessary remedial measures. Both mechanisms are a means to ensure the resolution of cases, rather than provide justice to victims. They have been criticized for their purely monetary focus, exclusion of victims from negotiations (in unilateral declarations), as well as their risk of concealing grave or even systemic violations. See Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 179-200. See Jonas Christoffersen, 'Individual and Constitutional Justice: Can the power Balance of Adjudication be Reversed?' in Jonas Christoffersen and Mikel R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2014) 186. On the other hand, fact-finding missions deployed by the Court in cases on South-East Turkey, provided victims with many opportunities to express to Court their suffering and contribute to collection of evidence which then increased the success of their cases. However, this is extremely limited in the practice of the Court theses days and has not been deployed in subsequent cases on gross human rights violations before the Court, such as those relating to the Chechen conflict. See more at section 3.4.2. Other Reparative Measures.

[1405] See also theoretical framework, section 3.4.

[1406] See e.g. Jo-Anne M. Wemmers, 'The Healing Role of Reparation' in Jo-Anne M. Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge, 2014) 226; see theoretical framework.

[1407] Marc Groenhuijsen, 'Victims' Rights in the Criminal Justice System: a Call for a More Comprehensive Implementation Theory' in Jan Van Dijk, RGH Van Kaam & Jo-Anne Wemmers (eds) *Caring for crime victims. Selected proceedings of the 9th International Symposium on Victimology* (Criminal Justice Press, 1999)

legal facts might result in repercussions for the victims who could interpret it as lack of respect for and interest in their victimization and stories, especially if their expectations have not been properly managed by their lawyers.

3.2.3. Substantive justice

Substantive justice refers to potential justice actualized through the reparations awarded by the ECtHR in cases of gross human rights violations. The ECtHR awards reparations under article 41. According to article 41, when the State is found in violation of one of the human rights set forth in the ECHR[1408] and when the national law does not afford reparations to victims (or only partial reparation), then the Court, upon its discretion ("if necessary") may make awards for pecuniary and non-pecuniary damage, respectively, to the injured party (as well as for costs and expenses). Furthermore, after a judgment is final, according to article 46 (on the binding force and execution of judgements), the States Parties undertake to abide by it by taking individual and/or general measures,[1409] and the Committee of Ministers will supervise the execution.[1410] As will be seen, in exceptional cases, the Court may step up and provide in its judgements obligations for States in the form of individual and/or general measures under article 46, which according to the van Boven/Bassiouni Principles might amount to additional reparations measures. The next section will put forward an illustration of the Court's practice with regard to awards on reparations (under articles 41 and 46), as well as reflect on the reparations' potential to provide substantive justice for victims of gross human rights violations.

3.4.1. Just Satisfaction

In what follows, the practice of the Court concerning just satisfaction is established, structured along its components identified in the case-law, namely, *restitutio in integrum*, pecuniary damage awards, and non-pecuniary damage awards.

I. *Restitutio in Integrum*

The principle *restitutio in integrum* (or restitution) is not inscribed as such in the ECHR, however the current analysis elicited that the Court makes recourse to it in its case-law on an *ad-hoc* basis. In the Court's Practice Direction, reference is made to *restitutio in integrum* under 'pecuniary damage awards', holding that through these awards the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place.[1411] In its case law, the Court first shed light on the use of the *restitutio in integrum* principle in the *Cases of de Wilde, Ooms and Versyp ("Vagrancy") v. Belgium.*[1412] In that judgment, the Court established the primacy of this principle vis-à-vis just satisfaction (see below figure 1), in

[1408] To establish the States' responsibility, the ECtHR applies the 'beyond reasonable doubt' standard of proof. See e.g. *Kaykharova and Others v Russia* App nos. 11554/07 and 3 others (ECtHR, 1 August2013) para 150

[1409] Egbert Myjer, Leif Berg, Peter Kempees, Giorgio Malinverni, Michael O'Boyle, Dean Spielmann, Mark E. Villiger, Jonathan Sharpe, 'The Conscience of Europe: 50 Years of the European Court of Human Rights' (Third Millennium Publishing, 2010) 88

[1410] ECHR, art 46 (1) and (2)

[1411] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 10

[1412] *De Wilde, Ooms and Versyp v Belgium* (Article 50) (1972) Series A, no 14, para 20; Later on, the ECtHR declared the primacy of *restitutio in integrum* in case Papamichalopoulos and others v Greece (concerned with the arbitrary deprivation of property) where it held that restitutio in integrum applies only in regard to pecuniary damage, as precursor to any awards under this head. However, this is distinct from the Vagrancy cases, where the *restitutio in integrum* was invoked in a matter concerned with non-pecuniary damage, although in this case no just satisfaction was awarded in the end.

that it held indirectly that *restitutio in integrum* should be the litmus test for making awards under article 41. To be precise, the Court clarified that article 41 (then article 50) could be employed in two scenarios. When the nature of the injury makes it possible to wipe out the consequences of a violation – yet the State's internal law precludes this,[1413] or when the nature of the injury does not accommodate restitution, and there are no remedies available at the national level.[1414] While both scenarios warrant just satisfaction awards, *restitutio in integrum* is to be provided only in the first scenario, when it is possible due to the nature of the violation and there are no national remedies available. Hence, *restitutio in integrum* appears dependent on two conditions: the nature of the violation and the existence of remedies at the national level.

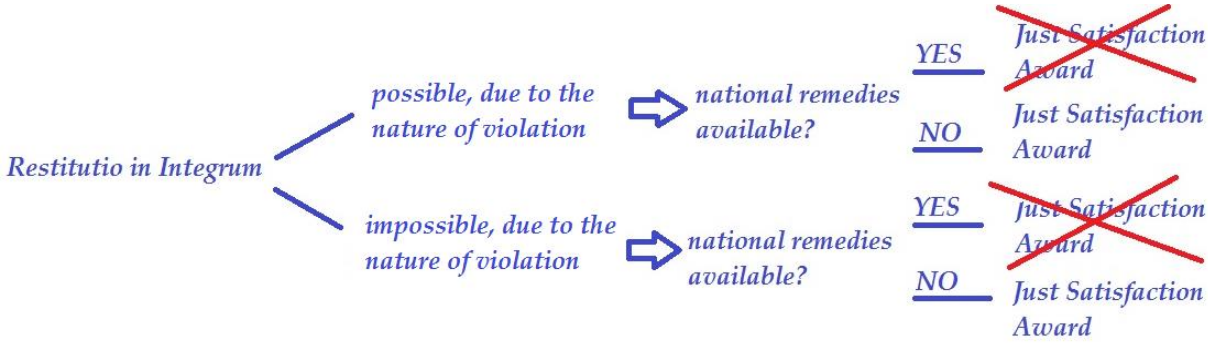


Figure 1

While the Court clarified in the *Vagrancy case* its understanding of *restitutio in integrum*, its application and role within just satisfaction awards, this research identified that the Court's understanding and approach towards *restitutio in integrum* is not as clear and varies considerably across its jurisprudence, with implications for individuals and the protection of their human rights.

To begin with, in most of the cases, the Court does not make reference to *restitutio in integrum* when it makes assessments and awards under article 41, which undermines altogether the idea of primacy of this principle. Taking into account the rationale established in *Vagrancy* and confirmed in *Papamichalopoulos cases*, the Court's award of just satisfaction without mentioning *restitutio in integrum* appears to be justified on grounds that national remedies are not available, which is the underlying assumption for just satisfaction awards. The case law analysis shows that indeed, in the large majority of cases, the Court found a violation of article 13 ECHR (right to an effective remedy) at the national level, which explains why the Court might have reasoned that reparation at the national level is not available, and thus bypassed restitution. In addition, the nature of crimes in most of the cases under review – violations of articles 2 and/or 3 - does not accommodate restitution, and again, this might explain why the Court considered that restitution is unachievable. As such, the Court's bypassing of *restitutio in integrum* and directly making just satisfaction awards appears to be grounded in the rule established in *Vagrancy case*, compounded with the reasoning in *Papamichalopoulos*. Once the Court establishes a violation of human rights, it then proceeds to award just satisfaction without the victims having to go again through domestic proceedings to request reparations.[1415] Going through new proceedings at the national level to request reparations would extend unreasonably the proceedings, which would "hardly be

[1413] *De Wilde, Ooms and Versyp v Belgium* (Article 50) (1972) Series A, no 14, para 20
[1414] *De Wilde, Ooms and Versyp v Belgium* (ECtHR, 18 June 1971) Series A no. 12, paras 79-80
[1415] As per *Papamichalopoulos and Others v Greece* (Article 50), (ECtHR, 31 October 1995 Series A no. 330-B) para 40

consistent with the effective protection of human rights and would lead to a situation incompatible with the aim and object of the Convention".[1416]

While the Court's reasoning elicits an approach considerate of victims and their interest in receiving speedy reparations, it may also be problematic because it fails to engage with the State's responsibility to attempt to restore the situation or provide arguments regarding the actual impossibility to do so. This way, a State will always have the possibility to pay for the human rights violations it incurs upon its citizens, instead of ceasing to perpetrate them in the first place. Consequently, the protection of the individuals' human rights might be weakened and the States' responsibility deflected. In the literature, this approach was both condemned and defended, arguments varying between the need of efficiency of the system and the need to condemn the State's possibility to 'buy off' treaty violations and to keep the benefits of illegal conduct.[1417]

In spite of the Court's approach to bypass *restitutio in integrum* adopted in the majority of the cases investigated in this research, the analysis also revealed two exceptions. The first exception concerns certain cases where the Court makes reference to *restitutio in integrum* even in cases involving a violation of the right to life, where the Court would not ordinarily invoke this principle and instead direct the State to provide just satisfaction.[1418] According to this analysis, in certain cases, the Court appears to invoke *restitutio in integrum* as a precursor for its 'exceptional' prerogative to direct the State to implement individual measures, such as reopening of an investigation at the national level. [1419] In these cases, *restitutio in integrum* is exceptionally invoked under article 46 - dealing with the execution of judgements, and not article 41,[1420] disclosing thus a variation in the ordinary application of *restitutio in integrum* principle. For instance, in *Case Abuyeva and others v. Russia*, the Court invoked *restitutio in integrum* under article 46, holding in respect to the State that:[1421]

[1416] *Jalloh v Germany* [GC] App no 54810/00 ECHR 2006-IX, para 129

[1417] Loukis Loucaides, 'Reparation for Violations of Human Rights under the European Convention and Restitutio in Integrum' (2008) 24 European Human Rights Law Review 435, 437; Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 42

[1418] These cases concern either killing and violence by state forces against a background of conflict (*Case of Association "21 December 1989" and Others v Romania*); land expropriation against a background of conflict (*Case of Chiragov and Others v Armenia*); bombings (*Case of Esmukhambetov and Others v Russia*, *Case of Abuyeva and others v Russia*, *Case of Abakarova v Russia, Case of Benzer and Others v Turkey*); enforced disappearances (*Case of Doğan and others v Turkey*) and terrorist attack (*Case of Tagayeva and others v Russia*). Although these cases involve gross human rights violations, here the Court does make reference to *restitutio in integrum.*

[1419] Ordinarily, the Committee of Ministers is tasked with the development of individual and general measures to ensure the States' implementation of judgements; however, the Court's proactive stance as to order such measures is clearly supported by the Committee of Ministers as well as the States Parties. See Linos-Alexander Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under article 46 ECHR' (2014) 32 Netherlands Quarterly of Human Rights 235, 253-254; in *Abuyeva and Others v Russia* App no. 27065/05 (ECtHR, 2 December 2010) paras 240-242; *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015). For a detailed discussion of individual and/or general measures, see section below 3.4.4. Other Reparative Measures.

[1420] *Restitutio in integrum* is included under article 41 assessment in the cases: *Association "21 December 1989" and Others v Romania* App nos. 33810/07 and 18817/08 (ECtHR, 24 May 2011) para 201; *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017), para 53. *Restitutio in integrum* is included under article 46 assessment in the cases: *Abuyeva and Others v Russia* App no. 27065/05 (ECtHR, 2 December 2010) para 236; *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015), which quotes the Case of Abueyva; *Tagayeva and Others v Russia* App nos 26562/07 and 6 others (ECtHR, 13 April 2017) para 637; and *Benzer and Others v Turkey* (revision) App no. 23502/06 (ECtHR, 13 January 2015) para 215

[1421] *Abuyeva and Others v Russia* App no. 27065/05 (ECtHR, 2 December 2010) para 236

"*[I]individual measures [must] be adopted in its domestic legal order to put an end to the violation found by the Court and to make all feasible reparation for its consequences in such a way as to restore, as far as possible, the situation existing before the breach*." [Author's insertion]

It then went on to order the State to undertake 'a new and independent investigation'. Against this background, amid a potential devaluation of *restitutio in integrum* in the context of article 41 and confronted with manifest disregard by States to take action,[1422] the Court appears to have migrated the application of *restitutio in integrum* outside of the just satisfaction awards in an attempt to deal with the States' evasion of responsibility (as per argument above). As such, by invoking *restitutio in integrum* under article 46, the Court appears to remind the State of their foremost obligation to tackle the consequences of the rights' violation. In addition, these cases, although limited, appear to mark a shift in the Court's initial approach, to ensure that the State's responsibility is not limited to the payment of just satisfaction, and instead it must implement individual measures, such as investigations at the national level which are a form of remedy for the victims.

The second exception are cases that next to irrevocable human rights violations involve, amongst other crimes, violations of the right to property.[1423] For instance, in *case of Chiragov and Others v. Armenia*, concerned with mass land expropriation as a result of a protracted armed conflict, in providing just satisfaction, the Court first outlined the principle of *restitutio in integrum* and then held that "Court is mindful of the fact that some situations – especially those involving long-standing conflicts – are not, in reality, amenable to full reparation".[1424] In other two cases, *Case of Esmukhambetov and Others v. Russia* and *Akdivar and Others v. Turkey*, concerned with claims for property rights restoration in relation to killings by State forces, the Court made reference to restitution as a guiding principle under article 41, but then it held that it is up to the State to select the means to execute the judgment.[1425] Another case is *Doğan and others v. Turkey* wherein the Court awarded just satisfaction only after acknowledging the wishes of the applicants in the case, for whom returning to their villages (measures which would have amounted to restitution) was not desirable.[1426] As such, the Court appears to invoke the *restitutio in integrum* principle in certain cases where the irrevocable human rights violations are accompanied by violations that are amenable to restitution, all the while denying the indiviuals' requests and holding that their realization is impossible.

From the above analysis, it can be inferred that there is no clear strategy that the Court is applying when invoking the *restitutio in integrum* principle. In the majority of cases, concerned with violations of articles 2 and/or 3, the Court does not even make reference to restitution, most likely due to the fact that restitution is not possible and/or the State is unwilling or unable to effect it. It is suggested that this approach might deflect the State's responsibility to justify the impossibility of restitution, which might be detrimental for the protection of victims' rights. However, this study also identified two exceptions from this approach. In certain cases the Court does make reference to *restitutio in integrum*, however, not under article 41, but under article 46 ECHR on the execution

[1422] All of these cases where *restitio in integrum* is invoked under article 46 are cases eliciting a pervasive unwillingness by Russia and Turkey to implement the orders of the Court issued in previous decisions dealing with similar crimes and facts. These new cases are dealing with the same issues already decided on by the Court in previous cases.
[1423] Under article 1 of Protocol 1 to the ECHR.
[1424] *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) para 53
[1425] *Esmukhambetov and Others v Russia* App no. 23445/03 (ECtHR, 29 March 2011) para 219; *Akdivar and Others v Turkey* (Article 50) (ECtHR, 1 April 1998) Reports of Judgments and Decisions 1998-II, para 47
[1426] *Doğan and Others v Turkey (just satisfaction)* App nos. 8803/02 and 14 others (ECtHR, 3 July 2006) para 49

of judgments, to direct the States to tackle the human rights violations by implementing individual measures such as reopening of an investigation. This approach is commendable, as the States' are less likely to deflect responsibility, and victims may actually benefit from both just satisfaction and individual measures. The second exception are cases involving, next to irrevocable human rights violations, violations of the right to property; however, the principle is invoked only to acknowledge its impossibility in practice. Against this background, it appears that the practice on *restitutio in integrum* varies considerably across its jurisprudence while its relevance for victims of gross human rights violations appears to be minimal.

II. Pecuniary Damage

Next to *restitutio in integrum*, the Practice Direction provides that the Court may also order just satisfaction in the form of compensation for pecuniary damage (hereinafter PD) for both loss actually suffered (*damnum emergens*) and loss, or diminished gain, to be expected in the future (*lucrum cessans*).[1427] It falls on the applicant to show that PD resulted from the alleged violation and to prove and document the value of material damage.[1428] The Court, after having reviewed the case and evidence, may decide to award the full calculated amount of the damage as put forward by the applicant, or for reasons of 'equity' to award less than the full amount of the loss.[1429]

As the analysis reveals, when deciding on PD awards, the Court reiterates an established set of criteria which need to be satisfied. First, a clear causal connection between the pecuniary damages claimed by the applicants and the violation of the Convention must be established. Second, the damage may be claimed only by close relatives of the disappeared persons, including spouses, elderly parents and minor children.[1430] If these criteria are fulfilled, the Court then makes awards for pecuniary damage in most of the cases, however, without providing explanation as to the different awards it makes. Conversely, the Court rejects claims where the causal link between the violation found and the alleged pecuniary damage is not established,[1431] or which fail to provide documentary evidence or other information substantiating the applicants' claims for pecuniary damages.[1432] Case *Meryem Celik and Others v. Turkey* constitutes an exception, as the Court, on its own motion, awarded pecuniary damages to the applicants, although they failed to submit to the Court itemized claims detailing their loss of financial support.[1433]

According to this analysis, PD is predominantly requested by indirect victims, in account of both damage to be expected in the future and loss suffered. In its turn, the Court appears to be generally granting the majority of PD claims, adopting a rather lenient approach to the deployment of the criteria for establishing the existence of harm.[1434] As revealed, indirect victims claim loss of financial support due to the disappearance or loss of relatives who were the breadwinners of the family, as a consequence of a violation of rights by the State's authorities.[1435] They represent the

[1427] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 10
[1428] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 11
[1429] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 12
[1430] E.g. *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) para 54
[1431] *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (ECtHR, 13 November 2012) para 368
[1432] *Benzer and Others v Turkey (revision)* App no. 23502/06 (ECtHR, 13 January 2015) para 223
[1433] *Meryem Çelik and Others v Turkey (revision)* App no. 3598/03 (ECtHR, 16 September 2014) para 100
[1434] For instance, in case *Esmukhambetov and others v Russia*, the Court held that "the Court recognises the practical difficulties for the applicants to obtain documents relating to their destroyed property and considers it appropriate to award the applicants equal amounts on an equitable basis". *Esmukhambetov and Others v Russia* App no. 23445/03 (ECtHR, 29 March 2011) para 206
[1435] E.g. *Magomadova and Others v Russia* App no. 33933/05 (ECtHR, 17 September 2009) paras 138-139

most common situation where awards in account of loss of future earnings suffered (*lucrum cessans)* are requested,[1436] and this analysis elicits that they are generally granted by the Court.[1437] In addition, PD for loss actually suffered (*damnum emergens*) is requested by indirect victims and awarded by the Court for travel expenses incurred in the course of search for the disappeared,[1438] or for funeral expenses.[1439] In other cases, PD is requested and awarded in respect of loss of immovable[1440] and movable property. Loss of movable property includes destroyed or damaged household property,[1441] loss of land,[1442] loss of rental income from land and houses, destroyed household items, cars,[1443] fruit trees and bushes, and livestock, loss of income from farming and stockbreeding, other business activities and employment, and expenses due to expenditure for alternative accommodation and other increased living expenses.[1444] In addition, the analysis revealed that the Court appears to reject PD requests in account of medications and public transportation expenses, holding that a clear causal connection cannot be inferred between these damages and the violations.[1445] In case *Aksoy v. Turkey*, the Court did make an award in regard to medical expenses, however the award for pecuniary and non-pecuniary damage was amalgamated into a lump sum.[1446]

As the analysis revealed, in the majority of cases under consideration the Court makes on average an award of approximately 80% lower than what is requested by the applicants. Only in a limited number of cases (approximately 8%), the Court made awards at the monetary level requested by applicants.[1447] All but one case in this category were brought against Russia, and concerned either aerial attacks[1448] or enforced disappearances and killings in alleged anti-terror operations carried

[1436] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 111.
[1437] The situation is prevalent in the cases against Russia, involving applicants residing in the Chechen Republic. See *Kaykharova and Others v Russia* App nos. 11554/07 and 3 others (ECtHR, 1 August2013); *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015); *Dzhabrailov and Others v Russia* App nos. 8620/09 and 8 others (ECtHR, 27 February 2014); *Gakayeva and Others v Russia* App nos 51534/08 and 9 others (ECtHR, 10 October 2013); *Lyanova and Aliyeva v Russia* App nos. 12713/02 and 28440/03 (ECthHR, 2 October 2008) paras 150 and 152; *Magomadova and Others v Russia* App no. 33933/05 (ECtHR, 17 September 2009) paras 138-139
[1438] *Kaykharova and Others v Russia* App nos. 11554/07 and 3 others (ECtHR, 1 August2013) para 184
[1439] *Kaykharova and Others v Russia* App nos. 11554/07 and 3 others (ECtHR, 1 August2013) para 184; *Esmukhambetov and Others v Russia* App no. 23445/03 (ECtHR, 29 March 2011) para 193; *Jelić v Croatia* App no. 57856/11 (ECtHR, 12 June 2014) para 119
[1440] See *Khadzhimuradov and Others v Russia*, nos. 21194/09 and 16 others (ECtHR, 10 October 2017) para 104; *Khamzayev and Others v Russia* App no. 1503/02 (ECtHR, 3 May 2011) para 222; *Akdivar and Others v Turkey* (Article 50) (ECtHR, 1 April 1998) Reports of Judgments and Decisions 1998-II, para 15
[1441] *Abuyeva and Others v Russia* App no. 27065/05 (ECtHR, 2 December 2010) para 248; *Esmukhambetov and Others v Russia* App no. 23445/03 (ECtHR, 29 March 2011) para 193; *Khamzayev and Others v Russia* App no. 1503/02 (ECtHR, 3 May 2011) para 222
[1442] *Şemsi Önen v Turkey* App no. 22876/93 (ECtHR, 14 May 2002) para 113
[1443] *Isayeva and Others v Russia* App nos. 57947/00 and 2 others (ECtHR, 24 February 2005) para 242
[1444] *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) para 14; *Esmukhambetov and Others v Russia* App no. 23445/03 (ECtHR, 29 March 2011) para 193; *Kerimova and Others v Russia* App nos. 17170/04 and 5 others (ECtHR 3 May 2011) para 324; *Akdivar and Others v Turkey* (Article 50) (ECtHR, 1 April 1998) Reports of Judgments and Decisions 1998-II, para 15; *Doğan and Others v Turkey* (just satisfaction) App nos. 8803/02 and 14 others (ECtHR, 3 July 2006) para 8; *İpek v Turkey* App no. 25760/94, ECHR 2004-II (extracts) 228-233
[1445] *Pitsayeva and Others v Russia* App nos. 53036/08 and 19 others (ECtHR, 9 January 2014) para 527; *Tagayeva and Others v Russia* App nos 26562/07 and 6 others (ECtHR, 13 April 2017) para 643; *Aksoy v Turkey* (1996) Reports of Judgments and Decisions 1996-VI, para 111
[1446] *Aksoy v Turkey* (1996) Reports of Judgments and Decisions 1996-VI
[1447] *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015) para 119; *Bitiyeva and Others v Russia* App no. 36156/04 (ECtHR, 23 April 2009); *Pitsayeva and Others v Russia*, nos. 53036/08 and 19 others (ECtHR, 9 January 2014); *Petimat Ismailova and Others v Russia*, App nos. 25088/11 and 11 others (ECtHR, 18 September 2014); *Gakayeva and Others v Russia* App nos 51534/08 and 9 others (ECtHR, 10 October 2013); and *Er and Others v Turkey* App no. 23016/04 (ECtHR, 31 July 2012)
[1448] *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015)

out by State authorities. In addition, in approximately 7% of the cases, the Court made awards at a higher monetary level than requested by applicants.[1449] All of these cases were brought against Russia and concerned enforced disappearances and killings in alleged anti-terror operations carried out by State authorities.

Furthermore, the Court does not generally appear to elaborate on its rationale to make awards at a lower, similar, or higher monetary level vis-à-vis the applicants. However, a closer examination of the cases reveals that awards at the same or higher monetary level were primarily made in respect of children of direct victims, and secondarily in respect of spouses. Consequently, this finding suggests that the relationship to the direct victim might be a criterion that the Court is considering when making pecuniary damage awards.[1450] However, the analysis reveals that there are also situations when the Court relies its decision for PD awards on the 'principle of equity'. The Court asserts that a precise calculation of the sums necessary to make reparation in respect of pecuniary damage may be prevented by the 'inherently uncertain character of the damage flowing from the violation",[1451] or by the passage of time, which makes the link between a breach of the Convention and the damage less certain.[1452] These circumstances are seldom as far as PD is concerned, because the material harm can generally be quantified in financial terms; however, they are prevalent in regard to non-pecuniary damage awards, which will be elaborated in the next section.

Therefore, as far as pecuniary damage awards are concerned, the Court's practice appears to be straightforward, as long as the applicant reports and documents the material harm incurred as a result of victimization. The Court appears to be granting the victims' requests for compensation in the majority of cases, covering both actual and future losses that can be monetarily quantified. The Court attempts to base its method of calculation on objective criteria supported by evidence, such as valuation reports,[1453] property certificates issued by national authorities,[1454] the monthly minimal living standard in a certain State, when awards in respect of loss of financial support are made,[1455] or other financial statements.[1456] Through its awards, the Court recognizes the material harm incurred by victims and consequently, directs the States to pay the victims for the PD suffered. While this approach by the Court will undoubtedly help victims relieve some of the financial strains incurred by the violations, it is unfortunate that the large majority of awards are at a level significantly lower than the level requested by applicants. In practice, these awards may at best ensure that the victims are not further impoverished by the victimizing act.

[1449] *Bitiyeva and Others v Russia* App no. 36156/04 (ECtHR, 23 April 2009); *Magomadova and Others v Russia* App no. 33933/05 (ECtHR, 17 September 2009); *Aslakhanova and Others v Russia* App nos. 2944/06 and 4 others (ECtHR, 18 December 2012); *Pitsayeva and Others v Russia* App nos. 53036/08 and 19 others (ECtHR, 9 January 2014); *Sultygov and Others v Russia* App nos. 42575/07 and 11 others (ECtHR, 9 October 2014); *İpek v Turkey* App no. 25760/94, ECHR 2004-II (extracts)

[1450] Although the age of children is not provided for in the majority of judgments, in *Abakarova v Russia*, the applicant was eight years old at the time when the crimes were committed; the age of children might influence the Court's rationale in making pecuniary damage awards.

[1451] *Chiragov and Others v Armenia (just satisfaction)* [GC] App no 13216/05 (ECtHR, 12 December 2017) para 56; *Esmukhambetov and Others v Russia* App no. 23445/03 (ECtHR, 29 March 2011) para 209-211

[1452] *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) para 79

[1453] E.g. *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) paras 65 and 73 *Akdivar and Others v Turkey* (Article 50) (ECtHR, 1 April 1998) Reports of Judgments and Decisions 1998-II, para 15

[1454] E.g. Esmukhambetov and Others v Russia App no. 23445/03 (ECtHR, 29 March 2011) para 204

[1455] E.g. *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015) paras 116 and 119; *Gelayevy v Russia* App no. 20216/07 (ECtHR, 15 July 201) para 167

[1456] E.g. *Sangariyeva and Others v Russia* App no. 1839/04 (ECtHR, 29 May 2008) para 128; *Arapkhanovy v Russia* App no. 2215/05 (ECtHR, 3 October 2013) paras 180 and 182

III. Non-Pecuniary Damage

According to the Practice Direction, just satisfaction may also be afforded in regard to non-pecuniary damage (hereinafter NPD), in the form of awards intended to provide financial compensation for non-material harm, such as mental or physical suffering.[1457] In addition, as the Practice Direction posits, due to the inherent nature of NPD, the award itself might not be easily determined, therefore, the Court might make the assessment on an equitable basis, having regard to the awards claimed by the applicants, as well as its case law and established standards.[1458]

As the analysis showed, applicants put forward NPD requests for several categories of non-material harm, stemming from different rights violations. They wish to receive these awards in account of anxiety, pain and suffering due to the disappearance of family members,[1459] prolonged anxiety due to failed or lengthy national investigations,[1460] mental damage due to (violent) deaths of members of family,[1461] physical harm as a result of inhumane treatment during detention,[1462] anxiety, emotional suffering and distress from attacks and ensuing loss of livelihood,[1463] distress due to failure to receive information about the crimes, compounded by indifference of local authorities towards the applicants' grief,[1464] as well as feelings of injustice and lack of trust in the national justice system.[1465]

Consequently, according to the analysis, the Court appears to have developed a two-fold approach to its NPD awards, inasmuch as it differentiates in its case law between situations when the NPD awards carry either symbolic or compensatory value. This differentiation as to the purpose of NPD awards has been put forward by the Court in the case *Varnava and others v. Turkey*, quoted then in case *Cyprus v. Turkey*. It held that:

"*[I]n many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right [through a declaratory judgment]. In some situations, the impact of the violation may be regarded as being of a nature and degree as to have impinged*

[1457] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 13
[1458] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 14
[1459] E.g. *Kaykharova and Others v Russia* App nos. 11554/07 and 3 others (ECtHR, 1 August2013); *Bitiyeva and Others v Russia* App no. 36156/04 (ECtHR, 23 April 2009); *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014; *Gelayevy v Russia* App no. 20216/07 (ECtHR, 15 July 201), etc
[1460] E.g. *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (ECtHR, 13 November 2012); *Abuyeva and Others v Russia* App no. 27065/05 (ECtHR, 2 December 2010); *Cangöz and Others v Turkey (revision)* App no. 7469/06 (ECtHR, 19 September 2017); *Gelayevy v Russia* App no. 20216/07 (ECtHR, 15 July 201), etc.
[1461] E.g., *Abakarova v Russia* App no. 16664/07 (ECtHR, 15 October 2015); *Abuyeva and Others v Russia* App no. 27065/05 (ECtHR, 2 December 2010); *Cangöz and Others v Turkey (revision)* App no. 7469/06 (ECtHR, 19 September 2017); *Erdoğan and Others v Turkey* App no. 19807/92 (ECtHR, 25 April 2006), etc.
[1462] In *Aslakhanova and Others v Russia* App nos. 2944/06 and 4 others (ECtHR, 18 December 2012); *Pitsayeva and Others v Russia* App nos. 53036/08 and 19 others (ECtHR, 9 January 2014)
[1463] In *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017); *Isayeva and Others v Russia* App nos. 57947/00 and 2 others (ECtHR, 24 February 2005)
[1464] E.g. *Imakayeva v Russia* App no. 7615/02, ECHR 2006-XIII (extracts); *Gelayevy v Russia* App no. 20216/07 (ECtHR, 15 July 201); *Khamila Isayeva v Russia* App no. 6846/02 (ECtHR, 15 November 2007); *Lyanova and Aliyeva v Russia* App nos. 12713/02 and 28440/03 (ECthHR, 2 October 2008); *Magomadova and Others v Russia* App no. 33933/05 (ECtHR, 17 September 2009), etc.
[1465] E.g. *Tagayeva and Others v Russia* App nos 26562/07 and 6 others (ECtHR, 13 April 2017); *Taymuskhanovy v Russia* App no. 11528/07 (ECtHR, 16 December 2010)

so significantly on the moral well-being of the applicant as to require something further."[1466] [Author's insertion]

The former situation covers the cases when the Court considers that the public vindication of the wrong suffered by the applicant, in a judgment binding on the States is a powerful form of redress in itself (i.e. it has symbolic value).[1467] In the Court's practice, they are labelled as declaratory judgements, but they are mainly concerned with cases when the harm is too insignificant to be compensated.[1468] The remainder of the section will focus on the Court's practice on NPD awards with compensatory value and infer its consequences for victims under the Court's jurisdiction.

According to this analysis, the Court appears to be granting the victims requests for NPD awards in the large majority of cases. In comparison with the PD awards where the applicants must prove the existence of damage, NPD awards are generally awarded on grounds that:[1469]

"*[W]herever the Court finds a violation of the Convention, it may accept that the applicants have suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations, and make a financial award*."

Moreover, in certain cases such as those involving enforced disappearances the Court may hold that the trauma, pain, anxiety, frustration, feelings of injustice or humiliation suffered by the indirect victims as a result of disappearances amount to torture or ill-treatment under article 3, and consequently makes awards for non-pecuniary damages accordingly.[1470] In some rare situations, the Court may even make awards that were not requested by applicants. For instance, in case *Erdogan and others v. Turkey*, in addition to awards of non-pecuniary damage for anxiety and pain suffered as a result of the direct victims' victimization, the Court made non-pecuniary damage awards in respect to damage sustained by applicants in their personal capacity, although not requested.[1471]

Despite the Court's lenient approach to NPD awards, the current research found out that as far as the monetary value of NPD awards (i.e. actual compensation received by victims) is concerned, the Court makes on average an award of 61% lower than what is requested by the applicants. In only a handful of cases (approximately 9%), the Court makes awards at a level higher than the one requested by applicants; and in approximately 23% of the cases the awards are at the same level as the one requested by applicants. The sums of money the Court generally awards in account of NPD vary between 15.000 and 20.000 EUR, however, the Court may also award as much as 60.000 EUR in limited situations.[1472]

[1466] *Varnava and Others v Turkey* [GC] App nos. 16064/90 and 8 others, ECHR 2000, para 224; also *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 56

[1467] Costas Paraskeva, 'European Court of Human Rights: From Declaratory Judgments to Indications of Specific Measures' (2018) 1 European Human Rights Law Review 46, 49

[1468] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 141.

[1469] E.g. *Kaykharova and Others v Russia* App nos. 11554/07 and 3 others (ECtHR, 1 August2013) para 192; *Elena Apostol and Others v Romania* App nos. 24093/14 and 16 others (ECtHR, 23 February 2016); *Esmukhambetov and Others v Russia* App no. 23445/03 (ECtHR, 29 March 2011) para 216

[1470] For instance in *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) para 57

[1471] *Erdoğan and Others v Turkey* App no. 19807/92 (ECtHR, 25 April 2006) 109

[1472] E.g. *Petimat Ismailova and Others v Russia* App nos. 25088/11 and 11 others (ECtHR, 18 September 2014); *Sultygov and Others v Russia* App nos. 42575/07 and 11 others (ECtHR, 9 October 2014)

Although there are large discrepancies in the amounts requested by applicants versus the amount granted by the Court, this research posits that the Court's rationale for NPD awards is ambiguous and it is not possible to fully discern what criteria inform the Court's decisions for the awards. This finding is in line with previous research investigating NPD awards under article 41, which posited that the Court's practice is unpredictable, lacks transparency, as well as consistency.[1473] However, an empirical study by Szilvia Altwicker-Hàmori et al. of NPD awards across the ECtHR's case law in a given year pinpointed different criteria that the Court takes into account when making such awards. The study aimed to challenge the academic reproach that the Court's practice is arbitrary or unprincipled, and attempted, *inter alia*, to decipher the underpinnings of the principle of equity, as used before the ECtHR in relation to NPD. The seriousness of the violation (with the rights to life, physical and mental integrity violation being compensated with the highest amount of money), the applicant-related factors (being a legal person or a natural person) and overall context-related factors (disagreement inside the Court, presumably due to the complexity of the case, as indicated by appended judge opinions) appeared to be the most important factors that the Court takes into account when making NPD awards, especially on an equitable basis.[1474] As will be seen below, these criteria put forward in the empirical study may help to make sense of awards in the general population of cases, however, the analysis of the cases involving gross human rights violations reveals much more complexity.

To begin with, in the large majority of cases, the Court does not provide an elaboration on its rationale for making NPD awards; it infers the existence of NPD from the finding of a right's violation and then makes the NPD awards.[1475] There are also cases where the Court provides more elaboration. For instance, in some cases, the Court explains that its NPD awards serve:[1476]

"*[T]o give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage.*"

The approach was followed, for instance, in case *Chiragov and others v. Armenia*, concerning the ongoing Nagorno-Karabakh conflict,[1477] case *Al-Skeini and others v. the UK*, concerning actions of British armed forces in Iraq,[1478] as well as in cases *Varnava and others v. Turkey*[1479] and *Cyprus v. Turkey*,[1480] concerning the Turkish occupation of Northern Cyprus. In another case, *Tagayeva and others v. Russia*, in which Russia's responsibility to protect human rights of people involved in a massive terror attack was at stake, the Court's NPD awards took into account the rights violated as well as the "steps taken with the aim of compensating and rehabilitating the victims of

[1473] Franz Bydlinski, 'Methodological Approaches to the Tort Law of the ECHR' in Attila Fenyves, Ernst Karner, Helmut Koziol & Elisabeth Steiner (eds), *Tort Law In The Jurisprudence Of The European Court Of Human Rights* (De Gruyter, 2011) 176; Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 121

[1474] Szilvia Altwicker-Hàmori, Tilmann Altwicker, Anne Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights' (2016) 76 Heidelberg Journal of International Law 1, 7

[1475] E.g. *Pitsayeva and Others v Russia* App nos. 53036/08 and 19 others (ECtHR, 9 January 2014) para 538

[1476] E.g. In *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) para 57

[1477] In *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) para 57

[1478] *Al-Skeini and Others v the United Kingdom* [GC] App no. 55721/07, ECHR 2011, para 182

[1479] *Varnava and Others v Turkey* [GC] App nos. 16064/90 and 8 others, ECHR 2000, para 224

[1480] *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 56

the terrorist act, the seriousness of the damage caused, family links with the deceased and other individual circumstances."[1481]

Furthermore, in a large number of cases (approximately 36%), the Court explains that it makes its assessment of NPD awards 'on an equitable basis'. The deployment of the equity principle by the Court adds to the complex practice on NPD, as the Court does not clarify what it considers to be equitable. In some cases, the Court explains that the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to involve awards of NPD on an 'equitable basis'.[1482] In only a handful of cases (approximately 6%), the Court stated that the principle of equity involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.[1483] The Court's holding in these cases appears to support previous research revealing that indeed equity takes into account the seriousness of the violation, the applicant-related factors, and the overall context-related factors.[1484]

According to the current examination of cases concerned with gross human rights violations, (therefore the seriousness of the violation is a constant across all cases), the deployment of 'equity' in regard to NPD claims reveals a much more complex or indeed arbitrary practice than the empirical study mentioned above.[1485] The following examples provide support to this point. In cases where the Court found the State guilty of failure to carry out investigations into disappearances or deaths (article 2 violation in the procedural aspect) and the principle of equity was invoked, applicants (all natural persons, so the applicant related factor was again constant across the cases) received different awards in regard to NPD. In case *Kelly and others v. the UK*, the applicants received approximately EUR 11220; in case *Ibragim Tsechoyev v. Russia*, the applicant received approximately EUR 20000; in cases *Elena Apostol and others v. Romania*, *Association '21 December 1989' and Others v. Romania, and Picu and Others v. Romania*, the applicant received approximately EUR 15000; in case *Kharayeva and Others v. Russia*, the applicants received approximately EUR 6666; and in case *Al-Skeini and Others v. the UK*, the applicants received EUR 17000. These cases reveal different NPD awards across different cases and one first criterion that might influence these differences is the fact that the State against which the claim is being brought is different. This finding is supported by common knowledge that the Court makes NPD awards taking into account the local economic circumstances,[1486] and indeed, the awards in the three cases above against Romania concern the same amount of money, for the same violation.

[1481] *Tagayeva and Others v Russia* App nos 26562/07 and 6 others (ECtHR, 13 April 2017) para 649

[1482] See, for instance, *Varnava and Others v Turkey* [GC] App nos. 16064/90 and 8 others, ECHR 2000, para 224; *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017) para 54

[1483] *Varnava and Others v Turkey* [GC] App nos. 16064/90 and 8 others, ECHR 2000, para 224; *Al-Skeini and Others v the United Kingdom* [GC] App no. 55721/07, ECHR 2011, para 182; *Chiragov and Others v Armenia* (just satisfaction) [GC] App no 13216/05 (ECtHR, 12 December 2017); *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 56

[1484] Szilvia Altwicker-Hàmori, Tilmann Altwicker, Anne Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights' (2016) 76 Heidelberg Journal of International Law 1, 40-41

[1485] Szilvia Altwicker-Hàmori, Tilmann Altwicker, Anne Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights' (2016) 76 Heidelberg Journal of International Law 1

[1486] Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press, 2017) 550; 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 2

However, the cases above against Russia or the UK concern the same right violation, against the same State, yet the NPD awards are different. Interestingly, in the cases against the UK, one of the cases, namely *Al-Skeini and Others v. the UK* has two concurring opinions attached to it, revealing the complexity of the case at hand, whereas the other case, *Kelly and others v. the UK* does not have any opinion attached to it. This finding reveals that the NPD awards might be influenced by the complexity of the cases at hand, which in turn might justify the higher NPD awards in case *Al-Skeini and Others v. the UK*. Altwicker-Hàmori et al.'s study found a link between context-related factors (i.e. disagreement inside the Court illustrated by the existence of an opinion) and NPD awards made on an equitable basis, however, contrary to the current analysis, it asserted that these factors negatively influence the awards, in the sense that disagreement inside the Court will lead to lower NPD awards.[1487] According to the current analysis, the NPD was awarded at a higher level in the more 'complex' case. On the other hand, in the cases against Russia, none of the cases has any opinion attached, yet the awards are different. What might explain the difference is the number of beneficiaries in these cases; in case *Ibragim Tsechoyev v. Russia*, the beneficiary was one sibling of the direct victim, whereas in case *Kharayeva and Others v. Russia*, the beneficiaries were three siblings of the direct victim. However, there could also be different other factors that informed the NPD awards in these cases, which do not immediately transpire from the judgments.

Another example concerns a batch of cases brought by families of disappeared persons against Russia, which concern virtually the same rights violations (article 2 substantive and procedural; article 5; article 13; and article 3), yet the awards are widely different.[1488] A closer analysis of these awards reveals that the relationship between the direct victim(s) and the beneficiaries might influence the NPD awards, with higher awards being granted to parents, and lower awards to spouses, although this is not always straightforward.

Consequently, this analysis reveals that the Court's practice with regard to NPD awards is fraught with intricacies. To begin with, in many judgments the Court does not even make awards in regard to NPD, holding that the public vindication of the wrong suffered by the applicant, in a judgment binding on the States is a powerful form of redress in itself. Conversely, it holds that due to the nature of the rights violated, NPD cannot be compensated for solely by the finding of violations, and makes a financial award. The Court's approach to NPD awards is generally lenient, in that it makes these awards in the majority of cases without requirements of burden of proof on the victims' part, however, according to the present analysis, the Court makes NPD awards at a significantly lower level than the one requested by victims.

As such, it is commendable that the Court is acknowledging the existence of moral harm, without putting strain on victims to substantiate it. The Court's NPD awards might have symbolic and practical value for the victims.[1489] The judgments acknowledge the rights violations as well as the ensuing victimization, and provides compensation, albeit at a lower level. This might be

[1487] Szilvia Altwicker-Hàmori, Tilmann Altwicker, Anne Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights' (2016) 76 Heidelberg Journal of International Law 1, 40. One case is adjudicated in 2001 and the other in 2011 and as such, economical considerations (e.g. inflation, etc.) might explain some of these differences.

[1488] *Utsayeva and Others v Russia* App no. 29133/03 (ECtHR, 29 May 2008); *Ibragimov and Others v Russia* App no. 34561/03 (ECtHR, 29 May 2008); *Sangariyeva and Others v Russia* App no. 1839/04 (ECtHR, 29 May 2008); *Bitiyeva and Others v Russia* App no. 36156/04 (ECtHR, 23 April 2009); *Musayev and Others v Russia* App nos. 57941/00 and 2 others (ECtHR, 26 July 2007).

[1489] See also Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 320

particularly important for the victims whose primary motivation in bringing a case before the Court was fueled by lack of or prolonged investigations into crimes at the national level. However, the awards might not fully satisfy the victims, as due to the large monetary discrepancies vis-à-vis what the victims want (~61% difference), they do not fully respond to the victims' preferences. In fact, scholars criticized the Court's practice in this regard, arguing that the sums of money "insult to the victims and risk undermining the authority of the Court in the eyes of the perpetrators and the governments responsible for such deeds".[1490] Interestingly, an NGO report showcasing excerpts from interviews with victims before the Court revealed that for victims the compensatory awards are of relative value;[1491] what is more important is to know what happened to the relatives and who perpetrated the crimes.[1492] This need of victims is hardly satisfied by the ECtHR judgments, as they might find the States in violation of their obligations of doing so, but the responsibility ultimately falls on States to take further measures in this regard. It is therefore important to complement NPD awards with various measures at the national level, such as reopening of an investigation into the crimes.

In addition, the lack of insight into the rationale for making the specific NPD awards puts into question whether the Court takes into account, at all, the mental and physical trauma, anxiety, distress, feelings of injustice, frustration that the victims allege in their applications. It is already a known fact that the Court has in place a standard table for calculating NPD awards that it then adapts to the circumstance of the case, however, the criteria upon which Judges base their calculation are not revealed.[1493] The current analysis revealed a complex practice in regard to these awards. While the Court does not generally justify its rationale for the awards, in many instances it invokes the principle of equity as rationale, without clarifying further what it means. Altwicker-Hàmori et al. found out that the seriousness of the cases, the characteristics of the applicants (natural or legal person) and the overall complexity of the cases might inform the awards made in equity. However, the current analysis involving gross human rights violations cases, hence the seriousness was a constant, could not confirm those criteria. Although the current study could not pinpoint what exactly informs the Court's rationale, it found out that the State against which the case is adjudicated, the number of applicants, and the relationship of the applicants with the direct victims might also influence the Court's decisions.[1494] From a victims' perspective, the lack of insight into the process and purpose of NPD awards might result in unfulfilled expectations and disappointment with regard to the awards the applicants receive.

3.4.2. Other Reparative Measures

[1490] Gabriella Citroni, 'Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts' (2012) 5 Inter-American and European Human Rights Journal 49, 68

[1491] It is possible that the victims make requests for NPD awards knowing that, according to the Court's legal basis, compensation is in theory the only form of reparations they might receive, although they would like to receive measures extending beyond NPD, and indeed, PD.

[1492] 'Annual Report 2010' (EHRAC, 2010) 15 <http://ehrac.org.uk/wp-content/uploads/2014/10/EHRAC-AR-2010.pdf> accessed 15 April 2020

[1493] Egbert Myjer and Peter Kempees, 'Notes on Reparations under the European Human Rights System' (2009) 2 Inter-American and European Human Rights Journal 81, 91

[1494] However, another study focusing on cases involving disappearances in Russia has noticed that the amounts awarded in these cases were without any regard to the family ties between the applicant and the direct victim, to whether the applicant witnessed the apprehension, to the time elapsed since the disappearance, or to the intensity of the applicant's search for his or her disappeared relative. Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: the Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies 275, 289

In addition to Court awarded reparations within the just satisfaction framework and the corresponding State obligations to implement them, as exposed above, this research identified in the Court's practice seldom instances where the judgments establish additional obligations for the States that might hold reparative value for the victims.

Pursuant to its reparations regime, the Court asserts that the reparations it will award (i.e. just satisfaction) include the measures of *restitutio in integrum* and compensation for PD and NPD damage. Furthermore, according to article 46, States have the obligation to abide by final judgements of the Court under the Committee of Ministers' supervision,[1495] and in doing so they have the responsibility to adopt, when appropriate, individual and/or general measures.[1496] However, as this analysis identified, across several 'exceptional cases'[1497] of gross human rights violations, the Court indicated on its own motion (i.e. without the victims requesting them) measures that the States would need to adopt to discharge their obligations under the judgments, expanding thus its reparatory regime beyond just satisfaction.[1498] These measures – individual and/or general - constitute obligations for States under article 46 on the execution of judgments,[1499] and, as this research posits, they might hold reparative value as they amount to measures of satisfaction and guarantees of non-repetition, as defined by the van Boven/Bassiouni Principles. However, insofar as the legal basis for these measures is article 46 and not article 41, legally speaking, these measures cannot be considered a form of reparation.

The current research identified that the instances where the Court directs States to adopt individuals and/or general measures under article 46 are rather limited (approximately 14%). However, they appear to indicate a tendency on the Court's part to become more proactive in the area of reparations in cases involving gross human rights violations that have a pervasive nature.[1500] To be precise, the Court appears to either provide these measures in cases revelatory of patterns of violence spanning across many years, or in cases concerned with a rather singular victimizing event, at a fixed point in time, but whose negative consequences continue to affect the victims years after the event, amid a failure of national authorities to tackle them.[1501] They include cases against Russia, focusing on "disappearances which occurred, in particular, in Chechnya and Ingushetia between 1999 and 2006, where such a situation constitutes a systemic problem under

[1495] ECHR, art 46

[1496] Egbert Myjer, Leif Berg, Peter Kempees, Giorgio Malinverni, Michael O'Boyle, Dean Spielmann, Mark E. Villiger, Jonathan Sharpe, 'The Conscience of Europe: 50 Years of the European Court of Human Rights' (Third Millennium Publishing, 2010) 88

[1497] Elisabeth Lambert Abdelgawad, 'The Execution of Judgments of the European Court of Human Rights' (Council of Europe Publishing, 2008) 52

[1498] These measures may be also taken in the context of Pilot Judgment Procedures whereby shortcoming in the legal order – the systemic problem – that is the cause of the violation and which affects a whole class of individuals are identified. In the judgment in the pilot case, the Court gives advice to the Government, in terms of recommended measures on how to solve the systemic problem. See Mr Erik Fribergh, 'Pilot judgments from the Court's perspective' (CoE, 9-10 June 2008) 87-88 <https://rm.coe.int/applying-and-supervising-the-echr-towards-stronger-implementation-of-t/1680695ac3> accessed 15 April 2020. I therefore acknowledge that the practice of individual and general measures has mostly developed in relation to pilot judgments; however, my case-law selection does not include fully-fledged pilot judgements. (For a discussion on how Dogan and others v Turkey discussed below might amount to pilot judgment see Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16 Human Rights Law Review 731, 760. However, the Court did not label it as such – as it did for instance in Broniowski v Poland [GC] App no. 31443/96, ECHR 2004-V).

[1499] ECHR, art 46

[1500] See also Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 Human Rights Law Review 451, 451

[1501] This differentiation is not so clear-cut in practice, as there may be cases where patterns of violence across time have been compounded by failure of national authorities to carry out investigations.

the Convention";[1502] against Tukey, wherein the Court observed that disappearances "fitted in with the pattern of disappearances of large numbers of persons in south-east Turkey between 1992 and 1996";[1503] and against Romania, dealing with "the violent suppression of the demonstrations during the events of December 1989"[1504] and the ensuing scarce or ineffective investigations.

Of the cases under current investigation, the Court first started to stipulate these measures in the cases against Tukey, including, amongst other crimes, patterns of enforced disappearances of large numbers of persons in South-East Turkey. The measures the Court provided evolved gradually, from assuming the role of a first-instance Court by denouncing the lack of effectiveness of national remedies, to measures that target impunity for enforced disappearances, by placing on the State an obligation to carry out an investigation with a view to identifying and punishing the perpetrators.

Thousands of cases regarding the conflict in South-East Turkey started to flood the Court since the second half of the 1990s.[1505] In the emblematic case *Akdıvar and Others v. Turkey,* the Court absolved the applicants of the requirement to exhaust domestic remedies for admissibly purposes, based on the general legal and political background of the case and its particular circumstances.[1506] In those cases, the Court (and the former Commission) had started deploying fact-finding missions by delegation of Judges, as the Turkish courts were not hearing such cases.[1507] Through these missions, the Court managed to establish what was happening in Turkey, and consequently, established in its judgment that in addition to just satisfaction, States also have an obligation to provide individual measures. It held that 'effective remedy' within the meaning of Article 13: [1508]

"*[E]ntails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible*".

This strategy propelled the Court to assume functions of a first-instance tribunal and had its challenges, but at the same time, this exception to the subsidiarity principle reflected the Court's commitment to closing gaps in accountability when States Parties fail to investigate credible claims of serious human violations.[1509]

Another illustrative example in the batch of cases against Turkey depicts how the Court's approach evolved across time to eventually direct States to adopt measures under article 46. One important case is *case Dogan and others v. Turkey*, concerned with the applicants' forced eviction from their homes, and refusal by the Turkish authorities to allow them to return home, in the context of the violent conflict in the region.[1510] This case is significant against a background of cases where the

[1502] See, for instance, *Sagayeva and Others v Russia* App nos. 22698/09 and 31189/11 (ECtHR, 8 December 2015) para 82
[1503] *Meryem Çelik and Others v Turkey* (revision) App no. 3598/03 (ECtHR, 16 September 2014) para 58
[1504] See for instance *Picu and Others v Romania* App no. 74269/16 and 22 other applications (ECtHR, 30 October 2018) para 24
[1505] See Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 57 Nomiko Vima (Greek Law Journal) 1, 11
[1506] Akdivar and Others v Turkey (Article 50) (ECtHR, 1 April 1998) Reports of Judgments and Decisions 1998-II; see also Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16 Human Rights Law Review 731, 745
[1507] Philip Leach, 'What is Justice? Reflections of a Practitioner at the European Court of Human Rights' (2003) 4 European Human Rights Law Review 392, 394
[1508] *Akdivar and Others v Turkey* (Article 50) (ECtHR, 1 April 1998) Reports of Judgments and Decisions 1998-II, para 98
[1509] Laurence Helfner, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 The European Journal of International Law 125, 144
[1510] *Doğan and Others v Turkey* App nos. 8803/02 and 14 others, ECHR 2004-VI (extracts) para 12

applicants repeatedly asked the Court to acknowledge that an officially tolerated practice existed in the respondent State in violation of the right to life, coupled with a practice of inadequate investigations and failure to prosecute those responsible for killings committed by members of the security forces in South-East Turkey.[1511] Time and again, the Court decided contrary to the applicants' allegations and held that due to scarce evidence, it is insufficient to allow it to reach a conclusion on the existence of a practice in violation of the right to life. In *Dogan and others v. Turkey*, however, the Court took a stance in favor of victims and held that the Government's efforts to remedy the situation of internally displaced persons were inadequate and ineffective,[1512] and practical steps to facilitate the return of the applicants to their village were lacking.[1513] In its decision on just satisfaction, the Court noted that the Turkish authorities had taken several general measures, including enacting the Compensation Law of 27 July 2004, with a view to redressing the grievances of persons who were denied access to their possessions in their villages.[1514] The issue here is that after the Court acknowledged the existence of the Compensation Law at the national level in *Dogan and others v. Turkey*, it rejected almost 1.500 similar applications under Article 35 ECHR for non-exhaustion of domestic remedies,[1515] throwing victims off the path of access to justice at the ECtHR level.[1516]

A couple of years later, several other cases concerned with the same situation in South-East Turkey made it before the Court, which determined the Court to acknowledge Turkey's pervasive failure to tackle the situation at the national level, despite its adoption of the Compensation Law, and directed it to implement individual measures under article 46. In cases *Er and Others v. Turkey* and *Meryem Celik and others v. Turkey*, both concerned with enforced disappearances as a result of operations conducted by security forces and subsequent lack of investigation, the Court acknowledged that the cases "fit in with the pattern of disappearances of large numbers of persons in south-east Turkey between 1992 and 1996". The Court used the statement as support in finding the State in violation of article 2, but limited its reparations awards to just satisfaction.[1517] Later on, in *Benzer and others v. Turkey*, the Court dealt yet again with the situation in South-East Turkey; the case concerned the bombing of two villages by an aircraft belonging to the Turkish military, which had caused multiple deaths and injuries. The Court, in addition to article 41 awards, invoked article 46 as a basis for placing further obligations on the State, as "the nature of the

[1511] *Kaya v Turkey* (ECtHR, 9 February 1998) Reports of Judgments and Decisions 1998-I, para 58; *Tanrıkulu v Turkey* [GC] App no 23763/94 ECHR 1999-IV para 120; *Timurtaş v Turkey* App no. 23531/94, ECHR 2000-VI, para 114

[1512] As the case itself shows, the Court relied on new evidence provided by an expert report detailing the mission into Turkey by the Representative of the Secretary-General on internally displaced persons, Mr. Francis Deng. *Doğan and Others v Turkey* App nos. 8803/02 and 14 others, ECHR 2004-VI (extracts) para 61

[1513] *Doğan and Others v Turkey* App nos. 8803/02 and 14 others, ECHR 2004-VI (extracts) para 154

[1514] *Doğan and Others v Turkey (just satisfaction*) App nos. 8803/02 and 14 others (ECtHR, 3 July 2006) para 6. The Court tested the Turkish Compensation Law in another case and concluded that that the Government could be deemed to have fulfilled their duty to review the systemic situation at issue and to introduce an effective remedy.

[1515] *Doğan and Others v Turkey (just satisfaction)* App nos. 8803/02 and 14 others (ECtHR, 3 July 2006) para 6. This decision, although not labeled as pilot judgment, was appraised as matching all the criteria for being considered as such. In Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16 Human Rights Law Review 731, 740

[1516] In addition, research assessing the Compensation Law in Turkey, asserted that, in practice, it does not compensate the material losses of all eligible victims and does not allow compensation for their emotional distress. Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16 Human Rights Law Review 731, 760. The research details other shortcomings of the Compensation Law, including the very limited responsibility that the State assumes for the crimes.

[1517] *Er and Others v Turkey* App no. 23016/04 (ECtHR, 31 July 2012) para77; *Meryem Çelik and Others v Turkey (revision)* App no. 3598/03 (ECtHR, 16 September 2014) para 58

violation was such as to leave no real choice between measures".[1518] It first clarified its subsidiary role in enforcing article 46.[1519] Then, it held that in exceptional situations, such as the one in the current case, where the very nature of the violation found was such as to leave no real choice between measures capable of remedying it, the Court found it necessary to indicate the measures in its judgment, with a view to helping the State fulfill its obligations under article 46.[1520] In this case, the measures recommended by the Court "aim to prevent impunity" and concern effective criminal investigation, with a view to identify and punish those responsible for the bombing of villages.[1521] It also marked one of the few instances when the Court invoked article 46 in regard to the South-East Turkey situation and ordered the State to take clear-cut measures to tackle impunity at the national level, however, the Court's proactive approach developed gradually.

Furthermore, several cases against Russia are indicative of a similar gradual approach by the Court. In some cases of exceptional nature, the Court evolved from reluctance to express a position on the situation, to clearly denouncing the Russian authorities' inaction and ordering under article 46 a large range of individual and general measures.[1522] For instance, cases *Lyanova and Aliyeva v. Russia* and *Medova v. Russia* are both concerned with enforced disappearances by State forces in relation to the Chechnya and Ingushetia conflicts. In these cases, the applicants requested the Court to direct Russia to undertake independent investigations into the disappearances of their relatives. However, next to finding Russia in violation of several Convention articles, including the right to life and failure of investigation, and making just satisfaction awards, the Court held that it was the most appropriate to leave it up to Russia to choose the means in the domestic legal order to discharge their legal obligation under article 46 of the Convention.[1523]

The Court changed its approach in its later cases *Abuyeva and others v. Russia* and *Abakarova v. Russia*, cases concerned with gross human rights violations as a result of bombings during military operations by the Russian military and security forces in Chechnya. In *Abuyeva and others v. Russia*, the Court invoked again the standard used in *Benzer and others v. Turkey*, according to which the very nature of the violation left no real choice of measures to remedy it, and provided for individual measures under article 46 to tackle impunity at the national level. To this end, the Court noted the ineffectiveness of the national investigation and placed on the State the obligation to carry out a new and independent investigation, with a view to attributing individual responsibility for the loss of life.[1524]

However, in *Abakarova v. Russia*, faced with the continued impunity prevailing at the national level since the Abuyeva case,[1525] the Court relinquished previous reticence with regard to its involvement in the implementation of judgments under article 46. In this case, the Court elaborated on a comprehensive list of individual and general measures with backward and forward-looking

[1518] *Benzer and Others v Turkey (revision)* App no. 23502/06 (ECtHR, 13 January 2015) para 217
[1519] *Benzer and Others v Turkey (revision)* App no. 23502/06 (ECtHR, 13 January 2015) para 216
[1520] *Benzer and Others v Turkey (revision)* App no. 23502/06 (ECtHR, 13 January 2015) para 217
[1521] *Benzer and Others v Turkey (revision)* App no. 23502/06 (ECtHR, 13 January 2015) para 219
[1522] The Court has not deployed any fact-finding missions in Russia, which led to criticism from scholars; see Philip Leach, 'The Chechen conflict: analysing the oversight of the European Court of Human Rights' (2008) 6 European Human Rights Law Review 732; Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: the Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies 275
[1523] *Lyanova and Aliyeva v Russia* App nos. 12713/02 and 28440/03 (ECtHR, 2 October 2008) paras 159-160; and *Medova v Russia* App no. 25385/04 (ECtHR, 15 January 2009) paras 142-143
[1524] *Abuyeva and Others v Russia* App no. 27065/05 (ECtHR, 2 December 2010) paras 242-243
[1525] *Abakarova v Russia* App no. 16664/07 (ECtHR, 15 October 2015) para 111

functions, which would benefit the victims in the cases at hand, but also prevent similar violations from taking place in the future. The Court directed Russia to tackle impunity by taking measures to establish the truth about the events, acknowledge publicly and condemn the serious violations of the right to life in the course of security operations, assess the adequacy of national instruments pertaining to these operations, as well as provide information and better training for both military and security personnel in order to ensure strict compliance with the relevant legal standards, including human rights and international humanitarian law.[1526] These measures should ensure proper protection of the interests of (vulnerable) victims, and provide them with information with regard to all aspects of future investigations.[1527]

Furthermore, *case Aslakhanova and others v. Russia*, dealing with the same pattern of disappearances that occurred in Chechnya and Ingushetia, is illustrative of another change in the Court's approach to article 46. This approach appears to be motivated by victim-related concerns that needed to be tackled with urgency. In *Aslakhanova and others v. Russia*, the Court finally labelled the issue in Russia as "systemic failure to investigate disappearances in the Northern Caucasus", and asserted that it provided compelling reasons for the Court to provide extensive guidance on certain measures that must be taken, as a matter of urgency, by the Russian authorities to address the situation.[1528] The first category of measures concerns finding the truth about the circumstances of crimes, which could be carried out by a newly set up high-level body in charge of solving disappearances in the region. This could include large-scale forensic and scientific work on the ground, to locate presumed burial sites, as well as the payment of financial compensation to the victims' families.[1529] The second category refers to measures to tackle impunity, and to deal with the ineffectiveness of the criminal investigations and the lack of prosecution of perpetrators of the most serious human rights abuses. The victims' relatives' access to the case files should also be ensured.[1530] The Court stressed that given their wide-ranging scope, the nature of the violations concerned and the pressing need to remedy them, Russia should submit to the Committee of Ministers a comprehensive and time-bound strategy to address the problems enumerated above.[1531]

In addition to the cases against Turkey and Russia, the Court invoked article 46 in cases against other countries, such as Romania. The cases against Romania concern the violent suppression of demonstrations during the events of December 1989, resulting in hundreds of deaths and injuries, and the ensuing failure to investigate these crimes. In these cases, the Court used a milder version of the standard employed in *Aslakhanova and others v. Russia*. Although it did not label the situation in Romania as 'systemic failure', it did mention that the failure of investigation originated in "a widespread problem, given that several hundred persons are involved as injured parties in the

[1526] *Abakarova v Russia* App no. 16664/07 (ECtHR, 15 October 2015) para 112

[1527] *Abakarova v Russia* App no. 16664/07 (ECtHR, 15 October 2015) para 113. The measures ordered in Abakarova were later on upheld in another emplematic case Tagayeva and others v Russia, where the Court again invoked article 46 to provide for a series of measures, ranging from finding the truth, public acknowledgment of the crimes, condemnation of violations, effective investigations, as well as several measure to contribute to the prevention of similar crimes in the future. *Tagayeva and Others v Russia* App nos 26562/07 and 6 others (ECtHR, 13 April 2017) paras 640-641

[1528] *Aslakhanova and Others v Russia* App nos. 2944/06 and 4 others (ECtHR, 18 December 2012) para 221

[1529] *Aslakhanova and Others v Russia* App nos. 2944/06 and 4 others (ECtHR, 18 December 2012) paras 225-227

[1530] *Aslakhanova and Others v Russia* App nos. 2944/06 and 4 others (ECtHR, 18 December 2012) paras 236-237

[1531] *Aslakhanova and Others v Russia* App nos. 2944/06 and 4 others (ECtHR, 18 December 2012) para 238. In cases coming out of the Court after Aslakhanova and others v Russia, the Court denied yet again the victims' requests to the Court to direct the State to carry out a further investigation. The Court made reference to the measures it had already ordered in *Aslakhanova and others v Russia*, and asserted that they need to be carried out to address the systemic failure to investigate disappearances in Northern Caucasus. See *Yandiyev and Others v Russia* App nos. 34541/06 and 2 others (ECtHR, 10 October 2013) para 146; and *Sultygov and Others v Russia* App nos. 42575/07 and 11 others (ECtHR, 9 October 2014) paras 503-504

impugned criminal proceedings".[1532] In the leading case *Association '21 December 1989' and others v. Romania*, the Court held that notwithstanding its subsidiary character in relation to the State's implementation of article 46, general measures at the national level are undoubtedly called for in the execution of the present judgment.[1533] To this end, the Court directed the State to introduce an appropriate remedy at the national level, including effective investigations, in order to shed light on the truth about the events of December 1989, important for both the victims involved but also for the Romanian society.[1534] In other cases which ensued after *Association '21 December 1989' and others v. Romania*, the Court continued to find violations of article 2 in the procedural aspect, related to shortcomings of investigations, which *inter alia*, excluded victims from proceedings and failed to provide them with information regarding the progress of investigations.[1535]

Reflecting on the Court's practice, this section elicited how in exceptional cases the Court may depart from its approach to just satisfaction under article 41, as to award individual and/or general measures under article 46.[1536] As the analysis revealed, the Court awarded individual and/or general measures in cases where only one type of measure is feasible or where the Court identified major structural or complex problems at the national level.[1537] As can be inferred, the individual measures concern the applicants and translate into the States' obligation to tackle the consequences suffered by victims because of the human rights violations.[1538] These measures were exemplified above, with the Court ordering the States to carry out new investigations to establish the truth and punish the perpetrators. In addition, the general measures relate to the States' obligation to prevent violations or to put an end to continuing violations.[1539] General measures were presented above too, in cases where the Court directed the State to set up a high-level body in charge of solving disappearances in Chechnya and Ingushetia regions. As this research posits, the individual and/or general measures the Court directs the States to adopt indicate a more victim-oriented approach on the Court's part. In all, these measures might amount to satisfaction and guarantees of non-repetition for victims, in the sense of van Boven/Bassiouni Basic Principles and have the potential to respond to victims' needs relating to the establishment of truth and punishment of perpetrators,[1540] as well as serve a preventive function for the society to avoid similar cases in the future.[1541] In addition, the award of these measures by the Court might serve the symbolic function

[1532] *Association "21 December 1989" and Others v Romania* App nos. 33810/07 and 18817/08 (ECtHR, 24 May 2011) para 189
[1533] *Association "21 December 1989" and Others v Romania* App nos. 33810/07 and 18817/08 (ECtHR, 24 May 2011) para 193
[1534] *Association "21 December 1989" and Others v Romania* App nos. 33810/07 and 18817/08 (ECtHR, 24 May 2011) para 194
[1535] *Elena Apostol and Others v Romania* App nos. 24093/14 and 16 others (ECtHR, 23 February 2016) para 37; *Mocanu and Others v Romania* App nos. 10865/09 and 2 others (ECtHR, 13 November 2012) para 370; *Picu and Others v Romania* App no. 74269/16 and 22 other applications (ECtHR, 30 October 2018) para 24
[1536] As discussed at the beginning of the Chapter, drawing on the travaux preparatoires, the drafters decided to Court prerogatives to amend or annul unlawful laws or to impose a certain line of conduct at the State level. 'Report of the sitting of the Consultative Assembly' (CoE, 14 August 1950) 216, 248. In directing States to adopt these measures, the Court is mindful of its subsidiary role vis-a-vis States. See also Costas Paraskeva, 'European Court of Human Rights: From Declaratory Judgments to Indications of Specific Measures' (2018) 1 European Human Rights Law Review 46, 53
[1537] See also Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 Human Rights Law Review 451, 474
[1538] Egbert Myjer, Leif Berg, Peter Kempees, Giorgio Malinverni, Michael O'Boyle, Dean Spielmann, Mark E. Villiger, Jonathan Sharpe, 'The Conscience of Europe: 50 Years of the European Court of Human Rights' (Third Millennium Publishing, 2010) 88
[1539] Egbert Myjer, Leif Berg, Peter Kempees, Giorgio Malinverni, Michael O'Boyle, Dean Spielmann, Mark E. Villiger, Jonathan Sharpe, 'The Conscience of Europe: 50 Years of the European Court of Human Rights' (Third Millennium Publishing, 2010) 88
[1540] Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 320-321
[1541] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 217.

of countering the denial of the national authorities with regard to these crimes;[1542] establish the human rights violations,[1543] and attempt to catalyze change at the national level.[1544]

However, as shown above in the cases against Turkey and Russia, tens of victims might bring cases before the Court and have their claims denied until the Court finally decides that the situation calls for targeted measures. It can be implied that the Court is extremely reluctant to interfere with the internal affairs of a State,[1545] until the situation becomes critical as to be labelled as 'pervasive', 'systemic' or 'widespread', at the expense of justice for many victims. In addition, as the Court places obligations on States in only a handful of selected cases,[1546] the expectations of victims in similar cases will either be quashed or limited to monetary awards under just satisfaction.[1547] On the other hand, as Judge Linos-Alexander Sicilianos reported, this approach was brought about by the adoption of Protocol 14 and the accompanying Resolution Res(2004)3 'on judgments revealing an underlying systemic problem',[1548] which aim to improve the functioning of the system amid concerns relating to the Court's excessive caseload.[1549] As such, the Court's awards of reparative measures, as elicited above, are only a relatively recent attempt by the Court to intervene in order to facilitate the execution of judgments.[1550] However, this has been one of the core tasks of the Committee of Ministers since the ECHR was adopted.[1551] The fact that the Court has only recently started issuing these reparative measure represents an attempt to facilitate the execution of judgments in cases involving a 'systemic problem'.[1552] As such, it does not necessarily mean that

[1542] Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 319

[1543] Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: the Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies 275, 303

[1544] Steven Greer has argued that the provision of measures by the Court has the following added benefits: "compliance with the judgment is less open to political negotiation in the Committee of Ministers, it is easier to monitor objectively both by the Committee and by other bodies such as NGOs and other domestic human rights agencies, and a failure by relevant domestic public authorities to comply effectively is, in principle, easier to enforce by both the original litigant, and others, through the national legal process as an authoritatively confirmed Convention violation." Steven Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006) 160

[1545] See also Aisling Reidy, Francoise Hampson, Kevin Boyle, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey' (1997) 15 Netherlands Quartely of Human Rights 161, 165

[1546] A study showed that 160 judgments of the Court explicitly rely on Article 46 of the Convention in order to indicate the individual and/or general measure. See Linos-Alexander Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under article 46 ECHR' (2014) 32 Netherlands Quarterly of Human Rights 235, 236. The number should be considered in light of the fact that the case law of the Courts consists in thousands of judgments.

[1547] Pietro Sardaro,'Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court' (2003) 6 European Human Rights Law Review 601, 609

[1548] Through the Resolution, the Committee of Ministers "invites the Court: as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments". 'Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem' (CoE, Committee of Ministers, 12 May 2004) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd190> accessed 15 April 2020

[1549] Linos-Alexander Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under article 46 ECHR' (2014) 32 Netherlands Quarterly of Human Rights 235

[1550] Resolution Res(2004)3 of The Committee of Ministers on Judgments Revealing an Underlying Systemic Problem' (Council of Europe, Committee of Ministers, 12 May 2004)

[1551] As per Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, the Committee of Ministers is tasked with overseeing the implementation of judgments, which includes overseeing the States' implementation of individual and/or general measures. 'Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements' (CoE, Committee of Ministers, 10 May 2006) rule 6(2). <https://rm.coe.int/16806eebf0> accessed 15 April 2020

[1552] Resolution Res(2004)3 of the Committee of Ministers on Judgments Revealing an Underlying Systemic Problem' (Council of Europe, Committee of Ministers, 12 May 2004)

the victims in previous cases not involving a systemic problem could not benefit from individual and/or general measures, albeit under the Committee of Ministers' supervision, or that the victims in these cases cannot benefit from better protection of their rights. For instance, it may be that in certain cases the States implemented individual and/or general measures at the national level under the Committee of Minister's supervision, without the Court having to step in to exercise itself these functions.[1553]

Before concluding this section, a final example where the Court awarded measures which deviate from its just satisfaction approach includes the inter-state case *Cyprus v. Turkey*, which attached novel dimensions to reparations before the Court. The case is concerned with numerous human rights violations arising out of the Turkish military operations in northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus and the activities of the Turkish Republic of Northern Cyprus (TRNC).[1554] The Court found Turkey responsible under the ECHR for 14 rights violations in regard to Greek-Cypriot missing persons and their relatives, the home and property of displaced persons, the living conditions of Greek Cypriots in Karpas region of northern Cyprus, and the Turkish Cypriots living in northern Cyprus.[1555]

In this case, the Court did not award individual and/or general measures with reparative value (as the cases introduced above against Russia, Turkey, and Romania); however, it took a novel approach in regard to just satisfaction in that the awards it made extend beyond their mere compensatory purpose and add a punishment-oriented dimension to them. As such, in the decision on just satisfaction, the Court awarded on an equitable basis, the aggregate sums of 30.000.000 EUR for NPD suffered by the surviving relatives of the missing persons, and 60.000.000 EUR for NPD suffered by the enclaved residents of the Karpas peninsula (indirectly, because it awarded just satisfaction to the Cyprus Government, which would then distribute the sums to the individual victims of the violations).[1556]

Interestingly, although these awards flow from findings of several Convention rights violations,[1557] and protracted feelings of helplessness, distress and anxiety of the Karpas residents,[1558] the case departed from its previous just satisfaction awards rationale presented so far in this chapter, where a concrete number of direct and indirect victims, as well as the relationship between them was established. Since the claim for just satisfaction was put forward by Cyprus and not by individual victims, it is unlikely that the individual characteristics i.e. relationship to the direct victims or vital status, or the dimension of harm were established for the purpose of the Court's decision.[1559] The Court relied in general lines on its rationale employed in *Varnava and others v. Tukey*, and

[1553] As Veronik Fikfak wrote in regard to the Committee of Ministers' impact on implementation through its supervision, "The exercise of shaming states into compliance is a function for the Committee of Ministers rather than the Court and has been only varyingly successful." see Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 The European Journal of International Law 1091, 1094. See also conclusion below, section 3.4.3.
[1554] *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 4
[1555] ECHR, 'Press Release Issued by the Registrar: Judgment in the Case Of Cyprus v. Turkey' (ECHR Website, 10 May 2001) < https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-68489-68957%22]}> accessed 12 June 2020

[1556] The Court's decision on just satisfaction in Cyprus v Turkey greatly resembled the rationale and sums awarded in Varnava and others v Tukey, a case with the same root conflict but based on individual applications. Cyprus v Turkey (just satisfaction) [GC] App no. 25781/94, ECHR 2014, para 56
[1557] See operative paragraphs of *Cyprus v Turkey* [GC], no. 25781/94, ECHR 2001-IV
[1558] *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 57
[1559] Some of these facts were pointed out by the respondent Government (Turkey) and dismissed by the Court in the Judgment. E.g. *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 50

used the shield of the equity principle to awards just satisfaction to Cyprus, which would then set up an effective national mechanism to distribute the above-mentioned sums to the individual victims.[1560]

Furthermore, the just satisfaction awards in this case appear to entail a punishment-oriented dimension, as elicited by the concurring opinion of Judge Pinto de Albuquerque joined by Judge Vučinić, attached to the Court's judgment.[1561] Therein, the Court's approach was appraised as a clear message that those CoE Member States that:[1562]

"*[W]age war, invade or support foreign armed intervention in other member States must pay for their unlawful actions and the consequences of their actions, and the victims, their families and the States of which they are nationals have a vested and enforceable right to be duly and fully compensated by the responsible warring State*."

The Judges indicated that the just satisfaction awards in this case amount to punitive damages that,[1563] on the one hand, aim to punish Turkey for its unlawful actions and omissions and their harmful consequences,[1564] but on the other hand, aim to prevent further violations of human rights.[1565] These just satisfaction awards mark a departure from the Court's previous practice, as the Court provided reparations to a group of unidentified beneficiaries. Consequently, the value these awards might hold for the victims cannot be assessed, as it was Cyprus and not the victims themselves who put forward the claims for reparations, albeit the awards are meant to 'benefit individual victims'.[1566] However, these awards are significant for their punishment-oriented dimension and their alleged deterrent effect, which represent an exceptional prerogative exercised by the Court.[1567]

[1560] *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 59

[1561] In other paper, Judge Pinto de Albuquerque appraised the judgment for its symbolic function as an authoritative and indispensable response by an international court to a wrongdoing State. He posited that the judgment speaks on behalf of all European States, acting as the ultimate defender of a Europe rooted in the rule of law and faithful to human rights. Paulo Pinto de Albuquerque and Anne van Aaken, 'Punitive Damages in Strasbourg' (University of St. Gallen Law School Law and Economics Research Paper Serie, Working Paper No. 2016-05, May 2016).

[1562] *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, 24

[1563] Punitive damages are forbidden in the ECtHR system, as just satisfaction's goal is to compensate the applicant for the actual harmful consequences of a violation and not to punish the Contracting Party responsible, see 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 9. Furthermore, in case Varnava and others v Tukey, decided earlier than the Decision on Just Satisfaction in Case of Cyprus v Turkey, the Court dismissed the applicants' claim for punitive damages in the form of daily fines to be imposed on the respondent Government until they finally comply with the Court's judgment. The Court has even rejected the applicants' requested that the Court orders an effective investigation under article 46, leaving it up to Turkey to choose the means by which it will discharge its legal obligation under Article 46 of the Convention. *Varnava and Others v Turkey* [GC] App nos. 16064/90 and 8 others, ECHR 2000, para 222-223

[1564] *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, 31

[1565] However, these judges' opinion has been criticized by Judge Karakaş who attached a dissenting opinion criticizing the decision, inter alia, for aspects relating to the rationale for and the awards on just satisfaction. Judge Karakaş pointed out inconsistencies in the rationale of decision, compared to other previous judgments on just satisfaction, but most importantly, compared to Varnava and others v Tukey, concerned with the same crimes but in the context of individual applications. He criticized the Court's decision for several shortcomings, relating to the lack of clear information relating to the victims and the abstract group of beneficiaries, contrary to the general approach of the Court in this regard. *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, 36

[1566] *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014, para 46

[1567] Whether the Court should exercise such prerogatives is debatable; while condemning the behavior of Turkey for the crimes it has perpetrated in order to convey its condemnation towards such actions, the Court does not mention anything about the victims on the other side of the conflict, who continue to suffer from human rights violations as a result of the conflict. See dissertation showcasing the different human rights violations that the children in the TRNC suffer from. Marieke Hopman, Looking at law through children's eyes (Unpublished dissertation, Maastricht University, 2019) 257-315

3.4.3. Conclusion

Since its establishment, the Court was empowered to provide reparations to victims in the form of just satisfaction, and prerogatives to amend or annul legislation or to impose a certain line of conduct on States were expressly excluded from the Court's reparations mandate.[1568] According to the Court's legal basis on just satisfaction (article 41 and the accompanying Rules of the Court), in the aftermath of finding a State in violation of human rights included in the ECHR or its Protocols, the Court might award *restitutio in integrum*, PD awards, and NPD awards in account of the victims of violations and the State must implement them.

As the analysis revealed, across its jurisprudence, the reparations the Court awarded have generally remained confined to the measures provided for in the Court's legal basis. The Court's practice in regard to each of the measures will shortly be summarized below.

To begin with, in regard to *restitutio in integrum*, this principle appeared largely irrelevant in the cases investigated. Given the nature of the human rights violations, the Court either did not invoke it or invoked it to restate the impossibility of materializing it. In a handful of cases, the Court took a different approach, invoking *restitutio in integrum* under article 46 ECHR on the execution of judgments, and not article 41 on just satisfaction. In those cases, it did so to direct States to tackle the human rights violations by implementing individual measures such as reopening of an investigation amid a pervasive failure on their part to deal with the cases nationally. Overall, the relevance of *restitutio in integrum* for victims of gross human rights violations appears to be minimal, although the latter approach to *restitutio in integrum* attempts to engage the States' responsibility to a larger extent and to enable victims to benefit from individual measures in addition to just satisfaction.

Furthermore, in regard to PD awards in regard to material damage suffered as a result of crimes, the analysis revealed that the Court appears to be granting the majority of victims' requests as long as the causal link is established. While this approach by the Court will undoubtedly help victims relieve some of the financial strains incurred by the violations as well as provide acknowledgment for the material harm suffered by victims, it is unfortunate that the large majority of awards are at a level significantly lower than the level requested by applicants. As such, in practice, these awards may, at best, ensure that the victims are not further impoverished by the victimizing act. Moreover, in regard to NPD provided in account of moral harm, the analysis revealed that the Court appears to be granting the victims' requests for NPD in the majority of cases. The Court takes a lenient approach in regard to NPD awards and infers the existence of moral harm from the existence of a rights violations. It is submitted that the Court's practice in regard to NPD awards is commendable, as it acknowledges the existence of moral harm, without putting strain on victims to substantiate it. In addition, they might have symbolic and practical value for the victims in that the violation of rights and the victimization suffered is acknowledged and compensated. However, it is likely that the awards will not fully satisfy the victims. Due to the large monetary discrepancies vis-à-vis

[1568] 'Report of the Sitting of the Consultative Assembly' (CoE, 14 August 1950) 216, 248. It has been asserted that challenges to legislation would not be suitable for a Court's judgment but rather came exclusively within the political sphere. In addition, States expressed extreme reluctance towards a court interfering with their internal affairs. Mikael Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 Law and Contemporary Problems 141

what the victims want (~61% difference), they fail to fully respond to the victims preferences.[1569] Furthermore, the importance of these awards for the victims should not be overestimated, as their low values do not appear to even grasp the extent of harm, anxiety and suffering of victims of gross human rights violations. Moreover, an NGO report featuring testimonies by several victims before the Court highlighted that the NPD awards are of relative value compared to other needs they have (e.g. for the truth to be established). The Court's judgements cannot satisfy these needs, as it is ultimately upon States to take further measures such as caring out investigations at the national level.

Next to reparations awards under article 41, the current analysis identified a change in the Court's practice in recent years. As such, in certain exceptional cases the Court appears to go beyond awards under article 41, and provides under article 46 that individual and/or general measures be adopted by States in the execution of judgments rendered against them. This approach marks a departure from the initial purpose of article 46, which provided States with freedom to determine for themselves what individual and/or general measures they wanted to adopt to discharge their obligations to implement the judgment, under the supervision of the Committee of Ministers. The current analysis found out that the Court takes up such prerogatives in cases where only one course of action is feasible for the State to implement the judgment or when faced with cases eliciting pervasive or complex problems at the national level. In such situations, the Court provides on its own motion a broad spectrum of measures for the States to implement, ranging from measures to tackle impunity, establish the truth, as well as prevent future violations from taking place again in the future. This research submitted that the measures the Court provides amount to reparations measures for the purposes of the van Boven/Bassiouni Principles and might have reparative value for the victims. Although these measures are not expressly requested by victims throughout cases, they respond to various needs of victims that can inferred from their submissions such as, for instance, the need to know the truth inferred from their frustration with lack of investigations at the national level. As such, the measures the Court provides may contribute to establishing the truth regarding the crimes and well as the harm perpetrated, countering the denial of the national authorities with regard to these crimes, as well as attempt to catalyze change at the national level.

Against this background, an evaluation of the Court's potential contribution to substantive justice for victims under its jurisdiction will necessarily conclude that the Court's practice is complex. Inasmuch as substantive justice is evaluated by taking into account whether it responds to the victims' harm and preferences in regard to just satisfaction, it can be asserted that the Court tends to generally grant the victims' requests, however, at a significantly lower level than what the victims requests. The Court's awards appear to acknowledge the existence of material and moral harm suffered by victims and consequently, directs States to pay compensation to make up for the harm suffered. In addition, the just satisfaction awards might hold a symbolic value for the victims, inasmuch as they entail the acknowledgment by an international judicial setting that the injustice

[1569] On the other hand, see results of research by José Mulder surveying victims' perceptions of compensation provided by the Dutch Compensation Fund for severe crimes. She discovered "that the exact amount of money awarded to victims of violent crime is not that important. People who are granted relatively high amounts, for example, are not more satisfied than others are, nor do they contribute more symbolic value to the Fund's money. In other words, recipients of state compensation seem to be happy with relatively little. Yet, it seems likely that too little compensation could be taken as an offence. Hence, it might be interesting to see whether there exists something like an optimal level of compensation." José Mulder, *Compensation: The Victim's Perspective* (Wolf Legal Publishers, 2013) 6-7. However, since her research was carried out in a specific country (The Netherlands), with participants featuring certain characteristics, it is difficult to import the findings and implications to victims of gross human rights violations in poorer countries.

did occur, and the State is indeed responsible for these crimes and must realise the reparations.[1570] Moreover, as far as the implementation of PD and NPD measures by States is concerned, studies show that the States tend to pay for these damages,[1571] contributing thus to satisfying to a certain extent the victims' financial needs without creating undue delays and frustrations.

Nonetheless, the limitations inherent in the just satisfaction awards at the ECtHR must be acknowledged, as the Court's awards are mainly limited to compensation, due to the Court's legal basis as well as its approach to its reparations regime in practice.[1572] Yet, NGOs interacting with victims report that compensation, albeit important, is not able to attend to the victims' multiple needs and expectations in the aftermath of gross human rights violations.[1573] Consequently, the reality is that the just satisfaction awards favor an easy way out for the States, to 'buy off' human rights violations.[1574] The awards fail to grasp and acknowledge the overall victims' situation, victimization, and extent of harm while the low awards provided by the Court do not even attempt to grasp the real extent of anxiety and suffering of victims.[1575] In addition, the awards do not touch upon the collective dimensions of harm which exist in situations of gross human rights violations that involve multiple victims or the need to acknowledge and tackle it.[1576] Against this background, the ECtHR's potential contribution to substantive justice for victims through just satisfaction appears to be limited to its financial benefits, if any.

However, the recent change in the Court's approach, brought about by Protocol 14, whereby it steps in and provides individual and/or general measures that States should adopt are much more indicative of victim-oriented considerations, and might result in a better fulfilment of the victims' needs. To the extent that these measures aim to tackle the impunity at the national level, establish

[1570] This has been acknowledged by victims in cases before the ECtHR. 'Annual Report 2010' (EHRAC, 2010) 15 <http://ehrac.org.uk/wp-content/uploads/2014/10/EHRAC-AR-2010.pdf> accessed 15 April 2020. In addition, this is acknowledged in studies with victims in other situations; although compensation might be one of the easiest reparations measures to deliver, they will not other primary needs that the victims have and which might not be attended through cash payment. Lisa Magarrell, 'Reparations in Theory and Practice' (ICTJ, 2007) 12 <https://ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf> accessed 15 April 2020

[1571] This study did not look at implementation as such, therefore, it cannot be contended that the PD and the NPD awards have been paid out by States in all the cases investigated in this study. However, other studies looking into whether States implement these measures have contended that just satisfaction tends to be paid by States after the initial judgment is rendered, in contrast with individual and/or general measures. See Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 Journal of International Law and International Relations 35; Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 The European Journal of International Law 1091. A notable exception is the case *Cyprus v Turkey* where Turkey has yet to pay the just compensation damages.

[1572] In contrast with the IACtHR which has interpreted its reparations regime in an expansive manner as to enable victims to make submissions in regard to all possible forms of reparations known under the Van Boven/Bassiouni Principles. See chapter on the Inter-American Court's practice.

[1573] 'Annual Report 2010' (EHRAC, 2010) 15 <http://ehrac.org.uk/wp-content/uploads/2014/10/EHRAC-AR-2010.pdf> accessed 15 April 2020. As similar challenge was reported by [1573] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 461

[1574] Veronika Fikfak argued that the Russian legislation explicitly requires that the country's annual budget contains a part intended to pay off ECHR violations. In addition, she states that "Russia may be aware of the cases that are coming through the pipeline of the Court, yet rather than invest money into addressing systemic problems and breaches (or providing alternative remedies at home, as Italy does), Russia instead puts money towards compensating human rights violations". Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 The European Journal of International Law 1091, 1116

[1575] See also Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 The European Journal of International Law 1091, 1110

[1576] See e.g. Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved', in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 170

the truth, as well as investigate the crimes at the national level, they might have further reparative value for victims, and might tackle the harm in a more comprehensive manner. However, this approach is restricted to a handful of cases and is usually deployed in the context of the Court's general goals to protect human rights in Europe.[1577] In addition, although relatively new within the Court's practice, the supervision of individual and/or general measures has long been one of the core tasks of the Committee of Ministers and research shows that it is precisely the implementation of these measures that is lagging behind at the State level.[1578] It is unclear whether the Court's involvement in the provision of individual and/or general measures that the States should adopt will result in better rates of implementation.[1579] These measures' relative value and actual benefits for the victims will only assessable in time. However, their benefits for the victims will need to take into account the measures' scope, limited only to a handful of cases, their scarce implementation,[1580] as well as the broader goals of the Court, which might be more concerned with the efficiency of the European human rights system rather than actual benefits for individual victims.[1581]

4. Final Considerations: Reparative Justice at the ECtHR

The ECHR entered into force in 1953 under the auspices of the CoE, with a clear purpose to preclude the Second World War's atrocities from taking place in Europe again.[1582] In doing so, the ECHR established the first international system for the protection of human rights, made up of the ECtHR, the former European Commission on Human Rights, and the Committee of Ministers. In its turn, the Court started its operations holding a rather general purpose, to ensure that democracies in Europe would not backslide toward totalitarianism and to protect the human rights of individuals

[1577] As discussed above, the change was brought about by Procotol 14, whose explanatory report clearly states that "the urgent need has arisen to adjust this mechanism, and particularly to guarantee the long-term effectiveness of the European Court of Human Rights (hereinafter referred to as "the Court"), so that it can continue to play its pre-eminent role in protecting human rights in Europe". 'Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention' (ECtHR, 13 May 2004) para 2

[1578] Research on the situation in Chechenia indicates that the pervasive failure to investigate the serious ECHR violations found by the Court, at the national level, maintains impunity for crimes and denies victims the right to know the truth. Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: the Approach of the European Court of Human Rights in Context' (2010) 1 International Humanitarian Legal Studies 275, 301. Similarly, a study looking into the legacy of cases in South-East Turkey highlighted that in light of recent uncovering of burial sites and human remains, expectations arose that prosecutions will follow, twenty years after the crimes took place. However, due to statutes of limitations at the national level, the reality is that attempts to bring perpetrators to justice in Turkey are extremely limited. Philip Leach, 'What is Justice? Reflections of a Practitioner at the European Court of Human Rights' (2003) 4 European Human Rights Law Review 392, 394

[1579] Some studies have indeed posited that the inclusion of individual and/or general measures within the Court's judgment, and particularly within the operative paragraphs of a judgment, results in more implementation of these measures by States. See here for a list of cases including individual measures in the operative paragraphs and led to implementation such as immediate release of individuals or reinstatement in function, in Costas Paraskeva, 'European Court of Human Rights: From Declaratory Judgments to Indications of Specific Measures' (2018) 1 European Human Rights Law Review 46, 51-52. Another research supported this conclusion and highlighted that one in 11 cases led to implementation of these measures when they were not included in operative paragraphs. Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 Human Rights Law Review 451, 475

[1580] See also Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases' (2007) 7 Human Rights Law Review 396, 408; Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 213

[1581] See Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases' (2007) 7 Human Rights Law Review 396, 408; Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 213

[1582] Mikael Madsen explains how the Court, in its first years, held narrow authority, with restrictive and state-friendly interpretation of the ECHR, in order to facilitate States' acceptance of the system. Mikael R Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) 32 Law & Social Inquiry 137, 143

in already established democracies.[1583] The Court was therefore mandated to receive and adjudicate over complaints alleging human rights violations across the States Parties to the ECHR and its Protocols. In addition, in a historical step in the protection of individuals' rights, the individuals were enabled to put forward complaints of human rights violations against their own States through the individual petition mechanism. However, these entitlements have consolidated on a gradual basis, and only decades later the individuals gained *locus standi* before the Court, with the individual petition mechanism becoming compulsory for all States Parties as well as the individuals gaining direct access to the Court, after the abolition of the Commission.

Since its adoption, the ECHR included a reparations regime, bestowing upon the ECtHR the power to award just satisfaction to victims that would compensate them for the consequences of the human rights violations perpetrated by States. The reparations regime, as currently set forth within the ECHR and the Rules of the Court, includes several prerogatives that the victims of human rights violations before the Court can avail themselves of before the Court. Consequently, the prerogatives in regard to the process enable the victims to submit claims before the ECtHR alleging violations of human rights as well as to request reparations should the State be found in violation of their human rights. During adjudication, the victims may benefit from representation from a legal representative as well may receive information regarding developments in their cases. In addition, in regard to outcome-related prerogatives, the reparations regime provides for the possibility that the Court awards reparations to victims in the form of just satisfaction, which may include measures of *restitutio in integrum* and compensation for pecuniary and non-pecuniary damage. In addition, the Court's legal basis enables an extensive category of beneficiaries, including direct, indirect and potential victims, which can be natural as well as legal persons.
Bearing in mind the normative background underlying the establishment of the Court, the development of the individuals' role within the Court, as well as its reparations regime, this chapter set out to empirically analyze how the ECtHR's reparations regime is transposed in practice and assess its potential contribution to reparative justice for the victims under the Court's jurisdiction. While employing the operationalization of reparative justice as procedural justice and substantive justice, the analysis of the ECtHR's jurisprudence extensively focused on how the process- and outcome-related prerogatives materialized across the Court's practice. Since the current research is focused on gross human rights violations and pursuant to several methodological choices elaborated upon in detail in the chapter, the jurisprudence analyzed was comprised of 74 cases focusing on gross human rights violations adjudicated by the ECtHR.

The findings of the current empirical inquiry into the ECtHR's case law on reparations demonstrate that transposing the reparations regime to concrete cases and consequently, the ECtHR's potential contribution to reparative justice for victims of gross human rights violations is fraught with intricacies. To begin with, as this research showed, the individuals' access to the ECtHR entails several limitations, due to their circumscribed character (only approximately 97.5% of cases are admitted for adjudicated before the Court), limited transparency regarding the admissibility criteria employed by the Court, and finally, hindrances at the national level in some cases. For the victims whose cases make it before the Court, the current analysis revealed that the Court's potential contribution to procedural and substantive justice for victims of gross human rights violations is restrained and most of the times has (only) monetary value.

[1583] Steven Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006) 40; Laurence Helfner, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 The European Journal of International Law 125, 129

The Court appears to adopt a conservative approach to its reparations regime, at best, confining the materialization of the process- and outcome- related prerogatives across its case law to the limits established by its legal basis. In regard to the process-related prerogatives, despite the Court's potential contribution to cementing the individuals' role within the ECHR system across time, according to this analysis, the Court appears to be increasingly restrictive in regard to the individuals' role within the trial. As such, the Court's approach indicates a regress, from providing victims with the possibility to express their voice and interact with Judges during fact-finding missions deployed in several cases involving Turkey, to an instrumental role for victims in the trial to put forward factual submissions through a legal representative. Except for several cases involving Turkey, which have been adjudicated before 2000, the Court's approach largely entails that the victims' voice, information and interaction is mediated through and materialized by means of legal representation. This in its turn entails several challenges, as the victims run the risk of becoming dependent to their lawyers' diligence to litigate the case. Consequently, as this research posits, the possibility for the victims to benefit from procedural justice at the ECtHR is extremely limited, translating in failed opportunities for the victims to voice their needs and concerns, recount their stories, draw attention to the extent and impact of their victimization, or interact with Court actors. The Court's approach indicates a manifest failure on its part to acknowledge the importance of procedural justice for victims as well as to contribute to it through its proceedings, although for the victims it may be as important as substantive justice. At the same time, it is likely that the victims will perceive the Court's approach as a lack of respect for and interest in their victimization and stories, especially if their expectations have not been properly managed by their lawyers.

Furthermore, as far as the outcome-related prerogatives are concerned, the current analysis similarly revealed a conservative approach by the Court, with reparations awards generally limited to compensation in the form of pecuniary damage and non-pecuniary damage awards. Although the Court's awards acknowledge the moral and material harm suffered by victims and appears to be granted in the majority of cases, responding thus to the victims' requests, due to their low levels, they hardly cover the financial burdens incurred by crimes. Harm, suffering, trauma in the aftermath of mass victimization are similarly assessed in monetary terms, and they are not worth more than some thousands euro per person. The anxiety and suffering of victims appear hardly grasped by these awards. In addition, the Court holds a narrow conception of harm, limited to individual harm, as it fails to touch upon and acknowledge the collective harm suffered by victims. As such, the Court and the reparations it awards fail to grasp and acknowledge the overall victims' situation, victimization, and extent of harm, and other needs and reparations preferences that the victims might have beyond compensation are not even requested or considered at the ECtHR. However, in a limited number of cases involving pervasive failure of States to take measures at the national level to address systemic human rights violations, the analysis revealed a deviation from the Court's general approach. Instead, the Court stepped in and provided within its judgments individual and/or general measures for the States to implement in the fulfilment of their obligation to execute the ECtHR judgments. These measures are much more indicative of victim-oriented considerations at the Court level and showcase a more comprehensive outlook on harm (for instance, the Court acknowledges the existence of the right to truth pertaining to societies). Although they were not requested by the victims themselves, they entail the potential to respond better to the harm and needs of victims of gross human rights violations. However, these measures are limited only to a handful of cases and the previous experience of the Committee of Ministers with these measures shows that States tend to fail to implement these measures. Overall, through

the tangible reparations it awards, the Court's potential contribution to substantive justice is confined to its financial benefits, which are minimal.

To conclude, potential reparative justice for victims under the ECtHR's jurisdiction by means of its reparations regime is extremely limited, as it appears of secondary rather than primary importance for the Court. The Court appears concerned with reparative justice for victims in that its core work revolves around finding States in violation of human rights and directing them to provide just satisfaction to victims. However, its interpretation of the legal basis and subsequent approach towards victims and reparations detailed above elicit that providing reparative justice for victims by means of reparations is not the priority of the Court.

At this point, it must be recalled that the ECHR and the Court came into existence to maintain democratic regimes by ensuring the protection of human rights of individuals across Europe. However, the main responsibility to respect human rights remained with the States Parties, with the ECHR protection system maintaining a subsidiary nature. In addition, the individual petition system was instated since the Court's establishment; however, it only became fully operational across all States Parties almost half a century later. Faced with developments stemming from the expansive membership of CoE, increased denunciation of human rights violations across Europe, including gross human rights violations, and the pervasive failure of certain States to deal with human rights violations at the national level the Court altered its approach towards victims and reparative justice across time. The changes in the external world have mirrored in changes in the Court's approaches. More importantly, due to increasing jurisprudence concerned with gross human rights violations, the Court had to adjust its previous position concerned with maintaining general justice and stable respect for human rights across Europe. Instead, it begun to alternate in its approach, from acting as a guarantor of justice for thousands of applicants who could not access justice at home,[1584] to a defender of peace and human rights protection in Europe,[1585] and to engaging with attributions formerly reserved for States and the Committee of Ministers.[1586]

At the same time, the Court had to face the mounting challenges of its increasing case law, whose numbers skyrocketed, as well as increasing criticism from its Member States which sought ways to limit its powers. The Court became concerned with ways to keep the system functional and avoid it from becoming clogged or collapsing, thus having to create new systems to adapt to challenges.[1587] Examples include the adoption of Protocol 14 and the Committee of Minister's request for the Court to provide for individual and/or general measures in the body of the judgment in exceptional cases. These mechanisms aim to ensure the faster resolution of cases and avoid the

[1584] With reference to the cases in South-East Turkey, see Laurence Helfner, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 The European Journal of International Law 125, 130

[1585] With reference to *Cyprus v Turkey (just satisfaction)* [GC] App no. 25781/94, ECHR 2014)

[1586] With reference to the changes brought about by Protocol 14, wherein the Court provides individual and/or general measures for the States to adopt. Previously, this was the sole responsibility of States, under the Committee of Ministers' supervision.

[1587] See here for extensive discussions on how the Court has developed following the Adoption of Protocol 11, the 2012 Brighton Summit, as well as after the adoption of Protocols 15 and 16. Mikael R Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) 32 Law & Social Inquiry 137, 169

collapse of the system altogether. The creation of the pilot judgment procedure, to manage large numbers of applications arising from the same structural problem in a State is another example.[1588]

Against this background, it appears that all efforts to effect reparative justice for individuals are framed taking into account the Court's original goals, relating to the general protection of human rights in Europe and keeping up a functioning Court system.[1589] Indeed, even in cases where the Court appears to adopt victim-oriented measures, reparative justice for individuals at the ECtHR level is a means to an end.[1590] While these measures may result in benefits for the victims if the States follow up on them, their end goal is to foster respect for human rights in Europe, to ensure States deal effectively with human rights violations at the national level, and eventually avoid the ECtHR becoming overburdened with claims stemming from the same problems all over again. Empirical research, which is currently scarce, could help foster the understanding on how victims perceive these measures and more generally, the Court. As this research elicited, the Court's limited contribution to reparative justice is a lost opportunity for the ECtHR to have a bigger impact on the lives of victims in conflicts in Europe. At the same time, more empirical research into the victims' experience with and perception of the ECtHR is also paramount given its scarcity, to understand the impact the ECtHR actually has on the victims under its jurisdiction. Unfortunately, for the time being, victims of gross human rights violations around Europe will either need to remain satisfied with what the Court awards or give up the idea of attaining reparative justice through the ECtHR for the crimes they endured.

[1588] See also a paper arguing that the pilot judgment procedure is also a manifestation of the Court's subsidiary character, attempting to encourage State to find solutions at the national level. Rhodri C. Williams and Ayla Gürel, 'The European Court of Human Rights and the Cyprus Property Issue: Charting Way Forward' (Peace Research Institute Oslo: Cyprus Centre, 2011) 12

[1589] For instance, Laurence Helfner posits that a combination of factors has propelled the Court into a crisis of massive proportions: the Court's positive public reputation, its expansive interpretations of the Convention, a distrust of domestic judiciaries in some countries, and entrenched human rights problems in others – has attracted tens of thousands of new individual applications annually. In Laurence Helfner, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 The European Journal of International Law 125, 126

[1590] This can be exemplified by referring to judgments in the current study indicative of victim-oriented concerns. Take the cases against Romania, when the Court directed the State to carry out investigations to establish the truth, for the individual victims and for the Romanian society, or the cases against Russia and Turkey, when many individual/general measures that amount to satisfaction and guarantees of non-repetition have been ordered by the Court, or the case Cyprus v Turkey where Turkey was directed to pay large sums of money, although many legal aspects of the decisions were not clarified. This position has been also been referred to in Steven Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006) 165

Chapter 6: The Inter-American Court of Human Rights and its Reparations Regime: Reparative Justice for Victims of Gross Human Rights Violations?

Introduction

The current chapter consists in an analysis of the Inter-American Court of Human Rights (hereinafter 'the IACtHR' or 'the Court') jurisprudence relating to reparations for gross human rights violations, in order to evaluate the Court's potential contribution to reparative justice for the victims under its jurisdiction by means of its reparations regime.

The chapter is divided into four sections. After the brief introduction, the first section will provide an immersion into the establishment of the Court, focusing on its institutional evolution as well as the role of individuals before the Court. The second section will focus on the IACtHR's reparations regime, discussing its inclusion within the IACtHR's mandate as well as elaborating on the reparations regime's prerogatives bestowed upon individuals, in relation to the process and outcome of reparations in the context of the IACtHR. In addition, this section will also elaborate on who can benefit from reparations at the IACtHR. The third section will explain the methodological choices for the selection of cases analyzed in the current chapter, followed by the core of this chapter, the results of the analysis. The current chapter entails an analysis of 38 cases adjudicated before the IACtHR, involving gross human rights violations perpetrated in Latin America. Drawing on these cases, the chapter will then elicit how the IACtHR's reparations regime is transposed in practice and its potential implications for victims, structured alongside procedural justice and substantive justice sections. Finally, the last section will bring together the results of the study and will provide final considerations of the IACtHR's potential contribution to reparative justice for the victims under its jurisdiction by means of its reparations regime.

1. The Establishment of the IACtHR

1.1. Institutional Evolution

The IACtHR was established in 1979 by the American Convention on Human Rights (hereinafter 'ACHR' or 'the Convention'),[1591] which entered into force on 18 July 1978.[1592] The entry into force of the ACHR marked the creation of a legally binding instrument in relation to human rights for the States that signed and ratified the Convention.[1593] At the same time, the ACHR brought into being a dual system for the protection of human rights in the Americas, composed of the already existing Inter-American Commission on Human Rights ('IACommHR' or 'the Commission') and the newly established IACtHR.[1594]

The entry into force of the ACHR represented the culmination of a process put in motion at the end of Second World War, when the American nations gathered in Mexico City in 1945 and

[1591] ACHR, art 33

[1592] The ACHR entered into force following the deposit of the eleventh ratification, in accordance with article 74(2) ACHR.

[1593] To date, 25 States have signed and ratified the ACHR, see 'B-32: American Convention On Human Rights "Pact Of San Jose, Costa Rica"' (San José, Costa Rica, 22 November 1969 at the Inter-American Specialized Conference on Human Rights) <https://www.cidh.oas.org/basicos/english/Basic4.Amer.ConvRatif.htm> accessed 15 April 2020

[1594] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 5

directed the Inter-American Juridical Committee of the Organisation of American States (OAS)[1595] to prepare a draft declaration on human rights.[1596] As envisioned at that time, the declaration would eventually turn into a convention with legally binding force, meant to secure human rights on the American territory in accordance with international law.[1597] However, the political context changed dramatically in 1948,[1598] with the emergence of the Cold War and increasing reluctance on the part of the American States vis-à-vis a legally binding convention that would allegedly enable other States' intervention into internal affairs.[1599] The result of these dynamics culminated in the adoption of the American Declaration on the Rights and Duties of Man as a non-legally binding instrument, which emphasized that the protection of human rights was essentially a function of States themselves.[1600]

The efforts to strengthen the regional human rights protection in the Americas resurfaced in 1959; upon realization of the widespread denial of fundamental liberties in many American States, the OAS timidly started to promote the protection of human rights.[1601] These intentions materialized in consensus amongst the OAS' Ministers of Foreign Affairs in Santiago, Chile[1602] to call upon the OAS's Inter-American Juridical Committee to prepare a draft convention on human rights, which should also provide for the creation of an Inter-American Court of Human Rights.[1603] At the same meeting, the Ministers agreed on the creation of an Inter-American Commission on

[1595] The OAS came into existence in 1948, with the signing of the Charter of OAS, which entered into force in 1951. Article 1 of the Charter explains the nature and purpose of this organization: "The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency." 'Charter of the Organization of American States (A-41)' (OAS Website, 1948) <http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp> accessed 15 April 2020. Currently, 35 independent States of the Americas have ratified the OAS Charter and are members of the Organization. For an overview of the ratifying States see, 'Member States' (OAS Website) <http://www.oas.org/en/member_states/default.asp> accessed 15 April 2020.

[1596] Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 11

[1597] 'Court history' (IACtHR Website) <http://www.corteidh.or.cr/historia-en.cfm> accessed 15 April 2020

[1598] As Davis Forsythe writes, in the 1940s a number of American States were devoted to the cause of international human rights protection: "a small number of Latin states in the 1940s tried to exert moral leadership in support of precise legal obligations and a capacity for regional action on human rights. This handful of Latin American states – Panama, Uruguay, Brazil, Mexico, the Dominican Republic, Cuba, and Venezuela – also pushed for binding human rights commitments at the San Francisco conference which led to the establishment of the United Nations". David Forsythe, 'Human Rights, the United States and the Organization of American States' (1991) 13 Human Rights Quarterly 66, 76. However, one concern of the American States, which dated back to the World War II was the power position assumed by the United States following the defeat of the Axis Powers, which could potentially relegate the American States to a position of secondary importance in the post-war international order. Skepticism towards the Unites States and 'its interventionist approach' into the affairs of other States influenced the American States' decision to vote in a favor of a declaration and not a legally binding instrument of human rights protection in 1948. Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 2, 12-13

[1599] Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 12-13

[1600] 'American Declaration of the Rights and Duties of Man' (OAS, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948), preamble, at:
https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf

[1601] Davis Forsythe elaborates that moral leadership by Venezuela and the United States to take more action on human rights provided the situation in several States, such as the Dominican Republic and Cuba, had encountered widespread resistance by other OAS Member States who preferred the traditional view that action on human rights was a domestic matter. However, the compromise achieved by the OAS Member States culminated in the human rights developments of 1959. David Forsythe, 'Human Rights, the United States and the Organization of American States' (1991) 13 Human Rights Quarterly 66, 82

[1602] The Declaration emerging out of the 1959 Santiago meeting expressed the ideals echoed by the Member States: "Harmony among the American republics can be effective only insofar as human rights and fundamental freedoms and the exercise of representative democracy are a reality within each one of them." 'Declaration at the Fifth Meeting of Consultation of Ministers of Foreign Affairs' (Santiago, Chile, August 12 through 18, 1959) 4-6
< https://www.oas.org/council/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf> accessed 15 April 2020.

[1603]'Basic Documents Pertaining to Human Rights in the Inter-American System' (Secretariat of the Inter-American Court of Human Rights, July 2003) 8 <https://www.corteidh.or.cr/docs/libros/Basingl01.pdf> accessed 15 April 2020

Human Rights,[1604] which was eventually established in 1960.[1605] Initially, the Commission came into existence as an 'autonomous entity' of the OAS, with the abstract function to promote and protect human rights provided in the American Declaration.[1606] It is interesting to note that at this point, the OAS Member States decided to exclude the individuals' right to bring petitions before the Commission, although this possibility was included in the Commission's draft Statute.[1607] Despite the limited mandate conferred upon the Commission at the beginning, it continuously evolved its role by proactively unearthing human rights violations in OAS Member States[1608] and contributing to the development of a role for individuals to put forward complaints in relation to violations of their human rights.[1609] On this latter point, Thomas Buergenthal, former Judge at the IACtHR, explained that after repeated prodding, the Commission became formally authorized in 1965 to receive and act upon individual complaints in relation to violations of certain basic rights proclaimed in the American Declaration.[1610] Despite this advancement,[1611] the protection of individuals' rights remained limited, as the Commission's role in this regard was confined to investigating the individual complaints and making recommendations to the OAS Member States, without any formal enforcement mechanism.[1612]

1.2. Development and Evolution of the Individuals' Role within the IACtHR system

The role of individuals in the Inter-American Human Rights System strengthened with the entry into force of the ACHR in 1978.[1613] According to the ACHR's preamble, by signing this

[1604] As Scott Davidson reports, the OAS Member States Representatives did not unanimously vote for the establishment of a Commission, with the Dominican Republic, Mexico, and Uruguay voting against, and Bolivia and the United States abstaining. The main opposition to the creation of the Commission was again the fear that some States would interfere in the internal affairs of other States. However, as that meeting they agreed that the Permanent Council of the OAS would establish a committee to draft a statute for the Commission. Upon submission of the draft statute to the States for comments, the Council eventually adopted the founding Statute of the Commission in 1960. Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 16

[1605] Robert K. Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 863

[1606] 'Basic Documents Pertaining to Human Rights in the Inter-American System' (Secretariat of the Inter-American Court of Human Rights, July 2003) 8

[1607] See Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 16

[1608] Despite its initial function as an OAS organ to promote and protect human rights, the Commission interpreted its role to entail the power to make recommendations on human rights violations to OAS Member States and undertake studies (sometimes 'on site' investigations) and make reports on human rights where large-scale violations were allegedly taking place. Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 17

[1609] As Richard Goldman reports, through the Protocol of Buenos Aires in 1967, the Commission's role evolved from an 'autonomous' entity into an organ of the OAS, giving it a constitutional status within the framework of OAS and further institutionalizing the American Declaration. The new status of the Commission was a recognition of the Commission's efforts to protect human rights, amid complaints coming out of Cuba, Haiti, and Dominican Republic in particular. R Robert K. Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 869-870

[1610] Thomas Buergenthal, 'The American Convention on Human Rights: Illusions and Hopes' (1971) 21 Buffalo Law Review 121, 133

[1611] It is important to keep in mind that receiving individual complaints was just one of the many functions carried out by the Commission. Pursuant to article 112 of the Protocol of Buenos Aires, the Commission's "principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters". 'Protocol of Amendment to the Charter of the Organization of American States (B-31)' (OAS Website, 27 February 1967) <https://www.oas.org/dil/treaties_B-31_Protocol_of_Buenos_Aires.htm> accessed 15 April 2020

[1612] Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 110

[1613] Although the adoption of the ACHR took place in San Jose in 1969, it took almost 10 years until the eleventh country deposited the instrument of ratification for it to enter into force in 1978. The 11 countries are Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Panama, and Venezuela. See 'American Convention on Human Rights: "Pact of San José, Costa Rica"' (San José, Costa Rica, on 22 November 1969) <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf> accessed 15 April 2020

Convention, the States reaffirmed their intention to consolidate a system of personal liberty and social justice, based on respect for the essential rights of individuals.[1614] *In concreto*, this brought about significant changes in relation to the role of the Commission, the establishment of the IACtHR, and the protection of individuals and their human rights.[1615] As a result,[1616] the Commission gained authority under a legally binding instrument to receive individual claims and investigate alleged violations of human rights included in the ACHR, to pursue friendly settlements, and to refer cases to the IACtHR.[1617] In addition, the ACHR established the IACtHR endowing it with a double jurisdiction, an adjudicatory/contentious jurisdiction and an advisory jurisdiction.[1618] Under its contentious jurisdiction - which is also the focus of this chapter - the Court has the power to receive individual petitions referred to it by the Commission, investigate human rights violations and hear cases, as well as to issue legally binding judgments against States that have previously accepted its jurisdiction.[1619] Most importantly, the ACHR institutionalized the right of individuals to submit claims before the Commission alleging violations of their human rights and requesting reparations.[1620] This development was hailed in the literature as being innovative[1621] and representing a step forward towards vesting individuals with juridical personality under international law.[1622]

However, pursuant to ACHR, the individuals could not and still cannot submit individual petitions directly to the Court, as the Commission retains an intermediary role between individuals and the Court, referring cases to the Court following its own preliminary investigations.[1623] This entails that the individuals' access the Court is mediated by the Commission and until 2001 the

[1614] ACHR, Preamble

[1615] Despite the unanimous support for the creation and adoption of a convention on human rights, several developments in the regional human rights protection propelled the ACHR into a long drafting and adoption process, which spanned 20 years in total. The drafting process proceeded slowly due to the involvement of several States and OAS organs in fleshing out the content of the convention, as well as parallel developments at the UN level, which spurred concerns regarding the possibility of coexistence and coordination of UN and regional conventions on the same rights. Several OAS Member States were consulted on the desirability of having two such systems, which the majority of respondent States, excluding Argentina and Brazil, militating in favour of 'coexistence and coordination'. The dilemma was eventually sorted out by the Comission, whose Secretariat concluded upon study of the matter that "Consequently the Inter-American Convention on the Protection of Human Rights should be autonomous rather than complementary to the United Nations covenants, although it should indeed be coordinated with those covenants". Robert K. Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 864-865

[1616] The Commission also maintained its functions in relation to the American Declaration, including the individual petitions in relation to OAS Member States. However, the Commission's Statute makes clear differentiation between its two different functions under the American Declaration and under the American Convention. 'Statute of the Inter-American Commission on Human Rights' (Approved by Resolution Nº 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979) art 1

[1617] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 5. For an overview of the Commission's functions pursuant to ACHR, see ACHR, artts 41-51

[1618] 'Statute of the Inter-American Court of Human Rights' (OAS, 1 October 1979) <https://www.refworld.org/docid/3decb38a4.html> article 2; ACHR, art 62

[1619] As per 'Statute of the Inter-American Court of Human Rights' (OAS, 1 October 1979) art 2; In addition, according to article 61 ACHR, the contentious jurisdiction of the Court can either be activated by the Commission or by States. ACHR, art 61(1),

[1620] ACHR, art 44, art 63

[1621] Robert K. Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 866; Thomas Buergenthal, 'The American Convention on Human Rights: Illusions and Hopes' (1971) 21 Buffalo Law Review 121, 130

[1622] Robert K. Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 866

[1623] Rules of Procedure of the Inter-American Commission on Human Rights (2000), articles 42 and 43. This point will be discussed in more detail in section 2.1.

Commission maintained exclusive power of decision whether to refer a case to the Court.[1624] To be precise, before the amendment of the Commission's Rules of Procedure in 2001, it was unclear when the Commission was supposed to refer to the Court cases against States that had accepted its jurisdiction.[1625] As the jurisprudence of the Court shows, it was only on 24 April 1986 that the IACtHR received its first contentious case from the Commission and awarded reparations, despite the Court operating since its establishment in 1979.[1626] Until that moment, the Commission had opted to decide on cases in its own manner, which was to supervise the cases itself and not to refer them for Court adjudication, a matter which some of the IACtHR Judges strongly resented. Scott Davidson wrote, quoting Judge Maximo Cisneros' words in 1985:[1627]

"*[T]he 'love' that we [the judges] put into our work has not been sufficient to avoid the sense of frustration that I feel leaving the Court before it has had the opportunity to hear a single case of a violation of human rights, in spite of the sad reality of America in this field*." [Author's insertion]

Pursuant to the 2001 Rules of Procedure, the referral procedure became straightforward. If the Commission finds human rights violations by States following its own investigations, it compiles a report under article 51 ACHR wherein it recommends measures for States to remedy the violations within a certain deadline.[1628] If the Commission considers that the State did not comply with the Commissions' recommendations within the deadline, it refers the case to the Court for adjudication,[1629] including the individual's position, evidence, and claims concerning reparations.[1630]

Furthermore, in regard to the individuals' role before the Court, it similarly developed across time, through successive amendments to the Court's Rules of Procedure. Originally, individuals or their legal representatives could not participate directly in the Court proceedings.[1631] Rather, once the Commission forwarded a case to the Court, the Commission became the representative of the individual applicants during the Court proceedings, as the sole party opposing the responding State.[1632] As such, the individuals did not have a role before the Court, neither in their own name nor through a legal representative, and had to rely on the Commission to convey to the Court their

[1624] The Commission relinquished the exclusive power of deciding whether to refer cases to the Court with the adoption of its Rules of Procedure in 2001. Rules of Procedure of the Inter-American Commission on Human Rights (2000) Article 44. See also Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 The American Journal of International Law 783, 797.
[1625] Indeed, criteria as to when the Commission should refer a case to the Court were not established until the Court settled the matter in an advisory opinion. Therein, it held that "this decision is not discretionary, but rather must be based upon the alternative that would be most favorable for the protection of the rights established in the Convention." *Certain Attributes of the inter-American Commission on Human Rights (arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)* Advisory Opinion oc-13/93 IACtHR Series A No 13 (16 July 1993) para 50
[1626] *Case of Velásquez-Rodríguez v Honduras* (Preliminary Objections) IACtHR Series C No. 1 (26 June 1987) paras 1 and 10
[1627] Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 192
[1628] 'Rules of Procedure of the Inter-American Commission On Human Rights (2001)' (Approved by the Court at its Forty-ninth Regular Session held from November 16 to 25, 2000)
< https://www.oas.org/xxxivga/english/reference_docs/Reglamento_CorteIDH.pdf> art 43
[1629] Rules of Procedure of the IACommHR (2001) art 51
[1630] Rules of Procedure of the IACommHR (2001) art 43(3)
[1631] Two of the 38 cases analyzed in the current chapter have been adjudicated under the old Rules of Procedure, which did not enable victims to submit pleadings in their own name or through the legal representative. As apparent in these cases, it is the Commission pleading the case on victims' behalf, including claiming reparations for victims. See *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) and *Case of Caballero-Delgado and Santana v Colombia* (Reparations and Costs) IACtHR Series C No. 31 (29 January 1997)
[1632] James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 The American Journal of International Law 768, 781

position in the case at hand.[1633] As some authors argue, in that period, the Commission's position was rather controversial, as throughout the process it was shifting its role, from a mediator between the individuals and the State (in the friendly settlement stage preceding the adjudication before the Court) to a defender of individuals' interests (during the Court case).[1634] Around 1996, the role of individuals started to develop, as the Commission enabled some of the victims' lawyers to participate in the proceedings before the Court, to assist its work at the reparations stage, leading thus to direct interaction between the victims' lawyers and the Court.[1635] As reported, the direct involvement of the victims' lawyers in the proceedings made it clear to the Court that the direct involvement of victims in the proceedings was essential in order to deal with reparations in an adequate manner.[1636] Consequently, this led to several amendments of the Court's Rules of Procedure; first in 1997, whereby the representatives of victims were granted the right to submit their own evidence and arguments before the Court 'independently', but only at the reparations stage.[1637] Thereafter, the Rules of Procedure were amended again in 2000, whereby the individuals and their legal representatives gained full legal standing during Court proceedings, and gained the right to litigate their case and claim reparations as fully-fledged parties.[1638] As reported by the Court, the changes took place as part of 'the constant evaluation of the procedure […] to ensure the true and effective protection of human rights.'[1639]

2. Legal Framework on Reparations

As established above, individuals alleging to have been victims of violations of human rights included in the IACHR have the right to submit petitions before the Commission, which may be then referred to the Court for adjudication. In addition to allegations of human rights violations, the individuals may also put forward claims for reparations under article 63(1) ACHR.[1640] In what

[1633] The Rules of Procedure underlying the Court's work when it started hearing its first contentious cases did not provide for a role for victims or their legal representative before the Court. Article 22 of those rules bestowed upon the Court the option to invite victims or their legal representatives to submit briefs on reparations. In addition, it mentioned that the legal representatives of victims might be employed to assist the Commission. See article 22(2) and 44 of 'Rules of Procedure of the Inter-American Court of Human Rights' (1991) (Adopted by the Court at its Twenty-Third Regular Session, 9-18 January 1991) <http://www.corteidh.or.cr/sitios/reglamento/1991_eng.pdf> accessed 15 April 2020

[1634] Antonio Augusto Cancado Trindade, 'Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century' (2000) 8 Tulane Journal of International and Comparative Law 5, 41; Diana Contreras-Garduño, The Inter-American System of Human Rights in Anja Mihr and Mark Gibney (eds), *SAGE Handbook of Human Rights* (SAGE Publications Ltd, 2014) 610

[1635] Clara Sandoval-Villalba, 'The Concept of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: a Commentary on their Implications for Reparations' in Carla Fertsman, Mariana Goetz, Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff Publishers, 2009) 255

[1636] Clara Sandoval-Villalba, 'The Concept of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: a Commentary on their Implications for Reparations' , in Carla Fertsman, Mariana Goetz, Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff Publishers, 2009) 256

[1637] 'Rules of procedure of the Inter-american court of human rights (1996) (Approved by the Court at its XXXIV Regular Session, 9-10 September 1996) Article 23 <http://hrlibrary.umn.edu/iachr/rule1-97.htm> accessed 15 April 2020

[1638] As per 'Rules of Procedure of the Inter-American Court of Human Rights (2000)' (Approved by the Court at its Forty-ninth Regular Session, 16-25 November 2000). The Commission's role during Court proceedings was relegated to a procedural role. Currently, the Court operates under the Rules of Procedure adopted in 2000 but amended again in 2009. The role of victims or their representatives under these Rules of Procedure remained the same. See 'Statement of Reasons to Modify the Rules of Procedure' (IACtHR Website, 2009) <http://www.corteidh.or.cr/sitios/reglamento/ene_2009_motivos_ing.pdf> accessed 15 April 2020

[1639] As reported by Veronica Gomez, 'Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases' (2001) 1 Human Rights Law Review 111

[1640] 'Rules of Procedure of the Inter-American Commission On Human Rights (2002)' (Approved by the Commission at its 109º Special Session, 4-8 December 2000 and Amended at its 116th Regular Period of Sessions, Held from 7-25 October 2002) art 43(3)(e)

follows, this section will discuss the legal framework on reparations at the IACtHR, establishing first how reparations came to be incorporated within the IACHR and then zoom in on the Court's reparations regime, delving into the process and outcome related prerogatives that individuals may avail themselves of. It will also identify who can benefit from these reparations. Importantly, although this chapter's focus is on the IACtHR's potential contribution to reparative justice for victims by means of reparations, it will also refer to and consider the Commission's relevant work, because of its intermediary role between individuals and the Court.

2.1. Travaux Préparatoires

As the drafting history of article 63(1) ACHR reveals, the inclusion of a reparations regime within the Court's mandate resulted from successive proposals during the negotiation process; while all proposals agreed that the injured individuals should be entitled to reparations awarded by the Court, the scope of reparations was refined during the negotiations. The initial proposal for the ACHR, prepared by the Inter-American Commission, only referred to the Court's competence to grant injured individuals an 'amount of compensation' in the case of human rights violations.[1641] However, during the San José Conference when the ACHR was negotiated, the Conference's Committee II opted to expand this provision.[1642] As reported, it was the Guatemalan representatives' proposal to enable the Court to grant reparations beyond compensation that helped shape out the current reparations regime at the IACtHR.[1643] The Guatemalan Proposal was as follows:[1644]

"*Whenever it is recognized that there has been a violation of a right or freedom protected by this Convention, the Court shall decide what procedure to follow and may provide:*

a. That the consequences of the decision or measure that has impaired those rights be stopped;
b. That the injured party be guaranteed the enjoyment of his right or freedom;
c. The payment of just compensation to the injured party."

As reported, the Guatemalan Proposal received an affirmative vote, leading the Committee II to write in its minutes that it approved "a text which is broader and more categorically in defense of the injured party than was the Draft".[1645] Unfortunately, the travaux préparatoires do not provide

[1641] According to the draft Inter-American Convention on Human Rights, article 52 (now article 63) provided that: "After it has found that there was a violation of a right or freedom protected by this Convention, the Court shall be competent to determine the amount of compensation to be paid to the injured party." Human Rights System, 'The Legislative History of the American Convention on Human Rights' in Thomas Buergenthal and Robert Norris (eds), 'The Inter-American System' (binder 2, booklet 13, release 2, Oceana Publications, 1982) 20

[1642] As reported in Thomas M. Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press, 2017) 289

[1643] Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1, 10

[1644] 'Observation by the Governments of the Member States on the Draft Inter-American Convention on Protection of Human Rights: Guatemala (presented to the Secretariat on November 8, 1969)' in Thomas Buergenthal and Robert Norris (eds), 'The Inter-American System' (binder 2, booklet 13, release 2, Oceana Publications, 1982) 132

[1645] Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1, 10

further explanation regarding the Committee II's reasoning for strengthening the provisions on reparations.[1646]

Across literature, different authors expressed that the reparations regime embedded within the Court's mandate responds to circumstances specific to Latin America, however opinions differ as to the drafters' intentions.[1647] While it is admitted that the ACHR is modelled on the European counterpart - whose early experiences constituted a reference point for the Inter-American Human Rights System, the ACHR and its reparations regime do not merely replicate this system but reflect the local challenges.[1648] To be precise, Henry Steiner and Philip Alston compared the two regional human rights systems and explained that in the CoE Members States, military and other authoritarian governments had been rare, while in Latin America they were close to being the norm until changes started to take place in the 1980s. They furthermore highlighted that the States that drafted and approved the European Convention were mostly genuine liberal democracies with strong and independent judiciaries, and adopted the ECHR to strengthen and preserve existing rights, rather than to create new rights. This contrasted the poor human rights situation in many of the Latin American countries, with weak or corrupt domestic judiciaries.[1649] Against this background, some authors argued that the ACHR drafters may have decided to strengthen the reparations regime pursuant to Guatemala's proposal due to their motivation to enhance the protection of human rights,[1650] amid an acute need for international protection in the Americas.[1651] Other authors were more critical; they posited that the reparations regime, the human rights included within the ACHR as well as the Convention's ratification by States signaled a sham 'allegiance to constitutional democracy', given the doubtful commitment to human rights prevailing in the Americas at that time.[1652]

Regardless of the drafters' motivations, the ACHR endowed the IACtHR with expansive remedial powers,[1653] especially when compared to the ECtHR's powers. In what follows, the next section will zoom in on the IACtHR's reparations regime and detail the prerogatives that the victims can avail themselves of in relation to the process of obtaining reparations as well as the outcome of the process. The section will also explain who can benefit from reparations at the IACtHR.

[1646] This is supported by both my reading of the travaux préparatoires and what other authors reported. E.g. Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1, 10

[1647] Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 The American Journal of International Law 783, 795-796; Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 31; Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1, 10; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 4

[1648] E.g. Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 The American Journal of International Law 783, 795-796

[1649] Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, and Morals* (second edition, Oxford University Press, 2000) 869

[1650] Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1, 10

[1651] Thomas Buergenthal, 'The American Convention on Human Rights: Illusions and Hopes' (1971) 21 Buffalo Law Review 121, 122

[1652] Robert K. Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 867

[1653] See also Thomas M. Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press, 2017) 289

2.2. Reparations Regime

The IACtHR's reparations regime is set forth in the ACHR and the Rules of the Court, which provide further clarification to the ACHR and the Court processes.[1654] The core of the reparations regime is article 63(1) ACHR, which enables the Court to rule on reparations to be awarded by States to 'injured parties', victims of violations of the human rights included in the ACHR.

Article 63(1) reads:[1655]

"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

However, the process of obtaining reparations at the IACtHR is closely connected with a trial on the merits in that the award on reparations flows from the Court's finding through a judgment that ACHR human rights were violated.[1656] In addition, before awarding reparations, the Court must establish the existence of a causal link between the human rights violations and the reparations awarded, as the awards aim to respond to the harm incurred to the victims are a consequence of the violations.[1657] Finally, in contrast with the ECtHR which in theory may order reparations only if the respondent State provides no or partial reparation, article 63(1) confers upon the IACtHR a primary role in relation to the reparations awards, being able to order reparations as long as it finds a right violation.[1658]

The following sections will draw on the ACHR and the Rules of the Court to introduce the IACtHR's reparations regime – structured along prerogatives bestowed upon potential victims in relation to the process of obtaining reparations and the outcome of the process, as well as an elaboration on who can benefit from these prerogatives.

2.2.1. Process-related Prerogatives

[1654] Rules of Procedure of the Inter-american Court of Human Rights (2009) (Approved by the Court during its LXXXV Regular Period of Sessions, 16-28 November 2009)
< https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm> accessed 15 April 2020

[1655] ACHR, art 63(1)

[1656] Principle confirmed by the Court throughout its jurisprudence. See e.g. *Case of Ticona Estrada et al. v Bolivia* (Merits, Reparations and Costs) IACtHR Series C No. 191 (27 November 2008) para 106

[1657] E.g. *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) para 236.

[1658] See also Clara Sandoval-Villalba, 'The Concept of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: a Commentary on their Implications for Reparations' , in Carla Fertsman, Mariana Goetz, Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff Publishers, 2009) 245. ACHR, art 46(1)(a). Admittedly, the exhaustion of remedies at the national level is one of the admissibility criteria, which entails that the main responsibility for addressing the human rights violations and providing remedies lies with the States. There are exceptions to the exhaustion of national remedies, as the Court expressed in an advisory opinion wherein it held that if indigence or general fear prevented a petitioner from securing an attorney to represent him or her before domestic authorities, the petitioner did not need to exhaust domestic remedies before filing a complaint with the Commission. *Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights,* Advisory opinion oc-11/90, IACtHR Series A No.11 (10 August 1990)

The prerogatives bestowed upon individuals in the process of obtaining reparations at the IACtHR correspond to the individuals' involvement with the trial, unless the reparations proceedings take place separately.[1659]

Individuals claiming to have been the victim of a human rights violation may avail themselves of a number of prerogatives in the process of obtaining reparations at the IACtHR. Foremost, they may initiate a case by submitting individual petitions whereby they complain to have been victims of human rights violations and put forward claims for reparations.[1660] However, different from the European system, the individual petitions are submitted to the Commission, which evaluates them on the basis of certain admissibility criteria and subjects them to a multitude of procedural steps.[1661] Eventually, the Commission might refer the individual petitions to the Court.[1662]

In addition, the victims may avail themselves of legal representation by means of a legal representative which can be exercised since the moment an individual petition is brought before the Commission or before the Court.[1663] The legal representation of victims in the Inter-American context remained for a long time a convoluted matter, especially for the victims who lacked legal representation or financial resources to avail themselves of legal representation. As already explained above, victims and their legal representatives gained the status of party to Court proceedings after 2000, as prior to this change, it was the Commission who was representing the victims' interests before the Court.[1664] Even after this change, for the victims lacking legal representation or resources, the Commission continued to advise and to represent victims before the Court until 2010.[1665] However, with the 2010 Rules of Procedure, the Court introduced the institution of the 'Inter-American public defender'.[1666] Pursuant to an Agreement of Understanding between the Court and the Inter-American Association of Public Defenders, the victims who do not have legal representation or cannot afford a legal representative can benefit from free legal assistance from lawyers employed at the association.[1667] Additionally, the Rules introduced the 'Victims' Legal Assistance Fund'[1668] which aims to support victims who lack financial resources

[1659] ACHR, art 66(1)

[1660] ACHR, art 44; 'Rules of Procedure of the Inter American Commission on Human Rights (2013)' (Approved by The Commission at its 137th Regular Period of Sessions, Held From October 28 to November 13, 2009, and Modified on September 2nd, 2011 and During the 147th Regular Period Of Sessions, Held from 8 to 22 March 2013, for Entry into Force on August 1st, 2013) < https://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf> art 23

[1661] The conditions for admissibility of a petition are included in articles 46 and 47 ACHR. They are further elaborated upon in Rules of Procedure of the IACommHR (2013) art 30-36. For a detailed elaboration on the process before the Commission see section 3.2.1. Access to Justice.

[1662] ACHR, Articles 44-47. 'Individual petitions' refers to the claims submitted by individuals whereas 'communications' refers to complaints submitted before the Commission by States Parties to the ACHR. However, under the Inter-American System the right of inter-state communications is optional rather than mandatory and is dependent upon the State Parties' acceptance (as per ACHR, art 45(2)). This is different from the European Convention of Human Rights where States by mere ratification of the Convention accept the right of other States to bring claims against them. The reason for the optional character of inter-state complaints in the Inter-American System is avoidance of using them as tools for political intervention. Thomas Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences' (1980) 30 American University Law Review 155, 159-160. The case law selected in this study does not contain any inter-state case; hence, from this point onwards the chapter will not make reference the inter-state communications or their procedure.

[1663] Rules of Procedure of the IACommHR (2013), art 23; Rules of Procedure of the IACtHR (2009) art 25

[1664] As per Rules of Procedure of the IACtHR (2000)

[1665] 'Annual Report 2011' (IACtHR Website) 64 <http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2011.pdf> accessed 15 April 2020

[1666] Rules of Procedure of the IACtHR (2009) art 37; see also *Case of Contreras et al. v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 240

[1667] Christina M. Cerna, *Regional Human Rights Systems: Volume V* (Routledge, 2016)

[1668] See 'Rules for the Operation of the Victims' Legal Assistance Fund of the Inter-American Court Of Human Rights' (IACtHR Website) <http://www.corteidh.or.cr/docs/regla_victimas/victimas_eng.pdf> accessed 15 April 2020

for all expenses incurred in relation to the proceedings before the Court.[1669] Consequently, these changes cemented the role of victims and their legal representatives as parties before the Court, as well as clarified the role of the Commission as a guardian of the Convention next to the Court, rather than also the defender of the victims' interests, as was previously the case.[1670] Furthermore, in cases with multiple victims, the Rules provide that the victims should designate a common intervener who shall be the only person authorized to act on victims' behalf to present pleadings, motions, evidence, and claim reparations, throughout the oral and written stages of the Court proceedings.[1671] If the victims cannot agree on a common intervener, the Court may enable the victims to select more common interveners, from one to up to three.[1672]

In addition, the victims may also provide oral statements during hearings, on which occasion they may also interact with and be questioned by various Court actors such as the Judges, legal representatives and representatives of the respondent State.[1673] If the Court does not render a ruling on reparations in the context of the trial proceedings, it may also adjourn the matter and hold another reparations hearing at a later stage.[1674] Finally, according to the Rules, the victims have the right to be notified in relation to any developments relating to their case, including when the case is referred to the Court and when the Court is rendering its judgment.[1675]

2.2.2. Outcome-related Prerogatives

After having established the prerogatives that victims may avail themselves of in the process of obtaining reparations at the IACtHR, the current section will elaborate on prerogatives relating to the outcome, i.e. potential tangible reparations that successful applicants may receive.

Article 63(1) provides three possible reparations measures that the Court may take should it find the respondent State in violation of the human rights set forth in the ACHR: [1676]

a) it may order that the injured party be ensured the right or freedom that was violated;
b) it may rule that the consequences of the right violation be remedied,
c) and that 'fair' compensation be paid to the injured party.

[1669] 'ABC of the Inter-American Court' (IACtHR, 2019) 18 <http://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf> accessed 15 April 2020

[1670] Antonio Augusto Cancado Trindade, 'Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century' (2000) 8 Tulane Journal of International and Comparative Law 5, 41

[1671] Rules of Procedure of the IACtHR (2009) article 25(2), article 40 (2), article 51. The Court may even order that cases with a commonality of parties, subject matter, and applicable law may be joined together through a 'Joinder of Cases'. Rules of Procedure of the IACtHR (2009) art 30

[1672] Rules of Procedure of the IACtHR (2009) art 25(2)

[1673] Rules of Procedure of the IACtHR (2009) artts 51 and 52

[1674] The Rules of Procedure however do not elaborate on the potential course of action by the Court. Rules of Procedure of the IACtHR (2009) art 66(1)

[1675] Rules of Procedure of the IACtHR (2009), artts 39, 55(3), 67

[1676] As I mentioned above, if the State has ratified the ACHR and accepted the contentious jurisdiction of the Court, then the Court has *ratione materiae* jurisdiction to determine if the State has violated the rights set forth in the ACHR. However, in practice, the Court may go beyond investigating whether the rights set forth in the ACHR have been violated as to investigate whether the rights included in other OAS treaties that confer jurisdiction on the Court have been violated. This is the case only if the State concerned has ratified other OAS treaties. In this situation, the Court acquires *ratione materiae* jurisdiction to determine if the State has violated the other treaty, in addition to the ACHR. See Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 122. This extended jurisdiction of the Court can also be traced down in its jurisprudence, for instance, in *Case of Cantoral-Huamaní and García-Santa Cruz v Peru*, the Court investigated Peru's obligations under the Inter-American Convention to Prevent and Punish Torture. *Case of Cantoral-Huamaní and García-Santa Cruz v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 176 (28 January 2007) para 12

The article mentions that all three reparations measures may be taken jointly, however, it does not elaborate further on what exactly the steps for the realization of these measures are, leaving it up to the Court to interpret and give meaning to these provisions. Consequently, the Court clarified the meaning of article 63(1) in the first case brought under its contentious jurisdiction, namely *Velásquez-Rodríguez v. Honduras*. Therein, it held that in awarding reparations for human rights violations, the Court must rely upon the American Convention and the applicable principles of international law, dismissing thus Honduras' argument that reparations should be calculated on the basis of domestic legal provisions on social security.[1677] In addition, it shed light on the types of possible reparations to be awarded under articles 63(1), holding that reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), the reparation of the consequences of the violation, and compensation in account of pecuniary and non-pecuniary damage, including emotional harm.[1678] However, as explained in this chapter, the Court continuously expanded its understanding of reparations measures under article 63(1), and as such, interpreted the 'reparation of the consequences of the violation' to include several other types of reparations, including rehabilitation, satisfaction and guarantees of non-repetition.[1679]

2.2.3. Beneficiaries

As in the case of the ECtHR, the process and outcome related prerogatives may only be enjoyed by the 'injured party', which refers to the applicant who shows that he/she was a victim of a human rights violation.[1680] The existence of an 'injured party' for the purpose of just satisfaction is connected to the *ratione personae* admissibility criteria set out in article 44 ACHR. As such, any person, group of persons, or any NGO legally recognized in one or more member states of the OAS may lodge individual petitions with the Commission, containing complaints of a right violation by a State Party and requests for reparations.[1681] Interestingly, within the inter-American System, the person filing the individual petition does not necessarily have to be the same person who has suffered harm from the human rights violation.[1682] This is different from the ECHR, where the petitioners must be the victims of a right violation.[1683] In addition, there is no requirement under article 44 ACHR that the petitioner is located within the jurisdiction of the respondent State. As Jo Pasqualucci argues, this lenient provision is very important in the Inter-American system, where victims or their family members may be intimidated or not know how to submit a petition. An NGO often has more resources than the victims have and is less susceptible to threats of retaliation.[1684]

[1677] *Case of Velásquez-Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No. 7 (21 July 1989) para 54
[1678] *Case of Velásquez-Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No. 7 (21 July 1989) para 26
[1679] See e.g. *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004)
[1680] ACHR, art 63(1)
[1681] ACHR, art 44
[1682] 'Petition and Case System' (Inter-American Commission On Human Rights, 2010) 10 <https://www.oas.org/en/iachr/docs/pdf/HowTo.pdf> accessed 15 April 2020
[1683] ECHR, art 25
[1684] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 5

In practice, the Court may receive applications from 'direct victims', which is understood to be the victim of a human rights abuse, i.e. the individual whose right or freedom has been violated.[1685] With some exceptions, such as for instance in the cases of prolonged enforced disappearance, when the victim of the human rights violation is found alive or is living, reparations are awarded only to the direct victim. However, when the human rights violation resulted in the death or disappearance of the victim, the Court may also consider that person's spouse, children, parents or even more extended relatives to be injured parties who will be eligible for reparations, as so-called indirect victims.[1686] Furthermore, it is important to note that although the Court did not hold that 'collectivities' or 'indigenous groups' are to be considered injured parties as such, in practice, the Court also awarded reparations (such as satisfaction or guarantees of non-repetition) to groups of victims beyond the direct/indirect victims categories. [1687]

3. Case Law Analysis and Results

The section above elaborated upon the establishment of the IACtHR and the inclusion of a reparations regime within its mandate. In addition, drawing on the legal instruments underlying the functioning of the Court, the section clarified the prerogatives bestowed upon potential victims of human rights violations, in the process of obtaining reparations and in relation to the outcome of the process. In what follows, this chapter will delve into an analysis of the IACtHR's jurisprudence structured along procedural and substantive justice, grasping how the reparations regime materialized across the IACtHR's practice and what the potential implications for victims are, in order to establish the IACtHR's potential contribution to reparative justice for the victims under its jurisdiction. However, before doing so, this section will first discuss the methodological aspects of the IACtHR's case-law analysis.

3.1. Methodological Aspects of the IACtHR's Case-Law Analysis

As this chapter is concerned with the analysis of cases involving gross human rights violations, the section will first discuss how gross human rights violations were approached in the context of the IACtHR, then put forward the methodology employed for the case-law selection and analysis, and finally, will introduce several general characteristics of the cases analyzed in this thesis following the aforementioned selection.

3.1.1. Gross Human Rights Violations at the IACtHR

[1685] See also Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1, 16

[1686] See *Case of Valle Jaramillo et al. v Colombia* (Merits, Reparations, and Costs) IACtHR Ser. C, No. 192 (27 November 2008) para 119. The Court has first made the distinction between direct victims and next-of-kin (indirect victims) in its first judgment on reparations in *Case of Velásquez Rodríguez v Honduras* (Merits) IACtHR Series C No. 4 (29 July 1988) para 192; in addition, it is important to note that Diana Contreras-Garduño, by making reference to a statement by former IACtHR Judge Cançado Trindade, refers to a third category of victims that may receive reparations, that is 'potential victims'. See Diana Contreras-Garduño, 'Defining Beneficiaries of Collective Reparations: The experience of the IACtHR' (Amsterdam Law Forum, VU University Amsterdam, 2012) 55

[1687] See for instance, *Case of Escué-Zapata v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 165 (4 July 2007) para 131. See also *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para . 96, wherein it awarded re-opening of a school as well as a medical dispensary which would benefit the entire Saramaka community, despite the fact that it did not consider the 'community' as an injured party.

As in the case of the ECHR, the ACHR does not include provisions on gross human rights violations or international crimes. Nonetheless, as this section highlights, the IACtHR developed its jurisprudence on gross human rights violations and corresponding reparations due to the cases it dealt with since its establishment, spurred by the human rights situation in Latin America.

As is well known, particularly in the 1970s and 1980s, many countries in Latin America were plagued by dictatorships, guerilla wars, and political conflicts characterized by torture, extra-judicial executions, massacres, and enforced disappearances, to name just a few of the crimes committed during that period.[1688] After several States on whose territory such crimes took place accepted the jurisdiction of the Court, cases dealing with these situations were bound to make the object of adjudication at the IACtHR. As such, gross human rights violations and corresponding reparations have been tackled extensively by the IACtHR and include the following situations: the internal armed conflict in El Salvador (1980-1991); the military dictatorship in Brazil (1964-1985); the internal armed conflict in Guatemala (1962-1992); the guerilla wars in Colombia starting in the 1960s; the internal armed conflict in Peru (1980-2000); and the military regime in Suriname.[1689] As the analysis elicited, in many of its judgments the Court itself labelled the crimes it has adjudicated as gross human rights violations, and provided examples of crimes falling within this category, such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[1690] Interestingly, the Court also made use of concepts borrowed from international criminal law such as 'crimes against humanity' to characterize facts.[1691] The remainder of this section will introduce the research sub-question guiding this chapter and explain the methodology to select cases covering gross human rights violations for the purpose of the current analysis.

3.1.2. Research Sub-question and Methodology

The research sub-question guiding this chapter is:

Taking into account the IACtHR's reparations regime and its practice on reparations for gross human rights violations, how does the Court potentially contribute to reparative justice for victims under its jurisdiction?

[1688] See for instance account by Scott Mainwaring and Aníbal Pérez-Liñán, *Democracies and Dictatorships in Latin America: Emergence, Survival, and Fall* (Cambridge University Press, 2013); Jerry Davila, *Dictatorships in South America* (Wiley-Blackwell, 2013); Gina Donoso, 'Inter-American Court of Human Rights' Reparation Judgments. Strengths and Challenges for a Comprehensive Approach' (2009) 49 Revista Instituto Interamericano de Derechos Humanos 29; James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 The American Journal of International Law 768

[1689] *Case of Contreras et al. v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 17; *Case of Gomes Lund et al. ("guerrilha do araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 219 (24 November 2010) para 2; *Case of Gudiel Alvarez et al. ("diario militar") v Guatemala* (Merits, reparations and costs) IACtHR Series C No. 253 (20 November 2012) para 54; *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) para 84(b); *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004) para 67(a); *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 86(12)

[1690] *Case of Barrios Altos v Peru* (Merits) IACtHR Series C No. 75 (14 March 2001) para 44; *Case of Gomes Lund et al. ("guerrilha do araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 219 (24 November 2010) para 200

[1691] *Case of Gudiel Alvarez et al. ("diario militar") v Guatemala* (Merits, reparations and costs) IACtHR Series C No. 253 (20 November 2012) para 215; *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 165

In answering the research sub-question, this chapter was compiled in several steps.

Firstly, drawing on the IACtHR's legal basis, the IACtHR's reparations regime was put forward, to understand how the process of obtaining reparations and outcome of the process ought to be.

Secondly, the IACtHR's jurisprudence was selected through an inductive approach. To begin with, in order to select the relevant cases, the IACtHR's Corteidh database was accessed[1692] and navigated utilizing two criteria of selection, the 'English language' as well as 'decision and judgments'[1693] as the type of document. This first methodological choice resulted in approximately 280 cases appearing relevant, which were subsequently reviewed one by one.[1694] As such, bearing in mind this chapter's focus on cases concerning gross human rights violations and corresponding reparations, the Court's case law was narrowed down further, taking into account the criteria elaborated upon in the Introduction section:

a. the serious character of the violation (minimum five victims);[1695]
b. the type of human rights violated, to include only the non-derogable human rights;[1696]
c. comparability to international crimes.

Following this second scrutiny, 38 Court cases[1697] appeared to be relevant and were subjected to coding using the qualitative data software Atlas.ti, following the methodology established in the Introduction section.[1698] The cases were read in their entirety, although the analysis and results, as presented and discussed in the remainder of the chapter, focus mainly on the section in the judgment devoted to article 63(1) on reparations.[1699] Additionally, the legal submissions put forward by lawyers on victims' behalf could not be analysed, since they are written in local languages and not in the English language.

Finally, in a third step the IACtHR's potential contribution to reparative justice was appraised, by assessing how the IACtHR's reparations regime materialized across its practice on reparations ('what is'), taking into account the reparations framework (what 'ought to be') and its potential

[1692] 'Decisions and Judgments' (IACtHR Website) <http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=en> accessed 15 April 2020
[1693] Due to this chapter's focus on reparations, it is important that the selection includes cases the Court has already adjudicated and made awards for reparations.
[1694] The total number of cases at the end of 2018 was estimated at 341. '40 year protecting rights' (IACtHR, July 2018) 34 <http://www.corteidh.or.cr/sitios/libros/todos/docs/40anos_eng.pdf> accessed 15 April 2020
[1695] However, as in the ECtHR case, cases with a fewer number of victims were considered too, as long as the Court established in its judgment that it was connected with a continuing human rights violation by the State, i.e. the human rights violations has been raised in similar cases brought before the Court. In such case, the chapter analysed several such cases concerning the same human rights violations, even though they involved less than five applicants.
[1696] Art 27 (2) ACHR establishes that "The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights."
[1697] The list of cases scrutinized for the purpose of this chapter is included in Annex 4.
[1698] The selection covers cases added to the database by 1 August 2019. The case-law selection purported to provide a coherent picture of the IACtHR's jurisprudence on gross human rights violations, in order to assess its potential contribution to justice for victims under its jurisdiction.
[1699] The section on 'costs and expenses' for legal representation was not included in this analysis as it falls outside the scope of this research.

implications for victims, as established in the theoretical framework. The findings of the analysis and the overall assessment of the Court's potential contribution to reparations justice, elaborated on in section 3.2, are complemented by empirical studies and secondary scholarship, to contextualize where possible the findings to the actual victims and their expressed perceptions. However, it must be conceded that there appears to be a scarcity of empirical studies scrutinizing the victims' perceptions of their involvement with the IACtHR in cases of gross human rights violations. As such, this study relied on the findings generated by only one empirical study written in the Spanish language, carried out Carlos Martín Beristain. Beristain's study consists in interviews with 207 persons, of which 72 direct and indirect victims participating before the IACtHR and 62 legal representatives of victims.[1700]

The final step will put forward final considerations regarding the IACtHR's potential contribution to reparative justice for victims through its reparations regime.

3.1.3. General Characteristics of Case-Law

Before moving on to introduce the results of the analysis and the assessment of the Court's potential contribution to reparative justice for victims under its jurisdiction, structured along procedural justice and substantive justice, a short overview of the characteristics of the cases will be put forward. The current analysis of IACtHR covers 38 cases against eight countries, namely, Colombia, Guatemala, Peru, El Salvador, Suriname, Brazil, Mexico and Bolivia. The cases investigated include enforced disappearances (approximately 37%),[1701] followed by massacres (approximately 26%),[1702] extra-judicial executions (approximately 23%),[1703] enforced disappearances of children (approximately 10%),[1704] and extra-judicial execution and forced displacement (approximately 3%).[1705] These characteristics are also represented visually below.

[1700] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008). Due to failure to find empirical studies in the English language, I found this study by carrying out a search for empirical studies utilizing the Spanish language.

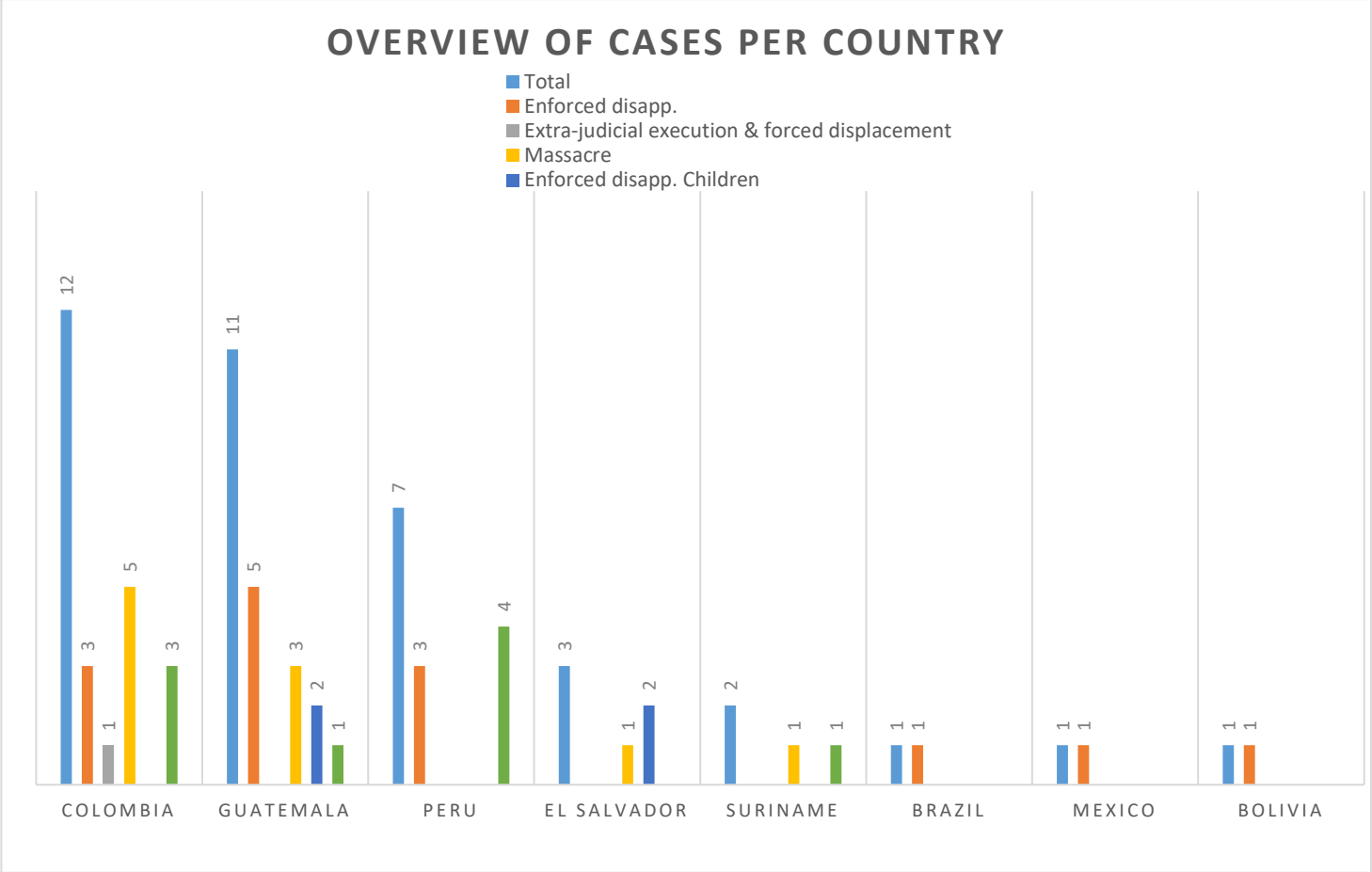
[1701] For instance, see *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014); *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013); *Case of Garcia and Family Members v Guatemala* (Merits, Reparations, and Costs) IACtHR Series C No. 258 (29 November 2012)

[1702] For instance, see *Case of the Massacres of El Mozote and Nearby Places v El salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012); *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012); *Case of the Rochela Massacre v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 163 (11 May 2007)

[1703] For instance, see *Case of Baldeón-García v Perú* (Merits, Reparations, and Costs) IACtHR Series C No. 147 (6 April 2006); *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004)

[1704] For instance, see *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005); *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004)

[1705] For instance, see *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013)



3.2. Mapping the IACtHR's Potential Contribution to Procedural Justice and Substantive Justice for Victims under Its Jurisdiction: Analysis and Assessment

After having established the parameters of this analysis, this section aims to elicit how the IACtHR's reparations regime is transposed and materialized across its practice as well as to assess how it may contribute to reparative justice for the victims under its jurisdiction. It will first put the situation of victims benefiting from reparative justice at the IACtHR into perspective, by focusing on the individuals' access to justice before the IACtHR, which necessarily entails a discussion about the Commission's function to select the petitions that make it before the Court.

3.2.1. Access to Justice

As far as the individuals' access to the Court is concerned, they still do not have direct access and it falls on the Commission to review and refer cases to the Court. Across time, the Commission's function to refer cases to Court evolved from exclusive discretion to a regulated mandate, with the

Commission now regularly referring cases to the Court.[1706] Nonetheless, the reality remains that in the Inter-American Human Rights System, the individuals' access to the Court is dependent on the Commission. As former IACtHR Judge Antonio Augusto Cancado Trindade posited, the role of regional human rights courts is to enable individuals to assert their international legal personality and full procedural capacity to vindicate their rights whenever national organs fail to secure the realization of justice.[1707] To this end, he stated that the Inter-American system must overcome "the paternalistic and anachronistic conception of the total intermediation of the Inter-American Commission on Human Rights between the individual petitioners and the Court",[1708] in order to enable the true complainant party – the victim – to access the Inter-American system of protection. However, for this to happen, the willingness of States to carry out the reform is required, which does not appear forthcoming.[1709]

In addition to the individuals' lack of direct access to the Court, the current research identified that further barriers at the Commission and States' levels place further limitations on the individuals' access to justice. Similar barriers were also identified in regard to the European counterpart and they will be discussed next. To begin with, the individuals' access to justice is restricted by the legal architecture of the Inter-American system and its interpretation by the Commission. As discussed above, the Commission is the guardian to the individuals' access to justice before the Court. According to the ACHR, its role is to screen the individual applications it receives, by deploying the ACHR admissibility criteria,[1710] and then, if a case is declared admissible, it opens a 'Procedure on the Merits' which can either result in the dismissal of the case, friendly settlements between the victims and the State, or referral to the Court.[1711]

A review of the Commission's Procedural Rules and its annual reports, which reveal the Commission's practice in regard to individual petitions showcased that the Commission interpreted its function in a complex manner, deploying a multitude of procedural steps to be executed from the moment it receives the individual petitions until their resolution.[1712] These steps operate as layers of selection which reduce the number of admissible applications, minimize the chances that a case will be referred to the Court, and appear to neglect certain interests of individuals bringing petitions. To be precise, the Commission's process entails an 'initial review' of petitions by the Executive Secretariat of the Commission, checking for information according to article 28 of its Rules,[1713] followed by 'initial processing' by the Secretariat, which checks again the admissibility, notifies the parties, requests further information and may also join cases with

[1706] Pursuant to art 44 of the Rules of Procedure of the IACommHR (2001) and art 45 of the Rules of Procedure of the IACommHR (2013) under which the Commission is currently operating.
[1707] Antonio Augusto Cancado Trindade, 'Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century' (2000) 8 Tulane Journal of International and Comparative Law 5, 45
[1708] Antonio Augusto Cancado Trindade, 'Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century' (2000) 8 Tulane Journal of International and Comparative Law 5, 45
[1709] Back in 1994, Jo Pasqualucci was reporting the unwillingness of States to reform the system to enable individuals to access direct access to the Court. 25 years later, the individuals' access to the court remains mediated by the Commission. Jo M. Pasqualucci, 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' (1994) 26 Inter-American Law Review 298, 310
[1710] ACHR, artts 46 and 47
[1711] ACHR, artts 48-51
[1712] See 'Annual Report 2018' (IACommHR, 2018) <https://www.oas.org/en/iachr/docs/annual/2018/docs/IA2018cap.2-en.pdf> accessed 15 April 2020. 'Statistics' (OAS Website) <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> accessed 15 April 2020
[1713] Rules of Procedure of the IACommHR (2013) art 28

similar victims, facts or pattern of conduct.[1714] Thereafter, the decision on the admissibility is taken by Working Groups made up of three or more Commissioners,[1715] on the basis of the additional information received and in line with the admissibility criteria of articles 30-36 of its Rules.[1716] Pursuant to a decision on admissibility, the Commission will proceed to evaluate the substance of the petition.[1717] The 'Procedure on the Merits' may entail hearings and on-site investigations, and will result in a Merits Report, which contains the conclusions about whether the facts of the case constitute human rights violations.[1718] If the Commission finds human rights violations, it makes recommendation for measures the State should take within a certain deadline.[1719] At this point in the process, the case can follow two possible scenarios. In the first scenario, the Commission may attempt to secure a friendly settlement between the two parties, the petitioner and the State, while keeping respect for human rights as a basis for the settlement.[1720] In a second scenario, the Commission may decide to refer the case to the Court,[1721] either when the parties did not manage

[1714] Rules of Procedure of the IACommHR (2013) art 29

[1715] Rules of Procedure of the IACommHR (2013) art 35. As per art 1(1) in total, the Commission is made up of seven commissioners "elected in their individual capacity by the General Assembly of the Organization. They shall be persons of high moral character and recognized competence in the field of human rights."

[1716] Rules of Procedure of the IACommHR (2013) art 30-36

[1717] Rules of Procedure of the IACommHR (2013) art 37

[1718] The merits reports are confidential in line with art 51(3) ACHR, unless the Commission decides to publish them. They may also become available once the facts in the reports came before the Court for adjudication. 'Merits Reports' (OAS Website) <http://www.oas.org/en/iachr/decisions/merits.asp> accessed 15 April 2020

[1719] Rules of Procedure of the IACommHR (2013) art 44

[1720] Rules of Procedure of the IACommHR (2013) art 40; ACHR, art 48(1)(f). If the parties agree on a friendly settlement, the Commission will draw a report under article 49 of the 2013 Rules of Procedure of the IACommHR, which will contain a brief statement of the facts and of the solution reached. According to the 2018 Commission Report on the Impact of Friendly Settlements, this tool opens a dialogue between petitioners, victims of human rights violations, and the States, where the parties can reach agreements on reparation measures for the alleged victims and often for the society as a whole. This procedure may benefit both parties. For the State, the friendly settlement is an opportunity to put an end to the litigation and to demonstrate its commitment to its duty to respect and ensure human rights. For the victim, a friendly settlement might secure the reparations they wish to receive (including acknowledgement of responsibility by the State), without having to go through the lengthy litigation procedure. Furthermore, according to the 2018 Commission report, in the period 1987-2017, 137 friendly settlement agreements have been secured between parties. Of these, 117 are the subject of public follow-up through the Annual Report of the IACHR. According to information gathered in 2017, 41 of the reports have been implemented in full, 74 have been partially implemented, and two are pending implementation. 'Impact of the Friendly Settlement' (IACommHR, 1 March 2018) <https://reliefweb.int/sites/reliefweb.int/files/resources/ImpactFriendlySettlement-2018.pdf> accessed 15 April 2020

[1721] According to article 61(1) ACHR, States may also bring a case to the Court, however this scenario is less likely in that it would mean that the State subjects itself voluntarily to the contentious jurisdiction of the Court, which the entails various possible consequences, including financial expenses to plead a case, a finding of a violations, reparations awards, etc. See also Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 185. In order for the Commission to refer a case to the Court, the respondent State must have accepted the Court's contentious jurisdiction. On the contrary, if the State concerned has not accepted the contentious jurisdiction of the Court, all the Commission can do is compile reports under article 50 and then article 51 ACHR laying out its conclusions and keeping a close eye on the case. The 'threat' of publishing this report consisting in information of non-compliance with the ACHR obligations by the State concerned remains the most powerful weapon the Commission can have in this situation. See ACHR, art 62(1); see also Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 179

to agree on a friendly settlement,[1722] when the State failed to take recommended measures within the deadline, or when the Commission deems it necessary to refer the case directly to the Court.[1723]

How this complex process operates in practice will be further exemplified by referring to statistical data inferred from the Commission's 2018 Annual Report and the OAS' website. In 2018, the Commission received a record number of 2957 individual petitions.[1724] Of this number, after the 'initial review', it decided to process only 261 petitions (approximately 8%), dismissing 1989 for failing to provide the information pursuant to Rule 28, and relaying 707 applications for processing in the next year.[1725] In addition, it issued 133 decisions on admissibility, of which 118 resulted in Admissibility Reports, whereas 15 resulted in Inadmissibility Reports.[1726] Furthermore, six friendly settlements were concluded and only 18 cases were referred to the Court, which amount to approximately 0.6% of the total number of petitions.[1727] In addition, the Commission published four Merits Reports, which means that in addition to the cases referred to the Court, four other cases have eventually resulted in their successful resolution whereby the victims and the State agreed on a 'compromise agreement'.[1728]

Three observations can be drawn. As can be inferred from the data exposed above, the majority of individual petitions are dismissed at the initial review stage, for their alleged failure to abide by the criteria set forth in article 28 of its Procedural Rules.[1729] This finding has also been noted by

[1722] Rules of Procedure of the IACommHR (2013), article 45; in the case when the parties do not agree on a friendly settlement, the Commission must draw up a report under article 50 ACHR, including the facts and stating its conclusions. As per ACHR, art 51(2), the report shall be transmitted to the States concerned, which shall not be at liberty to publish it. However, if in three months from the moment the Commission has submitted its article 50 report to the parties the matter is not settled, there are two possible ways forward. The Commission may refer the case to the Court, but only if the State has accepted the contentious jurisdiction of the Court pursuant to ACHRM article 62(1). However, if the Court has not accepted the jurisdiction, the Commission will remain seized to supervise the case and make a new report under article 51 setting forth its conclusions on the case. As a last resort in case of no action from the State's side, the Commission may also decide to make the report public, which means that all States will become aware of the non-compliance.

[1723] The bypassing of the friendly settlement procedure by the Commission was determined by the Court in the Velasquez Rodriguez Case, where Honduras challenged the Commission's decision to do so. See *Case of Velásquez-Rodríguez v Honduras* (Preliminary Objections) IACtHR Series C No. 1 (26 June 1987) para 44

[1724] 'Annual Report 2018' (IACommHR, 2018) 59

[1725] 'Annual Report 2018' (IACommHR, 2018) 60, corroborated with statistical data for year 2018 retrevied at 'Statistics' (OAS Website)

[1726] As per statistical data on year 2018, 'Statistics' (OAS Website)

[1727] As per statistical data on year 2018, 'Statistics' (OAS Website)

[1728] See e.g. 'Report on Merits (Publication)' (IACommHR, 5 October 2018) para 240 <http://www.oas.org/en/iachr/decisions/2018/COPU11656EN.pdf> accessed 15 April 2020

[1729] As per Rules of Procedure of the IACommHR (2013) art 28: "Article 28. Requirements for the Consideration of Petitions: Petitions addressed to the Commission shall contain the following information:
1. the name of the person or persons making the denunciation; or in cases where the petitioner is a nongovernmental entity, its legal representative(s) and the Member State in which it is legally recognized;
2. whether the petitioner wishes that his or her identity be withheld from the State, and the respective reasons;
3. the e-mail address for receiving correspondence from the Commission and, if available, a telephone number, facsimile number, and postal address;
4. an account of the fact or situation that is denounced, specifying the place and date of the alleged violations;
5. if possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged;
6. the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated;
7. compliance with the time period provided for in Article 32 of these Rules of Procedure;
8. any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure; and
9. an indication of whether the complaint has been submitted to another international settlement proceeding as provided in Article 33 of these Rules of Procedure."

Dinah Shelton who reported, referring to a study carried out in 2011, that up to 90% percent of all individual petitions sent to the Commission are summarily dismissed at the initial processing stage carried out by the Commission's Secretariat.[1730] However, reports on how the individual petitions are evaluated by the Commission's Secretariat and the reasons for dismissal are not publicly available, and as such, it is unclear why the majority of petitions are dismissed at the initial review stage.[1731]

Furthermore, the Commission's complex procedural steps that limit gradually the number of applications minimize the number of cases that make it before the Court. As the statistics above show, only 0.6% of the total number of petitions end up being referred to the Court. However, it must be conceded that these statistics are not completely in balance. The main reason is the backlog of petitions before the Commission,[1732] which results in many petitions being processed years after they were submitted. As such, the 133 cases whose admissibility was decided in 2018 and the 18 cases referred to the Court are not petitions from 2018, but may date back to as early as 2012.[1733] However, the statistics for the period 2006-2018 do show clearly that the Commission received approximately 24.000 individual petitions in this period, and the cases sent to the Court are close to 200, which means that on average only 0.8% of the cases end up referred to the Court.[1734]

Finally, the Commission's process appears to neglect certain interests of the individuals bringing petitions. Arguably, according to the Commission's Procedural Rules, the victims or their lawyers play a role in the process, as they are notified of the procedural developments, are invited to submit further evidence, and may even participate during hearings held by the Commission.[1735] However, the victims or their lawyers do not have much of a say in relation to the process and they need to wait until all the procedural steps are completed before knowing whether the case will come before the Court. For the individuals whose main reason for putting forward individual petitions is to have the case adjudicated by the Court, the Commission's cumbersome process might take an important toll on the individuals' patience. This is likely to be further compounded by the length of the process, which according to a study looking at the average duration of the process from the filing of petition with Commission to the filing of the case with the Court amounts to 5.7 years, excluding the length of cases before the Court.[1736]

[1730] Dinah Shelton, 'The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System' (2015) 5 Notre Dame Journal of International & Comparative Law 1, 10

[1731] As one other study reported, "this process lacks any type of oversight and accountability. Neither the members of the Commission nor the public in general know the reasons for the rejection of those new petitions by the Executive Secretariat." In addition, the same study explained that the registry is made up of a senior attorney, four junior professionals, and two administrative assistants. This entails that the majority of applications before the Inter-American Commission are not rejected by Judges or Commissioners. See Human Rights Clinic, 'Maximizing Justice, Minimizing Delay: Streamlining Procedures Of The Inter-American Commission On Human Rights' (The University of Texas, School of Law, 2011) 25

[1732] 'Annual Report 2018' (IACommHR, 2018) 71. It is a known fact that the Inter-American System is faced with a backlog of cases; Richard Goldman asserted that "the system of petitions and cases is in imminent danger of collapse. The Commission's thirty staff lawyers, who are presently handling nearly 1,250 open cases, cannot keep pace with the annual increase in the number of petitions and thus cannot meet the reasonable expectations of states and victims for their prompt resolution". Robert K. Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 882-883

[1733] As can be inferred for instance from an admissibility report issued in 2018. 'Report on Admissibility' (IACommHR, 20 November 2018) <http://www.oas.org/en/iachr/decisions/2018/ARAD1225-12EN.pdf> accessed 15 April 2020

[1734] As per statistical data retrieved from 'Statistics' (OAS Website)

[1735] Rules of Procedure of the IACommHR (2013) art 64-65

[1736] See Human Rights Clinic, 'Maximizing Justice, Minimizing Delay: Streamlining Procedures Of The Inter-American Commission On Human Rights' (The University of Texas, School of Law, 2011) 36. The length of cases before the Court will be discussed in section 3.2.2.

Against this background, the individuals' access to justice before the Court is severely hampered by the legal architecture of the Inter-American system and the Commission's interpretation of its functions. As explained, the complex process developed by the Commission to screen individual petitions reduces significantly the number of admissible applications, minimizes the chances that a case will be referred to the Court, and fails to account for certain interests the individuals bringing petitions might have. As thousands of individuals continue to suffer human rights violations on the Latin American continent, it is distressing that only 12 cases per year are referred to the IACtHR per year.[1737] However, in its turn, the Commission suffers from structural and financial shortcomings,[1738] whereas the IACtHR is a human rights Court of last resort, which furthermore functions on a part-time basis, and as such, it is likely that it will not have the capacity to process more than a small number of cases per year.[1739] Consequently, measures to improve the individuals' access to justice would also need to find solutions to the shortcoming facing the Inter-American system.

Furthermore, individuals may also face obstructions to their access to justice at the State level. While retaliation in response to legal action pursued by individuals is mostly prevalent in relation to proceedings initiated at the national level,[1740] both the Commission and scholars explained that in many States victims and their families are intimidated and fear retaliation if they complain of human rights violations, including at the Inter-American level.[1741] Fear of retaliation can furthermore expand to the legal community, rendering lawyers reluctant to bring cases before the Commission.[1742] This matter was raised in the Commission's request for an advisory opinion by the Court, wherein it stated that:[1743]

[1737] Indeed, according to the 2018 Report, which provides statistics on the number of cases submitted by the Commission to the Court in the period 1997-2018, the Commission submitted an average of 12 cases per year before the Court. In addition, it has been reported that six friendly settlements have been reached in 2018. 'Annual Report 2018' (IACommHR, 2018) 75

[1738] As reported, the Commission is grappling with limited resources, a high volume of petitions to process, and the limited times the Commissioners meet annually (only three times a year). Human Rights Clinic, 'Maximizing Justice, Minimizing Delay: Streamlining Procedures of the Inter-American Commission On Human Rights' (The University of Texas, School of Law, 2011) 66. In this line, since 2017, the Commission has implemented a series of measures to reduce the backlog in the system of petitions and cases. 'Annual Report 2018' (IACommHR, 2018) 56

[1739] The same idea has been asserted by James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 The American Journal of International Law 768, 782

[1740] Many of the cases investigated in the current research reveal that the families of victims have been forced into exile upon attempting to find out what has happened with the victims. See e.g. *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003) para 192. Threat and retaliation can also be directed against national Judges investigating high profile cases. One of the cases investigated in the current research concerns the murder by paramilitaries of members of the judicial commission investigating the massacre of 19 Merchants in Colombia in 1987. During a visit to the region for the purpose of the investigation, 12 of the 15 members of the judicial commission (comprising judges and prosecutors) were apprehended and killed by paramilitaries. Both cases eventually made it before the IACtHR. See *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004); *Case of the Rochela Massacre v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 163 (11 May 2007)

[1741] Jo M. Pasqualucci, 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' (1994) 26 Inter-American Law Review 298, 315. *Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights*, Advisory opinion oc-11/90, IACtHR Series A No.11 (10 August 1990) para 3. As identified in the some of the cases analysed in the current study, some of the victims did not want to testify before the IACtHR out of fear of the national police. E.g. *Case of Las Palmeras v Colombia* (Reparations and Costs) IACtHR Series C No. 96 (26 November 2002)

[1742] *Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights*, Advisory opinion oc-11/90, IACtHR Series A No.11 (10 August 1990) para 3

[1743] *Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights*, Advisory opinion oc-11/90, IACtHR Series A No.11 (10 August 1990) para 3

"Complainants have alleged to the Commission that they have been unable to retain counsel to represent them, thereby limiting their ability to effectively pursue the internal legal remedies putatively available at law. *This situation has occured where an atmosphere of fear prevails and lawyers do not accept cases which they believe could place their own lives and those of their families in jeopardy*. [emphasis added]"

Similarly, Gates Garrity-Rokous and Raymond Brescia explained that the 1980s in particular were marked by a climate of fear, which translated into reluctance on the part of victims and lawyers to submit petitions before the Commission due to fear of reprisals.[1744]

To respond to these challenges, several solutions were adopted at the Inter-American system level. The first one was instated by the Court in its advisory opinion wherein it removed the 'exhaustion of domestic remedies' as a criterion for the admissibility of petitions in situations when a general fear in the legal community prevented the submission of petitions before the Commission.[1745] The second measure related to the various categories of applicants enabled to bring petitions before the Inter-American Commission, which includes individuals or NGOs residing or operating in another State than the one against which the claim is being brought.[1746] As Jo Pasqualucci explained, the ACHR is the only human rights treaty that attempts to counteract challenges to the individuals' access to justice and fear of intimidation by allowing unrelated parties such as NGOs to bring petitions on individuals' behalf as they face fewer security challenges.[1747] These solutions are commendable, as they are likely to increase the individuals' access to justice; however, it remains important to acknowledge the potential obstructions prevalent at the State level which can continue to manifest during the adjudication of the Court cases.[1748]

3.2.2. Procedural Justice

After having clarified the limitations to the individuals' access to justice to the Inter-American system in general and the Court in particular, this section will focus on the Court's potential contribution to procedural justice for the victims of gross human rights violations whose cases do make it to the Court. In assessing the Court's potential contribution to procedural justice – defined in terms of voice, information, interaction, and length – the section will establish how the statutory prerogatives bestowed upon victims in relation to the process of obtaining reparations materialized across the Court's practice and assess how they may contribute to procedural justice for the victims under its jurisdiction.

I. Voice

This section consists of an analysis of how voice is materialized in the process towards obtaining reparations at the IACtHR as well as an assessment of its potential implications for victims.

[1744] Gates Garrity-Rokous and Raymond H. Brescia, 'Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals' (1993) 18 Yale Journal of International Law 559, 602

[1745] *Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights,* Advisory opinion oc-11/90, IACtHR Series A No.11 (10 August 1990) 9

[1746] ACHR, art 44

[1747] Jo M. Pasqualucci, 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' (1994) 26 Inter-American Law Review 298, 316

[1748] For instance, as identified in the some of the cases analysed in the current study, some of the victims did not want to testify before the IACtHR out of fear of the national police. E.g. *Case of Las Palmeras v Colombia* (Reparations and Costs) IACtHR Series C No. 96 (26 November 2002)

According to this analysis, the modalities through which the victims' voice is materialized in the IACtHR's proceedings are written and oral testimonies and legal representation. They will be discussed in this section.

To begin with, victims may express their voice through affidavits, which are written testimonies provided by victims in front of a public notary and then submitted before the Court as evidence.[1749] Affidavits can be put forward by victims following a request for evidence through an order by the President of Court, and it falls upon the legal representative to indicate which victims may submit affidavits, having due regard to the principle of 'procedural economy'.[1750] The judgments investigated in this study do not explain how the legal representatives select which victims provide affidavits. However, Carlos Beristain wrote in his study that it is up to the victims whether they want to provide affidavits, choice which is then recorded by the legal representatives.[1751] As the analysis revealed,[1752] affidavits were put forward in all of the cases under current investigation, by a varied range of next of kin. On average, the Court receives affidavits from approximately five victims per case, however, in certain cases such as for instance, *Case of the "Mapiripán Massacre" v. Colombia* affidavits have been put forward by as many as 14 siblings, daughters and stepdaughters of approximately 40 direct victims.[1753] Nonetheless, the number of direct victims in the case does not necessarily result in a multitude of affidavits; for instance, in *Case of the Rio Negro Massacres v. Guatemala* wherein the Court confirmed that as many as 386 people in a community were executed during five different massacres, only four affidavits were put forward.[1754] One possible explanation would be that not all victims want to provide affidavits. However, it may also be that in cases with large number of victims, the legal representative has to make choices as to who may provide affidavits during the trial, as for 'procedural economy' reasons not all of them may be able to do so. In the latter situation, the victims' opportunity to express their voice through affidavits is curtailed.

Furthermore, for the victims who do submit affidavits, they appear to be an opportunity to provide information on the facts, elaborate on the impact of the crimes on their lives, and in seldom cases to elaborate on the reparations wishes. For instance, a summary of an affidavit in *Case of Las Palmeras v. Colombia* relayed:[1755]

"*Lack of punishment of those responsible and persistence of the idea that her father was a guerrilla fighter have morally affected her family. One way to avoid repetition of these facts is for everything that happened to be made known publicly and officially, clearly explaining how it happened and that it was a mistake by the police. She has never testified regarding her father's death. She also feels fear in testifying before the Court*."

[1749] E.g. *Case of Contreras et al. v El Salvador (Merits*, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 30; 2; *Case of Gudiel Alvarez et al. ("diario militar") v Guatemala* (Merits, reparations and costs) IACtHR Series C No. 253 (20 November 2012) para 36

[1750] See e.g. *Case of the Massacres of El Mozote and Nearby Places v El salvador* (Order of the President of the Inter-American Court of Human Rights) (22 march 2012) para 7 <https://www.corteidh.or.cr/docs/casos/masacres-del-mozote/res2.pdf> accessed 15 April 2020

[1751] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 118-119

[1752] It must be mentioned that the Court judgments provide only a summary of the affidavits.

[1753] *Case of the "Mapiripán Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 134 (15 September 2005) 243

[1754] *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 7

[1755] *Case of Las Palmeras v Colombia* (Reparations and Costs) IACtHR Series C No. 96 (26 November 2002) para 25

Against this background, the affidavits appear to represent an important modality for victims to put forward their voice before the Court, as they enable a varied range of next of kin to convey their stories. In particular, the affidavits may be important for the victims who do not wish to testify before the Court, but nonetheless want to engage in an active way with the Court and convey their stories. However, this modality of expressing voice is disadvantageous to victims in cases involving large number of victims.

Furthermore, the victims may also convey their voice directly before Judges through oral testimonies. Oral testimonies are provided during the oral hearings stage of the trial or during separate reparations hearings,[1756] as long as the Court does not opt for proceedings in a written form.[1757] In addition, oral testimonies are provided following a request for evidence through an order by the President of Court, and it falls on the legal representative to indicate which victims may provide oral testimonies having regard to the principle of 'procedural economy'.[1758] As with the affidavits, the data analysed in this study does not indicate how the legal representatives select which victims may give oral testimonies. However, scholars indicate that the oral testimonies are a voluntary act by the victims, and only the victims who request to give oral testimony may do so; consequently, the legal representatives pass on to the Judges the victims' wishes to provide oral testimony accordingly, having regard to procedural economy.[1759]

As the analysis identified, victims provided oral testimony in all the cases featuring oral proceedings (the Court opted for written proceedings in only 5% of the cases).[1760] On average, each of the case features two to three oral testimonies, stemming from various next of kin of the direct victims.[1761] There are also cases that feature a larger number of oral testimonies, such as for instance *Case of the 19 Merchants v. Colombia* where seven next of kin of 19 direct victims could provide oral testimony.[1762] However, as in the case of affidavits, a large number of direct victims does not necessarily result in an increased number of oral testimonies; for instance, *Case of the Plan de Sánchez Massacre v. Guatemala* which concerns the massacre of 268 Maya indigenous people features only three oral testimonies of next of kin.[1763] As such, while in cases with smaller number of direct victims nearly all victims who wish to testify may do so, the victims in cases with large number of direct victims are significantly disadvantaged, and their opportunity to provide oral testimony is curtailed for 'procedural economy' reasons. Furthermore, as identified, the Court granted full financial support for expenses incurred in relation to oral testimonies for victims in cases adjudicated after 2009. To be precise, while the Court maintained its limits to the number of

[1756] Rules of Procedure of the IACtHR (2009), article 66 posits that "When no specific ruling on reparations and costs has been made in the judgment on the merits, the Court shall set the date and determine the procedure for the deferred decision thereon." Whether to devote a public hearing to reparations separated from the merits appears to be a discretionary matter to be decided by the Judges.

[1757] At the IACtHR, the proceedings before the Court may take three forms: in written, both written and oral stages, and exceptionally they may also entail hearings devoted only to reparations. The decision on the type of proceedings lies with the Court. See Rules of Procedure of the IACtHR (2009), artts 15(1), 34-44 and 45-55

[1758] E.g. *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004) para 26

[1759] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 162. Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 118-119

[1760] *Case of Barrios Altos v Peru* (Reparations and Costs) IACtHR Series C No. 87 (30 November 2001) and *Case of Baldeón-García v Perú* (Merits, Reparations, and Costs) IACtHR Series C No. 147 (6 April 2006)

[1761] E.g. *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004)

[1762] *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) 22-32

[1763] *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) 13-17

victims who could testify (two to four), it granted the financial support to all victims who requested it.[1764] This measure follows from the 2009 amendment of its Procedural Rules whereby the Court instated a Victims' Legal Assistance Fund for the benefit of victims who lacked financial resources to bring their case before the system.[1765] Consequently, this appears to be a positive development at the IACtHR, indicating acknowledgment of the importance of victims to appear before the Court, especially for the victims who are in disadvantaged financial situations.[1766]

Furthermore, this analysis identified that for the victims who provide oral testimonies, they are an important vehicle to share their stories, provide details on the facts of the case, elaborate on the impact and consequences of the crimes, as well as put forward concrete requests for the Court, e.g. to find justice,[1767] punish those responsible,[1768] find the truth.[1769] For instance, a summary of an oral testimony in *Case of the Plan de Sánchez Massacre v. Guatemala* states:[1770]

"*He hopes that justice will be done, that the facts will be acknowledged, that those responsible will be prosecuted, and that this never happens again. It has been very difficult to recover all the property they lost, but the lives of their loved ones are priceless. They are protesting because there is no justice in everything they endured and continue to endure. They hope to improve their lives and that the State will respond to their needs in the areas of health, education and land*."

The empirical study carried out by Beristain confirmed the importance of providing oral testimonies for victims. He held that for the victims interviewed in this study, providing oral testimony before the IACtHR was appraised as providing an important space for the victims to recount what happened to them, especially for those victims whose access to justice at the national level was denied.[1771]

Consequently, it appears that oral testimonies represent important modalities for victims to express their voice in the context of the IACtHR. As elaborated above, they enable victims to recount the impact the crimes have had on their lives, the long-term consequences of crimes, as well as express their wishes in relation to reparative measures to be undertaken by the Court. As such, it is certainly positive that at least some victims have the opportunity to participate and express themselves during the IACtHR proceedings, especially when compared with the ECtHR where this opportunity is next to inexistent. Moreover, Viviana Krsticevic, the Executive Director of the

[1764] Of the cases investigated, the Court granted financial support in the following cases: *Case of the Massacres of El Mozote and Nearby Places v El salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 394; *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013) para 297; Case of Contreras et al. v El Salvador (Merits, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 240

[1765] 'Rules for the Operation of the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights' (IACtHR, 4 February 2010) article 1(1) <https://www.corteidh.or.cr/docs/regla_victimas/victimas_eng.pdf > accessed 15 April 2020

[1766] In this line, Jo Pasqualucci posited that a more worrisome trend she noticed is the fact that the Court limited the number of days scheduled for public hearings, the number of victims who may testify before the Court, as well as the duration of their testimony. Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 160

[1767] E.g., *Case of the "Las Dos Erres" Massacre v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009)

[1768] *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) 13

[1769] E.g. *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003) 35

[1770] *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) 16

[1771] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 177, 183

Center for Justice and International Law and litigant on victims' behalf in many of the cases before the IACtHR, including cases investigated in the current chapter, drew attention to the testimonies' positive implications beyond the victims. She expressed that conveying the victims' voice through oral testimonies and affidavits was instrumental in shaping some of the Court's decisions. This in turn helped build the jurisprudence and contributed to some changes in the culture of the Court.[1772] Nonetheless, expressing voice through oral testimonies cannot be enjoyed by all victims, for 'procedural economy' reasons, which entails that the victims' opportunity to express their voice is particularly curtailed in cases with large number of victims, such as those involving massacres against entire communities.

Furthermore, according to this research, legal representation is the main vehicle for victims to put forward their voice, as victims participate in Court proceedings through lawyers who act on their behalf before the Court.[1773] The role of victims and their lawyers before the Court witnessed a gradual development. As mentioned above and confirmed by observations in the current analysis, in the cases adjudicated prior to 2000 (approximately 8% of the cases in this analysis) the victims' voice was solely represented by the Commission's lawyers, and victims and their own lawyers did not have a standing before the Court.[1774] This changed with the amendment of the Court's Procedural Rules in 2001 and was reflected in large majority of cases analyzed (92%), wherein the victims' voice was put forward before the Court by their own lawyers. These amendments indicate a gradual acknowledgement of the importance of granting victims a voice before the Court and aim to strengthen the victims' independence and agency, as they are no longer represented by the Commission but by lawyers of their own choice.[1775]

Furthermore, as the analysis revealed, as in the case of the ECtHR, the majority of cases (approximately 80%) featured legal representation by teams made up, on the one hand, of renowned NGOs such as Center for Justice and International Law (CEJIL), Asociación Pro Derechos Humanos, or Center for Human Rights Legal Action and on the other hand, of organizations, human rights bodies, or lawyers operating at the local level. By way of example, *Case of the "Las Dos Erres" Massacre v. Guatemala* featured legal representation by CEJIL and the Commission by the Office of Human Rights of the Archdiocese of Guatemala.[1776] The large representation by these NGOs is, as in the case of the ECtHR, justified by the practice of strategic litigation, whereby NGOs specializing in IACtHR litigation select and initiate cases before the

[1772] Viviana Krsticevic provided examples on how the victims' testimony has influenced the Court's decisions in several cases, including for instance the case of Helen Mack, investigated in the current research. She explained that upon the indirect victims' request for punishment of all perpetrators involved in the murder of her sister, the Court provided explicit directions in the judgment, relating the State's obligations to investigate, identify and punish the direct perpetrators. See Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1418-1422

[1773] Rules of procedure of the IACtHR (2009) art 25

[1774] See e.g. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993). In *Case of Caballero-Delgado and Santana v Colombia*, victims' lawyers only played the role of assistants to the Commissions' lawyers, with the Commission passing on to the Court the victims' voice. *Case of Caballero-Delgado and Santana v Colombia* (Reparations and Costs) IACtHR Series C No. 31 (29 January 1997)

[1775] See also Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) Revue Québécoise de droit international 57, 82

[1776] *Case of the "Las Dos Erres" Massacre v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009) para 1

Inter-American Commission and then continue to represent the victims before the Court.[1777] To be precise, while in certain cases it is the victims that may initiate the cases,[1778] it is usually NGOs that select and initiate cases after partnering with local organisations or victims.[1779] Afterwards, they provide *pro bono* legal services to victims, in partnership with local organisations, by litigating the cases before the Commission and the Court.[1780] Consequently, the victims' legal representation by these expert teams of lawyers is important for the victims, since otherwise the chances that their cases will be make it before the Inter-American system are minimal. As reported, prior to the NGOs' involvement with strategic litigation, victims would send handwritten notes to the Commission about human rights abuses, including only minimal facts; after their involvement, NGOs professionalized the case information by providing facts and information in a manageable way for the Commission to handle.[1781] In addition, since the NGOs have extensive experience and expertise in litigating cases before the Commission and the Court, their involvement in the litigation of cases is likely to increase the success rate of cases.[1782] On the down side, this situation reveals that the adjudication of cases at the Inter-American Court appears to be primarily reserved to the few victims that succeed in attracting the support of prominent NGOs, calling into question whether victims with less prominent cases would still have their cases considered at the IACtHR.

Moreover, according to the analysis, legal representatives pass on to the Court the victims' voice by means of written and oral submissions, depending on the stage of proceedings before the Court. As far as can be inferred from the Court's decisions, the legal representatives' submissions aim to put forward information and evidence in regard to the facts of the case, to substantiate the allegations of human rights violations and the requests for reparations.[1783] As such, the submissions appear to play the crucial role of representing the victims' voice and stating facts regarding their stories before the Court. However, two caveats must be mentioned. The first one relates to the fact that the majority of victims' legal representatives are associated with NGOs, who usually have different end goals in relation to the cases than the victims.[1784] As Beristain wrote, the legal representatives associated with NGOs are 'lawyers with an agenda' whose ultimate interests lie in promoting an agenda for human rights and transforming the situations that give rise to victimization, whereas the victims are focused on their own cases.[1785] Consequently, this might entail that the oral and written submissions put forward on victims' behalf are not fully representative of the victims' voice, but might mirrow the broader goals the NGOs pursue.

[1777] See also Heidi Nichols Haddad, *The Hidden Hands of Justice. NGOs, Human Rights, and International Courts* (Cambridge University Press, 2018) 103-104

[1778] E.g. *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003). See also Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 442

[1779] See Sandra Carvalho and Eduardo Baker, 'Strategic Litigation Experiences in the Inter-American Human Rights System' (2014) 20 International Journal On Human Rights' 449, 452-453

[1780] Heidi Nichols Haddad, *The Hidden Hands of Justice. NGOs, Human Rights, and International Courts* (Cambridge University Press, 2018) 104

[1781] Heidi Nichols Haddad, 'Judicial Institution Builders: NGOs and International Human Rights Courts' (2012) 11 Journal of Human Rights 126, 142

[1782] See Heidi Nichols Haddad detailing that the involvement of CEJIL in many cases has resulted in many cases being successful. Heidi Nichols Haddad, *The Hidden Hands of Justice. NGOs, Human Rights, and International Courts* (Cambridge University Press, 2018) 104

[1783] E.g. *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009) para 4; *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 17

[1784] This point has also been discussed in relation to the ECtHR.

[1785] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 462

Admittedly, Beristan posited that this is particularly the case in relation to the requests for measures of guarantees of non-repetition featuring in the submissions.[1786]

The second caveat refers to whether the written and oral submissions capture the diversity of victims' voice. The latter point is especially relevant in the cases with large number of victims such as *Case of the Afro-Descendant Communities Displaced from the Cacarica river basin (operation genesis) v. Colombia* which features more than 500 victims,[1787] but the judgment does not provide information on potential differences amongst victims. Viviana Krsticevic, a frequent victims' lawyer before the IACtHR, also acknowledged this challenge. She stated that cases involving large numbers of victims make it particularly challenging to put forward the voice of victims. As she wondered, "in giving voice, how to give a voice that differentiates gender, culture, and impacts not only individuals but also communities?"[1788] Against this background, the written and oral submissions appear to be important instruments to put forward the victims' voice before the Court. However, there are challenges as to whether the submissions capture the victims' voice and stories in a robust manner or whether all victims' voice is robustly represented.

II. Interaction

This section aims to scrutinize the victims' interaction in the process of obtaining reparations at the IACtHR and provide an assessment of its potential implications for victims. As the current analysis elicits, the legal representation represents the main modality for the victims' interaction at the IACtHR, however, some victims may also interact with different Court actors in the context of oral testimonies before the Court. They will be discussed in turn.

To begin with, the victims' interaction at the IACtHR may entail their interaction with several Court actors, such as the Judges or the representatives of respondent States during oral hearings. Concretely, the Judges moderate the hearings, while the representatives of respondent States may interrogate the victims.[1789] Insights into how victims perceive the interaction during oral hearings are put forward by Beristain's study. As Beristain posited, for some of the victims the experience of talking in front of Judges and in an international judicial setting created a situation of tension and sometimes of fear.[1790] However, the majority of victims perceived the presence of Judges in the courtroom and the solemnity of hearings as expressions of authority and respect, but also of seriousness and commitment to the case.[1791] The hope of victims was that the information imparted during hearings would help the Court to analyze the case with impartiality, which would further

[1786] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 462

[1787] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 38

[1788] See Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1422

[1789] Rules of Procedure of the IACtHR (2009), rule 52(1) and (2)

[1790] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 183

[1791] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 183

provide victims with the satisfaction of being heard and taken into account.[1792] Against this background, it appears that the victims' interaction with the Judges was generally appraised as positive, and the victims felt respected.

Additionally, Beristain's study reported that the presence of the States' representatives during the public hearings made some of the victims feel uncomfortable or even fearful, particularly during the questioning stage,[1793] whose aim is to challenge the stories of victims.[1794] The victims reported that the manner in which the States' representatives acted during the testimonies elicited a lack of respect towards them, as well as a tendency to constantly minimize the suffering they had been through.[1795] This interaction might lead to secondary victimization for victims, especially during the confrontations with the States' representatives. However, as can be inferred from the case law and studies, the IACtHR does not have in place any measures, such as psychological support during oral testimonies, to minimize the potential secondary victimization resulting either from the disrespectful – as least in the victims' perception - interactions with the State representatives or the potentially negative effects of recalling highly traumatic events.

Furthermore, according to the present analysis, the legal representatives are the main vehicle of interaction for the majority of victims at the IACtHR. Details on the means or frequency of interaction between the victims and the legal representatives are not available in the IACtHR's judgements. To this end, insights into the victims' interaction with legal representatives can be drawn from Beristain's study, who interviewed 72 victims as well as 62 legal representatives working for various NGOs on their reflections and experiences as victims' lawyers.[1796] Beristain wrote in his study that the legal representatives litigating on victims' behalf before the IACtHR perceived their role as a bridge between the Inter-American system and the victims, having to navigate the complex judicial system while translating the victims' needs or cultural meanings into legal concepts, and vice versa.[1797] Furthermore, Beristain found out that trust building appeared to be the cornerstone of the attorney-client relationship in the Inter-American cases, showcasing that the lawyers he interviewed viewed trust-building as essential to the litigation of the cases.[1798] The quality of interaction between victims and lawyers appeared dependent on the victims' ability to express themselves, the lawyers' ways of listening to victims' expectations and needs, as well as the extent to which the victims were included in the decision-making concerning their cases.[1799] While Beristain's study did not elaborate on the exact details of interaction, relating to the frequency and means of interaction, he did highlight that the relationship between victims and their representatives is governed by values such as trust and mutual understanding. Equally important to mention is that according to Beristain's study, most of the victims interviewed appeared to be

[1792] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 184
[1793] As per art 52, para 2, the victims may be interrogated during their testimony by the States' representatives. ACHR, art 52(2)
[1794] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 197-198
[1795] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 198-199
[1796] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 439
[1797] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 441
[1798] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 443
[1799] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 441-442

satisfied with the relationship with their lawyers and felt that they had been treated with respect.[1800] However, Beristain did stress his finding that the NGOs located in different countries than the victims' country experienced challenges in building a relationship with the victims. To overcome the challenges, these NGOs liaised and cooperated with local NGOs and worked towards generating a space of trust, building the relationship with the victims and following up with them.[1801]

III. Information

This section aims to assess how victims benefit from information in the process of obtaining reparations at IACtHR and evaluate the potential implications for victims. It is important to mention that, as explained in the ECtHR chapter too, in cases of gross human rights violations such as those under current investigation, the victims' need of being informed gains particular importance, amid protracted silence and failure to conduct investigations prevalent at the national level. The lack of or deficient investigations at the national level and the victims' failure to access information were acknowledged in various cases at the IACtHR.[1802]

The legal representative is the main channel of communication between the victims and the Court, with the legal representative being responsible to maintain contact and inform the victims or their families with regard to all the decisions taken throughout the proceedings.[1803] As in the case of interaction, details on how victims are informed in relation to the process of awarding reparations are not elaborated in the judgments scrutinized in this analysis. To this end, the insights provided by Beristain's study are relevant. According to his study, it appears that the legal representatives litigating before the IACtHR understand the importance of informing victims throughout the process before the Court.[1804] The legal representatives appear to view their relationship with their clients as a two-way street, wherein the legal representatives provide information to the victims regarding the Inter-American system of petition, the legal terminology, as well explain the meaning and content of reparations at the IACtHR. At the same time, the legal representatives discuss with the victims in order to understand their suffering and to explore their expectations in relation to the trial, particularly regarding reparations.[1805]

As Beristain held, clarity on the information provided is important from the very beginning of the trial, in order to manage the expectations of victims, especially in the area of reparations.[1806]

[1800] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 443-444

[1801] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 450

[1802] E.g., *Case of Garcia and Family Members v Guatemala* (Merits, Reparations, and Costs) IACtHR Series C No. 258 (29 November 2012) para 200; *Case of Chitay Nech et al. v Guatemala* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 212 (25 May 2010) para 79

[1803] This responsibility of legal representatives has been acknowledged by lawyers of the Center for Justice and International Law, one NGO frequently representing victims before the IACtHR. See 'Guía para defensores y defensoras de Derechos Humanos' (2da. edición actualizada, CEJIL, 2012) 55 < https://www.cejil.org/sites/default/files/legacy_files/GuiaDH2012Links.pdf> accessed 15 April 2020

[1804] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 198-199

[1805] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 65

[1806] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 97

According to a legal representative interviewed in Beristain's study, as lawyers, they aim to take into account what the client wants, but they also need to be very sincere and provide information on what can be realistically achieved.[1807] As explained, failure to manage expectations and provide information from the very beginning might become particularly problematic with the passage of time and might create disappointment for the victims.[1808]

On their part, the victims also stressed the importance of maintaining communication with the legal representatives, which according to Beristain's study appeared to be particularly problematic in the reparations' implementation phase.[1809] As expressed, victims become particularly insecure when the State's implementation is not forthcoming, and a lack of information from the legal representatives on what is going on might trigger frustration in victims.[1810] As one victim in the *Pueblo Bello Massacre case* explained, after the judgement of the Court was rendered, they had not heard from their legal representative for one year. This situation was resented by the victims in the case, who would have liked to be updated even when nothing major was taking place.[1811] As such, it appears that the victims' need for information is satisfactorily fulfilled by the legal representatives, however, it could be further strengthened at the reparations' implementation stage, where victims face uncertainty and distress amid delays at the national level to implement the reparations measures awarded in the case.

Finally, as far as outreach is concerned, there is no outreach system in place, neither at the Commission not at the Court level, to raise awareness regarding the existence of the Inter-American system and the potential victims' opportunity to bring their cases before the system. As in the case of the ECtHR, outreach might not be a priority for the Inter-American system amid its current backlog of cases.[1812] However, as explained, outreach is important for victims in conflict situations who lack knowledge and understanding of their rights and mechanisms to safeguard them. Consequently, as the ECtHR, the Inter-American system institutions fail to respond to the situation of victims in many more conflict situations.

IV. Length of Proceedings

This final section looks at the length of the proceedings as an element of procedural justice and discusses its potential impact on the victims at the IACtHR.

According to the current analysis, the average length of a trial from the moment when the application is submitted to the Court until the Court's decision, including also the decision on

[1807] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 97

[1808] As one lawyer in one case explained, the victims coming before the Court were very surprised to hear that the case was brought against the State and not against the real perpetrators of the crimes. Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 98

[1809] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 449

[1810] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 455

[1811] Carlos Martín Beristain, Diálogos Sobre la Reparación: Experiencias en el sistema interamericano de derechos humanos (Instituto Interamericano de Derechos Humanos, 2008) 455-456

[1812] See e.g. 'Annual Report 2018: Activities of the IACHR In 2018' (IACommHR, 2018) para 4 <https://www.oas.org/en/iachr/docs/annual/2018/docs/IA2018cap.1-en.pdf> accessed 15 April 2020

reparations, is approximately two years. A similar result was found by another study analyzing the average duration of cases before the IACtHR in the period between 1996 and 2010.[1813] However, despite the relatively low duration of cases before the IACtHR, especially when compared with the ECtHR whose average is seven and a half years, as already explained, the cases also undergo a multitude of procedural steps at the Commission level, where the average length of proceedings is approximately five and a half years. Consequently, this entails that the duration of case in the Inter-American system, since the moment a victim submits an individual petition before the Commission until the Court renders its decision on merits and reparations, is approximately seven and a half years.

Furthermore, a decision rendered by the Court does not result in an immediate implementation of reparations by the respondent States. As opposed to the ECtHR, there is no mechanism in place to monitor the States' implementation of IACtHR judgments, and as of 1996, the Court took it upon itself to monitor the compliance by requesting reports regarding the States' actions from victims, legal representatives, and the Commission.[1814] A clear estimation of how long the implementation of reparations lasts on average is beyond the purpose of this study. However, as studies indicate that the implementation of Court awarded reparations varies depending on the reparations measures that the Court awards,[1815] in turn, the implementation will add extra time to the already lengthy process in the Inter-American system.[1816] As in the ECtHR case, the process of obtaining reparations at the IACtHR is likely to result in the frustration and dissatisfaction of victims, or as a study posited, it might even discourage victims from filing a petition at all.[1817]

V. Conclusion

The IACtHR's potential contribution to procedural justice for victims under its jurisdiction is a complex topic. The current section attempted to assess the Court's potential contribution to procedural justice for the victims whose cases make it before the Court, all the while acknowledging the narrow scope amid the restrictions highlighted above. The individuals' access to the Court is mediated by the Commission, as the Inter-American system does not afford them direct access. In addition, the individuals' access is subjected to severe limitations that are either inherent in the Inter-American legal architecture and its interpretation by the Commission, or are the result of abusive practices by States. Only 0.8% of the total number of petitions submitted by potential victims make it before the Court.[1818]

[1813] According to my analysis of 38 cases, the average duration is 1.78 years, whereas the study's average is 1.74. See Human Rights Clinic, 'Maximizing Justice, Minimizing Delay: Streamlining Procedures Of The Inter-American Commission On Human Rights' (The University of Texas, School of Law, 2011) 36

[1814] Darren Hawkins Aand Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (Annual Meeting of the American Political Science Association, Boston, MA, 28-31 August 2008) 16 <http://www.stevendroper.com/ECHR%20Hawkins%20and%20Jacoby%20APSA%202008.pdf> accessed 15 April 2020. The court confirmed its jurisdiction to monitor compliance in *Case of Baena-Ricardo et al. v Panama* (Competence) IACtHR Series C no 104 (28 November 2003) paras 133-134

[1815] Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 Journal of International Law and International Relations 35

[1816] For an elaboration on the implementation of reparations at the IACtHR see the concluding section of section 3.2.3 on Substantive Justice

[1817] This study even posited that "long wait times might discourage or diminish the impact of the Commission's decisions on human rights in the particular State as they are issued several years after an event happens". Human Rights Clinic, 'Maximizing Justice, Minimizing Delay: Streamlining Procedures Of The Inter-American Commission On Human Rights' (The University of Texas, School of Law, 2011) 44

[1818] As per statistical data on year 2018, 'Statistics' (OAS Website)

For the victims whose cases make it before the IACtHR, they mainly express their voice, interact, and receive information through their legal representatives. As far as voice is concerned, this study highlighted that providing victims or their legal representatives a *locus standi* within proceedings and then, affording them a voice in the trial witnessed a gradual evolution, as prior to 2000 the victims' voice was solely represented before the Court by the Commission. Moreover, as shown, in the large majority of cases, the victims' legal representation is made up of teams of renowned NGOs specialized in strategic litigation at the IACtHR and organisations at the national level. While such an expert legal representation might increase the rate of success of cases, this study also drew attention to the risk that the interests of victims as well as the diversity of victims' voice might not be adequately captured in the legal submissions put forward by lawyers on victims' behalf, especially in cases with large number of victims. As far as interaction and information are concerned, they are mainly materialized through the legal representatives, however, the judgments analysed do not provide details on their frequency and means. Beristain's study with victims and legal representatives involved in cases before the IACtHR showcased that the legal representatives perform their tasks with due understanding of the importance of interaction and information for victims, whereas victims generally appraise positively their representation by legal representatives.

Secondly, a limited number of victims per case may express their voice and interact with Court actors during oral testimonies. The experience of testifying enables victims to convey their stories, discuss about the impact of their crimes on their lives, and the consequences of victimization. According to Beristain's study, the victims' interaction with the Judges during oral hearings was generally appraised as positive. Meeting the Judges of an international judicial setting and having them listen to the victims' stories appeared to be perceived as a sign of respect and commitment to their case, although for some victims this encounter induced nervousness. On the contrary, the presence and interrogation by the representatives of the States caused distress for some of the victims who felt uncomfortable or even fearful. Despite the victims' positive appraisal of the possibility to express themselves during Court hearings, the Court does not have in place any mechanism to cushion against the victims' secondary victimization, which might ensue as a result of distress experienced during testimony giving. In addition, providing testimony in Court is an opportunity limited to a few victims per case, which in cases with large number of victims entails than only very few victims will be allowed to testify.

From a procedural justice perspective, and taking into account the challenges exposed above, there is room for improvement in the endeavor of providing victims with meaningful participation in the IACtHR reparations process. The victims' position and the Court's potential contribution to procedural justice drastically improved in the 40 years since the Court has come into existence. However, a large part of the Court's potential contribution is in fact dependent on the legal representatives' performance of their tasks, and more extensive procedural prerogatives such as enabling victims to express themselves through affidavits or Court testimonies, while potentially beneficial, are disproportionally disadvantageous in cases with large number of victims. In addition, the process of obtaining reparations at the IACtHR, since the moment a petition is brought before the Commission until a case is decided, is lengthy and fraught with a multitude of procedural complexities, both at the Commission and Court level, which is likely to decrease the victims' perception of procedural justice. Overall, the IACtHR may potentially bring a certain contribution to procedural justice for victims under its jurisdiction, however, there is room for improvement, starting with the simplification of procedural complexities, enabling more victims

to access the IACtHR, and finding ways to enable more victims in cases with large numbers to express their diverse voice.

3.2.3. Substantive Justice

The following section aims to put forward the results of the analysis of the IACtHR's potential contribution to substantive justice for the victims under the IACtHR's jurisdiction. Substantive justice refers to the (potential) justice afforded to victims through the reparations measures awarded by the Court following the establishment of States' responsibility for the human rights violations.[1819] Article 63(1) of the ACHR provides in a general language the reparations measures which may be awarded to victims; it holds that the Court shall rule that the injured party be ensured the right or freedom that was violated, that the consequences of the right violation be remedied, and that 'fair' compensation be paid to the injured party.[1820]

As the current analysis of the Court's practice dealing with gross human rights violations showed, across time, the Court interpreted article 63(1) in a progressive manner and awarded a whole range of reparations measures, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In cases adjudicated before 1998, the Court held that article 63(1) codified a rule of customary law, which imposed an international legal obligation on the States to provide reparations if they were found in violation of human rights embedded in the ACHR.[1821] It furthermore considered *restitutio in integrum* as the first possible measure of reparation to be awarded.[1822] However, it acknowledged that in cases involving violations of the right to life *restitutio in integrum* is not possible, and as such, held that reparation "must of necessity be in the form of pecuniary compensation".[1823] After 1998, the Court maintained that the obligation of States to provide reparations is an obligation rooted in customary law, and furthermore, interpreted article 63(1) in a more expansive manner, holding that reparations are "measures that are intended to eliminate the effects of the violation that was committed."[1824] In practice, the Court continued to award compensation as alternative to *restitutio in integrum*, however, it also imposed upon States the duty to investigate the acts that resulted in violation of the ACHR, to identify and punish those responsible and to adopt the internal legal measures necessary to ensure compliance with this obligation.[1825] Nowadays, this reparation measure is commonly awarded by the Court under satisfaction measures, although back then it was not labelled as such.[1826]

[1819] In order to establish the States' responsibility, the court applies a flexible standard of proof, established in its first case, *Case of Velásquez-Rodríguez v Honduras*. See *Case of Velásquez Rodríguez v Honduras* (Merits) IACtHR Series C No. 4 (29 July 1988) paras 127-143. Also, as held in case of La Cantuta v Perú: "International liability of the States arises automatically with an international wrong attributable to the State and, unlike under domestic criminal law, in order to establish that there has been a violation of the rights enshrined in the American Convention, it is not necessary to determine the responsibility of its author or their intention, nor is it necessary to identify individually the agents who are attributed with the violations." E.g. *Case of La Cantuta v Perú* (Interpretation of the Judgment on Merits, Reparations, and Costs) IACtHR Series C No. 162 (29 November 2006) para 156

[1820] ACHR, art 63(1)

[1821] E.g. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) paras 43-44

[1822] See section 3.4.1. below for a discussion on *restitutio in integrum*.

[1823] E.g. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 46; *Case of Caballero-Delgado and Santana v Colombia* (Reparations and Costs) IACtHR Series C No. 31 (29 January 1997) para 17

[1824] E.g. *Case of Blake v Guatemala* (Reparations and Costs) IACtHR Series C No. 48 (22 January 1999) para 34

[1825] E.g. *Case of Blake v Guatemala* (Reparations and Costs) IACtHR Series C No. 48 (22 January 1999) para 65

[1826] E.g. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 556

Starting with 2000, the Court embarked upon an expansive interpretation of article 63(1), especially when compared with its 1993 *Case of Aloeboetoe et al. v. Suriname* when the reparations awards were by and large limited to compensation. In the jurisprudence after 2000, the Court provided detailed explanation of its holding that article 63(1) contains a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility.[1827] Namely, that "it is a principle of International Law that every violation of an international obligation which results in harm creates a duty to make adequate reparation".[1828] The Court held that the finding of an unlawful act in violation of the human rights obligations enshrined in the ACHR, attributable to a State, incurs international responsibility for breaching the international obligation involved, and activates the subsequent duty to repair and to make the consequences of the right(s) violation cease.[1829] The Court furthermore explained that when *restitutio in integrum* is not feasible due to the nature of the crime,[1830] the Court would grant diverse measures of reparation in order to redress the damage comprehensively. In addition to pecuniary compensation, it would grant measures of restitution, satisfaction, and guarantees of non-repetition, that taken together have special relevance for the damage caused.[1831] Finally, and of importance for the current research, in several of its judgments the Court explained that the type of human rights violations – namely, finding the State liable for gross human rights violations in the context of an armed conflict (as well as the lack of due diligence in the investigation of the facts, and the consequences of the latter) - will likely influence the type of reparation measures awarded.[1832]

In order to understand the IACtHR's potential contribution to substantive justice through the tangible reparations it awarded, the following sections will elaborate on each of the reparations measures awarded by the IACtHR in cases of gross human rights violations and assess their implications for victims.

I. Restitutio in Integrum

Restitutio in integrum as a reparation measure aiming to bring the victims to the situation existent before the victimization took place is not inscribed as such in the IACtHR's legal framework. However, as can be inferred from the Court's jurisprudence, the Court is commonly referring to *restitutio in intergum* throughout its case law, with evidence pointing out to alterations to the Court's interpretation of this measure across its cases.

[1827] E.g *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 542; *Case of the Santo Domingo Massacre v Colombia* (Preliminary objections, merits and reparations) IACtHR Series No. 259 (30 November 2012) para 290

[1828] E.g. *Case of the "Las Dos Erres" Massacre v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009) para 223; *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 245

[1829] E.g. *Case of the "Mapiripán Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 134 (15 September 2005) para 243

[1830] E.g. *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) para 221; *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 412

[1831] See e.g. *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) para 54; *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 245

[1832] E.g. *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 248

The Court first put forward its interpretation of *restitutio in integrum* in the first case triggering the IACtHR's contentious jurisdiction. *Case of Velásquez-Rodríguez v. Honduras*, concerning the enforced disappearance of Manfredo Velásquez, brought into discussion Honduras' responsibility for the enforced disappearance and consequently triggered the State's responsibility for reparations under article 63(1). Therein, the Court established that:[1833]

"*[R]eparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm*."

According to the IACtHR's holding in *Case of Velásquez-Rodríguez v. Honduras,* the Court equated the reparation of harm under article 63(1) with full restitution (*restitutio in integrum*), which, as the Court held, consists in various other reparations measures such as restoration of the prior situation before the crimes took place, reparation for the consequences, as well as compensation for material and moral damages. As per *Case of Velásquez-Rodríguez v. Honduras*¸ *restitutio in integrum* does not appear to be a measure of reparation but rather the core principle guiding reparation awards under article 63(1). Nonetheless, despite equating reparations with *restitutio in intregum* in its first case, the Court did not clarify further why in the end it opted to award only compensation to the indirect victims in the case as stake.[1834]

Furthermore, as the subsequent case law illustrated, the Court adjusted its earlier characterization of reparations under article 63(1) as *restitutio in integrum*. In *Case of Aloeboetoe et al. v. Suriname*, the Court stated that "*restitutio in integrum* refers to one way in which the effect of an international unlawful act may be redressed, but it is not the only way in which it must be redressed, for in certain cases such reparation may not be possible, sufficient or appropriate."[1835] According to *Case of Aloeboetoe et al. v. Suriname, restitutio in integrum* has as goal the restoration of the situation existing before the crimes took place. Nonetheless, according to the Court, it should not be equated with reparations under article 63(1), as restitution is only one possible way to redress harm, which might not even be possible in certain cases, for instance, those concerning gross human rights violations. Interestingly, in *Case of Aloeboetoe et al. v. Suriname*, similar to *Case of Velásquez-Rodríguez v. Honduras*, the Court's reparations awards consisted only in compensation. However, in the former case the Court did explain its choice: "in matters involving violations of the right to life, as in the instant case, reparation must of necessity be in the form of pecuniary compensation, given the nature of the right violated".[1836]

This change in the Court's approach appears to reveal a realization by the Court of the impossibility to achieve *restitutio in integrum* in cases involving violations of certain human rights, such as the right to life. Equating reparations under article 63(1) with *restitutio in integrum* would have placed an unreasonable burden on reparations, as in cases involving gross human rights violations in particular this would always prove to be impossible. As Scott Dadvison explained, starting with the *Case of Aloeboetoe et al. v. Suriname,* the focus appeared to shift from attempting to return the victims to the position prior to the victimization to providing redress for all the consequences of

[1833] *Case of Velásquez-Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No. 7 (21 July 1989) para 26
[1834] *Case of Velásquez-Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No. 7 (21 July 1989) disposition
[1835] E.g. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 49
[1836] E.g., *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 46

the breach.[1837] Douglass Cassel similarly argued that the Court's extended reparations awards are a result of the Court's acquired awareness of the impossibility of fully repairing the damage caused by violations of human rights.[1838] Indeed, as explained above, the analysis of the Court's jurisprudence highlighted that since the *Case of Aloeboetoe et al. v. Suriname*, the Court evolved the range of awards on reparations; however, it is important to acknowledge that the Court maintained in the large majority of cases the principle *restitutio in integrum* as a baseline for reparations awards. The Court continues to explain in its case law that:[1839]

"*[R]eparation requires whenever possible, full restitution (restitutio in integrum), which consists in returning to the state of affairs prior to the infringement. If this is not feasible, as it happens in most cases […] the International Court shall determine the measures to be ordered to protect the rights that were affected, as well as to make reparations for the consequences of the infringements and shall determine a compensation for the damage caused*."

In addition, as the current analysis revealed, restitution in relation to certain rights that were violated as part of the gross human rights violations suffered by the victims is a reparation measure commonly invoked by victims in their reparation claims before the Court. However, this restitution measure has the capacity to respond only to certain consequences of the gross human rights violations at stake and are not meant to achieve *restitutio in integrum* in the sense exposed above. Examples of restitution measures invoked by the victims across the case law include the restitution of land and/or property, which became unavailable due to the victims' forced or fearful displacement,[1840] return to the place of origin for the victims who have been relocated to other areas of the country or to other countries,[1841] and the restoration of the public image of victims.[1842] It is interesting to note that in the cases under current analysis the Court granted the victims' requests for restitution of land and/or property in the majority of cases,[1843] sometimes even in cases where the victims did not ask for this measure.[1844] The restitution of land is particularly important for indigenous groups and communities, victims of the rights violations, who perceive the land as 'traditional territories'. By granting these measures, the Court acknowledged these groups' struggles and claims and furthermore directed the State to acknowledge and/or restore the

[1837] Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 216

[1838] Douglass Cassel, 'The Expanding Scope And Impact Of Reparations Awarded by the Inter-American Court Of Human Rights' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 100

[1839] E.g. *Case of Baldeón-García v Perú* (Merits, Reparations, and Costs) IACtHR Series C No. 147 (6 April 2006) para 176; *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 39

[1840] E.g. *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 199

[1841] E.g. *Case of the Massacres of El Mozote and Nearby Places v El salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 342

[1842] E.g. *Case of Las Palmeras v Colombia* (Reparations and Costs) IACtHR Series C No. 96 (26 November 2002) para 62

[1843] E.g. *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 209; exception to this assertion are two cases, where the court decided to reject the victims' requests for restitution of property/access to traditional territories due to a lack of link between the human rights violations and the measures requested. See *Case of Escué-Zapata v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 165 (4 July 2007) para 185 and *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 295

[1844] E.g. *Case of the Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 148 (1 July 2006) para 407: "Since some of the inhabitants of La Granja and El Aro lost their homes as a result of the facts of this case (the Court considers that the State must implement a housing program to provide appropriate housing to the surviving victims who lost their homes and who need this." *Case of the Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 159 (25 November 2006) para 275; *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) para 105

enjoyment of these rights.[1845] In addition, as apparent from the analysis, the Court granted the victims' requests for return to the place of origin for the victims who relocated to other areas of the country or to other countries. In all these cases, the Court ordered the State to take measures to safely guarantee the return of victims to the place of origin, if they wished so.[1846] Nonetheless, the analysis also revealed that the Court rejected the victims' request for the restoration of the public image of victims, arguing that "the instant Judgment is per se a form of reparation and satisfaction for the next of kin of the victims."[1847]

Despite the fact that *restitutio in integrum* as an ideal principle underlying reparation awards does not appear to be relevant in the cases of gross human rights violations investigated in the current research due to the severity of crimes involved, the Court appears to be granting in large part the restitution measures requested by victims. Taken together with other measures, these restitution measures aim to tackle the consequences incurred by the crimes. As explained above, the award of a whole range of measures, including restitution measures, entails an acknowledgment by the Court that while full restitution is not possible, reparations measures may help "attenuate their [victims'] suffering, making it less unbearable, perhaps bearable".[1848]

II. Compensation

Compensation has long been provided as a 'primary' measure falling within the reparations awards at the IACtHR.[1849] This reparation measure is inscribed in article 63(1) ACHR, which elaborates that in case of finding of a violation, the Court shall rule that "fair compensation be paid to the injured party."[1850] Relying on these statutory provisions, the reparations awards in the first contentious case of the IACtHR consisted solely in compensation. Therein, the Court interpreted the provision on compensation and explained that compensation can be awarded in account of patrimonial and non-patrimonial damages, including emotional harm.[1851] In addition, the Court explained that in determining the amount of compensation that the IACtHR may order a State to pay to the victims, it will rely on "the American Convention and the applicable principles of international law."'[1852] Maintaining the same dual division of compensatory damages, in its subsequent jurisprudence, the Court referred to compensation as encompassing pecuniary and non-

[1845] See *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 209: "the Court holds that the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for their use and enjoyment of those territories"; *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 459: "the Court orders the State to restore the efective use, enjoyment and possession of the territories recognized by law to the Afro-descendant communities assembled in the Cacarica Community Council."

[1846] E.g *Case of the Massacres of El Mozote and Nearby Places v El salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) paras 345-346; *Case of Contreras et al. v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 196

[1847] *Case of Las Palmeras v Colombia* (Reparations and Costs) IACtHR Series C No. 96 (26 November 2002) para 74; *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 84

[1848] See 'Reasoned Opinion' by Judge A. A. Cançado Trindade in Case of Bulacio v Argentina (Merits, Reparations and Costs) IACtHR Series C No. 100 (18 September 2003) para 25

[1849] The IACtHR held: "there may be cases in which restitutio in integrum is impossible, insufficient, and inadequate. Compensation is the primary remedy for damages suffered by the injured party, and includes, as this Court has held previously, both material and moral damages." In *Case of Blake v Guatemala* (Reparations and Costs) IACtHR Series C No. 48 (22 January 1999) para 42

[1850] ACHR, art 63(1)

[1851] *Case of Velásquez-Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No. 7 (21 July 1989) para 26

[1852] *Case of Velásquez-Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No. 7 (21 July 1989) para 31

pecuniary damage awards, introducing the same terminology as the ECtHR.[1853] In what follows, by focusing on the Court's jurisprudence, the sections will discuss the two categories of compensation that the IACtHR typically awards, taking into account on the one hand what victims request and on the other hand, what the Court awards.

Pecuniary Damages

Pecuniary damages may be awarded in account of loss of or detriment to the victims' income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the case under consideration.[1854] In making awards on pecuniary damage, the amount of compensation awarded by the Court is limited to the damage incurred by the human rights violations established in the case at hand.[1855]

As can be inferred from the current analysis, victims request pecuniary damages in account of several aspects. To begin with, in the majority of cases the indirect victims – the next-of-kin of murdered or disappeared victims – request pecuniary damage in account of loss of income of the direct victim, regardless of whether the direct victim was the breadwinner of the family. The Court's reasoning for paying compensation to the next-of-kin of the direct victims is that the "damages payable for causing loss of life represent an inherent right that belongs to the injured parties".[1856] In making the pecuniary damage awards in regard to loss of income, the Court applies a flexible standard of proof. In the majority of cases, the Court takes into account the direct victims' earnings at the time of death or the minimum wage in the country at that time, as well as the direct victims' age and probable life expectancy.[1857] However, when such information is not provided to the Court by the indirect victim or their legal representative, the Court employs the assumption that the direct victim would have earned the equivalent of the minimum salary in the country or awards lost wages on an 'equitable' basis. For instance, in *Case of the Gómez-Paquiyauri Brothers v. Peru*, the Court deemed it proven that the two direct victims in the case at hand were students at the time of crimes. While the legal representatives posited that both direct victims did some occasional jobs repairing ships, the Court did not possess sufficient evidence to estimate exactly how much they earned. However, the Court deemed it reasonable to assume that both direct victims would have entered the job market actively once they finished studying, and as such, awarded on an equitable basis a specific sum of money for lost earnings.[1858]

In some of the cases under current consideration, the Court made awards despite a lack of evidence, relying on an assumption that "the Court considers it logical that, in cases such as this one [relating to a massacre], gathering evidence to prove this type of material loss and submitting it to the Court

[1853] See e.g. *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004); in certain cases the Court maintained the same division but labelled the awards of compensation as material and moral damages. See e.g. *Case of Blake v Guatemala* (Reparations and Costs) IACtHR Series C No. 48 (22 January 1999)
[1854] See *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 43
[1855] See e.g. *Case of Blake v Guatemala* (Reparations and Costs) IACtHR Series C No. 48 (22 January 1999) para 47
[1856] *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 54
[1857] E.g. *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 44 (a); *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003) para 251
[1858] *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004) para 206

is a complex task".[1859] However, this is not a consistent practice; in another case concerning a massacre, the Court held that:[1860]

"*[T]he Court does not have sufficient grounds to set compensation in favor of most of the victims for pecuniary losses, for which reason it will set the respective amounts in fairness for those cases regarding which the Court has some evidence*."

Furthermore, as apparent from the analysis, the Court grants the indirect victims' requests in regard to the loss of income of the direct victims in the majority of cases. Exception to this holding are two cases in the present selection where the Court did not grant the indirect victims' requests for lost earnings due to the fact that the Court did not have temporary jurisdiction to rule over the right to life violation which would have entitled the next-of-kin to these pecuniary damages.[1861] As far as the sums awarded are concerned, the current analysis identified that the Court's awards are at a lower level than the level requested by the victims. In some of the cases, the Court granted awards approximately 28% lower than the awards requested by the victims, however, in other cases, the awards could be lower by approximately 70%.[1862] In a handful of cases where the sum of money requested by the victims was more modest, the Court awarded the sum of money at the same level requested by the victims or at a slightly higher level.[1863] However, the Court's reasoning for the variation in the awards in regard to loss of income cannot be inferred from the cases. As explained above, the Court argues that in making the awards, it takes into account several elements, including the salary of the direct victim and the life expectancy, however, it is unclear why the Court's calculation varies (sometimes significantly) from the victims' calculation. One possible explanation could be the lack of supporting evidence from the victims' side, resulting in awards made on an equitable basis, taking into account generic data (e.g. the minimum salary in a country) rather than data in the case at hand.[1864] However, this explanation does not hold for all the cases in the current analysis as there are situations when the Court made awards on an 'equitable basis'

[1859] *Case of the Massacres of El Mozote and Nearby Places v El salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 383

[1860] *Case of the "Mapiripán Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 134 (15 September 2005) para 267

[1861] See e.g. *Case of Blake v Guatemala* (Reparations and Costs) IACtHR Series C No. 48 (22 January 1999) and *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005)

[1862] For instance, in Case of Caballero Delgado and Santana v Colombia, the indirect victims requested loss of income in account of the direct victim equal to 90.000 USD, whereas the Court granted only 60.000 USD. The Court made the award: "bearing in mind the salary that Caballero-Delgado would have received between the date of his disappearance on February 7, 1989 and the time to which he would have expected to live; his age, 32, at the time of his disappearance, and life expectancy in Colombia, with a deduction of 25 percent for personal expenses, and adding interest at the rate of six percent per annum from the date of his disappearance up to the time of the present Judgment". In *Case of Caballero-Delgado and Santana v Colombia* (Reparations and Costs) IACtHR Series C No. 31 (29 January 1997) para 43. In addition, in Case of Bámaca Velásquez v Guatemala, what victims requested amounted to 300.000 USD, whereas the Court awarded only 100.000 USD, without explaining the rationale for the difference between the sums. See *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 55

[1863] E.g. In Case of Osorio Rivera and family v Peru, the indirect victims requested 42500 USD, whereas the Court awarded 57500 USD. *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013); In case Case of Cantoral Huamaní and García Santa Cruz v Peru, the awards requested by victims has the same level as the awards granted by the Court, namely 22500 USD. In *Case of Cantoral-Huamaní and García-Santa Cruz v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 176 (28 January 2007)

[1864] See e.g. *Case of Chitay Nech et al. v Guatemala* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 212 (25 May 2010)

or 'in fairness' and at a lower level, despite the fact that the victims had submitted supporting evidence.[1865]

Next to requests for loss of income, victims put forward requests for consequential damages. As can be inferred from the cases under analysis, consequential damages requested by the victims may relate to various types of expenses incurred as a result of the crimes to which the direct victims have been subjected. They can include expenses for the search of the disappeared,[1866] loss of job of the indirect victim due to the time invested to search for the disappeared,[1867] health expenses incurred for the medical treatment of physical and psychological illnesses of indirect victims,[1868] and funeral expenses.[1869] In addition, as can be inferred from the case law, the Court generally grants the victims' requests for consequential damage on an 'equitable basis' or 'in fairness', even when the evidence submitted by the indirect victims in this regard is minimal or even inexistent.[1870] However, the Court's practice is not always consistent. For instance, in regard to expenses for medical treatment, in *Case of Myrna Mack Chang v. Guatemala* the Court set in equity a sum to reimburse medical expenses, despite the fact that the indirect victims did not put forward receipts.[1871] However, in *Case of Radilla Pacheco v. Mexico*, the Court did not make any awards in regard to medical expenses, arguing that "the Court warns that the representatives did not present evidence, either receipts, medical histories or certificates".[1872]

Finally, as can be inferred from the analysis, pecuniary damages requests may also encompass 'damage to family assets'. The current analysis contains only one example where the indirect victims requested pecuniary damage awards in account of damage to family assets, which the Court also granted. To be precise, *Case of Molina-Theissen v. Guatemala* dealt with the forced disappearance of a child, the illegal detention, torture and rape to a family member and threats to the family, which resulted in the exile of the family members in different countries in Latin America due to fear and anguish. The members of the family were forced to abandon jobs, houses, and the family life; eventually, they managed to reunite after several years. Taking into account the conditions in the case, the Court acknowledged the losses to their income and subsistence and awarded, 'in fairness', 140.000 USD for damage to family assets.[1873]

[1865] E.g. *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009)
[1866] E.g. *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004)
[1867] E.g. *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002)
[1868] E.g. *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003).
[1869] E.g. *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004).
[1870] E.g. *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 152, wherein the Court held that despite the fact that the victims did not submit evidence to substantiate these requests, based on expert reports and the victims' testimonies, the Court decided to awards in equity or fairness the victims' requests. A counter-example is *Case of Radilla Pacheco v Mexico*, wherein the indirect victims argued that due to the disappearance of their father, the family was forced to sell several properties to pay the expenses resulting from the search for the victim and to provide for the daily needs of the family. However, the Court rejected this request, holding that the evidence provided by the representatives does not contain sufficient elements to allow it to establish the alleged damage and its connection to the facts of the forced disappearance of the direct victims. *Case of Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 209 (23 November 2009) para 368
[1871] *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003) para 253 (2)
[1872] *Case of Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 209 (23 November 2009) para 369
[1873] *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004) paras 59-61

Non-pecuniary damages

Non-pecuniary damages refer to suffering and affliction caused to the direct victims and their next-of-kin, detriment to very significant values of the individuals, as well as non-pecuniary changes in the conditions of existence of the victim or the victim's family.[1874] According to the case law, compensation for non-pecuniary damages is only one of the two avenues for addressing the harm of non-material nature incurred upon victims. Throughout the jurisprudence, the Court established the principle whereby,[1875]

"*[S]ince it is not possible to assign a specific monetary equivalent to non-pecuniary damage, for purposes of comprehensive reparations to the victims, it can only be compensated in two ways. First, by payment of an amount of money or delivery of goods or services that can be quantified in monetary terms, which the Court will establish by rationally applying judicial discretion and in terms of fairness. Second, by carrying out acts or works that are public in their scope or repercussion, such as broadcasting a message of official reproval of the human rights violations involved and of commitment to efforts to avoid their repetition and to ensure remembrance of the victims, acknowledgment of their dignity, and consolation to their relatives*."

The current section will focus on compensation for non-pecuniary damage, whereas the upcoming sections will assess satisfaction and guarantees of non-repetition measures that the Court awards in account of non-pecuniary harm. As can be inferred from above, when making compensation awards for non-pecuniary harm, the Court relies on 'equity' or 'fairness', as the type of harm – moral – that this reparation measure aims to address cannot be easily quantified in terms of money. According to Jo Pasqualucci, making awards in equity would require the Court to take into account the rights violated as well as the individual suffering of each victim.[1876]

As the present analysis reveals, in awarding compensation for non-pecuniary damages, the Court first refers to the international law principle according to which a judgment constitutes *per se* adequate reparation for moral damages.[1877] However, the Court then explains that due to the grave circumstances of the cases under analysis, it is of the view that the judgment itself is not sufficient, for which reason the Court deems it necessary to award compensation for moral damages.[1878] In addition, the Court does not require the victims to furnish evidence to prove the existence of non-pecuniary harm.[1879] As apparent from the cases under analysis, the Court deploys assumptions of existence of moral harm in regard to both the direct and indirect victims. For instance, in the *Case of Aloeboetoe et al. v. Suriname*, the Court held that:[1880]

[1874] *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004) para 211; *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) para 244

[1875] *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004) para 211; *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) para 80.

[1876] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 238-239

[1877] E.g. *Case of Blake v Guatemala* (Reparations and Costs) IACtHR Series C No. 48 (22 January 1999) para 55

[1878] E.g. *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 60

[1879] It is interesting to note that in one of its early cases the Court held that "it is of the opinion that, as in the case of the reparations for actual damages sought by the dependents, moral damages must in general be proved". Notwithstanding this statement, the Court awarded non-pecuniary damage to the parents of the direct victims by invoking the assumption that "it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child." *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) paras 75-76

[1880] *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 51

"*[T]he beatings received [by the direct victims], the pain of knowing they were condemned to die for no reason whatsoever, the torture of having to dig their own graves are all part of the moral damages suffered by the victims."*

The Court then awarded compensation for non-pecuniary damage to the next-of-kin, in account of the direct victims' harm. In addition, in the same case, the Court also awarded compensation for the non-pecuniary damage suffered by the next-of-kin in their own name, holding in regard to the parents of direct victims that "it is essentially human for all persons to feel pain at the torment of their child".[1881]

According to the present analysis, victims put forward requests for non-pecuniary damages for different types of moral harm. As hinted at above, they include moral harm in account of the direct victim, even if the direct victim is deceased or disappeared,[1882] as well as in account of the indirect victims, caused by anguish, suffering, and distress as a result of the direct victim's disappearance or murder,[1883] distress resulting from inability to obtain justice or the lack of investigation of crimes at the national level for extensive periods of time,[1884] or uncertainty with regard to the fate of the disappeared, exacerbated by failure to retrieve their remains and carry out burial ceremonies.[1885]

In addition, the analysis identified that the Court granted the victims' requests for non-pecuniary damages in all the cases under investigation, and in addition, the level of awards granted by Court appears to be, on average, at an approximately 28% higher level than the level requested by victims. Furthermore, in some of the cases, the Court goes at great lengths to explain the considerations underlying its non-pecuniary damage awards, which may represent a form of acknowledgement by the Court of the extensive harm suffered by both the direct and indirect victims. For instance, in *Case of the Serrano-Cruz Sisters v. El Salvador*, the Court explained the parameters it took into account for the awards on moral harm, which included excerpts from the victims' testimonies on their suffering, provided before the Court.[1886] However, despite the fact that in many of the cases – although not all – the Court elaborates on the reasons for awarding these damages drawing on the facts of the case at stake, it is unclear whether the end awards illustrate the individualities of cases or some standardized rates, as illustrated by the ECtHR's jurisprudence too. For instance, the current analysis identified that the IACtHR appears to deploy standardized rates in regard to awards for the harm of the direct victims, adjusted then depending on whether the direct victim was a minor at the moment when the crimes occurred. To exemplify this point, the Court appears to award a standard sum of 80.0000 USD in account of the moral harm of the deceased or disappeared victim;[1887] however, in some of the cases the awards amount

[1881] *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 76
[1882] E.g. *Case of the Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 148 (1 July 2006) para 381
[1883] E.g. see *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 154
[1884] E.g. *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 195
[1885] E.g. *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 195
[1886] See *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 160
[1887] E.g. *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013) para 284; *Case of Gudiel Alvarez et al. ("diario militar") v Guatemala* (Merits, reparations and costs) IACtHR Series C No. 253 (20 November 2012) para 371; *Case of Contreras et al. v El Salvador* (Merits, Reparations and

to 100.000 USD,[1888] while in other the awards amount to 50.000 USD,[1889] and 30.000 USD.[1890] In addition, the awards are adjusted by either 10.000 USD or 5.000 USD if the direct victim was a minor at the time of the crime.[1891] At the same time, the awards in account of the indirect victims' harm are very diverse across the cases, indicating that the Court potentially makes these awards taking into account the victims' individual harm. What is a constant across the awards in account of the indirect victims' harm is the importance the Court is attaching to the different familial relationships, with higher amounts being awarded to spouses, children, and parents, and with lower amount awarded to siblings, or even more estranged relatives such as cousins or aunts.

These findings above may indicate that the Judges take into account the individual harm of indirect victims due to the fact that they possess extensive evidence to understand and assess the extent of victims' harm. This is in contrast to the awards for direct victims, wherein the Judges cannot know exactly the extent of harm the direct victim suffered beyond the legal characterization e.g. the victims suffered extra-judicial killings or disappearance, and thus, prefer to deploy a relatively standardized rate for the harm of the direct victim. However, two remarks in regard to the latter awards must be put forward, as although these awards are rather standardized, they do reveal some significant differences which might provide insights into the Judges' reasoning.

The first one regards some of the cases where the Court awarded a higher than average sum in account of direct victims and which might indicate a value judgment of the facts by the Judges. Two of the cases, namely, *Case of the Rochela Massacre v. Colombia* and *Case of the Rodriguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, deal with horrendous assaults not only against human life but also against professionals invested with important functions for investigating crimes and shedding light on the truth (i.e. Judges). *Case of Bámaca Velásquez v. Guatemala* concerns the enforced disappearance of a former commander of a guerilla group, but also an indigenous leader of a Mayan community as well as the ensuing lack of action in finding his moral remains. Consequently, the higher awards in regard to non-pecuniary damage to indirect victims might indicate the Judges' evaluation of the facts at hand. These higher awards might aim to denounce crimes against justice officials, provide a sense of honor to Bámaca

Costs) IACtHR Series C No. 232 (31 August 2011) para 228; *Case of Chitay Nech et al. v Guatemala* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 212 (25 May 2010) para 290; *Case of Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 209 (23 November 2009) para 375; *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009) para 222

[1888] *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) 603; *Case of the Rochela Massacre v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 163 (11 May 2007) para 273; *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004) para 221; *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 66

[1889] E.g. see *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 160 (a); *Case of Cantoral-Huamaní and García-Santa Cruz v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 176 (28 January 2007) para 177

[1890] *Case of the Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 148 (1 July 2006) para 390 (a); *Case of the Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 159 (25 November 2006) para 258

[1891] In some cases, the Court adjusted the sums by 10.000 USD if the direct victim was minor, e.g. *Case of the "Mapiripán Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 134 (15 September 2005). Whereas in other cases, the Court adjusted the sums of 5.000 only, e.g. *Case of the Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 159 (25 November 2006)

Velásquez, as a leader of the Mayan community,[1892] as well as criticize the impunity prevailing in these cases due to failure of States to establish the truth.[1893]

The second remark concerns the discrepancy in awards for cases concerning large numbers of victims, despite the fact that these cases are mainly concerned with massacres, which entail horrendous and multiple human rights violations.[1894] For instance, in several cases the Court provided non-pecuniary damage in account of the direct victims' harm amounting to 30.000 USD,[1895] whereas in others amounting to 20.000 USD[1896] and 10.000 USD,[1897] respectively. In two of the cases, the Court awarded only an amalgamated sum of money in respect to both the pecuniary and non-pecuniary harm, amounting to 35.000 USD[1898] and 30.000 USD.[1899] In addition, in some of the cases there are also a handful of direct victims surviving the massacres, which were awarded an even lower amount of money than the deceased victims.[1900] Against this background, it appears unfair that the direct victims' harm in cases with only one direct victim is evaluated at 70% higher value than the harm of direct victims in cases with dozens or even hundreds of victims. The rationale of the Court in this regard might be explained by its consideration of the end sum of money that the State has to pay, which will likely influence the likelihood of implementation too. As Douglass Cassel noticed, *Case of the Plan de Sánchez Massacre v. Guatemala* entails one of the largest reparations awards in the history of the Court; 7.925.000 USD for an army massacre of 268 peasants in an indigenous Guatemalan village is a large amount of money, taking into account the widespread poverty in many States in Latin America.[1901] Nonetheless, the difference between

[1892] For instance, in his separate opinions Judges Antonio Augusto Cancado Trindade elaborated, amongst others, on this case's implications for the family and community of the leader. Similarly, in his Concurring Opinion, Judge Sergio Garcia Ramirez the cultural specificity of the case, and the importance that honoring and burying these remains has for the Mayan culture, the Mam group, to which the victim and his next of kin belonged. See *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) 43-56

[1893] For instance, in his Concurring Opinion, Judge Eduardo Ferrer Mac-Gregor Poisot discussed at length the lack of investigation of crimes and the need to recognize the right to the truth as an autonomous right under the Inter-American Human Rights System. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) 221-235

[1894] For instance, the Court established the following facts in *Case of the Plan de Sánchez Massacre v Guatemala*: " Between 2 p.m. and 3 p.m. a commando of approximately 60 individuals, comprising members of the Army, military and judicial agents, civilian informers and patrollers, dressed in military uniform and carrying assault weapons, entered Plan de Sánchez. They gathered the girls, and young women in one place, where they were physically abused, raped, and murdered. The older women, men, and boys were gathered in another place, and subsequently executed; two grenades were thrown and the house where they had been placed was set on fire. Around 268 people were executed, most of them members of the Maya-Achí people. Some of them were residents of the neighboring villages of Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac." *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) para 49 (2)

[1895] E.g. *Case of the Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 159 (25 November 2006); *Case of the Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 148 (1 July 2006)

[1896] *Case of the "Las Dos Erres" Massacre v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009)

[1897] *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005)

[1898] *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 384

[1899] *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 309

[1900] E.g. The surviving victims received 15.000 USD, as opposed to 30.000 USD. *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 309

[1901] Douglass Cassel, 'The Expanding Scope And Impact Of Reparations Awarded By The Inter-American Court Of Human Rights' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 94

the amounts awarded to direct victims across certain cases involving massacres remains stark, indicating a potentially discriminatory treatment of victims.[1902]

To sum up this section assessing the Court's practice on compensation, as identified in the case law analysis, the Court awards compensation for pecuniary damage and non-pecuniary damage. The present analysis contends that the IACtHR's awards on compensation respond to a large extent to the victims' requests – albeit at a lower level as far as PD awards are concerned. Due to its potential to respond in a comprehensive manner to the material and moral harm suffered by both the direct and indirect victims, the Court's practice can generally be appraised as positive. Despite several differences in awards across cases, as discussed above, it is significant that the Court provided compensation not only in cases involving several victims, but also, significantly, in cases involving dozens or hundreds of victims, such as the *Plan de Sánchez* or *Moiwana cases*. As apparent from the cases, the Court takes an individualized approach to compensation, making these awards on an individualized basis rather than on a collective basis. In fact, as apparent in *Case of Aloeboetoe et al. v. Suriname,* for instance, where the Court rejected claims for moral damages to the unique social structure of the Saramakas who were generally harmed by the direct victims' killings, the Court does not appear forthcoming to award compensation in account of the collective harm caused by the crimes.[1903]

In addition, the Court's practice elicits a significant degree of flexibility in proving the types of harm, sometimes providing compensation despite a lack of evidence.[1904] In some rare instances, the Court goes as far as awarding compensation in regard to new categories of pecuniary damage, such as the damage to family assets granted in *Case of Molina-Theissen v. Guatemala*. On this point, one interesting innovation depicted in the Court's jurisprudence is worth mentioning, namely, the 'life project' reparation measure that some of the victims request.[1905] As elaborated upon in the first case where this concept was employed, 'life project' refers to the personal fulfilment of individuals, "which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself".[1906] However, as can be inferred from the current analysis, claims by victims in regard to 'life project' as a reparation measure depend on the respective victims' interpretation of the term. For instance, in the *Bámaca Velásquez* case, the legal representatives of the widow argued that "the human rights violations committed by State authorities to the detriment of Efraín Bámaca Velásquez did not allow Jennifer Harbury to develop her 'life project', making it impossible for her to attain personal, professional, and family goals with him".[1907] However, in the cases *Cantoral Huamaní and García Santa Cruz* and *Escué Zapata* the victims posited that their 'life projects' were affected by the crimes and requested

[1902] See also Thomas Antkowiak, 'A Dark Side of Virtue: the Inter-American Court and Reparations for Indigenous Peoples' (2014) 25 Duke Journal of Comparative and International Law 1, footnote 505

[1903] *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 83

[1904] See also Douglass Cassel, 'The Expanding Scope And Impact Of Reparations Awarded By The Inter-American Court Of Human Rights' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 94

[1905] *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 272; *Case of Cantoral-Huamaní and García-Santa Cruz v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 176 (28 January 2007) para 151; *Case of Escué-Zapata v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 165 (4 July 2007) para 169

[1906] *Case of Loayza-Tamayo v Peru* (Reparations and Costs) IACtHR Series C No. 42 (27 November 1998) para 148

[1907] *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 69 (a)

scholarships as reparation. In the latter cases, the Court granted the victims' requests,[1908] however, in the former case the Court rejected it, arguing that the judgment itself as well as all the other measures already granted in the judgment are sufficient to tackle the harm of Jennifer Harbury.[1909] In light of these cases, the awards of 'life project' as a reparation measure remain rare and abstract.[1910] As the Court itself acknowledged, "neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms",[1911] which is likely the reason why the Court tends to reject this reparation measure as long as it is not construed in very clear terms, such as the scholarships in the above mentioned cases.

To conclude, one final finding with regard to the Court's approach to compensation awards is worth mentioning. As identified in approximately 30% of the cases in this research, several States took steps to provide compensation to victims at the national level. They are either provided as part of mutual agreements between the victims, their next-of-kin or their legal representatives and the State concerned or by means of legal proceedings started under national administrative law. As such, the current analysis identified that the Court's approach when faced with information regarding compensatory initiatives at the national level was to review them and assess whether they are in line with the IACtHR jurisprudence and if they repair the consequences of the crimes.[1912] To be precise, the analysis revealed that in cases where a mutual agreement between the parties is at stake, the Court tends to endorse the compensation awards provided therein, likely operating under the assumption that the agreement reflects the will of the parties.[1913] However, in cases where victims receive compensation under national administrative law, the analysis revealed that the Court tends to acknowledge the efforts done at the national level to award compensation to victims, but it nonetheless proceeds to make its own compensation awards. The Court's awards appear to fill the gaps created by awards under the national law, which include adjustment of compensation to levels usually awarded at the IACtHR,[1914] inclusion of next-of-kin excluded at the national level, and inclusion of other kind of harm usually acknowledged at the IACtHR level but left out at the national level.[1915] As such, in its approach to compensatory measures at the national level, the Court appears to apply a victim-centered approach,[1916] paying attention to the plight of victims, to make sure that their will is taken into account and that they are protected from

[1908] *Case of Cantoral-Huamaní and García-Santa Cruz v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 176 (28 January 2007) para 194; *Case of Escué-Zapata v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 165 (4 July 2007) para 170

[1909] *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) 84

[1910] See also Gina Donoso, 'Inter-American Court of Human Rights' Reparation Judgments. Strengths and Challenges for a Comprehensive Approach' (2009) 49 Revista Instituto Interamericano de Derechos Humanos 29, 53; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 245. Both scholars asserted that despite the fact the Court has recognized the existence of the concept, there is little evidence of this measure in practice.

[1911] *Case of Loayza-Tamayo v Peru* (Reparations and Costs) IACtHR Series C No. 42 (27 November 1998) para 153

[1912] See e.g. *Case of Barrios Altos v Peru* (Reparations and Costs) IACtHR Series C No. 87 (30 November 2001) paras 21-23

[1913] As held by the Court in *Case of Tiu Tojín v Guatemala* (Merits, Reparations, and Costs) IACtHR Series C No. 190 (26 November 2008) para 66

[1914] E.g. *Case of the Rochela Massacre v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 163 (11 May 2007) paras 243 and 246

[1915] E.g. *Case of La Cantuta v Perú* (Interpretation of the Judgment on Merits, Reparations, and Costs) IACtHR Series C No. 162 (29 November 2006) para 210

[1916] Ludovic Hennebel asserted that " the Inter-American Court places the human being at the very centre of Inter- American law". Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) Revue Québécoise de Droit International 57, 60. See also Tom Antkowiak, expressing that a victim-centered court places the preferences and needs of victims at the core of the process and expressed that the IACtHR's balancing approach to reparations can be deemed "victim-centered." Tom Antkowiak, 'An Emerging Mandate For International Courts: Victim Centered Remedies And Restorative Justice' (2011) 47 Stanford Journal Of International Law 279, 282-292

disadvantageous deals at the State level. As the Court itself stated, "the awards of compensation may neither enrich nor impoverish a victim",[1917] revealing also that the IACtHR awards on compensation do not aim to be punitive.[1918] However, in two newer cases, the Court appeared to change its approach. Instead of adjusting the awards through national schemes to be in line with the IACtHR standards, as mentioned above, the Court invoked the principle of complementarity to the protection provided by the domestic law, to acknowledge the compensation granted at the domestic level and to abstain from ordering reparations in this regard.[1919] The Court's new approach is surprising amid its repeated holding that the States' obligation to provide reparations is a principle of international law and national law may not be invoked to desist from their obligations under international law.[1920] In the case concerning the Afro-Descendent Communities, the Court maintained that "international law establishes the individual entitlement of the right to reparation", however, in a departure from its previous approach, it now indicated that "in scenarios of transitional justice in which States must assume their obligations to make reparation on a massive scale to numerous victims, which significantly exceeds the capacities and possibilities of the domestic courts, administrative programs of reparation constitute one of the legitimate ways of satisfying the right to reparation."[1921] Consequently, these newer cases indicate the Court's tendency to assess what victims want against other considerations, e.g. the scarcity of resources as shown above, especially when the States appear forthcoming to provide compensation at the national level.[1922] On the other hand, the Court's novel approach appears to mark an important jurisprudential turn in the work of the IACtHR, which may threaten the victims' right to adequate, prompt and effective reparation, especially because it is unclear at this point whether these national initiatives aim to complement or substitute efforts at the IACtHR's level and what their quality is compared to the IACtHR's awards.[1923]

III. Rehabilitation

In the IACtHR's jurisprudence, rehabilitation mainly refers to measures to treat the physical and psychological suffering resulting from the crimes endured by victims, including the next-of-kin of deceased or disappeared victims.[1924] Due to the health consequences that gross human rights violations might have on the victims,[1925] rehabilitation measures feature on the victims' requests

[1917] E.g. *Case of La Cantuta v Perú* (Interpretation of the Judgment on Merits, Reparations, and Costs) IACtHR Series C No. 162 (29 November 2006) para 207

[1918] See also Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1, 42

[1919] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 374; *Case of the Santo Domingo Massacre v Colombia* (Preliminary objections, merits and reparations) IACtHR Series No. 259 (30 November 2012) para 336

[1920] This principle has been stated since the very first judgment, *Case of Velásquez-Rodríguez v Honduras* (Preliminary Objections) IACtHR Series C No. 1 (26 June 1987) paras 28-30

[1921] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) 470

[1922] The Court continued to provide compensation at its regular rates after these two cases, as those cases did not feature discussions about potential reparations at the national level. E.g. *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013)

[1923] See also Clara Sandoval, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2018) 22 The International Journal of Human Rights 1192, 1204

[1924] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 202

[1925] See e.g. Dinah Shelton explaining that "serious human rights violations, especially those attacking physical integrity, can lead to massive trauma that can be life-long or even multigenerational." Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 394

for reparations in the majority of cases under current analysis. It is important to notice that across the cases analyzed, requests for the provision of medical care for victims started to make the object of reparations judgments at the IACtHR only after 2004.

However, some precursors to the rehabilitation measures can be identified in earlier cases. For instance, in *Case of Aloeboetoe et al. v. Suriname*, the Court mentioned that compensation does not suffice to tackle the harm of minor children - indirect victims in the case at hand - therefore, it stressed that "it is also essential that the children be offered […] basic medical attention". The Court further held that Suriname is under the obligation to take necessary steps for the medical dispensary already in place in the Saramaka villages to be made operational and reopened that same year; however, in this case, the Court framed this measure as being part of compensation and did not label it as rehabilitation.[1926] Notwithstanding the labelling, it is worth noting that this reparation measure was not requested by the victims themselves but was awarded by the Court *proprio motu* and, as such, it indicates the Court's willingness to acknowledge the broader harm incurred upon victims that needs to be tackled through measures beyond monetary compensation. Another reference to rehabilitation measures was made in *Case Barrios Altos v. Peru*, wherein the State pledged to cover, through the Ministry of Health, the health service expenses of the beneficiaries of the reparations, including free care at health center of their place of residence as well as access to specialized health procedures depending on victims' needs.[1927] Although these reparations measures amount to rehabilitation, these measures were not awarded by the Court. In this case, the role of the Court was limited to assessing and endorsing a mutual agreement on reparations among the respondent State, the Inter-American Commission and the victims, their next of kin or their duly accredited legal representatives, ordered by the Court in the merits judgments of the case.[1928]

According to the current analysis, the core of rehabilitation measures requested by victims at the IACtHR consists in adequate and effective medical, psychological or psychiatric treatment to the next-of-kin of the deceased or disappeared victims, including medicines if required, and taking into account the particular circumstances and needs of victims.[1929] Rehabilitation measures are to benefit the direct victims too, in the few cases where there are surviving direct victims.[1930] In its turn, the Court granted the victims' requests for medical services in all the cases, ruling that "the State has the obligation to provide without charge, through its specialized health institutions, the medical and psychological treatment required by the victims".[1931] It is interesting to note that for the victims living outside the defendant State the Court awarded a sum of money to be employed for specialized medical treatment or medicines in the States where victims reside.[1932]

[1926] *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 96
[1927] *Case of Barrios Altos v Peru* (Reparations and Costs) IACtHR Series C No. 87 (30 November 2001) para 42
[1928] *Case of Barrios Altos v Peru* (Reparations and Costs) IACtHR Series C No. 87 (30 November 2001) para 21
[1929] E.g., *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 266
[1930] *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 348
[1931] *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) para 278
[1932] E.g. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 569; *Case of Gomes Lund et al. ("guerrilha do araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 219 (24 November 2010) para 269

Furthermore, in some of the cases, rehabilitation measures requested by victims refer not only to medical treatment at the individual and family levels but also at a collective level.[1933] As identified, reference to rehabilitation measures on a collective level is encountered in cases concerning gross human rights violations involving either dozens of victims or indigenous groups or communities.[1934] In the former category of cases, the Court acknowledged the collective level of harm, and in consequence, ordered that the rehabilitation measures should benefit the individual, familial, and collective levels, as agreed with the victims and following an individual assessment.[1935] In the latter category of cases, the victims' requests for reparation are even more complex; for instance, in addition to medical treatment at a collective level, in one case the victims requested "technical assistance for rehabilitation", which refers to measures beyond the community level, such as the improvement of health centers in humanitarian zones.[1936]

As the analysis revealed, the Court granted the victims' requests in the latter category of cases too; the Court also acknowledged the psychosocial impact and emotional consequences suffered by the victims, which extended to the fabric of the community. For instance, in *Massacres of El Mozote and Nearby Places* case, the Court made reference to expert witness testimony provided in Court to emphasize that "the massacre […] dissolved the social networks in which the life project of both the individual and the community was inserted".[1937] The Court furthermore acknowledged that the violence destroyed not only the land and the animals, it also destroyed "the core of the collective way of life," "the identity and symbols of the peasant universe."[1938] In consequence, the Court directed the State to take comprehensive action to implement "a permanent program of comprehensive care and attention to their physical, mental and psychosocial health", with a multidisciplinary and collective approach.[1939] Similarly, *in Plan de Sánchez Massacre v. Guatemala* case, which involved a massacre against a community, the Court directed the State to set up a committee to evaluate the physical and mental condition of the victims and the treatment that they require, as well as to create a specialized program of psychological and psychiatric treatment, which should be provided free of charge for a period of five years.[1940] By the same token, in *Case of the Afro-Descendant Communities Displaced from the Cacarica river basin (operation genesis) v. Colombia*, the Court acknowledged that the victims require appropriate psychosocial care. As the victims not only suffered harm relating to aspects of their individual identity, but also to the loss of their roots and their community ties, the Court deemed it pertinent to establish a measure of reparation that seeks to reduce psychosocial problems.[1941] However, the Court strictly referred to the victims of the case as beneficiaries of this comprehensive medical

[1933] E.g. *Case of the Santo Domingo Massacre v Colombia* (Preliminary objections, merits and reparations) IACtHR Series No. 259 (30 November 2012) para 304
[1934] E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 351
[1935] E.g. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 568; *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) para 278.
[1936] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 451
[1937] E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 351
[1938] E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 351
[1939] *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 352
[1940] *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) para 108
[1941] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 453

treatment, denying thus the broader claims that victims put forward regarding victims in similar humanitarian situations across the country.

The current analysis revealed the Court's supportive approach to rehabilitation, granting the victims' request for medical services to tackle the harm at the individual and family level, as well as at the collective level, when required. In its practice, the Court is placing emphasis on the assessment of each of the victims' harm in view of the medical treatment to be provided,[1942] thus positioning the victims' individual needs at the center of the rehabilitation measures. In addition, the IACtHR acknowledges the several layers of harm suffered by victims, including the psychosocial impact of crimes in the cases involving communities or indigenous people. Finally, the Court appears to be culturally sensitive in its awards on rehabilitation;[1943] for instance, in one case involving massacres of indigenous people, the Court ordered the provision of medical and psychological treatment by State institutions and personnel, while expressing that the treatment may also be provided by healers of the Maya Achí community, following their traditional approach to medicines.[1944] Importantly, the Court also highlighted the necessity of involving the victims themselves in designing together with the State modalities of health care that best suit their needs.[1945]

IV. Satisfaction

In the IACtHR system, satisfaction measures are remedies that aim to respond to harm of non-pecuniary nature. As the Court held, these measures assist in repairing the suffering and anguish of victims, the harm to those values that are very significant to the victims, as well as changes in the victims' living conditions that are not financial in nature.[1946]

As apparent from the current analysis, satisfaction measures across the Court's jurisprudence before 2000 were extremely modest. The cases prior to this period reveal that the IACtHR mainly awarded satisfaction measures *proprio motu*, and they were limited to measures to be taken by the State to inform the next-of-kin of the fate of the executed victim as well as to use means at its disposal to locate their remains[1947] and hand them over to the relatives.[1948] In another case, the Court established that the State has a duty to investigate the acts that resulted in violations of the ACHR, to identify and punish those responsible and to adopt the internal legal measures necessary to ensure compliance with this obligation.[1949] Notwithstanding the limited scope of satisfaction measures in the early jurisprudence, they constituted important reparations measures amid oppressive military regimes in Latin American, characterized by enforced disappearances and

[1942] E.g. *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) para 107
[1943] Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 396
[1944] *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 289
[1945] *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 289
[1946] E.g. *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004) para 211
[1947] *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 109
[1948] *Case of Caballero-Delgado and Santana v Colombia* (Reparations and Costs) IACtHR Series C No. 31 (29 January 1997) para 58
[1949] In this case, the measure awarded by the Court responded to the Commission's (and victims') call for extensive measures to carry out an investigation, punish perpetrators, etc. *Case of Blake v Guatemala* (Reparations and Costs) IACtHR Series C No. 48 (22 January 1999) para 59 and para 65

prevailing impunity.[1950] These cases also paved the way to the later jurisprudence, as these satisfaction measures now feature commonly on victims' requests for satisfaction.

After 2000, not only did the Court's jurisprudence start to expand exponentially, but also the content of reparations measures, with satisfaction awards featuring a "diversity of remedies, directed to individual victims, communities, and society at large."[1951] Consequently, the current research identified that in most of the cases the victims put forward requests for extensive satisfaction measures. The most prevalent measures across the majority of cases can be grouped into "serious, expedite, impartial, and effective" investigations at the national level,[1952] to capture, try, and punish those responsible for the crimes committed,[1953] measures to establish the truth and inform the victims and the societies about the facts of the cases,[1954] to retrieve the remains of disappeared victims and deliver them to the family for burial ceremonies,[1955] to acknowledge the State's responsibility in the commission of the crimes and apologize,[1956] to commemorate the (disappeared or deceased) victims and preserve their memory, and to publish the judgment.[1957] In addition, in a small number of cases, the victims have also asked for development measures at a community level, which include education and other culturally sensitive activities.[1958]

As this research identified, the Court appears to be granting in large part the victims' requests for satisfaction measures. Each of the measures will in turn be discussed. According to the current analysis, the Court granted the victims' requests for investigations at the national level, directing States to capture, try, and punish those responsible for the crimes across all the cases. This approach by the Court has several implications. Foremost, it constitutes an acknowledgement of the victims' need for criminal investigations, punishment of crimes, and apprehending perpetrators, echoed consistently across all cases.[1959] At the same time, it establishes that measures focused on investigation of crimes and punishment of perpetrators are a form of reparation. In its first contentious case, the Court explained that carrying out investigations and punishing those responsible is an inherent duty of States Parties to the ACHR, as set out in article 1(1),[1960] leading

[1950] Tom Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 368
[1951] Tom Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 368
[1952] E.g. *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 69(a).
[1953] E.g. *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004) para 225 (b)
[1954] E.g. *Case of the Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 148 (1 July 2006) para 399
[1955] *Case of Chitay Nech et al. v Guatemala* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 212 (25 May 2010) para 238
[1956] E.g. *Case of Cantoral-Huamaní and García-Santa Cruz v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 176 (28 January 2007) para 152
[1957] E.g. *Case of Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 209 (23 November 2009) para 355
[1958] E.g. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 580
[1959] Antkowiak has explained that victims before the IACtHR have a 'fundamental need' that the facts are investigated and crimes punished. Tom Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 367. In addition, the victims' need for punishment of perpetrators has been echoed in cases investigated across this research and as such, it is not limited to the IACtHR context.
[1960] See *Case of Velásquez Rodríguez v Honduras* (Merits) IACtHR Series C No. 4 (29 July 1988) para 178

scholars to contest whether the Court itself considered such measures as reparations.[1961] However, in the reparations judgment of the same case, the Court made it clear that: [1962]

"*[M]easures of this type [e.g. investigation of the facts related to crimes; the punishment of those responsible] would constitute a part of the reparation of the consequences of the violation of rights or freedoms […], in accordance with Article 63(1) of the Convention*." [Author's insertion]

The Court's subsequent jurisprudence cemented the understanding that such measures are indeed a form of reparation as investigations and prosecution are commonly requested and granted under 'satisfaction' measures heading. Granting these measures consistently across cases might also represent an affront to and denunciation of impunity across Latin American States,[1963] which according to the Court, must be tackled through investigations and punishment of perpetrators.[1964] Indeed, including these measures and granting them across cases amounts to what has been identified across literature as the invocation of obligations rooted in criminal law within human rights law.[1965] Some authors criticize the deployment of criminal law by human rights bodies, as it promotes the idea that criminal law must intervene in protection of fundamental rights, and deviates from the liberal conception of criminal law that it is 'necessary evil' that can be employed only as last resort.[1966] However, in the context of the gross human rights violations in the cases at stake as well as the chronic failure by States to carry out investigation for extended periods of time in most of the cases, the Court's granting of these measures constitutes an acknowledgement of the victims' need for retributive responses,[1967] especially since it is the most requested measure across cases.

Furthermore, the current research identified a connected measure that the Court grants across cases, even when the victims have not asked for it specifically, namely, access to and participation in these national investigations, including victims' protection when partaking in such activities.[1968] To this end, in a significant number of cases, the Court held that "the State must ensure that the

[1961] Tom Antkowiak, 'An Emerging Mandate For International Courts: Victim Centered Remedies And Restorative Justice' (2011) 47 Stanford Journal Of International Law 279, 303

[1962] *Case of Velásquez-Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No. 7 (21 July 1989) para 32

[1963] In a joint concurring opinion, Judges A.A. Cançado Trindade and A. Abreu Burelli held that there exists "a close link between the persistence of impunity and the hindering of the very duties of investigation and of reparation, as well as of the guarantee of non-repetition of the harmful facts". *Case of Castillo-Páez v Peru* (Reparations and Costs) IACtHR Series C No. 43 (27 November 1998) 2

[1964] Across cases, the Court has mentioned that the lack of action of the States fosters impunity e.g. *Case of the Rochela Massacre v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 163 (11 May 2007) para 289

[1965] See Mattia Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Utrecht Journal of International and European Law 161; Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) Revue Québécoise de droit international 57

[1966] See Mattia Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34(2) Utrecht Journal of International and European Law 161, 181; See also Fernando Felipe Basch's critical view on the Inter-American Court's provision of a duty to punish, arguing that it promotes the violation of an individual's right to equal treatment and to be presumed innocent, as well as of a defendant's right to defense in a fair, ultimately infringing the very objectives of the Inter-American system of human rights protection. Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 American University International Law Review 195, 227-228

[1967] For a chapter on the importance of measures with retributive orientation for the victims see Alina Balta, 'Retribution through Reparations? Evaluating the European Court of Human Rights' Jurisprudence on Gross Human Rights Violations from a Victim's Perspective' forthcoming in Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing, 2020)

[1968] E.g. *Case of Garcia and Family Members v Guatemala* (Merits, Reparations, and Costs) IACtHR Series C No. 258 (29 November 2012) para 197

victim's relatives have full access and capacity to act in all the stages and instances of said investigations and proceedings, in accordance with the domestic law and the rules of the American Convention".[1969] This is an important measure, which acknowledges the significance of victims' access to justice, participation, and protection during national investigations which concern them. In addition, in *Case of Tiu Tojín v. Guatemala*, involving members from indigenous communities, the Court acknowledged the obstacles faced by these groups to access the national justice system, and directed the State to take extra steps to ensure the victims' access and understanding of the case.[1970] However, this approach does not appear to have been replicated in comparable cases dealing with indigenous groups that were analyzed in this research.

In addition, investigations and the punishment of perpetrators may contribute to the establishment of truth regarding the crimes, which represents another measure of satisfaction commonly requested by victims across the jurisprudence. Amid repeated denial of justice by States, failure to conduct investigation, and to provide information to the next-of-kin about what has happened with the disappeared or deceased victims, victims argue that States have not satisfied their right to find out what happened and to know the truth.[1971] Of the cases under current investigation, the Court elaborated for the first time on the existence of a victim's right to truth in *Bámaca-Velásquez Case*. It explained that the right to truth was subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and linked it to the States' obligations to carry out investigations and prosecutions.[1972] In addition to the significance of this holding, which, notably, acknowledges the victims' need to know the truth, it is important to highlight that, across its jurisprudence, the Court also emphasized the collective dimension of the right to know the truth. The analysis revealed that the Court established in a large majority of cases *proprio motu* that the results of the investigations must be published and widely disseminated, so that communities and the entire societies know the truth about the facts of cases.[1973] Ludovic Hennebel explained that, in taking this approach, the Court highlights the importance of the right to truth at both individual and collective levels, while at the same time reiterates its political position on the role of Inter-American justice, which aims to benefit a greater number of individuals.[1974] While it has to be acknowledged that the right to know the truth concerns foremost the victims in a case as they are most affected by the crimes, the Court's focus on collective levels appears justified in the Latin American context, where gross human rights violations such as enforced disappearances have been pervasive and a lack of accountability constituted a chronic condition.[1975]

Another measure commonly requested by victims, particularly in cases involving enforced disappearances, and connected to the victims' need to know the truth refers to the victims' requests for the States to carry out the search, identification, and delivery of the mortal remains of the

[1969] E.g. *Case of Escué-Zapata v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 165 (4 July 2007) para 166
[1970] E.g. *Case of Tiu Tojín v Guatemala* (Merits, Reparations, and Costs) IACtHR Series C No. 190 (26 November 2008) 100
[1971] E.g. *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 57 (b)
[1972] *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 75
[1973] E.g. *Case of the "Mapiripán Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 134 (15 September 2005) para 298
[1974] Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) Revue Québécoise de Droit International 57, 82
[1975] See Ariel E. Dulitzky, who maintains that Latin America is a space where the use of enforced disappearances was (and unfortunately still is in some areas) widespread, but also a place where the most effective responses to overcome them have developed. Ariel E. Dulitzky, 'The Latin-American Flavor of Enforced Disappearances' (2019) 19 Chicago Journal of International Law 424, 428

disappeared victims.[1976] In some of the cases, the victims expanded these measures to more robust action at the national level, such as the establishment of a DNA bank to facilitate the identification of remains,[1977] and the creation of a national search commission to search for victims of similar crimes across the country.[1978] As the analysis revealed, the Court granted the victims' requests in the majority of cases, and directed the States to conduct genuine search operations, to make all efforts to determine what happened to the remains and to localize them, and if possible, to return these to their next-of-kin.[1979] The importance of this measure for the victims was explained by the Court itself, which argued that it is a reparations measure "extremely important to repair the non-pecuniary damage caused to the victim's next of kin in cases of forced disappearance".[1980] Furthermore, the Court explained that returning the remains is part of the right to know the truth.[1981] It also argued that continued lack of truth about the fate of a disappeared person is a form of cruel and inhuman treatment for the family, as uncertainty about the whereabouts of the victim's remains caused and continues to cause intense suffering and anguish to the next of kin.[1982] In line with the victims' requests, the Court directed the States to set up a system of genetic information to store data regarding remains that are found during search operations, on the one hand, and of the next-of-kin in the cases at stake, on the other hand, to cross check constantly this genetic data with a view to identifying remains.[1983] However, the Court was not always forthcoming with directing States to establish a national commission for the search of remains; it nonetheless directed States to establish mechanisms within existing structures to carry out these measures.[1984] Finally, it is important to state that in some of the cases involving communities or indigenous groups, the Court has emphasized the significance of retrieving the remains from a culturally sensitive perspective.[1985]

Furthermore, another satisfaction measure that victims requested is that the Court orders the States to carry out a public act of acknowledgment of responsibility regarding the facts at stake as well as apologize to the victims and their next of kin.[1986] As this research identified, this measure started

[1976] E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 328

[1977] E.g. *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004) para 75 (j); *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009) para 186

[1978] E.g. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 561; *Case of Gudiel Alvarez et al. ("diario militar") v Guatemala* (Merits, reparations and costs) IACtHR Series C No. 253 (20 November 2012) para 331

[1979] E.g. *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 268

[1980] *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) para 264

[1981] *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 331

[1982] *Case of the 19 Merchants v* Colombia (Merits, Reparations and Costs) IACtHR Series C No. 109 (5 July 2004) para 267

[1983] E.g. *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 269; *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009) para 189

[1984] *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 565; for instance, in Serrano-Cruz sisters Case, the Court ordered the State to create a search web page for tracing the disappeared children. *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 189

[1985] For instance, in Case of Aloeboetoe et al. v Suriname the Court expressed that retrieving remains gains particular importance given the family relationships that exist among the Saramakas. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 109; also *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 81

[1986] E.g. *Case of the Gómez-Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) IACtHR Series C No. 110 (8 July 2004) para 225

to feature in the Court's jurisprudence only after 2000. It is interesting to recall at this point that Jo Pasqualucci, writing in 1996, expressed that while this reparation measure is not uncommon in international law, it may not be acceptable at this time in the Court's history, whose very jurisdiction must be expressly accepted by States, to demand that a sovereign State apologize to an individual.[1987] Against this background, the current state of affairs at the IACtHR appears particularly progressive, as this research shows that the Court ordered States to make a public acknowledgment of liability for crimes as well as to apologize to the victims and the next of kin across all the cases.[1988] In addition, in some of the cases, the Court noted 'approvingly' in the reparations judgment that the State already fully complied with this reparation measure, either during the public hearing of the case before the Court or during a special ceremony organized by the State.[1989] As such, the Court did not deem it necessary to order the State to carry out another act of acknowledgement of responsibility.[1990] However, in other cases, despite noting the acknowledgement of responsibility during the trial, the Court invoked the interests of the society to order the State to make a public act of acknowledgment and apology to the victims.[1991] Finally, it is notable that the Court –when ordering this measure- places emphasis on the victims' role in these ceremonies, positing that the States must consult and involve the victims in organizing the event for the acknowledgment of responsibility,[1992] adjusting to the victims' culture, traditions, and language, when applicable.[1993]

Another satisfaction measure commonly requested by victims across case law consists in different actions to be taken by the State that amount to the commemoration of the victims or keeping their memory alive. Across cases, victims ask for the establishment of a national day of remembrance commemorate not only the victims in the cases, but also the victims of similar crimes across the country,[1994] naming of schools, streets, square or scholarships in the name of the victims,[1995] establishment of a museum or exhibition in the name of victims,[1996] erecting a monument or a plaque to commemorate the victims,[1997] and the creation of an audiovisual documentary to raise awareness of the crimes and commemorate the victims.[1998] However, it is interesting to note that

[1987] Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1, 42

[1988] *Case of Baldeón-García v Perú* (Merits, Reparations, and Costs) IACtHR Series C No. 147 (6 April 2006) para 204

[1989] Case of Ticona Estrada et al. v Bolivia (Merits, Reparations and Costs) IACtHR Series C No. 191 (27 November 2008) para 163 and *Case of La Cantuta v Perú* (Interpretation of the Judgment on Merits, Reparations, and Costs) IACtHR Series C No. 162 (29 November 2006) paras 233-234. However, in one other case the Court noted that the State has only acknowledged partial responsibility, *Case of the "Mapiripán Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 134 (15 September 2005) para 314

[1990] E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 357

[1991] E.g. *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004) para 87

[1992] E.g. *Case of Contreras et al. v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 206

[1993] E.g. *Case of Escué-Zapata v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 165 (4 July 2007) para 177

[1994] E.g. *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) para 91; *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003) para 270

[1995] E.g. *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013) para 275

[1996] E.g. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 580

[1997] E.g. *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009) para 196

[1998] E.g. *Case of the Santo Domingo Massacre v Colombia* (Preliminary objections, merits and reparations) IACtHR Series No. 259 (30 November 2012) para 312

the Court is not always forthcoming with granting these commemoration measures that the victims request. To be precise, the analysis highlighted that the Court rarely granted the requests for the establishment of a national day of remembrance; in most of the cases, it even failed to consider this measure under its analysis on satisfaction measures.[1999] As far as measures for naming schools, parks, squares, scholarships carrying the names of victims are concerned, the analysis revealed that the Court is generally supportive of this measure,[2000] directing the States to take the required measures in this regard.[2001] It is also interesting to note that according to the Court, these measures do not only have symbolic value for the next of kin but also amount to guarantees of non-repetition, having the potential to raise awareness regarding crimes.[2002] Furthermore, in what regards the victims' requests for the establishment of a museum, exhibition, parks or the erection of a monument or a plaque to commemorate the victims, the Court grants this measure in a large number of cases.[2003] Moreover, the Court pays attention to what victims want, directing the State to carry out consultations with the victims regarding for instance, the content of text on the plaque, or to ensure that victims are present during the unveiling the monument.[2004] However, in some cases the Court rejects these requests by victims, explaining that the judgment and all the other reparations measures are a sufficient and appropriate remedy for the victims.[2005] It is unclear from the body of judgments why the Court denies, for instance, the erection of monuments in certain cases; however, the denial is likely to produce the dissatisfaction of victims, especially in cases dealing with crimes against large number of victims or communities who value this sort of measure.[2006] Finally, according to the current analysis, the Court is also supportive of the victims' requests for the creation of audiovisual documentaries or books on the lives of victims in certain cases, directing the States to take measures in this regard in the majority of cases where it was requested.[2007]

Another measure of satisfaction prevalent in the Court's jurisprudence is the publication of the IACtHR's judgments, it their entirety or only relevant portions. As identified, victims generally request for the publication of the judgment in print and audio-visual media, including gazettes, newspapers with national circulation, radio, and TV. In its turn, the Court granted this measure in all of the cases where it was requested, and even in earlier cases wherein the victims did not ask for his measure. Importantly, in cases with indigenous people, the Court – as per victims' request – ordered that the judgment be published in both the official language and the local language of communities, for instance, Maya Achí in the Río Negro Massacres case, indicating once again

[1999] E.g. *Case of the "Mapiripán Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 134 (15 September 2005)

[2000] However, the Court rejected this measure in several cases, e.g. *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013) para 276

[2001] E.g. *Case of Garcia and Family Members v Guatemala* (Merits, Reparations, and Costs) IACtHR Series C No. 258 (29 November 2012) paras 210-215

[2002] E.g. *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004) para 88

[2003] E.g. *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 280

[2004] E.g., *Case of Contreras et al. v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 208

[2005] E.g. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014) para 579

[2006] E.g. *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 450

[2007] Unfortunately, the Court denied this measure in case *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014)para 579

respect to the culture of indigenous groups or communities.[2008] As Judge Sergio Garcia Ramirez in his concurring opinion in *Case of Bámaca-Velásquez v. Guatemala* argued, there are important benefits to granting this measure, including the moral satisfaction of the victims, recovery of honor and reputation that may have been sullied by erroneous or incorrect versions and comments; the establishment and strengthening of a culture of legality; and serving the truth, to the advantage of those who were wronged and of society as a whole.[2009] However, caution is required with the publication of the judgment, as making publicly available the sums of money that victims receive as compensation might result in the persecution of victims or theft.[2010]

Before concluding this section, it is important to acknowledge other measures that the victims request in some cases; however, they are not satisfaction measures as such, as they do not only aim to tackle the non-pecuniary harm suffered by victims but also appear to add a measure of rehabilitation of social and cultural aspects of the lives of victims. It can be argued that, to a certain extent, these measures resemble transformative reparation that aim to 'transform' the circumstances in which the victims lived, and that could have been one of the root causes of conflict.[2011] However, they do differ from transformative reparations in that they do not aim to fulfill end goals such as creating gender-neutral societies or alleviate poverty, but more modestly, simply aim to enhance several aspects of victims' lives. In addition, as the current analysis identified, in cases with a small number of victims these measures are mainly directed at individual victims, while in cases involving communities or indigenous people, they have a collective dimension as they aim to provide benefits to the entire community.

As such, in some of the cases, the victims requested the establishment of scholarships or vocational trainings to benefit the next of kin. However, the Court is ambivalent regarding this measure as in approximately half of the cases it directed the State to take action in this regard,[2012] while in others it rejected it, arguing that the judgment and reparations already provided constitute sufficient reparations.[2013] Other measures that the victims requested, particularly in cases involving communities and indigenous communities are: ethno-educational programs which include the creation of institutional projects, improvement of schools, access of victims to trainings;[2014] a community development plan aimed at re-establishing the life projects impaired by the human rights violations, and the reconstruction of the village;[2015] rehabilitation of the public roads and the construction of at least one health care center and one school at a place that is accessible for most

[2008] *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 274
[2009] *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) 3
[2010] See also on this topic Tom Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 380
[2011] See Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625
[2012] E.g. *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013) para 267
[2013] E.g. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 287 (14 November 2014)
[2014] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 454
[2015] In *Case of the Santo Domingo Massacre v Colombia* (Preliminary objections, merits and reparations) IACtHR Series No. 259 (30 November 2012) para 321

of the villages;[2016] creation of a center for the training and protection of women;[2017] and the development of a program which includes works of infrastructure, such as rehabilitation of road and supply of potable water.[2018] The Court's approach in regard to these measures is similarly, ambivalent, as it rejected the requests in approximately half of the cases, arguing that "is not appropriate to order these other measures that have been requested".[2019] However, in other cases, the Court granted very holistic and complex development programs, tackling all the aspects mentioned by victims, including improvement of roads and sewage systems, construction of health centers and schools, and other.[2020] In the *Plan de Sánchez Massacre Case*, the Court even ordered the State to set up a program for the study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages, while in the *Moiwana Case* it directed the State to establish a developmental fund worth 1.200.000 USD to be directed to health, housing and educational programs for the Moiwana community members.[2021] Consequently, while the Court appears reluctant to provide this kind of reparations in all the cases, the complexity of measures in the cases where it does provide these measures is remarkable.[2022] As Antkowiak expressed, referring to the reparations in the *Plan de Sánchez Massacre Case*, "this was the first time any international tribunal ordered reparations for the survivors and next of kin of a full-scale massacre. The breadth and depth of the remedies orders are impressive."[2023] Nonetheless, it appears unfortunate that not all the victims in comparable cases can benefit from the same level of reparations.

As this section showcased, the Court awards a wide range of measures, spanning from measures with retributive potential to memorialization and acknowledgment of harm incurred upon the victims. In doing so, the Court appears to be taking once again a victim-centered approach, placing at the center of awards the victims' harm and requests, and directing the States to involve them in activities designed to serve the victims whenever possible. In addition, in cases involving indigenous people, the Court generally takes a proactive stance, granting to a large extent their requests and applying a culturally appropriate perspective. Taken together, these satisfaction measures awarded by the Court have the potential to tackle the most pressing concerns of victims, as according to research, measures falling under this category, such as finding the truth about the

[2016] *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 337

[2017] *Case of Cantoral-Huamaní and García-Santa Cruz v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 176 (28 January 2007) para 153

[2018] *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No. 116 (19 November 2004) para 91 (i).

[2019] *Case of the Santo Domingo Massacre v Colombia* (Preliminary objections, merits and reparations) IACtHR Series No. 259 (30 November 2012) para 323; In the Case of the Afro-Descendant Communities, the Court furthermore referred to domestic reparations programs of housing and land-restitution. *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 461

[2020] *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 339

[2021] *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005) para 214

[2022] See Clara Sandoval, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2018) 22 The International Journal of Human Rights 1192, 1193

[2023] Tom Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 353

disappeared victims,[2024] or measures to restore the victims' dignity are preferred to compensation measures.[2025]

V. Guarantees of Non-repetition

Guarantees of non-repetition measures granted in the IACtHR context refer to several types of measures taken at the State level that aim to prevent the re-occurrence of similar crimes in the future. In general, these measures do not only aim to tackle the situation of victims in the case at hand, but also, aim to benefit the entire societies where they are enacted.[2026] In addition, they are not always easy to delineate from satisfaction measures, which may also result in deterring future violations, such as, e.g. the punishment of perpetrators.[2027] In fact, some of the cases investigated in the current research have featured both satisfaction and guarantees of non-repetition measures under the same heading of 'Other forms of reparation', referring in essence to non-monetary measures to tackle the non-pecuniary damage.[2028]

According to the current analysis, as in the case of satisfaction, measures that amount to guarantees of non-repetition started to feature prominently across the IACtHR's jurisprudence since 2000. As identified across the jurisprudence, the measures which amount to guarantees of non-repetition that victims request include different law reforms at the national level, to address impunity and/or adapt the legislation to international standards,[2029] capacity building activities such as human rights training for different categories of State employees,[2030] the creation of a truth commission to contribute to clarifying the scope of different criminal phenomena, such as paramilitaries in Colombia,[2031] as well as some other measures tailored to the case at hand. Each of these measures will be examined in the remainder of this section.

As the current research identified, the Court grants in the majority of cases the victims' requests for legislative reforms. Across several cases, the Court granted requests to adopt legislation at the national level, in line with article 2 of the ACHR,[2032] or in line with to international human rights norms and humanitarian law that ensure the protection of human rights.[2033] In addition, the Court

[2024] See Dinah Shelton, discussing reparations at the IACtHR, in Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1396

[2025] See Tom Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 388

[2026] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 212

[2027] Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 397

[2028] See e.g. *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 68

[2029] See e.g. *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 163

[2030] E.g. *Case of the Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 148 (1 July 2006) para 397 (j)

[2031] E.g. *Case of the Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs) IACtHR Series C No. 159 (25 November 2006) para 262 (a)

[2032] Article 2 ACHR refers to the obligation of States Parties to the Convention to "to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." E.g. *Case of Molina-Theissen v Guatemala* (Reparations and Costs) IACtHR Series C No. 108 (3 July 2004) para 75 (k)

[2033] E.g. *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 85

granted requests to amend national legislation due to, for instance, the incompatibility of certain articles from the (military) criminal code with the ACHR. To this his end, it directed the State to make the appropriate legislative reforms to bring the relevant articles in the criminal code in line with international standards, including the Inter-American Convention on Forced Disappearance.[2034] In another case, the Court urged the State to continue with the legislative process to codify the crime of enforced disappearance of persons.[2035] Furthermore, it is interesting to note that in some of these cases, the Court takes a strong stance against legislation or mechanisms at the national level that maintain a state of impunity, such as amnesty laws or statutes of limitations. For instance, in *Las Palmeras v. Colombia Case,* the Court maintained that the legal effect of the provisions of the American Convention would be denied if the statute of limitations available at the national level would be applied, which "rather than promoting justice, it would bring with it impunity of those responsible for the violation".[2036] In *Case Myrna Mack Chang v. Guatemala*, the Court held that the State must abstain from resorting to legal concepts such as amnesty, extinguishment, and the establishment of measures designed to eliminate responsibility to run investigations and punish those responsible.[2037] Similarly, in *Cases Barrios Altos and La Cantuta*, the Court held that Peru's amnesty laws, which granted immunity to the perpetrators of grave human rights violations, were incompatible with ACHR and, consequently, declared that they were without legal effect.[2038] Finally, in *Case Gomes Lund v. Brazil*, the Court firmly proclaimed the express incompatibility of national amnesty laws with the ACHR, holding that such laws preclude the investigation and punishment of serious human rights violations and hence, lack legal effect.[2039] Against this background, the Court's approach with regard legislative reforms at the national level, elicit a clear stance against legislation that falls short of international human rights standards, offering, in theory, protection of victims from abusive national legislation.[2040]

Furthermore, as this research identified, the Court appears supportive of the victims' requests for capacity building at the national level, likely on the presumption that educating authorities on how to deal with human rights violations will likely act as a general deterrent to future human rights violations.[2041] As such, the Court ordered the States to implement permanent programs on human rights and international humanitarian law training for the armed forces,[2042] including a children

[2034] E.g. *Case of Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 209 (23 November 2009) para 342; *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009) para 191

[2035] *Case of Gomes Lund et al. ("guerrilha do araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 219 (24 November 2010) paras 286-287

[2036] *Case of Las Palmeras v Colombia* (Reparations and Costs) IACtHR Series C No. 96 (26 November 2002) para 69

[2037] *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003) para 276

[2038] *Case of Barrios Altos v Peru* (Reparations and Costs) IACtHR Series C No. 87 (30 November 2001) para 3; *Case of La Cantuta v Perú* (Interpretation of the Judgment on Merits, Reparations, and Costs) IACtHR Series C No. 162 (29 November 2006) para 189

[2039] *Case of Gomes Lund et al. ("guerrilha do araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 219 (24 November 2010) paras 171-173

[2040] See also James L. Cavallaro and Stephanie Erin Brewer, who explain that the Court's approach in this regard has contributed to human rights advances in the wider region. James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 The American Journal of International Law 768, 820

[2041] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 212

[2042] E.g. *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013) para 274

and gender-based perspective in some cases,[2043] for the justice system,[2044] including judges, prosecutors and intelligence services,[2045] for public officials,[2046] and police.[2047] In granting these measures in all the cases where they were requested, next to the educative dimension, which on the long run might result in deterrence, the Court acknowledged once again that state agents have been involved in the perpetration of the crimes, amid a widespread context of impunity for serious human rights violations.[2048]

Finally, the Court also granted some other measures that were seldom requested by victims. They include initiatives to allow access to information related to government activities relating to the human rights violations during the internal armed conflicts,[2049] including pertinent and adequate measures to guarantee public, technical and systematic access to agents of justice and to the society to the archives containing information that is useful and relevant investigations, and[2050] to establish an official mechanism with participation by the next of kin of the victims, in charge of the following functions, including to monitor the administrative-law proceedings in connection with the facts in the case.[2051] In two cases, the victims requested the Court to order the State to "create a Truth Commission that complies with the international parameters of autonomy, independence, and public consultation"; however, the Court endorsed this measure only when the State had already taken steps by itself in this regard.[2052] As such, it appears that the Court is generally supportive of society-wide measures, although the Court has also failed to consider them in several cases or rejected them.[2053]

As this section showed, guarantees of non-repetition refer to measures which do not only aim to tackle the harm of victims in the cases at stake, but also to prevent the occurrence of similar crimes in the future, by ordering States to take certain measures which might potentially have society-wide impact. Across the jurisprudence scrutinized in this chapter, the Court generally granted these

[2043] E.g. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 369
[2044] E.g. *Case of the "Las Dos Erres" Massacre v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009) para 253
[2045] E.g. *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009) para 193
[2046] E.g. *Case of Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 209 (23 November 2009) para 346
[2047] E.g. *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003) para 282
[2048] E.g. *Case of Anzualdo Castro v Peru* (Preliminary Objection, Merits, Reparations and Costs) IACtHR Series C No. 202 (22 September 2009) para 193
[2049] E.g. *Case of Gudiel Alvarez et al. ("diario militar") v Guatemala* (Merits, reparations and costs) IACtHR Series C No. 253 (20 November 2012) para 341
[2050] E.g. *Case of Contreras et al. v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 212
[2051] E.g. *Case of the "Mapiripán Massacre" v Colombia* (Merits, Reparations, and Costs) IACtHR Series C No. 134 (15 September 2005) para 311
[2052] E.g. *Case of Gomes Lund et al. ("guerrilha do araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 219 (24 November 2010) para 297; this measure has also been requested in Pueblo Bello Massacre v Colombia Case, however, the Court did not even pronounce itself on this matter in the case.
[2053] For instance, in *Case of the Massacres of El Mozoto and nearby places v El Salvador* the victims have asked the Court to order the State to eliminate the names of those identified as responsible for the massacres from any public institution, as well as to prohibit any means of honoring them (para 372), however, the Court did not consider it appropriate to order this measure. *Case of the Massacres of El Mozote and Nearby Places v El Salvador* (Merits, reparations and costs) IACtHR Series C No. 252 (25 October 2012) para 375. In *Myrna Mack Chang v Guatemala Case,* the Court did not order the dissolving the Presidential General Staff, contrary to the requests echoed in the case. *Case of Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 101 (25 November 2003) para 270

measures that the victims requested. If implemented, these measures have the potential to contribute to the construction of a general order where human rights can be fully guaranteed.[2054]

VI. Conclusion

The section above provided an illustration of the IACtHR reparations regime, through the lens of substantive justice. It consists in a thorough analysis of all reparations measures awarded under article 63(1) ACHR in 38 cases of gross human rights violations adjudicated by the IACtHR. The goal of this section was to assess the potential justice actualized through the *de facto* reparations awarded by the IACtHR.

Although article 63(1) ACHR provides in a rather general language the reparations measures to be provided to victims, as this section highlighted, the Court interpreted article 63(1) in a progressive manner and awarded a whole range of reparations measures, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. As Judge Sergio Garcia Ramirez, the then President of the Court, explained: [2055]

"*The evolution of the Court in reparations over the last fifteen or twenty years has been enormous. The Court's decisions on the merits have not been many, but […] the Court has advanced many issues and has demonstrated considerable advancements in the legal consequences of illicit conduct*."

As the analysis revealed, the Court appears to be granting to a large extent the various reparations requests that victims put forward before the Court. *Restitutio in integrum* (full restitution) appears to be the baseline for reparation awards; however, the Court acknowledged that the principle does not appear to be relevant in the cases of gross human rights violations investigated in the current research due to the severity of crimes. In addition, as the current analysis revealed, the Court appears to be granting in large part the restitution measures requested by victims, which do not amount to full restitution but aim to tackle some of the consequences of the crimes at stake. Furthermore, since early jurisprudence, compensation has been the 'primary' measure to be awarded by the IACtHR, with the Court deeming it a feasible alternative to *restitutio in integrum*.[2056] In addition, since its first contentious case, the Court has interpreted the provision on compensation and has explained that it can be awarded in account of pecuniary and non-pecuniary damages, including emotional harm.[2057] Furthermore, as the current analysis revealed, the Court appears to be granting the victims' requests for pecuniary damage in the large majority of cases – although at a lower level than the level requested by victims. They are usually provided in account of loss of income of the direct victim, consequential damage for the indirect victims, and in exceptional cases in account of damage to family assets. In regard to non-pecuniary awards, the Court similarly grants in the majority of cases the victims' requests, and in addition, the level of

[2054] See also Geneviève Lessard, 'Preventive Reparations at a Crossroads: The Inter-American Court of Human Rights and Colombia's Search for Peace' (2018) 22 The International Journal of Human Rights 1209, 1211

[2055] Judge Sergio Garcia Ramirez discussing the history of the jurisprudence on reparations at the IACtHR, in Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1430

[2056] E.g. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 46

[2057] *Case of Velásquez-Rodríguez v Honduras* (Reparations and Costs) IACtHR Series C No. 7 (21 July 1989) para 26

awards granted by the Court is, on average, approximately 28% higher than the level of awards requested by victims. The Court does not require evidence for the moral harm, and deploys assumptions of the existence of harm incurred by the crimes in regard to both the direct and indirect victims. Furthermore, as the research identified, the awards for non-pecuniary damages that the Court awards in account of the direct victims are rather standardized, with 80.000 USD being the average sum that is awarded. This is in contrast with the non-pecuniary damages in account of indirect victims, which vary more across cases. However, some cases where the awards for non-pecuniary damage differ from the baseline of 80.000 USD provided some insights into what might influence the Judges' reasoning. As such, they potentially include a value judgment by the Judges of the facts at stake, as cases involving gross human rights violations against justice officials or an indigenous group leader feature higher awards. In addition, the number of victims in the case appears to also influence the awards, with cases involving dozens or more victims featuring up to 70% lower awards. As posited in the section on compensation, in these cases, the Court appears to be taking into account the end sum of money that the State has to pay; however, these awards result in potentially discriminatory treatment of victims across similar cases.

Furthermore, as far as rehabilitation measures are concerned, the current analysis revealed the Court's supportive approach to rehabilitation, granting the victims' request for medical services to tackle the harm at the individual and family level, as well as at a collective level, when required. In addition, the Court's approach appears to be victim- and culturally- oriented, as the Court is placing emphasis on the assessment of each of the victims in view of the medical treatment to be provided, as well as acknowledges the several layers of harm suffered by victims, including the psychosocial impact of crimes in the cases involving communities or indigenous people. With regard to the latter group, the Court acknowledged the importance of culturally appropriate health care, involving victims themselves in designing together with the State modalities of health care that best suit their needs.[2058]

Finally, in what concerns the satisfaction and guarantees of non-repetition measures, as the Court held, they represent non-pecuniary measures provided in account of non-pecuniary harm. According to the current study, these measures started to feature amongst the victims' requests for reparations starting with 2000. It is possible that this change was influenced by the then newly acquired standing of victims or their legal representatives during Court proceedings, enabling them to be more outspoken with regard the reparations measures they wished to receive.[2059] At the same time, the Court's expansion of awards on satisfaction and guarantees of non-repetition measures could also represent a denunciation by the Court of the large number of gross human rights violations as well as reflect the Court's efforts to improve the human rights situation in Latin America and the prevailing impunity.[2060] As such, as this research revealed, the Court granted extensive satisfaction measures across its jurisprudence, which include "investigations at the national level, to capture, try, and punish those responsible for the crimes committed, measures to establish the truth and inform the victims and the societies about the facts of the cases, to retrieve the remains of disappeared victims and deliver them to the family for burial ceremonies, to

[2058] *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 289

[2059] The evolution of the victims' role before the ICtHR is explained at large in section 3.2.2. on Procedural Justice.

[2060] See Eleonora Mesquita Ceia discussing how the Court has contributed to the development of normative standards for different transitional justice processes in Latin America, in Eleonora Mesquita Ceia, 'The Contributions of the Inter-American Court of Human Rights to the Development of Transitional Justice' (2015) 14 The Law and Practice of International Courts and Tribunals 457, 466

acknowledge the State's responsibility in the commission of the crimes and apologize, to commemorate the (disappeared or deceased) victims and preserve their memory, and to publish the judgment. In doing so, the Court appears to be taking once again a victim-centered approach, placing at the center of awards the victims' harm and requests, informed by their needs and wishes, and directing the States to involve them in activities designed to serve the victims whenever possible. In addition, as far as guarantees of non-repetition measures are concerned, the Court similarly granted to a large extent the victims requests. The measures the Court granted include legislative reforms, capacity building, and other individual measures tailored to the case as hand, such as for instance, the establishment of a Truth Commission or opening national archives which contain information to the internal armed conflict for the use of victims and the society.

Due to the extensive character of reparations that the IACtHR awarded, the Court's approach was hailed across literature. Authors contend that the IACtHR system crafted the most comprehensive and holistic approach to reparations under international human rights law, which benefited many victims across the region.[2061] The reparations were praised as responding to the many needs of victims,[2062] and while Cassel asserted that the Court's approach endeavors to attain the elusive ideal of justice for victims of crimes,[2063] Hennebel posited that the Court is contributing towards the establishment of a real human rights and justice culture across the region.[2064] The current research, in its turn, showcased through a systematic empirical analysis the Court's impressive awards, attempting to respond to the victims' harm in a comprehensive manner, while also taking into account their preferences for reparations. Against this background, the Court's potential contribution to substantive justice for victims under the IACtHR jurisdiction can be appraised as positive. Since its very first case, the Court adopted an expansive interpretation of article 63(1), building into its case law the victims' preferences, and evolving constantly its reparations awards. This is not only the merit of the Court, but also of the Commission and of the victims (and their legal representatives affiliated with NGOs), who have pushed the Court continually to grant more extensive reparations, as evident from their submissions throughout the cases.[2065] In addition, throughout its jurisprudence, the Court appears to have adopted a victim-centered approach.[2066] It has done so by, for instance, placing the victims' needs at the center of rehabilitation measures and attempting to tackle the multi-faceted harm that victims have suffered. In addition, it has emphasized the victims' involvement and participation in many of the measures awarded, for instance, in national investigations, at ceremonies of acknowledgement of responsibility by the State, or in regard to commemoration activities. Furthermore, the Court has also been progressive in the cases involving indigenous groups or communities, issuing reparations that have positioned

[2061] See Clara Sandoval, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2018) 22 The International Journal of Human Rights 1192, 1192-1204

[2062] Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) Revue Québécoise de Droit International 57, 65

[2063] Douglass Cassel, 'The Expanding Scope And Impact Of Reparations Awarded By The Inter-American Court Of Human Rights' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 91

[2064] Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) Revue Québécoise de Droit International 57, 71

[2065] See also Douglass Cassel, 'The Expanding Scope And Impact Of Reparations Awarded By The Inter-American Court Of Human Rights' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 99. He acknowledged, amongst other factors, the creativity of jurists at the Court as one of the reasons for the evolution of the IACtHR's jurisprudence on reparations.

[2066] See also Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 191

the Court as the first tribunal to provide extensive reparations for the survivors and next of kin of a full-scale massacre.[2067]

Notwithstanding these accomplishments, one final observation needs to be put forward when assessing the Court's potential contribution to substantive justice. It relates to the States' implementation of the reparations awards. In theory, due to the binding character of the IACtHR's judgments,[2068] the States should implement all the reparations awarded by the Court.[2069] However, according to several studies that researched the States' implementation of the IACtHR's judgments, the implementation is not always forthcoming and in addition, is influenced by a multitude of factors at the national level.[2070] However, it has to be acknowledged that these studies focused on the entire case law of the Court, and not only on cases of gross human rights violations. According tot these studies, States paid compensation for pecuniary and non-pecuniary damage 50% of the time,[2071] and this was reported as the measure that States implement the most.[2072] Satisfaction and guarantees of non-repetition measures were adopted with less consistency.[2073] As such, studies report that States implement orders for more symbolic forms of reparations, such as those concerning public ceremonies acknowledging the States' responsibly and commemorating victims.[2074] In addition, States' implementation of measures to punish perpetrators or to alter government behavior in a way that ends the violations of rights was relatively low. Alexandra Huneeus explained that the Court never declared full compliance with measures to punish perpetrators;[2075] however, Darren Hawkins Aand Wade Jacoby estimated the partial compliance at 13-19%.[2076] In addition, the rate of implementation was estimated at only 5% with regard to guarantees of non-repetition measures focused on changing the laws, government rules and

[2067] Tom Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 353

[2068] ACHR, art 67

[2069] As opposed to the ECtHR, there is no mechanism in place to monitor the States' implementation of IACtHR judgments, and, as such, after 1996, the Court took it upon itself to monitor the compliance by requesting reports regarding the States' actions from victims, legal representatives, and the Commission. See Darren Hawkins Aand Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (Annual Meeting of the American Political Science Association, Boston, MA, 28-31 August 2008) 16-17

[2070] E.g. James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 The American Journal of International Law 768; Jo M. Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 1; Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493

[2071] According to Darren Hawkins Aand Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (Annual Meeting of the American Political Science Association, Boston, MA, 28-31 August 2008) 27. Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493, 507

[2072] Darren Hawkins Aand Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (Annual Meeting of the American Political Science Association, Boston, MA, 28-31 August 2008) 27

[2073] Santiago A. Canton, then Executive Secretary of the Inter-American Commission on Human Rights, talking about Compliance With Decisions On Reparations: Inter-American And European Human Rights Systems in Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1453

[2074] James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 The American Journal of International Law 768

[2075] Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493, 508

[2076] Darren Hawkins Aand Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (Annual Meeting of the American Political Science Association, Boston, MA, 28-31 August 2008) 27

institutions to ensure that violations will not occur again.[2077] The provision of human rights trainings for national security forced was estimated at a high of 50%.[2078]

In sum, these studies posit that while States are more likely to implement the compensation measures, on the contrary, measures that require complex and concerted efforts at the State level are less likely to be implemented.[2079] However, they also reveal that the Court's potential to contribute to substantive justice for victims, as elicited by the current analysis, is clouded by the rather scarce implementation of the reparations measures by States. This does not necessarily mean that the Court should be less victim-centered in its reparations awards or order less progressive reparations measures. On the contrary, it should continue doing its work, and potentially also engage in a dialogue with the national organs in charge with implementation, to identify how the States' implementation with IACtHR reparations could be fostered.[2080]

4. Final Considerations: Reparative Justice at the IACtHR

The IACtHR came into existence in 1979, through the adoption of the ACHR, after a long period of political negotiations amongst States on how to strengthen the regional human rights protection in the Americas. The adoption of the ACHR and the States' Parties commitment to "a system of personal liberty and social justice, based on respect for the essential rights of individuals",[2081] stated in the ACHR's preamble, represented the culmination of work started as early as the Second World War. However, the Cold War, the political climate in Latin America, and the general reluctance of States to have other States or bodies intervene in their internal affairs stalled the individuals' human rights protection in Latin America for a significant amount of time. [2082] In fact, even the adoption of the ACHR was met with skepticism, with authors arguing that the expansive rights included within the ACHR and its ratification by several States signaled a sham 'allegiance

[2077] Darren Hawkins Aand Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (Annual Meeting of the American Political Science Association, Boston, MA, 28-31 August 2008) 27

[2078] Tom Antkowiak, 'An Emerging Mandate For International Courts: Victim Centered Remedies And Restorative Justice' (2011) 47 Stanford Journal Of International Law 279, 306

[2079] Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493, 507; Darren Hawkins Aand Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (Annual Meeting of the American Political Science Association, Boston, MA, 28-31 August 2008) 45. It is interesting to note that these studies have also attempted to explain the overall low implementation rates, with a study positing that sufficient pressure from local actors such as media, strategic advocacy campaigns and public or governmental support for an issue, can bring about the implementation of judgments; James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 The American Journal of International Law 768, 818. Another study has identified that reparations measures that require the agreement of the executive branch, the public ministry, and the judiciary have implementation orders as low as 2%. Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493, 509. Other authors posit that institutional capacity and political will are determinative of the States' implementation of IACtHR reparations. Tom Antkowiak, 'An Emerging Mandate For International Courts: Victim Centered Remedies And Restorative Justice' (2011) 47 Stanford Journal Of International Law 279, 307-309; Santiago A. Canton, then Executive Secretary of the Inter-American Commission on Human Rights, talking about Compliance With Decisions On Reparations: Inter-American And European Human Rights Systems in Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1454

[2080] See Huneeus' interesting proposal for regional judicial dialogue amongst IACtHR judges and national judges and prosecutors, particularly on the issues that frequently obstruct compliance. Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493, 531-532

[2081] ACHR, preamble

[2082] Scott Davidson, *The Inter-American Human Rights System* (Darmouth Publishing Company, 1997) 11-13

to constitutional democracy', given the doubtful commitment to human rights prevailing in the Americas at that time.[2083] Indeed, when the Court came into existence, States in Latin America were plagued by dictatorships which perpetrated gross and systematic human rights violations, and human rights State-sponsored forced disappearances, extrajudicial killings, and torture were commonplace.[2084] However, some authors perceived the adoption of the ACHR and the establishment of the Court as a signal of the acute need for international protection in the Americas.[2085]

With its establishment, the Court became mandated to hear cases – under its contentious jurisdiction - brought for adjudication by the Commission, pursuant to individual petitions alleging human rights violations by the States Parties. As such, the adoption of the ACHR enhanced the protection of individuals' human rights as it enabled individuals aggrieved by human rights violations at the national level to bring claims against their own States at a regional human rights level. Furthermore, the Court became mandated to provide reparations to individuals whose human rights were breached by States. Pursuant to article 63(1) ACHR, if the Court finds that a State was in violation of the human rights of an individual, it shall rule that the injured party be ensured the right or freedom violation and "that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".[2086] Given the regional political climate existing when the IACtHR was established, many skeptics doubted that the Court would receive support and have impact on the Latin American territory.[2087] Indeed, due to the Commission's initial reluctance to refer cases to the Court, it was only seven years after the Court's establishment that it received its first contentious case from the Commission.[2088] Starting with *Velásquez-Rodríguez v. Honduras case*, the Court developed an impressive jurisprudence, which through the processes and outcomes of the reparations proceedings, has the potential to contribute to reparative justice for victims under the Court's jurisdiction. Nonetheless, this research highlighted important barriers to the victims' access to justice before the Court, due to the legal architecture of the Inter-American system, the Commissions' interpretation of its functions or potential obstructions at the State level. As illustrated above, the number of cases that make it before the Court is extremely limited; to shortly recap, of the 24.000 applications that the Comission received between 2006-2018 and the cases sent to the Court are close to 200, which means that on average only 0.8% of the cases end up referred to the Court.[2089]

Bearing in mind this caveat, the current chapter aimed to assess the IACtHR's potential contribution to reparative justice - defined in terms of procedural justice and substantive justice – for the victims under its jurisdiction, taking into account the IACtHR's reparations regime and the jurisprudence developed since its establishment, focusing on reparations. The jurisprudence

[2083] Robert K. Goldman, 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly 856, 867

[2084] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 6; Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, and Morals* (second edition, Oxford University Press, 2000) 869

[2085] Thomas Buergenthal, 'The American Convention on Human Rights: Illusions and Hopes' (1971) 21 Buffalo Law Review 121, 122

[2086] ACHR, art 63

[2087] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 6

[2088] *Case of Velásquez-Rodríguez v Honduras* (Preliminary Objections) IACtHR Series C No. 1 (26 June 1987) paras 1 and 10

[2089] As per statistical data retrieved from 'Statistics' (OAS Website)

analyzed in the current chapter consisted in 38 cases dealing with gross human rights violations. As the analysis revealed, the Court's potential contribution to procedural justice for victims under its jurisdiction witnessed a gradual improvement across time and made great strides to afford victims a place in the Inter-American system. In terms of voice, interaction, and information afforded to victims during IACtHR proceedings on reparations, the study revealed that the victims' experience with the legal representatives, coupled with the fact that several victims per case can interact by themselves with the Judges during court proceedings, may translate into the victims' general satisfaction with the process of obtaining reparations at the IACtHR. However, the study also identified several caveats, which indicated that, from a procedural justice perspective, there is room for improvement in providing victims with meaningful participation in the IACtHR reparations process.[2090] In terms of substantive justice, the study identified that the Court has constantly evolved the content of reparations measures provided to the victims. While in its early days the reparations were solely limited to compensation, the Court's judgments nowadays feature impressive reparations measures, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. This study concluded that the Court appears to be responding to a large extent to the majority of victims' requests for reparations, by applying a victim-centered approach and by taking into account culturally related aspects in many cases involving communities and/or indigenous people.[2091]

Against this background, it can be asserted that the IACtHR's potential contribution to reparative justice for victims under its jurisdiction can be appraised as generally positive. One of the most important factor to this positive assessment is the Court's victim-centered approach in what concerns both the process and outcome of the reparations proceedings. When the Court came into existence, its stated aim was the application and interpretation of the ACHR,[2092] with a view to protecting human rights, by judging on the human rights violations by States and providing reparations to the injured party.[2093] Since its first contentious case, the Court added more clarity to this objective and held that its vision of international human rights law "is […] to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible".[2094] However, as scholars and Judges at the IACtHR later clarified, the Court interpreted the ACHR and developed its jurisprudence in light of its objective and, as such, adopted a *pro homine* interpretation.[2095] The *pro-homine* interpretation signifies that American Convention must be interpreted in favor of the individual, who is the object of international protection.[2096] Equally, it can also be labelled a victim-centered approach, hinted at in several instances in this

[2090] See above section 3.2.2.
[2091] See above section 3.2.3.
[2092] 'Statute of the Inter-American Court of Human Rights' (OAS, 1 October 1979) art 1
[2093] ACHR, art 63
[2094] *Case of Velásquez Rodríguez v Honduras* (Merits) IACtHR Series C No. 4 (29 July 1988) 134; on another occasion the Court has held that "Their [modern human rights treaties such as the ACHR] object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality". *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (arts. 74 and 75)*, Advisory Opinion oc-2/82, IACtHR Series A No 2 (24 September 1982) para 29
[2095] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 12; Judge Sergio Garcia Ramirez discussing the history of the jurisprudence on reparations at the IACtHR, in Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1430; Sergio Garcia Ŕamiŕez, 'The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions' (2015) 5 Notre Dame Journal of International & Comparative Law 115, 130
[2096] *In the matter of Viviana Gallardo et al*., Advisory Opinion No. G 101/81, IACtHR Series A (1984) paras 15-16

chapter. The objective to protect the victims and provide them with reparations has become central throughout the Court's adjudication of cases, and translated into a progressive interpretation of the Convention,[2097] maintaining a victim-oriented outlook.[2098] As such, the *pro-homine* interpretation can be particularly noticed in Court's potential contribution to substantive justice, responding to a large extent to the victims' harm and requests, and emphasizing their needs and participation in the various forms of reparations. As asserted above, the wealth of reparations awards is equally the result of relentless work by the victims, legal representatives and NGOs, as well as the Commission; however, the argument here is that the Court, likely due to its *pro-homine* approach, attempted to respond to the victims' individual and collective harm, while also taking into account to their preferences. Additionally, the IACtHR's outlook on collective harm in cases involving indigenous people or communities has a culturally-oriented dimension.

Despite the preponderant inclination of the Court to embrace this approach in the reparations awards, thus potentially contributing to substantive justice to victims, in what regards the procedural justice afforded to victims before the IACtHR, as detailed above in Section 3.2.2., the *pro-homine* approach appears to be less developed. This is the case amid a lack of possibility for victims to submit claims before the Court, the limited – although existent – participation of victims during trials, as well other challenges in relation to voice, interaction, and information as detailed above. In addition, in relation to the reparation awards, the Court's approach in certain cases reveal an 'altered' version of the *pro-homine* approach, where what the victims want is not central anymore but is weighted against other factual or political considerations. This concerns in particular the cases with dozens or hundreds of victims, where the Court awarded compensation at a significantly lower rate than in cases adjudicating comparable crimes with a low(er) number of victims. In addition, in some recent cases where the States submitted documentation that victims may receive reparations through national reparations programs, the Court accepted these submissions and failed to award its own reparations. As discussed at large above, the Court's approach in both categories of cases may not be perceived victim-oriented but discriminatory (when comparing the awards across cases with lower number of victims, yet similar crimes at stake; or when comparing the awards across cases where the Court has adjusted the reparations awards to reflect IACtHR, despite proof of national reparations programs by States). It is possible that the Court is embracing an 'altered version' of the *pro-homine* approach when it clashes with other considerations, such as the State's economic situation[2099] or the State's capacity to manage on its own the internal human rights situation in transitional justice situations spanning across many years.[2100] While this is not problematic in and of itself, as reparations awards may require such compromises in complex situations, it may become problematic when the Court applies different standards in comparable cases, as it may weaken the protection of the victims' right to reparations.

[2097] Clara Sandoval, 'Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes' (2018) 22 The International Journal of Human Rights 1192, 1118

[2098] Tom Antkowiak, 'An Emerging Mandate For International Courts: Victim Centered Remedies And Restorative Justice' (2011) 47 Stanford Journal Of International Law 279, 282-283

[2099] *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 124 (15 June 2005); see above section 3.4.2 under non-pecuniary heading.

[2100] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 470; see above section 3.4.2 under non-pecuniary heading.

In addition to the Court's *pro-homine* interpretation, albeit connected, another factor in the Court's potential contribution to reparative justice for victims is the initial political context in which the Court developed. As explained above, the Court was established in a period of time when several States in the Western hemisphere were plagued by dictatorships; consequently, gross and systematic human rights violations, such as forced disappearances, extrajudicial killings, and torture were a common occurrence.[2101] Amid this situation, a strong position by the Court against impunity and in favor of human rights promotion represented an opportunity to establish itself as an authority in the protection of human rights, but also an urgency to rescue the legal order on the Latin American continent.[2102] As such, as can be noticed throughout the jurisprudence on reparations, the Court's reparations awards started timidly, potentially in an attempt by the Court to gain acceptance amongst States Parties.[2103] However, after 2000, the victims gained *locus standi* in the IACtHR trials, and the Court's reparations awards moved beyond mere compensation or limited reparations to include clear direction for the States to punish perpetrators, carry out investigations, amend amnesty laws and provide human rights trainings to armed forces and Judges. While some authors criticize the 'criminalization' of human rights law,[2104] the current research asserts that the Court's stance against impunity, amid the situation in Latin America, has spurred it to take a stronger approach in the reparations measures it directed States to implement for the benefit of victims, which have ultimately contributed to providing reparative justice to victims.[2105] However, this analysis also problematized the challenges in actually implementing these reparations measures, as highlighted by various studies looking at compliance. Despite the Court's wide range of reparations it awards, States tend to be more likely to implement the compensation awards, and less likely to implement measures that require concerned action across different branches. However, this reality is not a failure of the Court's potential contribution to reparative justice, but rather an indication of the need to engage further efforts (such as dialogue with the States) to enhance the implementation of the IACtHR' reparations measures.

Looking back at the Court's evolution since its establishment, its reparations framework, and jurisprudence, the Court's potential contribution to reparative justice for victims under its jurisdiction can be appraised as positive. There are challenges and caveats, as exposed above and, not to be forgotten, the IACtHR is a court of last resort that can hear only a limited number of

[2101] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 6; Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, and Morals* (second edition, Oxford University Press, 2000) 869

[2102] See Judge Sergio Garcia Ramirez discussing the history of the jurisprudence on reparations at the IACtHR in Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1433

[2103] Cassel explained in his article that the Court steadily gained acceptance among Latin American States, thereby enhancing its institutional self-confidence; Brazil's and Mexico's acceptance of the Court's jurisdiction in 1998, in addition to all the other States accepting before, ensured an almost universal Latin American participation. Douglass Cassel, 'The Expanding Scope And Impact Of Reparations Awarded By The Inter-American Court Of Human Rights' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 99

[2104] See Mattia Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34(2) Utrecht Journal of International and European Law, p. 181; Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 American University International Law Review 195, 227-228

[2105] See for instance, Christina Binder, who researched the Court's impact on amnesties across States in Latin America. She concluded that impact of the IACtHR lawmaking as far as amnesties as concerned is considerable. Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German Law Journal 1203

cases, hence the number of victims benefiting from reparative justice at the IACtHR is extremely limited. In addition, the scarcity of empirical research is also problematic, as it would generate a better understanding of how the victims themselves perceive the Court and the Inter-American System.[2106] However, the IACtHR and its progressive approach are a testament to the importance of embracing a victim-centered approach in the interpretation of the reparations mandate, if a Court is indeed placing the harmed individual at the center of its processes and outcomes.

[2106] The NWO Vidi project 'What's law got to do with it? Assessing the contribution of international law to repairing harm' entails forthcoming empirical research with 30 beneficiaries of reparations in the *Case of the Rio Negro Massacres v Guatemala* and 30 non-beneficiaries, victims of other massacres that have not been considered by the IACtHR. The empirical research is designed and coordinated by Mijke de Waardt, in cooperation with a local team in Guatemala, coordinated by Glenda Garcia Garcia, and including Haydée Valey and Otto Ical Coy. Dora Miron has an advisory role.

Chapter 7: Conclusions

Introduction

The theoretical framework chapter illustrated how reparations in the context of international courts may contribute to reparative justice for victims of mass atrocities. In addition, drawing on previous studies in social psychology and victimology, the chapter introduced a taxonomy on reparative justice to assess the international courts' reparations regimes and their potential contribution to reparative justice. The taxonomy developed in this study consists in elements pertaining to procedural justice (consisting in voice, information, interaction, and the length of proceedings) and substantive justice (i.e. outcome viewed as tangible reparations that respond to victims' harm and preferences) whose realisation may potentially contribute to reparative justice for victims.

Bearing in mind the taxonomy on reparative justice, the next four chapters focused on the potential contribution to reparative justice of four international courts with reparations mandates, namely, the ICC, the ECCC, the ECtHR, and the IACtHR. Each of the chapters entail comprehensive analyses. They depict the institutional evolution of each of the courts, focusing on their establishment, approach to victims and their rights, as well as characteristics of their reparations regimes. Furthermore, they illustrate how each of the courts transposed their reparations regime throughout their practice on reparations for international crimes and gross human rights violations as well as reflect on what the potential implications for victims under their jurisdiction might be. Finally, they assess how each of the courts may potentially contribute to reparative justice for victims through their reparations regimes. Importantly, these analyses were realized by employing a qualitative data analysis software – Atlas.ti – which enabled robust and systematic identification, coding and analysis of all elements pertaining to procedural justice and substantive justice throughout the courts' entire practice on reparations for mass atrocities. In total, over 135 judgements and 150 other documents including legal representatives for victims' submissions, Trust Fund for Victims' submissions and Trial Days transcripts were coded and analyzed.

In what follows, this final chapter is divided into two sections.

This first section will bring together the findings of the previous chapters and will provide an answer to the main research question:

How do international courts mandated to provide reparations potentially contribute to reparative justice for victims of international crimes and gross human rights violations through their reparations regimes and additionally, how can their potential contribution be explained?

Drawing on the theoretical framework as well as the chapters showcasing how each of the courts may potentially contribute to reparative justice for victims under their jurisdiction, this section will put forward a general reflection on how international courts that are mandated to provide reparations may contribute to reparative justice for victims of mass crimes. The section will adopt a comparative approach to highlight in a comprehensive manner the differences and similarities across courts, focusing on their underlying legal frameworks and reparations regimes, the diverse interpretation of concepts that inform them, and the potential consequences for the victims. The comparison will focus on both differences between ICL-based courts such as the ICC and the ECCC versus IHRL-based courts such as the ECtHR and the IACtHR and differences between

courts governed by the same body of law. In addition, the section will also highlight several aspects that help to explain their potential contribution to reparative justice through the reparations regimes. They may be internal (such as the legal framework and its application and interpretation by Judges) and external (such as the normative background permeating the courts' legal framework and its evolution across time, the involvement of actors external to courts such as NGOs, and the inevitable reliance on the accused and States to actualize the courts' reparations regimes). By and large, this section will constitute one of the most complex and comprehensive overviews existing in the literature to date, highlighting the legal characteristics, standards, and practices around reparations in the context of international courts, combined with an articulation of the aspects that help to explain the courts' potential contribution to reparative justice

The second section will reflect on possible implications flowing from this research's findings. It will discuss the need to rethink the notions and elements pertaining to procedural justice and substantive justice utilized in this study to conceptualize reparative justice in the context of international courts. In addition, it will put forward recommendations for international courts mandated to provide reparations to enhance their potential contribution to reparative justice as well as will reflect on the suitability of including a reparations regime and aspirations of reparative justice within the mandate of international courts to respond to mass atrocities.

1. International Courts' Potential Contribution to Reparative Justice for Victims of Mass Crimes through their Reparations Regimes

1.1. Limited Beneficiaries of Reparative Justice

The aim of this research was to assess the courts' potential contribution to reparative justice by means of reparations for victims under the respective courts' jurisdictions, by employing a taxonomy on reparative justice informed by the procedural justice-substantive justice dichotomy. While this remained the core goal and the results provided throughout this research focus exclusively on the potential beneficiaries of reparative justice in the context of these courts, one important aspect revealed by this research is their limited nature as to the scope of beneficiaries. As this section will show, the population of victims potentially benefiting from reparative justice in the context of international courts is circumscribed by a multitude of layers of selection that are both common and specific to both sets of courts. Consequently, the emerging population of potential beneficiaries constitutes only a fraction of the number of victims suffering in situations of mass victimisation such as those under the courts' jurisdiction.

To begin with, both ICL and IHRL-based courts feature layers of selection which circumscribe the population of victims potentially benefiting from reparative justice in the context of international courts. ICL-based courts have in place layers pertaining to their respective *ratione materiae, personae, loci* and *temporis* jurisdictions, the mandates and their manner of interpretation by various court organs. The latter include the prosecutors who open investigations focusing on specific crimes for which legal evidence must be established at a certain legal standard, the victims' units and the public information sections that carry out outreach and inform victims of their rights and potential role before courts, and the Judges who appraise the facts, decide on the admissibility of victims' applications, and award reparations to victims after an accused has been found guilty of harm warranting repair. In their turn, IHRL-based courts feature similar layers of selection pertaining to their *ratione materiae*, *loci,* and *temporis* jurisdictions as well as the mandates and the manner of interpretation by court organs. The latter include the Inter-American Commission

and the ECtHR that decide on the admissibility of victims' applications as well as the Judges, who appraise the facts and may award reparations to victims after a State was found in violation of their human rights. In addition, interference at the State level might constitute an additional barrier to victims' access to international courts.

As can be inferred, the layers of selection can be both common and specific to both sets of courts. First, both sets of courts entail jurisdictional limitations that limit the potential beneficiaries of reparative justice. Furthermore, both sets of courts feature layers pertaining to the mandates and their manner of interpretation by various court organs. However, the main difference between ICL and IHRL-based courts is that ICL-based courts entail organs performing prosecutorial and outreach and information functions. As such, the victims in the context of ICL-based courts are foremost dependent on the opening of an investigation by prosecutors into the crimes they suffered, and then on the outreach and information provided by relevant units once a case comes before the court. Only then, victims may submit applications before ICL-based courts to denounce their victimisation and avail themselves of their rights. In contrast, in the context of IHRL-based courts, it falls on the victims to put forward applications alleging human rights violations, in order for courts to begin considering their cases. The different approaches entail that the IHRL-based courts would potentially enable all victims alleging human rights violations to put forward applications, without dependency on prosecutorial and outreach functions, and thus benefiting more victims than ICL-based courts. However, in practice, victims do not necessarily have knowledge about the existence of courts and the possibility of putting forward applications, particularly since IHRL-based courts do not feature outreach and information functions.[2107] In addition, IHRL-based courts appear to operate under an assumption that victims would understand the complexities inherent in submitting applications as well as have the resources necessary of pursuing international judicial proceedings. As Hodson put it, the idea that victims will seek out judicial remedies for their human rights violations is based on "lawyerly optimism rather than on sociological realism".[2108] This is all the more the case for victims of mass atrocities, who bear the scars of massive harm and trauma,[2109] and for whom pursuing judicial proceedings would not only represent a heavy burden psychologically, but would also entail a challenge to their shattered trust in justice institutions.[2110]

Moreover, the potential population of beneficiaries before both sets of courts is limited by admissibility criteria and their manner of interpretation by the responsible organs. It generally falls on the Judges to decide on applications according to the courts' admissibility criteria after an initial evaluation by the courts' administrative units. However, in the Inter-American Human Rights System, it is the Inter-American Commission and not the Inter-American Court that decides on the applications' admissibility. Moreover, IHRL-based courts feature more complex admissibility criteria than ICL-based courts. In addition to requirements relating to form, the applications must prove the exhaustion of national remedies, must be submitted within six months from the final decision at the national level, must not be considered by other international investigations, as well as must prove the existence of harm as a consequence of a violation of human rights captured in

[2107] As also asserted by e.g. Loveday Hodson, *NGOs and the Struggle for Rights in Europe* (Hart Publishing, 2011) 86
[2108] Loveday Hodson, *NGOs and the Struggle for Rights in Europe* (Hart Publishing, 2011) 86
[2109] See See Yael Danieli, 'Massive Trauma and the healing role of reparative justice' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 50
[2110] Nora Sveaass, 'Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation' (2013) 4 European Journal of Pshychotraumatology 1, 3

the respective human rights Convention.[2111] In practice, over 90% of victims' applications are dismissed for alleged failure to adhere to the admissibility criteria before the cases make it before courts.

In the context of ICL-based courts, in addition to requirements relating to form, the victims' applications must show the existence of harm as a result of crimes an accused is charged with.[2112] In practice, the failure to establish the causal link between the victims' harm and the crimes charged to the accused appears to be the main ground for the dismissal of applications.[2113] However, the applications are reviewed on a case-by-case basis and a clear-cut rate of dismissal cannot be put forward.[2114] As can be inferred, the admissibility criteria are more restrictive in the context of IHRL-based courts, as opposed to ICL-based courts, which result in a large number of victims being denied access to IHRL-based courts. Nonetheless, it is challenging to assess which set of courts has the potential to enable more victims to benefit from reparative justice. Each of them possess their specific characteristics which entail different implications for victims. IHRL-based courts are courts of last resort that demand that a multitude of admissibility criteria are satisfied, including the exhaustion of national remedies,[2115] whereas ICL-based courts center on the criminal responsibility of individuals whereby individuals have to be formally charged with the commission of crimes falling under the jurisdiction of the court before applications can even be submitted. As such, the main conclusion of this illustration is that admissibility criteria and their manner of interpretation by the responsible organs limit the number of beneficiaries before IHRL and ICL-based courts.

A final issue at stake concerns potential barriers at the State level that might interfere with the victims' access to international courts. They include threats and other intimidating techniques that might jeopardize the safety of victims and that of their lawyers. As reported, in the context of IHRL-based courts this is an actual risk for many victims and their lawyers attempting to denounce and bring cases against certain States.[2116] In the context of ICL-based courts, the cases are opened pursuant to investigations carried out by international prosecutors, and as such, similar barriers to preclude victims from bringing cases before ICL-based courts are not applicable. However, there is some evidence showing that fear of reprisals is also present for some victims in the context of

[2111] ECHR, art 35. ACHR, artts 46-47

[2112] ICC's RPEs, Rule 85(b); ECCC's Internal Rules, Rule 23 bis (1)(b)

[2113] See *Lubanga case* (Pre-Trial Chamber I, Decision on the Application for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6) ICC-01/04-01706-172-tEN (20 July 2006) 8; *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 229

[2114] By means of example, in the Lubanga case, all victims' applications have been declared admissible at this stage, whereas in the Katanga case, 17% of the applications have been rejected at the admissibility stage. See e.g. *Lubanga case* (Trial Chamber, Judgement pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) and *Katanga case* (Trial Chamber: Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014)

[2115] Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 67

[2116] Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13 Human Rights Review 303, 312; Jo M. Pasqualucci, 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' (1994) 26 Inter-American Law Review 298, 316

ICL-courts,[2117] which might represent a deterrent for victims to submit their applications and get involved with the courts.[2118]

Against this background, the layers of selection inherent in the legal frameworks of both ICL and IHRL-based courts and their subsequent application and interpretation by various court organs appear to dictate a limited conceptualization of victimhood, including only those victims considered 'legally relevant' in a specific jurisdiction,[2119] as Kendall and Nouwen labelled them. Given that mass victimization is a characteristic and consequence of mass atrocities investigated by IHRL and ICL-based courts,[2120] the emerging 'legally relevant' beneficiaries of reparative justice engaged with international courts are likely to be only a drop in an ocean of victims suffering the consequences of mass atrocities.

In what follows, this chapter will reflect on how international courts might contribute to reparative justice for these 'legally relevant' victims under the courts' jurisdiction, through their reparations regimes.

1.2. Decentralized Procedural Justice

The international courts' potential contribution to procedural justice through the elements that inform it – voice, information, interaction, length of proceedings – represents one of the two pylons in the current research's assessment of the international courts' potential contribution to reparative justice for victims, next to substantive justice. The current section aims to bring together this research's theoretical underpinnings and findings across the four courts' analyses and elaborate on the international courts' potential contribution to procedural justice in the process of providing reparations. This section will highlight that the international courts' potential contribution to procedural justice is largely overlapping with the legal representatives of victims' potential contribution to procedural justice. It will elaborate on legal representatives of victims' central role throughout the process of obtaining reparations and the potentially positive and negative implications for victims. Furthermore, the section will place emphasis on the role of a mix of actors, both internal and external to courts, in materializing procedural justice for victims, with a focus on ICL-based courts. In addition, the section will elaborate on oral testimonies by a small number of victims in the context of certain courts and their potential contribution to procedural justice to victims. Finally, the section will reflect on the negative impact of lengthy procedures for the courts' potential contribution to procedural justice.

[2117] The fear of victims has been reported in the context of ECCC, however, as stated, the fear has dissipated as the Court advanced its jurisprudence as no reprisals were experienced by victims. also Melissa Fardel and Nuria Vehils Olarra, 'The Application Process: Procedure and Players' in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 34; In the case of the ICC, Cody et al.'s study with victims in the DRC revealed that "the vast majority of DRC respondents said they felt safe participating in the ICC cases. However, some respondents said they had safety concerns when they applied to be victim participants." Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015) 45

[2118] It is worth noting that ICL-based courts have in place protective measures to ensure the participation of victims in trials. ICC's RPEs, rule 87. ECCC's Internal Rules, rule 29

[2119] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 Law and Contemporary Problems 235, 241

[2120] Theo van Boven, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (2 July 1993) E/CN.4/Sub.2/1993/8, para 131

As this study found out, for the most part, the international courts' potential contribution to procedural justice can be equated with the legal representatives of victims' potential contribution to procedural justice because they play the central role in materializing procedural justice for victims throughout the process of obtaining reparations before international courts. To begin with, in the context of IHRL-based courts, procedural justice is mainly materialized by the legal representatives of victims, the majority of which are associated with NGOs specialized in strategic litigation. Amid lack of outreach by IHRL-based courts in raising awareness in conflict areas about the existence of courts to safeguard the victims' human rights, the challenges posed by complex courts procedures as well as the dangers associated with bringing claims against States, the development and efforts by NGOs emerged to fill in the gaps in the IHRL's capacity and to connect victims with courts. As such, except for the rare situations when victims initiate cases relying on own lawyers or reach out by themselves to NGOs,[2121] NGOs reach out to victims, provide support in filling applications as well as initiate and litigate cases before IHRL-based courts on their behalf. Through their mobilization, the NGOs and their lawyers become a bridge between victims and courts, actualizing procedural justice for victims on 'courts' behalf' while fulfilling, to the extent they do, the victims' expectations in relation to procedural justice. Consequently, the IHRL-based courts' potential contribution to procedural justice can be appraised as largely symbolic; it lies in the moral authority associated with justice imparted by an independent tribunal situated at an international level[2122] and the victims' perception of acknowledgment of their victimisation and harm.[2123] Furthermore, in the context of ICL-based courts, procedural justice is similarly materialized to a large extent through the legal representatives; however, their role differs from one court to another. In the context of the ICC, the legal representatives' role is paramount; they enable victims to express their voice during lawyer-victim meetings and then pass the voice on to the courts by means of oral and/or written submissions, interact with victims, as well as provide them with information in relation to their cases. In the context of the ECCC, the role of legal representatives is different and is mainly limited to passing on to the Judges the victims' voice and engaging with victims on an *ad-hoc* basis. Amid a scarcity of resources and capacity by the ECCC, legal representatives rely to a large extent on support from external NGOs in carrying out other important tasks in relation to voice, information, and interaction with victims. Against this background, while procedural justice for victims in the context of IHRL-based courts is mostly reliant on lawyers associated with NGOs and their diligence in performing their tasks, procedural justice in the context of ICL-based courts maintains a similar reliance on the legal representatives, with certain variations induced by the capacity of courts.

Despite the legal representatives' central role in materializing procedural justice for victims, the international courts' support for the legal representation of victims has not always been forthcoming, eliciting the vulnerability of victims and of their status in the context of international courts. As far as ICL-based courts are concerned, the ICC is the most equipped to support the legal representation of victims, as it has an Office of the Public Counsel for Victims, which provides support, assistance, and advice to the victims' legal representatives. In addition, victims may benefit from legal aid paid by the Court, which may cover the expenses of their legal

[2121] For instance, as ilustrated in chapter six, in certain cases the victims themselves or victims' organisations may reach out to NGOs. e.g. *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012)

[2122] See e.g. Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time Has Passed' (2005) 38 Cornell International Law Journal 753

[2123] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 359

representatives and assistants,[2124] albeit research reported that the Court's legal aid was not readily available when the Court was established.[2125] In contrast to the ICC, the ECCC did not provide any financial resources neither to the legal representatives for victims nor to the Victims Support Section until its second trial,[2126] when due to funding from external donors and the amendment of the Internal Rules, it finally established a rather functional system of legal representation.[2127] The legal representation of victims in the ECCC's first case materialised through the *pro bono* work of legal representatives and support by external NGOs. Furthermore, in the case of IHRL-based courts, it falls upon victims to organise their legal representation and pay for the corresponding expenses. However, the victims who demonstrate a lack of financial resources may benefit from legal aid provided by courts. While the ECtHR enabled victims to benefit from legal aid in regard to their representation for a long time,[2128] the IACtHR provides victims with these benefits only as of 2010.[2129] As already explained above, in practice, the legal representation materialized to a large extent through lawyers working for NGOs who litigate cases on a *pro bono* basis and in case of successful litigation, they may be reimbursed for their costs and expenses by the respondent States pursuant an order by the Court. It can thus be inferred that the courts' acknowledgment of the importance of legal representation to adjudicate the victims' claims before international courts and their subsequent support for this purpose developed gradually. Except for the ICC, the courts' feeble support for legal representation urged the mobilization of external actors such as NGOs who deployed their lawyers on a *pro bono* basis in order to safeguard the victims' procedural prerogatives. Consequently, this situation unraveled the vulnerability of victims and their role in the context of international courts, at risk of being compromised as long as courts fail to set up systems that make the prerogatives statutorily bestowed upon victims a reality, rendering them dependent on the mobilization of external actors.

Furthermore, the legal representatives' core responsibility in materializing procedural justice for victims has a multitude of potentially positive and negative implications for victims. The positive implications will be discussed first. To begin with, in line with the theory,[2130] legal representation is a useful vehicle to convey the victims' voice and interests to courts, as they are well versed in the intricacies of courts proceedings and the highly technical language utilized in these legal settings. As illustrated in the chapters above, the majority of victims do not understand the legal language utilized in international courts' adjudication and as such, many view legal representation as a useful vehicle to put forward their voice before courts.[2131] In the case of the ICC, the distance to the Court made voice through legal representation even more appealing for some victims.[2132]

[2124] Regulations of the Court, Regulation 83

[2125] As reported, support for legal representative for victims was not available until the confirmation of charges in the Lubanga case. Luc Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) 16 International Criminal Law Review 995, 1004

[2126] Helen Jarvis, '"Justice for the Deceased": Victims' Participation in the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 *Genocide Studies and Prevention: An International Journal* 19, 22

[2127] But see chapter 4, section 3.2.2. wherein it is discussed that NGOs maintained an important role amid lack of proper resources for legal representatives.

[2128] Dinah Shelton tracks the provision to legal aid to an ECtHR case in 1979. Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 7

[2129] Christina M. Cerna, *Regional Human Rights Systems: Volume V* (Routledge, 2016); Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 244-245

[2130] See e.g. Rachel Killean and Luke Moffett, 'Victim Legal Representation before the ICC and ECCC' (2017) 15 Journal of International Criminal Justice 713, 715. Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court (2015) 26 Criminal Law Forum 255, 263

[2131] This point has been articulated in regard to the ICC, ECCC, and IACtHR drawing on empirical studies with victims.

[2132] In line with Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 18

Second, legal representation is useful for passing on to the Court the voice of those victims who view the experience of recounting painful events as too harmful,[2133] or who are simply too traumatized to testify or to interact with the Court.[2134] In the context of IHRL-based courts, the legal representatives play a crucial role in providing support for victims in filling in their applications to courts. The application forms are not only essential for the commencement of their cases, but they also enable victims to convey their stories, albeit in a form largely incompatible with storytelling due to their focus on factual information.[2135] Third, the meetings between the legal representatives and victims featuring in the context of all courts enable victims to convey their stories and elaborate on their harm.[2136] At the same time, they may also provide an acknowledgment of their harm,[2137] and alleviate suffering through the act of hearing by legal representatives.[2138] The meetings may also make victims feel respected, may contribute to their reintegration into the moral sphere, combating the de-humanisation of victims in the aftermath of mass victimisation,[2139] as well as convey to them that they are not forgotten.[2140]

However, there are also negative implications. The first negative implication is that the practice of legal representation entails an unavoidable reduction of victims' voice, as they capture and convey the victims' voice through written and oral submissions. As illustrated in the chapters above, the submissions follow legal stringencies in connection to their form and substance, focusing on facts and information to the extent necessary to build the case. In addition, they fail to capture the diversity of victims' voice and depth of their experiences. Even in the case of the ICC where efforts were made in certain cases to differentiate among the voice of several victims, this is not done in a systematic manner in regard to all or at least groups of victims that the legal representatives represent.[2141] This study's findings confirm Kendall and Nouwen's assertion that the legal representatives engage in the process of re-producing the victims' voice, distilling generalizable 'interests', and making important choices over what gets passed on to the Judges.[2142] While this is a limitation inherent in the practice of legal representation of victims, especially when large number of victims are involved,[2143] it also elicits that through legal representation, the victims'

[2133] Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 83

[2134] See, for instance, Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' (2009) 22 Journal of Traumatic Stress 351, 354; Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) Social & Legal Studies 489, 499

[2135] See chapter 5, section 3.2.2. on voice; see chapter 6, section 3.2.2. on voice.

[2136] Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate Publishing Limited, 2007) 27

[2137] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 359

[2138] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 80

[2139] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 352

[2140] Jo-Anne Wemmers, 'Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims' (2009) 16 International Review of Victimology 211, 221

[2141] E.g. *Lubanga case* (Team of Legal Representatives of V02 victims: Observations of the V02 Team in Compliance with Order No. ICC-01/04-01/06-3345) ICC-01/04-01/06-3363-tENG (8 September 2017); *Al Mahdi case* (Legal Representatives of Victims: Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) para 44

[2142] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2014) 76 Law and Contemporary Problems 235, 250

[2143] Indeed, a lawyer advocating before the IACtHR expressed concern at the prodigious job of conveying her clients' voice to the Court. See Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins,

voice undergoes an unavoidable reduction, while individual stories might be subsumed to collective ones.[2144]

Secondly, legal representation, as is currently materialized in the context of international courts places the victims in a situation of dependency on their legal representatives and may even diminish the extent to which it can be said that victims have enforceable rights in the context of these courts. As this study illustrated, whether the legal representatives capture the victims' voice in a robust manner, the quality and frequency of interaction between victims and their lawyers as well as whether and how often victims receive information from their lawyers is dependent upon lawyers' discretion and diligence. The legal representatives are bound by Codes of Conduct.[2145] However, the legal representatives perform their tasks without direct supervision from courts and victims cannot avail themselves of any mechanism to nudge the legal representatives for failure to interact or inform them. As this study illustrated, failure by the legal representatives to interact and inform victims resulted in some victims' disappointment and frustration (as shown by available empirical studies concerning the ICC and the IACtHR), while in the case of the ECCC, the victims' needs for interaction and information were fulfilled by NGOs. In addition, this study also showcased that the legal representatives' performance of tasks is also contingent on understanding of the local context,[2146] their outlook on their crucial role in relation to victims,[2147] and the resources devoted to the legal representatives to perform their tasks.[2148] Finally, in the case of IHRL-based courts, the association of legal representatives with NGOs specialized in strategic litigation, who also work on a *pro bono* basis, is likely to have subsequent impact on their performance of tasks and result in implications for victims. While the NGOs' involvement appears to drive the successful litigation of cases, the NGOs' different end priorities compared to those of victims might influence the lawyers' performance of tasks, to the extent that the victims' voice might be adjusted to accommodate these end goals and the information and interaction with victims may be curtailed. Consequently, this situation may diminish the extent to which it can be said that victims have enforceable procedural rights in the context of these courts, since their enforcement is left to a large extent up to the legal representatives and courts appear reluctant to offer them a fully-fledged protection.

Against this background, if legal representation is the main vehicle for materializing procedural justice for victims at the international courts, with all the positive and negative implications for victims, more efforts should be channeled by courts to ensure that victims' interests and needs are adequately fulfilled by the legal representatives, in order to suffer minimal shortcomings. This should entail necessary funding and support for the legal representatives in the performance of their tasks, rules in relation to written and oral submissions as well as the frequency and quality of interaction, and information. The rules on written and oral submissions by lawyers could entail obligations for lawyers to elaborate on the methodology employed, showcasing as robustly as possible how the diversity of victims' voice and interests is captured. In addition, the rules could

'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1422

[2144] See, e.g., John D. Ciorciari, Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia (Law, Meaning, and Violence)* (University of Michigan Press, 2014) 221-222

[2145] Of the Courts investigated, only the ICC has in place a code of conduct for lawyers at the ICC, in addition to the codes of conduct of the Bar Associations to which the lawyers pertain.

[2146] Apparent especially in the ICC's context.

[2147] Apparent especially in the ECtHR and the IACtHR's context.

[2148] Apparent especially in the ECCC's context.

either elaborate on what constitutes reasonable interaction and information for victims or include an obligation to gather the victims' views on these elements on a case-by-case basis. In addition, they should also feature an obligation for legal representatives for reporting on the frequency of interaction and information afforded to victims.

Next to the legal representatives, a mix of actors both internal and external to courts further materialize the Courts' potential contribution to procedural justice, however this is only specific to ICL-based courts. Compared to IHRL-based courts, ICL-based courts feature more robust infrastructures that converge efforts to engage with victims on the ground and further contribute to procedural justice for victims. However, they also elicit endemic challenges. At the ICC, procedural justice is further materialized through the VPRS and the TFV. In regard to the VPRS, except for an *ad-hoc* consultation with victims in the Katanga case whereby VPRS staff interacted with victims and gathered their stories and preferences on reparations,[2149] its role to support victims in filling in applications for participation and reparations is realized through intermediaries. Amid its limited capacity and resources as well as logistical and security challenges on the ground, the VPRS resorts to and trains intermediaries located in the conflict situations to help victims with their applications.[2150] As for the TFV, through the consultations it holds in the conflict situations, it engages with a multitude of victims, enabling them to express their preferences in regard to reparations. Nonetheless, the TFV's involvement with victims takes place only at the implementation of reparations stage,[2151] and additionally, its work is highly dependent on the security situation on the ground, which might result in its inability to engage with the victims and collect their voice.[2152] Furthermore, the ECCC features its own characteristics. Amid scarce financial resources to support the legal representation of victims and the VSS, procedural justice for victims materialized to a large extent due to the mobilization of massive efforts by local NGOs, which played the central role in helping victims in filling in applications as well as interacting and informing them. Due to funding from external donors, the legal representative and the VSS were enabled to perform their tasks as the ECCC advanced its jurisprudence. With increased capacity, the VSS started organizing public forums, which constituted an important vehicle to engage with a multitude of victims, enable them to express their voice in relation to reparations, as well as facilitate encounters between the legal representatives and victims.[2153] At the same time, NGOs maintained their involvement with victims and bore an instrumental role towards the realization of procedural justice for victims at the ECCC throughout its cases.

[2149] See *Katanga case* (Registry: Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015)

[2150] See also Melissa Fardel and Nuria Vehils Olarra, 'The Application Process: Procedure and Players' in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 19

[2151] E.g. *Lubanga case* (TFV: Filling on Reparations and DIP) ICC-01/04-01/06-3177-Red (3 November 2015) para 32. This statement refers to the TFV's involvement with victims in the materialization of its reparations mandate. The TFV's interaction with victims for the purpose of its assistance mandate was not included in the scope of this research.

[2152] See particularly See e.g. *Lubanga case* (TFV: Observations in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018) ICC-01/04-01/06-3398 (21 March 2018) para 8; Katanga case (Legal Representative for Victims: Communication du Représentant légal relative aux vues et préoccupations des victimes bénéficiaires de reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018) pp. 6-8; *Al Mahdi case* (Legal representative for Victims: Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017) paras 15-16

[2153] See e.g. *Case 002/02* (Civil Party Lead Co Lawyers: Final Claim for Reparation in *Case 002/02* with Confidential Annexes) 002/19-09-2007-ECCC/TC (30 May 2017), para 6. See also *Case 002/02* (Civil Party Lead Co Lawyers: Amended Closing Brief In *Case 002/02*) 002-19/09/2007-ECCC-TC (2 October 2017) para 18

As can be inferred, procedural justice for victims in the context of ICL-based courts is further materialized due to concerted efforts of a multitude of actors, internal and external to courts, which entails both positive and negative implications for victims. To begin with, the involvement of intermediaries at the ICC and of NGOs at the ECCC provided crucial support for victims with the written applications. In line with the theory,[2154] these applications enabled victims to express themselves and convey the harm and victimisation suffered, although admittedly, they do not accommodate ample story telling by victims. However, these applications are an important vehicle for the self-expression of victims who have preferred to tell their stories through applications rather than through oral testimonies, to spare themselves of the emotional stress connected with the experience of testifying that some victims experience.[2155] In particular, some victims involved with the ICC explained that they preferred the written applications to oral testimonies before a court located so far away from their locations.[2156] Furthermore, the consultations and public forums carried out by the ICC's TFV and the ECCC's VSS (in *Case 002*) provided victims with a safe space to express themselves, outside the courtroom, yet under the auspices of courts. Consequently, these encounters might contribute to the victims' empowerment, conveying that their opinion is important,[2157] acknowledging that they suffered harm worth repairing,[2158] and inducing feelings of respect.[2159] Finally, the support provided by NGOs in the ECCC's context, throughout the trials, interacting and providing information to victims in their localities might contribute towards the acknowledgment of victims' role and interests in the court cases,[2160] and combat feelings that they were forgotten.[2161] On the other hand, the necessity of involving external actors such as the intermediaries at the ICC or the NGOs at the ECCC, to connect with the victimised populations, brought into the spotlight consequences of a lack of capacity of courts (ECCC) or of the courts' distance to the victimized communities (ICC). As such, this situation not only places victims in a situation of dependency to external actors who may or may not have the victims' interests at heart, but also alters the quality of information flowing from and to victims. The involvement of external actors to connect courts with victims entails that the victims' voice and requests from courts as well as the information regarding developments at the courts' level are subjected to even more alterations. They can include, for instance, the translation from one language into another or the 'translation' of legal jargon to and back from the victims which involves a reduction of the initial meaning attached to words. In addition, the personal interests of intermediaries or the broader goals of NGOs might alter further the flow and meaning of information.

[2154] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 1

[2155] E.g. The long-term ICTY study discussed above; Kimi King, James Meernik, Sara Rubert, Tiago de Smit and Helena Vranov Schoorl, 'Echoes of Testimonies: A Pilot Study into the Long-term Impact of Bearing Witness before the ICTY' (University of North Texas & ICTY, 2016) 83

[2156] As per Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (2018) Virginia Journal of International Law 1, 18

[2157] Jonathan Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 International Criminal Law Review 263, 271

[2158] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 359

[2159] Rebecca Horn, Simon Charters and Saleem Vahidy, 'The Victim-Witness Experience in the Special Court for Sierra Leone' (2009) 15 International Review of Victimology 277, 284

[2160] In line with Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 361

[2161] In line with Jo-Anne Wemmers, 'Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims' (2009) 16 International Review of Victimology 211, 221

Against this background, it appears that ultimately, connecting victims and courts does not result in a genuine connection between them but rather entails a mix of processes involving a multitude of actors driven by different interests which overall might run counter to the experience of procedural justice for victims. Admittedly, as reported above, the lack of capacity or distance of courts to the victimised communities inherently entail these risks. However, increasing the direct interaction between court staff and victims, such as through the consultations and public forums discussed above might counter some of the risks, as the victims' voice and interests are still conveyed without being subjected to as many alterations.

In addition, international courts may also contribute to procedural justice through the victims' involvement with courts during their oral testimonies, however, bearing in mind several caveats. Of the courts scrutinized, only the ECCC and the IACtHR provide victims with the opportunity to provide oral testimonies during trials.[2162] While victims at the ECCC may choose from different variations of oral testimony, detailing the impact of the crimes on their lives or being interrogated on their suffering through structured questioning, at the IACtHR their testimony is confined to interrogation. In line with the theory,[2163] enabling victims to provide oral testimonies provides them with the opportunity to convey their stories to the world and to satisfy their various intrinsic motivations for testifying. As elicited, victims testifying at the ECCC explained that testifying enabled them to talk about emotional problems, the struggle to move on with their lives and coping with trauma, convey to the world their story as well as tell the truth about the Khmer Rouge.[2164] In addition, both in the context of the IACtHR and the ECCC,[2165] oral testimonies provided victims with acknowledgment of their victimisation by an international court and made victims feel respected and that their stories were taken seriously.[2166] However, providing oral testimony was not uniformly experienced by all victims, with some of the victims viewing the interaction with courts as stressful and triggering negative emotions.[2167] Furthermore, the oral testimonies also enabled victims to interact with the direct perpetrators of the crimes (at the ECCC) or with States' representatives (at the IACtHR). These encounters were powerful for certain victims at the ECCC.[2168] However, they also induced distress and fear for others, especially in the context of the IACtHR.[2169] Importantly, while the ECCC has in place psychological support for victims, which is employed before, during and after oral testimonies to help victims cope with their experiences in the Court, IACtHR does not provide any psychological support to victims during their oral testimonies.

By enabling victims to provide oral testimonies, international courts potentially contribute to several benefits for victims, albeit this cannot be generalized to all victims that provide oral testimony. However, courts such as the ICC and the ECtHR do not even provide for this opportunity for victims, failing to afford them the potential benefits associated with oral

[2162] See the ECtHR's limited possibilities for oral testimony during fact finding missions that no longer feature in the ECtHR's practice. Chapter 5, section 3.2.2. on voice.
[2163] Teresa Godwin Phelps, *Shattered Voices Language, Violence, and the Work of Truth Commissions* (University of Pennsylvania Press, 2006) 111; Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate Publishing Limited, 2007) 27
[2164] See chapter 4, section 3.2.2. on voice.
[2165] See chapter 4, section 3.2.2. on voice; see also chapter 6, section 3.2.2. on voice.
[2166] Rebecca Horn, Simon Charters and Saleem Vahidy, 'The Victim-Witness Experience in the Special Court For Sierra Leone' (2009) 15 International Review of Victimology 277, 284
[2167] This has been reported particularly in the case of ECCC.
[2168] See chapter 4, section 3.2.2. on interaction.
[2169] See also chapter 6, section 3.2.2. on interaction.

testimonies. Interestingly, due to the ICC's location and distance to the victimised communities, a sample of victims before the ICC expressed that they preferred to have their interaction with the courts through legal representatives rather than oral testimonies, due to the long distances they would have to travel. Furthermore, for the courts who enable victims to testify, this opportunity and the associated benefits are only provided to a handful of victims, which in cases with large number of victims can entail only a very small percentage of victims. As illustrated in the case of the ECCC, the number of victims testifying in its first case amounted to 29% whereas in its second case merely 2%. In the case of the IACtHR, the percentages vary on a case-by-case basis, however, in cases with large number of victims, as little as below 1% of the victims may testify. While this approach is justified on grounds of procedural economy, it entails that the benefits associated with oral testimonies will not be enjoyed by the large majority of victims. Finally, for the victims who do testify, the secondary victimisation as a risk faced by victims engaging directly with courts, their procedures, and the actors present during proceedings,[2170] is still not uniformly acknowledged and addressed by all international courts that enable victims to testify. This is the case of the IACtHR; despite enabling victims to testify and thus potentially affording them several benefits, the risks of secondary victimisation might undermine these benefits amid a failure to provide psychological support to victims during the stressful encounters with the Court and the cross examination by the respondent States' representatives. Against this background, providing victims with more opportunities for oral testimonies could be a possibility worth exploring by international courts which fail altogether to provide victims with this opportunity. Given the stressful effects of interrogations, testimonies that enable victims to convey their stories and views unrestricted appear to be a better option, but this will also depend on the role victims may have in a trial. However, due to the large number of victims in cases of mass atrocities and bearing in mind procedural economy considerations, it does not appear feasible that all victims who want could provide oral testimonies within the context of international courts, constituting thus a limitation inherent in litigation involving mass atrocities. Furthermore, more understanding of secondary victimisation by international courts as well as the inclusion of mechanisms to cushion the potentially negative impact of oral testimonies is paramount, to avoid further harm incurred by international courts and their procedures.

Finally, the international courts' potential contribution to procedural justice for victims is likely curtailed by the length of the courts' proceedings and their consequences for victims. This study elicited that the process of obtaining reparations in the context of IHRL-based courts spans seven and a half years on average. In the context of the ICC, the process lasts from four to eight years, whereas in the context of ECCC, the duration is of approximately five years. The ECCC features a reparations regime whereby funding and the design of reparations measures is already safeguarded at the moment of the court's judgment. However, the implementation of reparations measures by the TFV in the case of the ICC and by States in the case of IHRL-based courts prolongs further the reparations processes before courts. Drawing on the theory showcasing a multitude of negative implications for victims as a result of lengthy procedures,[2171] which were also confirmed in this study, the international courts' lengthy procedures are likely to induce

[2170] Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 333

[2171] Diane F. Orentlicher, *That Someone Guilty Be Punished The Impact of the ICTY in Bosnia* (Open Society Justice Initiative and International Center for Transitional Justice, 2010) 74; Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered (2009) 50 Harvard International Law Journal 323, 332

dissatisfaction for victims,[2172] leading some of them to even disengage from court processes[2173] and fail to provide victims with the long-awaited reparations when victims pass away before they might receive reparations.[2174]

Additionally, lengthy proceedings are all the more problematic amid an unstable security situation on the ground, as reported in the cases under adjudication at the ICC, which induce anxiety to victims.[2175] To be precise, the fact that the accused persons have already been released before the implementation of reparations has been completed is likely to increase the anxiety of victims. In addition, it is likely that the accused's release will result in the victims' disengagement from the process and outcome of reparations proceedings, due to fears for their lives if they are seen as associated with the criminal case at the ICC.[2176] In order to preserve the courts' potential contribution to procedural justice, as far as it exists, it is paramount that international courts look for ways to limit the length of their processes. One way would be to diminish the length and complexity of certain procedural steps,[2177] as well as settle on controversies arising in the process of adjudication in an expedited manner.[2178]

1.3. Complex Substantive Justice

The international courts' potential contribution to substantive justice through tangible reparations that respond to victims' preferences represents the second pylon in the current research's assessment of the international courts' potential contribution to reparative justice for victims. The current section aims to bring together this research's theoretical underpinnings and the findings of the four courts' analyses and elaborate on the international courts' potential contribution to substantive justice through the tangible reparations they award. As this section will elicit, the courts' potential contribution to substantive justice for victims is a complex matter. International courts appear to generally award tangible reparations, according to their legal frameworks and mandates. The content of tangible reparations the courts award is influenced by the courts' reparations regimes and their interpretation by Judges. Moreover, how robustly the tangible reparations may repair the victims' harm appears dependent on three elements, namely, the courts' underlying legal framework, how courts understand harm and how they evaluate the harm. Furthermore, whether the tangible reparations take into account and respond to victims' preferences in regard to reparations varies across courts and even within courts themselves. In addition, this study identified two additional aspects that might influence the courts' potential contribution to substantive justice, namely, the victims' involvement in procedural aspects of

[2172] In line with Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) 16 International Criminal Law Review 1, 23

[2173] E.g. *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) annex i: Procedural History

[2174] As reported by the lead Co-Lawyers in *Case 002*: "Since the commencement of proceedings 181 civil parties have died". *Case 002/02* (Civil Party Lead Co Lawyers: Amended Closing Brief in *Case 002/02*) 002-19/09/2007-ECCC-TC (2 October 2017) para 7

[2175] Katanga case (Legal Representative for Victims: Communication du Représentant légal relative aux vues et préoccupations des victimes bénéficiaires de reparation) ICC-01/04-01/07-3819-Red (17 Décembre 2018) 7

[2176] As identified in this research, albeit in the case of ECCC, some victims fear providing oral testimony due to the risk of having their identity exposed. It is likely that victims would similarly fear having their identify exposed and their lives threatened if they would be seen receiving reparations. See e.g. *Case 001* (Transcripts of Hearings, Trial day 73) 001/18-07-2007-ECCC/TC (23 November 2009) 39, 104

[2177] As particularly prevalent in the case of IHRL-based courts and the ICC.

[2178] See for instance chapter 3 section 3.3.3. on Collective Reparations detailing how it took almost one year for the TFV and the Trial Chamber II to finally agree on a common plan to move the design of the implementation plan forward in the Lubanga case.

reparations, as well as additional reparations measures emerging within courts' practice in addition to those set forth in their respective reparations mandate. Finally, the courts' potential contribution to substantive justice is also influenced by the prospect of implementation of tangible reparations awarded by courts.

To begin with, international courts award tangible reparations to victims only after the responsibility for human rights violations and international crimes, which incur the obligation to repair the harm by means of reparations, is established. Additional conditions for awarding reparations might apply too, depending on the court. As far as IHRL-based courts are concerned, they may award tangible reparations for victims only after they establish the States' responsibility for the human rights violations, whereas ICL may award reparations only after they establish the individuals' criminal responsibility for international crimes. In order to establish the responsibility, courts apply different standards of proof, which in turn influence the likelihood of reparations being awarded. To be precise, in establishing the States' responsibility, the IACtHR applies a flexible standard of proof,[2179] whereas ECtHR,[2180] ICC,[2181] and ECCC[2182] apply the 'beyond reasonable doubt' standard of proof.[2183] This entails that it is easier to establish the existence of human rights violations before IACtHR versus the ECtHR,[2184] as well as easier to establish the existence of human rights violations in the context of IACtHR, than to establish the existence of international crimes in the context of ICC and ECCC. Based on this, more victims are likely to receive tangible reparations in the context of IACtHR in comparison with the other three courts. Moreover, establishing the States or individuals' responsibility does not automatically entitle victims to receive tangible reparations, but additional conditions may apply, depending on each court. At the ECtHR, tangible reparations are dependent upon the subsidiarity principle whereby the Court will award reparations only if States provide no or only partial reparations and only if the Court deems it necessary. Whereas as far as the IACtHR, ICC, ECCC are concerned, awarding tangible reparations is dependent upon the courts' discretion, which 'may' make awards based on victims' requests for reparations. This entails that the victims' entitlement to tangible reparations is conditional upon States' capacity or courts' discretion and it is not an automatic right that victims may avail themselves of.[2185]

Furthermore, this research found out that in cases whereby courts establish the States or individuals' responsibility, courts generally award tangible reparations that aim to repair the victims' harm, in line with their statutory reparations mandate. Moreover, the tangible reparations'

[2179] In reaching its decisions, IACtHR allows "adjudicators to judge in accordance with the rules of reason and experience, and to explain their evaluation of evidence". Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edition, Cambridge University Press, 2012) 174. See also *Case of Velásquez-Rodríguez v Honduras*. See *Case of Velásquez Rodríguez v Honduras* (Merits) IACtHR Series C No. 4 (29 July 1988) paras 127-143

[2180] See e.g. Kaykharova and Others v Russia App nos. 11554/07 and 3 others (ECtHR, 1 August2013) para 150

[2181] Rome Statute, art 66(3)

[2182] Internal Rules (2015), Rule 87

[2183] The beyond reasonable doubt standard of proof requires that "proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact." See Imakayeva v Russia App no. 7615/02, ECHR 2006-XIII (extracts) para 112

[2184] See also Ophella Claude, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court Of Human Rights And The European Court Of Human Rights Jurisprudence' 5 Intercultural Human Rights Law Review 407, 461

[2185] For an analysis on the ECtHR see Antoine Buyse, 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law' (2008) 68 Heidelberg Journal of International Law 129. See also Alina Balta, Manon Bax and Rianne Letschert, 'Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia' 2019 International Journal of Comparative and Applied Criminal Justice 2

content depends on the courts' reparations regimes and their interpretation by Judges, which can bolster or weaken the reparation awards. In the ICC's case, the Court generally awarded tangible reparations to victims across all its cases, allegedly aiming to oblige those responsible for serious crimes to repair the harm they caused to victims.[2186] In line with the open-ended letter of its provisions on reparations,[2187] the ICC Judges interpreted the reparations mandate in an expansive manner, awarding reparations of individual and collective nature,[2188] featuring a wide range of measures, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

In the ECCC's case, the Court's reparations awards varied significantly between its first case and its subsequent two cases *002/01* and *002/02*. Despite acknowledging the harm suffered by victims as a direct consequence of the crimes for which the accused was convicted,[2189] in its first case, the Court awarded limited reparations of symbolic value, due to the indigence of the accused and the absence of prerogatives to compel the Government of Cambodia to engage in reparations measures.[2190] In its subsequent two cases, the Court awarded[2191] a wide range of tangible reparations to victims. This was possible amid an amendment of the Court's Internal Rules to include a new avenue for the implementation of reparations at the ECCC besides the accused' responsibility, via projects designed and identified by the Lead Co-Lawyers and the VSS, 'in liaison with governmental and non-governmental organisations'.[2192] Through the wide range of measures the Court awarded, it aimed to redress the victims' "immeasurable harm which includes physical suffering, economic loss, loss of dignity, psychological trauma and grief arising from the loss of family members or close relations".[2193] In making its awards across cases, the Judges complied with the 'collective and moral' statutory requirements of reparations at the ECCC. Nonetheless, as far as the interpretation of the reparations' means of implementation is concerned, the Judges' rationale varied across cases and consequently impacted the awards. The Judges oscillated between a very restrictive standpoint rooted in their evaluation of the scarce implementation prospects rather than the victims' harm, to a standpoint rooted in an expansive appraisal of the harm suffered by victims.[2194] Although the Judges awarded extensive awards of tangible reparations in *Cases 002/01* and *002/02*, at the same time, they relinquished their function of enforcing the Court's reparations mandate and instead, placed this responsibility upon actors entrusted with support roles in the realization of reparations. In addition, they redesigned the concept of reparations, bringing it closer to reparations as part of developmental programs rather

[2186] *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) para 93; *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 15. *Al Mahdi case* (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017) para 27
[2187] Rome Statute, art 75
[2188] The court awarded collective reparations across its three cases, whereas individual reparations were awarded only in Katanga and Al Mahdi cases. This matter will be elaborated upon below.
[2189] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) para 682; *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) para 699
[2190] *Case 001* (Trial Chamber: Judgment) 001/18-07-2007-ECCC/TC (26 July 2010) 242; *Case 001* (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012) 296
[2191] The use of word 'awarded' is not fully correct as following the amendment of the Court's Internal Rules, the Court's role was limited to 'endorsing' rather than 'awarding' reparations.
[2192] Internal Rules (2015), Rule 23 quinquies (3)(b), Rule 12 bis (3)
[2193] *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) para 1150; *Case 002/02* (Trial Chamber: *Case 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018) para 4453
[2194] As explained, in the two segments of *Case 002*, the court adopted a presumption of collective victimization, embedded in an awareness of the complexities inherent in mass atrocities and their consequence for the victims. See chapter 4, section 3.2.1.

than reparations in the context of international courts, linked to the criminal responsibility of the accused.[2195]

Furthermore, in the ECtHR's case, the Court awarded tangible reparations to victims across all of its cases, in account of material and moral damage suffered by victims. However, in line with the ECtHR's reparations regime limiting reparations to awards in account of 'pecuniary damage' and 'non pecuniary damage',[2196] to compensate the 'actual harmful consequences of a violation',[2197] the Judges opted for a deontological interpretation of the Court's legal basis and generally limited the reparations awards to compensation.[2198] As argued in this thesis, just satisfaction awards appear to favor an easy way out for the States, to 'buy off' human rights violations, failing to grasp and acknowledge the overall victims' situation, victimization, and extent of harm. Finally, as far as the IACtHR is concerned, the Court awarded tangible reparations across all of its cases, aiming to remedy the harm incurred by the human rights violations.[2199] In line with the open-ended letter of its reparations regime, the Judges' interpretation evolved across time and in an expansive manner, and consequently, awarded a whole range of tangible reparations, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[2200]

Furthermore, how robustly the different tangible reparations awards may repair the victims' harm appears to be influenced by three elements: 1) the courts' underlying legal frameworks and conditions; 2) how courts understand the concept of 'harm'; and 3) how courts evaluate harm in view of awarding reparations. To begin with, since the tangible reparations awards depend on each of the courts' conditions for establishing the existence of harm as well as the causality between the States/individuals' responsibility and the harm alleged by victims, it appears that the IHRL-based courts might be better positioned to tackle the harm of victims of mass atrocities. First, because the standards of proof are more lenient in the context of IHRL versus ICL-based courts, and second, due to the IHRL-based courts' 'power' to oblige States to afford victims more complex reparations measures. As such, IHRL-based courts understand harm as being related to the States' responsibility, whereby reparations are awarded in account of harm resulting from human rights violations due to States' failure to abide by their obligations assumed through the conventions they are party to.[2201] Whereas ICL-based courts understand harm as being related to the individual criminal responsibility of accused persons, whereby tangible reparations are awarded for harm resulting from the crimes they were found guilty of.[2202] This entails that different standards of proof apply to prove the existence of harm and the link between harm and the States or individuals' responsibility, which in turn influence the scope and content of tangible reparations awards. ICL-

[2195] For an elaboration see chapter 4, section 3.2.3
[2196] The current analysis excluded costs and expenses. 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 6.
[2197] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 9
[2198] For an elaboration see chapter 5, section 3.4.3
[2199] ACHR, art 63(1)
[2200] For an elaboration see chapter 6, section 3.2.3.
[2201] Article 1 of ACHR reads "The States Parties to this Convention undertake to respect the rights and freedoms […]" whereas Article 1 of ECHR reads "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." See also Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 58-59
[2202] See *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) para 6; *Case 001* (Trial Chamber: Judgement) 001/18-07-2007/ECCC/TC (26 July 2010), para 642. See also Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 Tulane Journal of International and Comparative Law 157, 181.

based courts adopt a 'balance of possibilities' standard for the existence of harm,[2203] as well as stress the necessity that a 'causal link' is established between the harm alleged and the crimes of which the person was convicted.[2204] Within IHRL-based courts, their approach varies. The IACtHR maintains a flexible standard of proof for the existence of harm, which must have a causal link with the human rights violations.[2205] In regard to moral harm in cases involving gross human rights violations, the Court does not even require proof of its existence, presuming its existence.[2206] The ECtHR requires that the existence of harm be supported by 'relevant documents' that prove and document it,[2207] as well as must have a causal link[2208] with the human rights violations. In practice, the ECtHR has also deployed a presumption of existence of moral harm flowing from a human rights violation.[2209]

Consequently, it appears that the scope of tangible reparations in the context of IHRL-based courts appears to be broader than in the context of ICL-based courts. Foremost, because IHRL-based courts tend to infer the existence of moral harm from the human rights violation, whereas ICL-based courts must necessarily show its link with the crimes the accused has been found guilty of. Secondly, because IHRL-based courts have the 'power' to oblige States to afford victims a multitude of reparations measures, compared to the ICL-based courts whereby the tangible reparations are linked to one person's responsibility. To exemplify, despite the fact that both the ICC and the IACtHR might award guarantees of non-repetition, the ICC's awards are limited to measures that could be implemented by an individual,[2210] whereas the IACtHR's awards might entail a whole range of measures that can be taken at a State level which can affect the judiciary, prosecution, and the police. Moreover, while the impact of the ICC's measures are limited to addressing the harm of victims in those unique cases, the IACtHR's measures have the potential to benefit victims in similar cases, victims of future crimes, and might even have implications at a societal level.[2211]

Furthermore, how courts understand the concept of 'harm' appears to influence how robustly the tangible reparations they award redress the victims' harm. As this research elicited, courts such as

[2203] E.g. *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 50; *Case 001* (Trial Chamber: Judgement) 001/18-07-2007/ECCC/TC (26 July 2010), p. 219. See also Heloise Dumont, 'Requirements for Victim Participation' in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer, 2017) 68

[2204] E.g. *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 163; *Case 001* (Trial Chamber: Judgement) 001/18-07-2007/ECCC/TC (26 July 2010) para 642

[2205] E.g. *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 43.

[2206] As court held: "it is essentially human for all persons to feel pain at the torment of their child". E.g. see *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 154

[2207] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 11

[2208] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 7

[2209] E.g. Kaykharova and Others v Russia App nos. 11554/07 and 3 others (ECtHR, 1 August2013) para 192; Elena Apostol and Others v Romania App nos. 24093/14 and 16 others (ECtHR, 23 February 2016); Esmukhambetov and Others v Russia App no. 23445/03 (ECtHR, 29 March 2011) para 216

[2210] In practice, it falls on the TFV to implement such measures but TFV does not have the power to compel States to implement measures with a broader scope.

[2211] But see also discussion on the implementation of the tangible reparations at the end of this section.

the ICC,[2212] the ECCC,[2213] and the IACtHR[2214] appear to view the victims' harm in a holistic manner in that it may be of both individual and collective nature. Acknowledging the existence of collective harm denotes an expansive understanding of mass atrocities and an intention to incorporate victimological insights regarding the massive victimization and magnitude of harm they bring about for both individuals and collectives into the realm of court-awarded reparations.[2215] In cases involving indigenous people or communities, the IACtHR furthermore tacitly acknowledge their existence as collectives entitled to rights and adopts a culturally sensitive approach to tackling harm.[2216] Admittedly, the courts' understanding of individual and collective harm differs per court, depending on the parameters of their respective legal frameworks. For instance, the ICC features an understanding of individual and collective harm that fits within the confines of its legal borders, in that it only acknowledges the existence of harm that is linked to the crimes the accused was charges with. The ECCC enlarged its understanding of collective harm in *Case 002* but only after the confines of its legal framework were curtailed and the link with the accused's crimes was weakened, whereas the IACtHR features a flexible standard of proof to the existence of harm which justifies an expansive understanding of individual and collective harm. Furthermore, these three courts also employ external experts to inform their understanding and evaluation of harm suffered by victims. On the contrary, the ECtHR appears to elicit a narrow understanding of harm, whereby the harm suffered by victims is solely redressed through compensation paid by the defendant State, failing to award other tangible reparations that could grasp and address the real extent of harm inherent in gross human rights violations. In addition, the ECtHR does not employ external experts to inform its understanding of harm,[2217] and consequently, through the awards it makes, only on an individual basis, it fails to acknowledge the collective harm suffered by victims of gross human rights violations.[2218] Against this background, it appears that courts such as the ICC, the ECCC, and the IACtHR, due to a holistic understanding

[2212] See e.g. Appeals Chamber in the Lubanga case, whereby the court adopted a holistic view on the harm of child soldiers. The Court's view was furthermore supported by evidence presented by the expert witness Schauer. *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) paras 189, 191

[2213] See e.g. *Case 002/01* and 002/02 whereby the Court acknowledged that victims 'have suffered immeasurable harm, which includes physical suffering, economic loss, loss of dignity, psychological trauma and grief arising from'. This view is informed by expert Chhim Sotheara's testimony, which constituted the basis for the court's evaluation of harm within Cambodia's context. *Case 002/01* (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014) para 1150

[2214] The Court is utilizing experts to elaborate on the harm of victims or the impact of crimes in almost all of its cases. E.g. *Case of the "Las Dos Erres" Massacre v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009) para 56

[2215] See Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 171; Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 343-353

[2216] E.g. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 109; also *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 81. The Court furthermore is utilizing experts to elaborate on the harm of victims or the impact of crimes in almost all of its cases. E.g. *Case of the "Las Dos Erres" Massacre v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009) para 56

[2217] The Court does not engage in an assessment of the damage, it merely evaluates whether the damage can be incurred to states and whether the victims have evidence to support it. In addition, although according to its Rules of Procedure the Court may use experts in reaching its conclusions, the Court does not use experts to evaluate the damage or harm suffered by victims (as far as can be inferred from the cases investigated in this thesis).

[2218] Admittedly, the Court deploys an assumption of the existence of moral harm of victims, without requiring them to substantiate it with evidence. Yet, the Court does not engage in an evaluation of this harm, it merely acknowledges its existence. In addition, the Court does not engage in an evaluation of potential collective harm. See Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization Key Challenges Involved' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), Victimological Approaches to International Crimes: Africa (Intersentia, 2011) 169

of harm suffered by victims award a wider range of reparations measures that are likely to address the victims' harm in a robust manner.

The courts' approach to the evaluation of both individual and collective harm when awarding reparations appears to also influence how robustly tangible reparations might redress the victims' harm. As this research revealed, the reparations awards made by both ICL and IHRL-based courts appear to be less informed by the courts' understanding of harm as such and more on an evaluation of harm taking into account different considerations. For instance, the ECCC in *Case 001*, despite acknowledging the existence of individual and collective harm, appeared to view the harm of victims as irrelevant to its reparations awards, because their implementation was unfeasible in practice due to the indigence of the accused and an absence of prerogatives to compel the government of Cambodia to engage in reparations. In addition, the courts' approach to individual moral harm tackled by means of compensation is another illustrative example, as it is a reparations measure provided by both the ICC and the IACtHR and their approaches can be evaluated in a comparative manner. To be precise, the compensation for moral harm provided by ICC in Katanga case and by IACtHR in a comparable case[2219] are 250 USD and 20.000 USD, respectively. As elicited, the courts' compensation awards are not as much based on the victims' harm but on the evaluation of the overall context wherein the awards are provided. To be precise, despite the ICC evaluating the victims' moral harm at 8000 USD, the final award was rendered having regard to additional considerations, such as the accessory role of Katanga in perpetrating the crimes causing harm and the impact of awards within the victims' community.[2220] On the other hand, the IACtHR did not even elaborate on its rationale for coming to these awards, although as argued above,[2221] it is likely that the Court is engaging in a similar approach as ICC. In addition, it is worth mentioning that although the compensation awards appear to be disproportionately different at the ICC versus the IHRL-based courts, in fact, they appear to have roughly the same value in practice.[2222]

Attempting to redress the harm of victims in situations of mass atrocities is undoubtedly a complex endeavor that inevitably entails tough decisions by Judges. As such, the evaluation of harm as a basis for reparations might require or indeed demand that the context wherein the reparations will be implemented is taken into account. While the awards will inevitably fail to address the real extent of harm suffered by victims, they might achieve their best impact, given the overall context. However, this study revealed that it is not clear what considerations guide the Judges' evaluation of harm and how these considerations are reflected in the various reparations awards they make. Consequently, this lack of transparency might weaken the concept of 'harm' as the basis for reparations. If the victims' harm is to remain the basis of reparations, then the reparations awards need not be rendered moot due to the unfeasibility of their implementation (ECCC) or limited

[2219] E.g. *Case of the "Las Dos Erres" Massacre v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009)

[2220] The Court acknowledged that "The Chamber underscores that the symbolic award is not intended as compensation for the harm in its entirety. Yet, the Chamber believes that that award may provide some measure of relief for the harm suffered by the victims."*Katanga case* (Trial Chamber: Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) 81

[2221] See chapter 6. Section 3.2.3. II, whereby I argued that in cases involving communities the court awards non-pecuniary damage likely taking into account the end sum the State has to pay.

[2222] This conclusion is reached by accessing the GDP per capita on the Word Bank website in regard to the DRC and Guatemala, and understanding that the sums awarded are roughly half of these countries' GDP per capita for a given year. In addition, the difference between the available GINI index in the DRC (42.1 – in 2012) and Guatemala (48.3 – in 2014) is rather small. see 'GDP per capita (current US$)' (The World Bank Website) <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD> accessed 15 April 2020; 'GINI index (World Bank estimate)' (The World Bank Website) <https://data.worldbank.org/indicator/SI.POV.GINI> accessed 15 June 2020

without clear elaboration as to what constituted the basis for the limitation (IACtHR in the case above; ICC in regard to individual reparations, which will also be discussed below). Deviating from the principle whereby harm is the basis for reparations not only weakens the legal basis of reparations but also cripples the protection of victims and their right to benefit from reparations. Finally, it has to be acknowledged that this finding holds in regard to IACtHR cases involving large number of victims. In cases with lower number of victims, the IACtHR appears to award higher amounts in regard to compensation for moral harm, eliciting a different approach to its evaluation of harm. For instance, the average awards in regard to moral harm at the IACtHR are of approximately 80.000 USD. Amid a lack of extensive elaboration on their rationale, by making these awards, the IACtHR appears to indeed place harm at the centre of their awards, rather than other considerations.

Furthermore, whether the tangible reparations that courts award take into account and respond to victims' preferences in regard to reparations varies across courts and sometimes across cases adjudicated by the same court. Relating to the previous point, victims' preferences appear to be one of the considerations the Judges evaluate when rendering their decisions. In the ICC's case, the tangible reparations awarded across its three cases take into account and respond to a large extent to victims' preferences, although to a lower extent in what regards individual versus collective reparations. Two exceptions are the individual reparations requested by victims and rejected by the Court in *Lubanga case*, whereby the Court opted to give priority to social considerations at the local level over the victims' preferences for individual reparations.[2223] In addition, in *Al Mahdi case*, the Court rejected the requests for individual reparations of certain victims, amid their evaluation by Judges taking into account other complex considerations, likely the local context and feasibility of implementation given the large number of victims.[2224] As far as the ECCC is concerned, as already explained, in its first case, the Court rejected the large majority of victims' requests for reparations amid a lack of feasibility of implementation. However, in its subsequent cases, it endorsed the majority of victims' requests, responding thus to their preferences in regard to reparations. Nonetheless, the fact that the tangible reparations awarded in two segments of *Case 002* respond to the victims' preferences is hardly the sole merit of the Court as they materialized due ceaseless efforts by actors from both inside and outside the Court, such as the VSS, the victims' lawyers, external NGOs, and funding from donors.[2225]

Moreover, as far as ECtHR is concerned, the tangible reparations it awarded respond only partially to the victims' preferences in regard to reparations. Although the Court appears to be granting the victims' requests for compensation in the majority of cases, the awards for pecuniary damages are provided at an approximately 80% lower level than the one requested by victims, whereas the awards for non-pecuniary damage are provided at an approximately 61% lower level than the one requested by victims. The Court does not generally explain why its awards are significantly lower than the ones requested by victims nor does it explain the rationale it employs for making the awards. Instead, it explains that in making the awards it relies on the 'equity principle',[2226] which

[2223] *Lubanga case* (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872 (25 April 2012)
[2224] For an elaboration see chapter 3, section 3.3.3. III.
[2225] For an elaboration see chapter 4, section 3.2.3.
[2226] The principle of equity has been widely used in the decision making of the International Court of Justice. In the case *Continental Shelf case*, the ICJ explained that justice based on equity is justice according to the rule of law and furthermore, the application of equity should entail consistency and a degree of predictability: "what is meant is that the decision finds its objective justification

is invoked depending on the (scarcity of) facts at its disposal (in the case of PD), or due to the nature of NPD which does not lend itself to precise calculation.[2227] Finally, as far as IACtHR is concerned, the tangible reparations it awarded generally respond to the victims' preferences in regard to reparations. In making its awards, the Court places the victims' requests at the centre of its reasoning, granting awards that respond in the large majority of cases to victims' preferences in a generous manner. By way of example, the Court's NPD awards are on average 28% higher level than the level requested by victims, aiming to provide acknowledgment to the extensive harm suffered by both the direct and indirect victims.[2228] Exception to the Court's approach are NPD awards in a handful of cases,[2229] wherein the Court deviated from its previous approach whereby it was adjusting the awards through national schemes to be in line with the IACtHR's standards. Instead, it elicited a tendency to assess what victims want against other considerations, e.g. the scarcity of resources, especially when the States appear forthcoming to provide compensation at the national level.[2230] Another exception concerns the Court's awards in regard to PD, which are awarded at an approximately 28% lower level than the level requested by victims. In making these awards, the courts generally takes into account the evidence submitted by victims, or in certain cases it makes it awards on an 'equitable basis'.

To the extent that international courts award tangible reparations that respond to victims' preferences, as expressed above, the awards might bring a certain positive contribution to the lived reality of the victims, as perceived by them.[2231] In addition, the tangible reparations have the potential to help victims overcome to a certain extent the consequences of the mass atrocities they experienced.[2232] On the other hand, in certain situations the courts' tangible reparations either fail or respond only partially to victims' preferences.[2233] As can be inferred, the victims' preferences are not always the central *rationale* to the courts' reparations awards; instead, they may be downplayed by other considerations, such as the reparations' impact on the ground,[2234] their implementation feasibility,[2235] or a deontological interpretation of law.[2236] Consequently, due to

in considerations lying not outside but within the rules". *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3 para 88

[2227] 'Practice Directions: Just Satisfaction Claims' (ECtHR, 28 March 2007) para 13-15

[2228] E.g. see *Case of the Serrano-Cruz Sisters v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 120 (1 March 2005) para 160

[2229] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 270 (20 November 2013) para 374; *Case of the Santo Domingo Massacre v Colombia* (Preliminary objections, merits and reparations) IACtHR Series No. 259 (30 November 2012) para 336

[2230] The Court continued to provide compensation at its regular rates after these two cases, as those cases did not feature discussions about potential reparations at the national level. E.g. *Case of Osorio Rivera and Family Members v Peru* (Preliminary objections, merits, reparations and costs) IACtHR Series C No. 274 (26 November 2013)

[2231] See e.g. Kelli Muddell and Sibley Hawkins, *'Gender and Transitional Justice: a Training Module Series'* (International Center for Transitional Justice, 2018) 1, 7

[2232] Heidy Rombouts, 'Importance and Difficulties of Victim-Based Research in Post-Conflict Societies' (2002) 10 European Journal of Crime, Criminal Law and Criminal Justice 216, 221.

[2233] E.g. The ECtHR's approach in general, the ICC's approach in Al Mahdi case, or the IACtHR's in regard to PD awards.

[2234] In regard to individual reparations in Lubanga case at ICC.

[2235] *Case 001* at ECCC; in regard to certain beneficiaries of individual reparations in Al Mahdi case at the ICC; in regard to NPD awards in a few cases before the IACtHR, where reparations were already provided to victims via national administrative law.

[2236] In the case of ECtHR, making awards on an 'equitable basis'. As previously explained in this thesis, the use of the word legalism refers to the strict adherence to pre-established rules, failing to take into account the context, which in the case of the ECtHR entails a failure to take into account the real extent of harm suffered by victims of mass atrocities. See John Czarnetzky and Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' 79 Notre Dame Law Review 55, 60

their failure to respond to victims' preferences, they may not bring as big a contribution to the victims' realities and may be perceived by victims as paternalistic and 'imposed by elites'.[2237]

Furthermore, this research found out that the procedural aspects of tangible reparations and the subsequent implications for victims are important to victims and their evaluation of substantive justice by courts. One important example to illustrate this point is the ICC's practice in regard to the process of crafting collective reparations. As this research found out, the victims' preferences in relation to collective reparations were indeed surveyed during consultations with victims and represent a first starting point to collective reparation awards. However, their process of crafting then appeared to slip into a long and cumbersome battleground of different perspectives in relation to collective reparations, including the Judges, the TFV, and the LRVs as actors. As this thesis submitted, this elicits a failure by the ICC to survey and take account of the victims' interests and preferences in relation to the process too, frustrating the victims and accentuating an already existing sense of uncertainty.[2238] On the contrary, in the case of the IACtHR, this research elicited an emphasis placed by the court on the involvement of victims in the decision-making in regard to the specifics of the reparations awarded by the court, in order to ensure that the tangible reparations suit their needs and take into account their preferences.[2239] Consequently, these examples draw attention that not only tangible reparations that respond to victims' preferences are important to victims, but also their involvement during the fleshing out of the specifics of reparations. An inclusive approach, such as the one militated by the IACtHR, places emphasis on the victims' own agency to decide and express what best suits their needs, grants them ownership over the reparation measures, as well as empowers them as decision makers.[2240] Conversely, an approach such as the one displayed by the ICC, detracts from the victims' agency and ownership, fails to empower them as decision makers over reparations that are allegedly crafted for their own benefit. Instead, it places the victims in a position whereby they are passive witnesses to a decision making process that concerns them. Consequently, embracing one approach over the other is likely to influence the victims' evaluation of substantive justice by international courts.

Next to tangible reparations awarded by courts in line with their reparations mandates, this research identified additional tangible reparations emerging within courts' practice that may contribute to or detract from the courts' potential contribution to substantive justice for victims, depending on the courts' different approaches in relation to these measures. They are not reparations measures in line with the courts' reparations mandates;[2241] however, they are measures that according to the van Boven/Bassiouni Principles amount to reparations for victims.[2242] In the ICC's case, they refer to victims' expressed preferences in relation to the accused persons, including the imposition of harsher sentences and different approaches to apologies, as well as the potential involvement of the State in the fulfilment of reparations. As this study elicited, the Court does not appear able to

[2237] Heidy Rombouts, 'Importance and Difficulties of Victim-Based Research in Post-Conflict Societies' (2002) 10 European Journal of Crime, Criminal Law and Criminal Justice 216, 221

[2238] For an elaboration see chapter 3. Section 3.3.3. III.

[2239] See e.g. *Case of the Rio Negro Massacres v Guatemala* (Preliminary objection, merits, reparations and costs) IACtHR Series C No. 250 (4 September 2012) para 289; *Case of Contreras et al. v El Salvador* (Merits, Reparations and Costs) IACtHR Series C No. 232 (31 August 2011) para 206

[2240] In line with Carlton Waterhouse, 'The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs' (2009) 31 University of Pennsylvania Journal of International Law 257; Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 Social & Legal Studies 489, 499. See above chapter 2, section 3.2.1

[2241] Albeit in the ICC's case, it could be argued that some of the measures might also fit within the ICC's reparations regime.

[2242] See above chapter 2. Section 3.2.1.

take these victims' preferences on-board.[2243] At the ECCC, they entail victims' expressed preferences that the Court should bring justice to victims, find the truth about crimes and the fate of victims' families, punish the perpetrators to the highest degree possible as well as provide victims with compensation. As this study found out, the Court may have managed to contribute to justice for the majority of victims as well as meted out high sentences for the accused persons, satisfying thus victims' preferences in this regard. However, the Court did not manage to adequately respond to the victims' preferences for truth, as well as failed to provide them with compensation, due to the courts' limited capacity and mandate to satisfy these preferences.[2244] In the ECtHR's case, they entail measures indicated by the Court on its own motion and not requested by victims, in 'exceptional cases'[2245] of gross human rights violations. They are individual and/or general measures that the Court directs the defendant States to adopt to discharge their obligations under the Court's judgments. According to the van Boven/Bassiouni Principles, they amount to satisfaction and guarantees of non-repetition, and might have reparative value for victims in the cases as hand.[2246] Against this background, this study elicited that courts' potential contribution to substantive justice for victims may be bolstered or weakened by additional tangible reparations measures emerging within the courts' work. Interestingly, these measures appear to emerge in the context of both ICL and IHRL-based courts as a result of their larger goals, additional to enforcing their reparations mandates. To be precise, in the context of ICL-based courts they appear as potential side benefits for victims emerging from the courts' focus on retributive justice (especially in the ECCC's case),[2247] whereas in the context of IHRL-based courts, they emerge as a result of the courts' attempt to satisfy their goal of maintaining respect for human rights in their respective legal orders.[2248]

Finally, the international courts' potential contribution to substantive justice is furthermore influenced by the prospect of implementation of tangible reparations awarded by courts. As explained, ICL-based courts rely on the responsibility of accused persons to repair the harm of victims through reparations, whereas IHRL-based courts rely on the States' responsibility to provide victims with reparations for the consequences of the human rights violations imputable to States. At a first glance, the ICL model of implementation appears to be deficient in comparison with the IHRL model. To begin with, singular individuals have significantly fewer resources and are less powerful than States. Certain satisfaction measures such as for instance, a commemoration day or naming streets after victims, and far-reaching guarantees of non-repetition measures cannot be implemented by individuals, but only by States. In addition, the tangible reparations implemented by States are likely to be more significant for victims than those implemented by singular individuals. Beyond the tangible benefits of reparations, reparations implemented by States may mark the States' separation from their violent past,[2249] vowing respect for human rights

[2243] For an elaboration see chapter 3. Section 3.3.3. III
[2244] For an elaboration see chapter 4. Section 3.2.3. II.
[2245] Elisabeth Lambert Abdelgawad, 'The Execution of Judgments of the European Court of Human Rights' (Council of Europe Publishing, 2008) 52
[2246] For an elaboration see chapter 5. Section 3.4.2.
[2247] For an elaboration on the ICC and ECCC's mandate to also enforce retributive justice see Alina Balta, Manon Bax and Rianne Letschert, 'Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia' 2019 International Journal of Comparative and Applied Criminal Justice 1, 8-9
[2248] See also Laurence Helfner, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 The European Journal of International Law 125, 126; Eleonora Mesquita Ceia, 'The Contributions of the Inter-American Court of Human Rights to the Development of Transitional Justice' (2015) 14 The Law and Practice of International Courts and Tribunals 457, 466
[2249] See Rudi Teitel discussing Chile's Truth and Reconciliation report "In assuming the obligation to pay reparations, the

and the protection of victims and their rights from future abuses.[2250] On the contrary, reparations implemented by individuals cannot guarantee neither of them;[2251] even though individuals may contribute towards the implementation of reparations flowing from their criminal responsibility, if their imprisonment time is up and they are set free, reparations are not a guarantee against recidivist criminal behavior.

Nonetheless, as this research showed, the benefits and implementation of reparations in the context of one model over the other are not as straightforward in practice. To be precise, in order to overcome the resources argument posited above, ICL-based courts made recourse to different strategies to design, fund and implement reparations; at the ICC, the inclusion of the TFV, and at the ECCC through the amendment of its Internal Rules to enable the VSS and Lead Co-Lawyers, to provide reparations via projects engaging NGOs and donor support. Due to these strategies, ICL-based courts ensured that the victims would receive reparations for their harm.[2252] However, they also entail shortcomings in that they weaken the link between reparations and the accused's liability to crimes to repair the harm they caused to victims,[2253] and outsource the design, implementation, and funding of reparations to actors internal and external to courts. Consequently, the tangible reparations that emerge are not so much a transaction whereby the accused is held responsible to repair the harm of victims is engaged, neither morally nor financially due to their indigence. At best, they might entail that the accused are held financially responsible for the harm of victims if they acquire funds in the future,[2254] but realistically, the tangible reparations that emerge are the result of influences by a multitude of actors, each of them featuring different interests and goals. Consequently, reparations in the context of ICL-based courts, linked to the individual criminal responsibility of the accused become weaker both in principle and in fact, making reparations more akin developmental programs. In addition, for the victims interested in seeing their harm addressed by the perpetrators of crimes, as a way to acknowledge their responsibility for wrongdoing and their obligation to make amends for their deeds, as well as validating the victims' harm,[2255] the ICL model is likely to set them for an outright disappointment.[2256]

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successor regime took responsibility for the past regime's wrongdoing". Rudi Teitel, *Transitional Justice* (Oxford University Press, 2002) 126

[2250] As Dinah Shelton expressed, "Individuals expect protection from the state; indeed, one of its fundamental purposes is to provide the institutional and other means to ensure the safety and well-being of those within its power. For the government itself to cause harm adds an element of outrage generally not present in purely private wrongdoing." Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 61

[2251] For a critical discussion on the backward and forward-looking functions of justice mechanisms see Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339, 343-345

[2252] As discussed, at ECCC, all reparations awarded in *Case 002* have already been implemented, whereas at ICC, TFV is still in the process of implementing reparations in all three cases.

[2253] This is particularly true as far as ECCC is concerned, which curtailed all together the link between the accused's responsibility for reparations in *Case 002*. At the ICC, the TFV is deployed as a safety net, operating under the assumption that funds acquired by the accused in the future will be reimbursed to the TFV for the costs incurred to fund reparations on the accused's behalf. As clarified in Katanga case, the ICC Presidency will monitor the convicted persons' financial situation and, should they acquire funding in the future, they will be seized and transferred to the TFV, *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) footnote 31, para 329

[2254] As clarified in Katanga case, the ICC Presidency will monitor the convicted persons' financial situation and, should they acquire funding in the future, they will be seized and transferred to the TFV, *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) footnote 31, para 329

[2255] In line with Margaret Urban Walker, *Moral Repair Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006) 31

[2256] As shown above, all the accused persons in the cases analysed in these thesis are indigent and their apologies, to the extent they were offered, were dismissed by victims as insincere.

On the other hand, the IHRL model of implementation is equally disappointing in practice. The implementation of reparations awarded by IHRL-based courts is dependent on the defendant States' capacity and willingness to implement them, and as this research highlighted, the implementation of reparations by States varies depending on the types of reparations measures. To be precise, the compensation measures that courts award are the only measure that States, both in the context of the ECtHR and the IACtHR, appear willing to implement in a consistent manner.[2257] However, as far as the other measures are concerned, their implementation by States is partial.[2258] To be precise, in the context of the ECtHR, the implementation of individual and/or general measures by States has been characterized as lagging behind,[2259] whereas in the context of the IACtHR, States' are particularly failing to implement satisfaction and guarantees of non-repetition measures.[2260] By limiting their implementation of reparations to compensation measures, States appear to choose an easy way to 'buy off' human rights violations.[2261] As such, due to the lack of capacity of IHRL-based courts to oblige States to implement the reparations they award,[2262] reparations in the context of IHRL might appear rather irrelevant in practice as long as States do not assume responsibility to redress the victims' harm in line with the courts' judgments. Additionally, this situation places the victims in a vulnerable situation, bolstering their distrust in the protection of their rights by States and potentially perpetuating their fear that similar crimes might reoccur in the future.

Both sets of courts feature shortcomings unique to their underlying legal frameworks which detract from the courts' potential to contribute to substantive justice in their own way. While in theory, reparations provided through IHRL-based courts appear to have more potential, in practice, the reparations provided by IHRL-based courts versus ICL-based courts might be even more limited and dissatisfying for victims.

2. Implications

As this thesis illustrated, the normative background permeating the courts' establishment and its evolution across time, to accommodate new understandings of victims and mass atrocities,

[2257] However, the implementation of compensation in the ECtHR context versus IACtHR is widely different, the former court featuring a higher rate of implementation than the latter. See Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 Journal of International Law and International Relations 35; Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 The European Journal of International Law 1091

[2258] For an elaboration on the complexities of implementation in the context of both courts see Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 Journal of International Law and International Relations 35

[2259] Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 The European Journal of International Law 1091, 1098

[2260] Santiago A. Canton, then Executive Secretary of the Inter-American Commission on Human Rights, talking about Compliance With Decisions On Reparations: Inter-American And European Human Rights Systems in Claudio Grossman, Ignacio Alvarez, Carlos Ayala, David Baluarte, Agustina Del Campo, Santiago A. Canton, Darren Hutchinson, Pablo Jacoby, Viviana Krsticevic, Elizabeth Abi-Mershed, Fernanda Nicola, Diego Rodríguez-Pinzón, Francisco Quintana, Sergio Garcia Ramirez, Alice Riener, Frank La Rue, Dinah Shelton, Ingrid Nifosi Sutton, Armstrong Wiggins, 'Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1453

[2261] See also Loukis Loucaides, 'Reparation for Violations of Human Rights under the European Convention and Restitutio in Integrum' (2008) 24 European Human Rights Law Review 435, 437; Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press, 2014) 42

[2262] As expressed, the only tool IHRL-based courts posses is shaming States. See Darren Hawkins Aand Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (Annual Meeting of the American Political Science Association, Boston, MA, 28-31 August 2008) 7

translated into the courts' legal bases and led to different roles, rights and prerogatives victims could avail themselves of, as well as loftier aspirations in regard to what the courts could do for the victims.[2263] Across time, to a lower or larger extent, the preexistent understanding of notions such as voice, legal representation, reparations, and harm expanded to accommodate new meanings and ways to realise them. Newer courts such as the ICC and the ECCC developed their legal frameworks building on the already existing understanding permeating the functioning and adjudication of IHRL-based courts.[2264] With the ICC's establishment, affording reparative justice to victims became an explicit aspiration of courts mandated to provide reparations.

However, as this study showed, this normative and legal evolution did not always translate into a better protection of victims' rights and prerogatives or indeed, contribution to reparative justice. This thesis is rife with examples showing that the expansion of each of the notions, while attempting to fix existing challenges, led to additional and more complex challenges that courts do not always have the capacity to address. Providing victims a fully-fledged role, enforcing their rights and prerogatives, and affording reparative justice within international courts remains marred with complications.

This study found out that the courts' potential contribution to procedural justice for victims is characterized by a decentralization of such responsibilities from courts and increased reliance on legal representatives, internal actors (i.e. the TFV and Victims' Units) and external actors (i.e. intermediaries and NGOs) to accommodate victims within trials. It illustrated that procedural justice for victims appears to be, to a large extent, developed outside the courtroom, in a space where the work of these actors converge. At the same time, it is the result of a multitude of efforts and practices that were mobilized by the aforementioned actors to actualize the procedural prerogatives statutorily bestowed upon victims. However, even under this decentralized model, challenges to afford procedural justice still exist, given, *inter alia*, the large number of victims, the distance to the victims, and capacity problems. Additionally, affording substantive justice for victims is a very intricate matter. When attempting to provide reparations, courts need to navigate convoluted dilemmas such as: how to evaluate the magnitude of harm in the context of mass atrocities; how to ensure that the reparations awards would not expand existing rifts within communities in conflict situations and in fragile States or expand serious threats resulting from ongoing violence as a result of international and national interests in the regions where reparations ought to be implemented; and how to make the reparations a reality amid the indigence of the accused or unwillingness of States to realise them. Being confined by legal imperatives, courts developed different strategies when engaging with such dilemmas, ranging from restricted to expansive interpretation of legal concepts.[2265] However, engaging in such an enterprise necessarily entails a consideration of various interests and decisions, which will eventually reveal its limitations when faced with the complexity of the task at hand. The victims' preferences may represent one consideration amongst others when faced with such complex matters. In addition, as in the case of procedural justice, the realization of substantive justice is subject to different dynamics amid its necessary reliance on other actors such as the TFV, Victims' Unit, the accused persons and States to actualize it.

[2263] For a detailed elaboration, see the first section of each of the chapters dealing with the establishment of courts.
[2264] In fact, these courts continue to build on each-other's work, as indicated by the nowadays often cross-referencing of their case-law. As can be inferred from the courts' jurisprudence, both IHRL and ICL courts reference each other's case-law.
[2265] See study by Shai Dothan eliciting how courts apply different techniques of interpretation. Shai Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights' (2019) 42 Fordham International Law Journal 765

Taking a victims' perspective to look at the courts' potential contribution to procedural and substantive justice provides further insights. As noticed in regard to procedural justice, not only whether victims are provided with voice, information, and interaction in the process of obtaining reparations is important, but also how and by whom they are materialized, which indicates that the substantive aspects of the process might also be relevant. In addition, in regard to substantive justice, not only whether the outcome features tangible reparations is important, but whether the reparations respond to the victims' harm and preferences, as well as whether they involve the victims in their crafting and implementation. Consequently, procedural aspects of the outcome of reparations proceedings appear also important to victims. This insight elucidates that for the victims the distinction between procedural justice and substantive justice might not be as clearly delineated as courts or theories conceive of the victims' involvement with international courts.

2.1. Rethinking of the Notions of Procedural Justice and Substantive Justice to Conceptualize Reparative Justice

As can be inferred from above, the conception of procedural justice emerging in the context of international courts is different from the use and conceptualization of procedural justice explained in the theoretical framework chapter, which centers on the people's involvement with a procedure and their subsequent evaluation of their experience,[2266] or the victims' involvement in courts, assuming their direct interaction.[2267] Similarly, in the context of international courts mandated to provide reparations for victims, the initial theoretical basis whereby courts might contribute to substantive justice if they provide tangible reparations that aim to repair the harm and respond to victims' preferences appears too narrow, as it does not account for all the complexities highlighted throughout this thesis.

These findings indicate the necessity of rethinking the notions of procedural justice and substantive justice in the context of international courts. Studying the courts' contribution to reparative justice as procedural justice and substantive justice requires more robust theoretical notions that go beyond the courts' formal roles and account for:

1) The role of legal representatives, internal actors (i.e. TFV and Victims' Units), and external actors (i.e. intermediaries and NGOs) in the realization of both procedural and substantive justice.

Doing so requires an acknowledgment of the role of these actors in shaping the courts' contribution to procedural justice and substantive justice. It also requires a comprehensive understanding of who the different actors contributing to procedural justice and substantive justice are as well as an unpacking of their respective roles, interests and contribution to the realization of procedural and substantive justice.

2) The challenges inherent in the realization of procedural justice and substantive justice in the context of mass atrocities.

[2266] E.g. Gerald Leventhal, 'What Should be Done with Equity Theory?' in Kenneth Gergen, Martin Greenberg and Richard Willis (eds), Social Exchange: Advances in Theory and Research (Springer, 1980)
[2267] E.g. Wemmers generally refers to victims' satisfaction with the performance by the police, the public prosecution and the courts at the national level, without further elaborating on the specific organs of courts. Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996) 21

Acknowledging these challenges puts into perspective what the courts are realistically able to do in terms of procedural justice and substantive justice, given the large number of victims, the complexities on the ground, and the magnitude of harm. The ambition of affording procedural justice and substantive justice, in the sense described in the theoretical framework, might simply not be a feasible option in the context of international courts dealing with mass atrocities.

3) The importance of embedding the victims' experiences and views to understand if the notions of procedural justice and substantive justice are relevant to them as well as how relevant.

More empirical research analyzing the victims' needs, perceptions, and views on justice and injustice is needed, to understand how victims relate to international courts, what their expectations are and how to best respond to them. When conducting research, it is indicated that the use of pre-established notions of justice and injustice is relinquished, to enable the victims to express their views and concerns freely. This way, the findings that emerge would be located as much as possible within the victims' own perceptions and interests and not influenced by external notions. Despite the fact that the victims' views and expectations are likely to vary greatly, they would still provide guidance in the re-conceptualization of procedural justice and substantive justice to better account for the experiences and views of victims of mass atrocities.

2.2. Recommendations for International Courts Mandated to Provide Reparations

This thesis elaborated extensively on how courts may potentially contribute to reparative justice by means of their reparations regime while highlighting shortcomings and limitations. Before moving forward to elaborate on main recommendations that courts could take onboard to enhance their contribution to reparative justice, it is important to put forward a final caveat, to put into perspective what can be expected from international courts. The courts' potential contribution to reparative justice has to be understood in light of the courts' overall purpose.[2268] More explicitly, each of the courts' understanding of reparative justice for victims relative to the courts' end goals helps to put into perspective their potential contribution to reparative justice. The ICC is the most outspoken court in regard to its approach to reparative justice, as 'justice for victims' is a goal stated in its 'strategy in relation to victims',[2269] to be realized by enabling the victims' participation and access to tangible reparations. Similarly, at ECCC 'justice for victims' is an aim of the court made explicit by the court's presidency.[2270] However, as inferred from the ICL-based courts' jurisprudence, they view reparations as a means to hold offenders accountable for their crimes by obliging them to repair the harm they caused.[2271] Against this background, while ICL courts appear

[2268] This is the general rule of interpretation of treaties, in line with article 31 of Vienna Convention.

[2269] Assembly of States Parties (ASP), 'Report of the Court on the strategy in relation to victims' (10 November 2009) ICC-ASP/8/45, para 3. See also the revised strategy, ASP, 'Court's Revised strategy in relation to victims' (5 November 2012) ICC-ASP/11/38 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf > accessed 29 January 2020

[2270] See https://www.eccc.govkh/sites/default/files/media/8th_plenary_president_speech_EN.pdf; Brianne McGonigle, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles' (2009) 22 Leiden Journal of International Law 127

[2271] As asserted by ICC "Reparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Court to ensure that offenders account for their acts." *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) para 2. and ECCC "awards are directed against and borne exclusively the Accused following a determination of responsibility for the harm established by Civil Parties as resulting from the criminal offending". *Case 001* (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) para 661

to view reparative justice for victims as important, it remains subordinate to their core retributive justice - oriented goal to punish and hold accountable those most responsible for international crimes.[2272] In comparison, IHRL-based courts do not assert explicitly their concern to provide reparative justice for victims. As far as their understanding of reparations is concerned, they appear to view them as a means to repair the victims' harm induced by the States' human rights violations[2273] and ultimately foster a culture of respect for human rights, by obliging States to ensure the protection of human rights.[2274] As such, in the context of IHRL-based courts, reparative justice for victims appears to be a precondition for the fulfilment of the courts' broader goals. [2275] Consequently, according to this reasoning, IHRL-based courts appear better positioned to contribute to reparative justice for victims, since the attainment of reparative justice is not made subordinate to broader goals, such as in the case of ICL-based courts. At the same time, amid the open-ended nature of IHRL-based courts' goals (i.e. the protection of human rights) reparative justice for victims appears important. Yet, it does not seem to represent the courts' priority either, since affording reparative justice to each victim appears less important than maximizing respect for human rights. In addition, in this sense, it can be said that IHRL-based courts have a forward-looking ambition in the sphere of prevention compared to ICL-based courts.[2276]

To enhance the courts' potential contribution to reparative justice, it is recommended that:

1) International courts expand the number of beneficiaries of reparative justice.

At the IHRL-based courts level, this could entail a simplification or attenuation of the complex procedural steps that the victims' applications are subjected to before reaching the Judges. Admittedly, it is unclear whether this is feasible given that these courts are of last resort, already overburdened with a large number of applications. A simplification or attenuation of the complex procedural steps would necessarily need to be matched by increased resources and capacity of courts.

At the ICL-based courts level, this could be realized by expanding the scope of charges brought by the Prosecutor, to enable more types of crimes to be adjudicated. Gathering evidence in situations of mass atrocities to prove expansive crimes is undoubtedly a very difficult task, again, given the complexities on the ground. However, it is long overdue that, for instance, more complex forms of harm such as the harm of victims of sexual and gender-based violence are acknowledged and attempts to repair such harm are undertaken. The first step is their inclusion in the Prosecutor's charges. Examples of best practices are *Case 002/02* of the ECCC wherein the Judges established the perpetration of forced marriage and rape within forced marriage under the Khmer Rouge

[2272] For an elaboration on these courts' goals and differences between them see Alina Balta, Manon Bax, Rianne Letschert, 'Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia' (2019) International Journal of Comparative and Applied Criminal Justice 1, 7

[2273] For both IACtHR and ECtHR the aim of reparations is to of reestablishing the situation prior to the victimization and when this is impossible, the courts award other reparations measures. E.g. See *Case of Bámaca-Velásquez v Guatemala* (Reparations and Costs) IACtHR Series C No. 91 (22 February 2002) para 39; *Case Association "21 December 1989" and Others v Romania* App nos. 33810/07 and 18817/08 (ECtHR, 24 May 2011) para 201

[2274] For elaboration see chapter 5, section 4 and chapter 6, section 4.

[2275] For elaboration see chapter 5, section 4 and chapter 6, section 4.

[2276] See e.g. Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339

regime as crimes against humanity,[2277] as well as the recent ICC decision in the Bosco Ntaganda case.[2278]

2) International courts provide adequate support for victims to actualize their statutory rights and prerogatives, which might include support to the legal representatives, the Victims' Units, and other relevant actors.

International courts should provide from the beginning of a case various types of support that might be needed, including financial, logistical (e.g. trainings), or expertise to the legal representatives, the Victims' Units, and other relevant actors, in order to enable victims to benefit from the rights and prerogatives statutorily bestowed upon them. This recommendation has in mind the particular example of the ECCC whereby the legal representatives and the Victims' Unit could not operate in its first case amid a lack of funding. By means of example, the system in place at the ICC, whereby the legal representatives receive advice and funding or the legal aid system to ensure the victims' legal representation in the context of IHRL-based courts (which in the case of the IACtHR was recently adopted) appear as promising good practices.

3) *International courts flesh out an accountability mechanism for the various actors actualizing the victims' rights and prerogatives before courts.*

Connected to the previous recommendation is the recommendation that international courts should flesh out an accountability mechanism, which could include an obligation for the various actors actualizing the victims' rights and prerogatives before courts to report on how they fulfill their mandates in relation to victims. The obligation of reporting would provide more robust information into how, for instance, the legal representatives interact with the victims, how they collect their voice, what type and how often they provide victims with information. In addition, there should be a possibility for the victims to express their opinion on these aspects, to convey whether their procedural prerogatives are realized, and communicate ways through which they may be enhanced. Another important aspect is the clarification of the mandates and goals each of these various actors pursue and how they tie into the overall goal of courts in relation to victims. This is particularly relevant to evaluate the work of the various actors and the choices they made when discharging their victim-oriented mandates, especially since there is no system in place to report or to sanction potential breaches of victims' procedural rights.

4) International courts reduce the length of proceedings.

International courts should engage in solving complex legal disputes or deciding on the cases having the victims' interests at heart, including their interests in relation to the process. Solutions should be deployed to reduce the length of proceedings, as they have impact on both the process and outcome of reparations. Where possible, the period for implementing reparations should be simplified and shortened, to ensure that victims benefit from reparations in a timely manner.

5) *International courts award reparations that respond as much as possible to the victims' harm and where possible, their preferences.*

[2277] ECCC (Trial Chamber: *CASE 002/02* Judgement) 002/19-09-2007/ECCC/TC (16 November 2018) disposition
[2278] ICC, 'Situation in the Democratic Republic of the Congo: The Prosecutor v Bosco Ntaganda' < https://www.icc-cpi.int/CaseInformationSheets/NtagandaEng.pdf> accessed 8 June 2020

Reparations that aim to repair the victims' harm caused by mass atrocities for which individuals or States were found guilty or responsible is the underlying principle of reparations in the context of international courts. To respond to the victims' harm as much as possible necessitates an unshaken commitment to this legal principle but also an expansion of the courts' understanding of harm in the context of mass atrocities, to accommodate victimological insights and knowledge on the magnitude of harm and its individual and collective dimensions.[2279] In addition, reparations that take into account and respond to victims' preferences are also recommended, as they would be effective and respond to the lived reality of the victims, as perceived by them.[2280]

However, if the local dynamics and context make it difficult or impossible for international courts to award reparations that respond as much as possible to the victims' harm and preferences, international courts should be explicit about what interests and considerations are balanced out when making decisions. This would offer more transparency into how courts balance out different interests while safeguarding the victims' rights and prerogatives. Making clear these choices would also make explicit the actual limits of reparations in the context of international courts.

6) *Deeper reflection on the possibilities to actualize the reparations regimes when international courts are established.*

In the author's opinion, affording reparations within the context of international courts that aim to repair the harm incurred as a consequence of crimes or human rights violations for which individuals or States have been found guilty or responsible is important for at least three reasons. The first one concerns their moral relevance in that reparations purport to 'hold accountable' individuals and States, to denounce their criminal behavior, and to make clear their obligation to repair the harm their criminal actions have caused to the victims.[2281] The second one refers to their symbolic relevance in that reparations aim to acknowledge the harm and suffering experienced by victims at both individual and collective levels and may represent a form of recognition owed to victims whose rights were violated.[2282] The third one is the reparations' tangible relevance whereby actual benefits are granted to victims to enable them to make sense of their victimization and to attempt to move on with their lives.[2283]

When international courts mandated with reparations regimes are established, an in-depth consideration of the aforementioned aspects of reparations is paramount to ensure the reparations' relevance in practice. Drawing on the findings of this thesis, it can be said that international courts and their reparations regime are of symbolic relevance, in that they acknowledge the victims' harm and suffering and provide a form of recognition to victims that their rights have been violated (with several caveats exposed throughout the thesis). However, as far as their moral and practical relevance are concerned, they remain largely theoretical as in the context of ICL-courts all persons

[2279] See e.g. Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer and Roelof H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) 15 International Criminal Law Review 339
[2280] See e.g. Kelli Muddell and Sibley Hawkins, 'Gender and Transitional Justice: a Training Module Series' (International Center for Transitional Justice, 2018) 1, 7
[2281] See e.g. Brandon Hamber and Richard Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 Journal of Human Rights 35, 38
[2282] See e.g. Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), Handbook of Reparations (Oxford University Press, 2006) 461
[2283] See e.g. Margaret Urban Walker, *Moral Repair Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006) 18

found guilty of crimes and responsible for reparations so far were declared indigent, while in the context of IHRL-courts the States are not always forthcoming in their obligation to provide reparations. In the context of the ICC, the role of the TFV is essential to provide actual benefits to victims. Whereas at the ECCC, its flexibility to amend the Internal Rules and to enable victims to benefit from reparations in one way or another is commendable given the circumstances; however, this approach stripped reparations within the ECCC's context of their potential moral relevance. While the mechanisms available at the ICC and the ECCC emerged to ensure the reparations' practical relevance and may have a certain value if victims receive tangible reparations, neither mechanism can substitute the moral relevance of reparations.

While a way out of this conundrum is complicated, a deeper reflection by the negotiators or drafters of courts' legal instruments on all these issues is recommended, especially before new international courts mandated to provide reparations are established.

7) Lower expectations are attached to reparations in the context of international courts.

Connected to the recommendations above is the need to attach lower expectations to reparations in the context of international courts, which is applicable to both negotiators, drafters, international courts themselves and their organs and actors as well as to the audiences of the courts, such as victims, their representatives, etc. In regard to negotiators, drafters, international courts themselves and their organs and actors, some of the recommendations above have already highlighted the need to make clear certain aspects of their work and decision-making *rationale* that would also be valuable for expectation management. For instance, if the Judges or others organs and actors with victim-oriented mandates would make clear which interests are balanced out when awarding reparations or realizing their mandates or if the negotiators would reflect on and acknowledge the limited potential of reparations to realize their moral, symbolic or practical dimensions, then lower expectations would be conveyed to the outside world. This in turn would likely result in lower expectations being placed by victims in international courts and the reparations they award, minimizing their disappointment.

Against this background, the recommendations made in this section might help to enhance the courts' potential contribution to reparative justice to victims. At the same time, they also highlight the efforts and complexity involved in affording reparative justice to victims in situations of mass victimization, all too easily overlooked when crafting new institutions with reparative justice mandates or when making lofty assertions that courts can provide justice to victims. They also perfectly illustrate the insight Amartya Sen offered, referring to institutions:[2284]

"*There are, however, good evidential reasons to think that none of these grand institutional formulae typically deliver what their visionary advocates hope, and that their actual success in generating good social realisations is thoroughly contingent on varying social, economic, political, and cultural circumstances. Institutional fundamentalism may not only ride roughshod over the complexity of societies, but quite often the self-satisfaction that goes with alleged institutional wisdom even prevents critical examination of the actual consequences of having the recommended institutions*."

[2284] Amartya Sen, *The Idea of Justice* (The Belknap Press, 2009) 83

2.3. What's Law Got to Do with It? Final Reflections on the Inclusion of a Reparations Regime and Aspirations of Reparative Justice within International Courts' Mandates

As this thesis illustrated, the realization of reparative justice in the context of international courts is rife with challenges that need to be tackled to enhance the courts' potential contribution to reparative justice. However, another insight offered by this thesis is that given the complexity of the task at hand, all efforts are bound to fall short of coming to grips with mass atrocities and their consequences. This is the predicament of reparations, acknowledged in the first pages of this thesis, and demonstrated in the systematic assessments of each of the courts' practice on reparations. Reparations for victims are a possible justice reaction to mass atrocities yet they can never be adequate if measured against the depth of the wounds they attempt to repair.[2285]

This realization brings with itself the question:

Given the international courts' limited contribution to reparative justice and ultimately, the futility of these efforts, does this mean that international courts should not feature reparations regimes and aspirations of reparative justice?

In the author's opinion, the answer should be in the negative. From a legal perspective, as long as international courts deal with the criminal liability of perpetrators for international crimes and the responsibility of States for gross human rights violations, the victims of these crimes deserve a role, rights, and a say within the judicial processes that concern them. The idea that the victims are the forgotten party in their own trials has slowly but steadily lost relevance and it is paramount that it stays this way.[2286] Furthermore, in line with the underlying *rationale* of reparations in the context of international courts, the commission of criminal acts or human rights violations brings with itself the obligation to repair the harm suffered by affording victims with reparations. For these reasons, the inclusion of reparations regimes and aspirations to repair the harm and afford reparations within the mandates of international courts should be indisputable. From a moral perspective, to the extent that international courts are amongst the States Parties' best efforts to come to grips with mass atrocities and attempt to provide a measure of justice to victimized societies, the inclusion of reparations regimes and reparative justice aspirations may be thought of as a moral obligation of States. Drawing on Dan Kahan's insights in regard to punishment whereby "what a community chooses to punish and how severely tell us what (or whom) it values and how much",[2287] the same could be said in regard to reparations and reparative justice. Whether international courts aim to repair the harm of victims and afford them reparative justice tells us how States view victims and their harm and what their intentions to come to terms with the mass atrocities are. As such, aspirations to afford reparative justice infused into the international courts' legal bases may convey the States' intentions to acknowledge the massive harm suffered by victims of mass atrocities, to deploy their best efforts to attempt to repair the harm, and may represent a tacit commitment to avoid engaging in actions that might have similar consequences. Unfortunately, these intentions and the appearance of morality are short-lived when States fail to offer support to international courts in the realization of their reparative mandates, or indeed, in their overall functioning.

[2285] Gary Bass, 'Reparations as a Noble Lie' in Melissa S. Williams, Rosemany Nagy and Jon Elster (eds), *Transitional Justice* (Nomos Li, 2012) 171
[2286] See e.g. Nils Christie, 'Conflicts As Property' (1977) 17 The British Journal Of Criminology 1
[2287] Dan M. Kahan, 'Social meaning and the economic analysis of crime' (1998) 27 Journal of Legal Studies 609, 615

On the other hand, while the inclusion of reparations regimes and aspirations of reparative justice appears important, this thesis illustrated the necessity of not taking them at face value. As Amartya Sen advised, it is important to subject such aspirations to a critical examination, amid the realization that establishing institutions with the right institutional structure and aspirations will not automatically lead to the realization of justice.[2288] This is exactly what this thesis set out to achieve; to assess in a systematic manner how international courts mandated to provide reparations may contribute to reparative justice for victims of international crimes and gross human rights violations by means of their reparations regimes. As a result of this approach, this thesis achieved two important goals:

First, by employing a taxonomy of reparative justice conceptualized on the basis of elements pertaining to procedural justice and substantive justice, it revealed shortcomings in the courts' potential contribution to reparative justice and put forward recommendations that courts could take onboard to further improve their practice on reparations and do better to actualize their reparative justice aspirations. Second, it confirmed an insight concerning mass atrocities that Hannah Arendt put forward back in 1946: "The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness."[2289] More precisely, this thesis illustrated the limitations inherent in affording reparative justice for victims in the context of international courts, which include the limited number of beneficiaries as well as the limited possibilities for procedural justice and substantive justice due to, *inter alia*, the large number of victims, immensity of harm, and complexities on the ground.[2290] These limitations are primarly justified by the inherent role of law to include and exclude events and facts according to pre-established sets of rules,[2291] making international courts and their legal frameworks bound to fall short of coming to grips with mass atrocities and their consequences. This ultimately illustrates that affording reparative justice to victims of mass atrocities necessarily requires additional efforts to those of international courts. This argument has also been highlighted by Pablo de Greiff in his capacity as the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, who stressed:[2292]

"*[T]he importance of taking a comprehensive approach to address gross violations of human rights and serious violations of international humanitarian law […] an approach that combines the elements of truth-seeking, justice initiatives, reparations and guarantees of non-recurrence in a complementary and mutually reinforcing manner*."

[2288] Amartya Sen, *The Idea of Justice* (The Belknap Press, 2009) 83

[2289] 'Letter from Hannah Arendt to Karl Jaspers' (17 August 1946) in Lotte Kohler and Hans Saner (eds) and Robert Kimber and Rita Kimber (translators), Hannah Arendt and Karl Jaspers: Correspondence 1926-1969 (A Harvest Book, 1992) 54

[2290] See also Luhmann Niklas, 'Law as a Social System' (1988-1989) 83 Northwestern University Law Review 136; Andrew Trevor Williams, 'Human rights and law: between sufferance and insufferability' (2007) 122 Law Quarterly Review 2007 132, 142; Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish, 2007) 81

[2291] Niklas Luhmann, 'Law As A Social System' (2009) *Right & Power* 180, 186; Andrew Trevor Williams, 'Human rights and law: between sufferance and insufferability' (2007) 122 Law Quarterly Review 2007 132, 142; Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish, 2007) 81

[2292] UNGA, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' (Human Rights Council, Twenty-first session) A/HRC/21/46 (9 August 2012) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf> accessed 8 June 2020

The TFV's assistance mandate at the ICC, the non-judicial reparations at the ECCC and national reparations programs whereby reparations are currently provided in some States in Latin America are examples of initiatives that should go alongside the reparative efforts of international courts. Such initiatives must be acknowledged and supported. However, a comprehensive approach similar to the one advocated by Pablo de Greiff would require the mobilization of a multitude of other efforts, including by States, NGOs, other actors as well as potentially the establishment of other institutions, such as Truth and Reconciliation Commissions.

2.4. Final Remarks

Aspiring to realize reparative justice for victims of mass atrocities does not start nor end with international courts. However, as this thesis ilustrated, they represent a relevant pylon in the endeavor of affording reparative justice for victims, and as such, their efforts must be strengthened to come a step closer to its attainment. This thesis' focus to challenge aspirations of reparative justice in the context of international courts did not mean to quash such aspirations. It aimed to critically examine them to identify shortcomings and maximize ways to better contribute to the realization of reparative justice for victims of mass atrocities, while putting into perspective what can be realistically expected of such aspirations in the context of international courts mandated to provide reparations. Ultimately, the findings of the study are helpful to manage the expectations that victims and the outside world place on international courts and their reparative regimes, but are also a reality check for international courts and the narratives they put forward.

Summary

The past several decades have witnessed important developments in regard to the victims' role and rights within international criminal law (ICL). The initial military and *ad-hoc* tribunals established within the ambit of ICL demonstrated a scarce attention to the plight of victims, as they were primarily focused on the punishment of the accused persons.[2293] However, the establishment of the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) marked a departure from this approach, as in addition to a focus on the accused's punishment, they granted victims of international crimes different roles within proceedings, for instance, to express their views and concerns or to participate as civil parties. In addition, these courts bestowed upon victims different rights and prerogatives, including the right to information, protection and assistance,[2294] as well as the right to receive reparations. The reparations would be awarded against and borne by individuals found criminally responsible for incurring harm to victims.[2295]

The inclusion of reparations regimes within the mandates of international courts is not unique to ICL-based courts. Courts operating within the ambit of international human rights law (IHRL) such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR), which long predate the ICL-based courts, also feature reparations regimes. These IHRL-based courts aim to protect the individuals' human rights, which entails holding States accountable for human rights violations,[2296] and affording reparations to victims to tackle the harm suffered because of the human rights violations.

Central to the inclusion of reparations regimes within the mandate of these courts is the idea that providing reparations might contribute towards repairing the harm suffered by victims and potentially afford reparative justice to victims of international crimes and gross human rights violations. This aspiration is laid out in these courts' legal bases as well as reiterated throughout their case law, with the ICC being the most vocal and commonly invoking the 'justice for victims' narrative in relation to its reparations regime.[2297] Notwithstanding the progressive normative underpinnings and the high level aspirations demonstrated by these courts' reparations regimes, the extent to which ICL and IHRL-based institutions succeed in achieving their stated aspirations is yet to be substantiated in a robust assessment. Not only do these courts fail to set robust standards as to when the realisation of their aspirations is considered attained as well as to elaborate on its constitutive elements (e.g. what amounts to repairing harm) but also, existing normative and

[2293] Marc Groenhuijsen and Anne-Marie de Brouwer, 'Participation of Victims: Commentary' in André Klip, Göran (eds), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Court 2005-2007* (Intersentia, 2010) 273; Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric And the Hague (2015) 13 Journal of International Criminal Justice 281, 282

[2294] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) ICC-PIOS-LT-03-002/15_Eng (Rome Statute), articles 68 and 75; Internal Rules of ECCC (2007), Rule 23

[2295] Rome Statute, art 75; Internal Rules of ECCC (2007), Rule 23(11)

[2296] See e.g. *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015) para 112. *Case of Aloeboetoe et al. v Suriname* (Reparations and Costs) IACtHR Series C No. 15 (10 September 1993) para 104

[2297] See e.g. *Lubanga case* (Appeals Chamber, Amended order for reparations) ICC-01/04-01/06-3129 (3 March 2015) para 71. *Katanga case* (Trial Chamber, Order for Reparations pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728-tENG (24 March 2017) para 15, para 267

empirical studies challenge and highlight shortcomings in the attainment of the courts' aspirations.[2298]

Against this background, this thesis set out to address the gap between, on the one hand, the inclusion of reparations regimes within the international courts' mandates and their reparative justice aspirations and, on the other hand, the existent, although scarce, evidence pointing to shortcomings in the realisation of these courts' aspirations. Concretely, this thesis's aim was to assess in a systematic manner how four international courts mandated to provide reparations may contribute to reparative justice for victims of international crimes and gross human rights violations by means of their reparations regimes. The four courts are the ICC, the ECCC, the ECtHR, and the IACtHR.

The main research question guiding this research was:

How do international courts mandated to provide reparations potentially contribute to reparative justice for victims of international crimes and gross human rights violations through their reparations regimes and additionally, how can their potential contribution be explained?

In a first step towards answering the research question, this thesis established the theoretical framework underlying this research (chapter two). It first positioned the concept of reparations as a justice reaction to mass atrocities within legal and normative contexts, elaborating on the evolution and development of reparations within the context of international law, and differentiating them from non-juridical reparations developed and employed in the design of administrative programs with massive coverage. Reparations may pursue different aims and have different meanings; however, this thesis was concerned with reparations in the first sense, which are conceived of as benefits geared towards redressing the various harms suffered as a consequence of certain crimes or breaches of State responsibility.[2299] Furthermore, this chapter elaborated on the link between reparations and reparative justice. In its turn, the notion of reparative justice is complex, as different authors attribute to it different understandings. This thesis adopted a view on reparative justice, which places reparations for victims at its center,[2300] while it also detailed common challenges in affording reparative justice to victims of mass atrocities. Given this thesis' focus on reparations and reparative justice in the context of international courts, the thesis further adhered to a conceptualization of reparations before judicial bodies whereby reparations hold procedural and substantive dimensions as they consist in both the process whereby reparations are

[2298] E.g. Stephen Cody, Eric Stover, Mychelle Balthazard, Alexa Koenig, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court (Berkeley: Human Rights Center, University of California, 2015); Timothy Williams, Julie Bernath, Boravin Tann, Somaly Kum, 'Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process' (Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018); Jeremy Rabkin, 'Global Criminal Justice: An Idea Whose Time Has Passed' (2005) 38 Cornell International Law Journal 753; Antony Pemberton and Rianne Letschert, 'Justice as the Art of Muddling Through' in Chrisje Brants and Susanne Karstedt, *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation* (Bloomsbury Publishing, 2017)

[2299] In line with Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2006) 452-453; See also Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 83-84

[2300] In line with Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict,' in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 79

provided and the outcome of the said process.[2301] Consequently, reparative justice by means of reparations was conceptualized in terms of procedural justice and substantive justice. The choice for this operationalization is rooted in previous research showing that the victims' experience with the process and the outcome of court proceedings informs the victims' perceptions of procedural and substantive justice, respectively.[2302]

Drawing on research in relation to procedural justice and substantive justice in social psychology and in victimology (both in national and international settings), this thesis proposed a taxonomy of reparative justice to study international courts' reparations regimes and their potential contribution to reparative justice. The design of the taxonomy emerged amid research showing that when victims seek justice in the context of international courts, it is possible to identify some common elements whose realization may contribute to justice for victims. The taxonomy consists in elements pertaining to procedural justice (consisting in voice, information, interaction, and the length of proceedings) and substantive justice (outcome) which may potentially contribute to reparative justice for victims. How each of these elements may contribute towards the realization of procedural justice and substantive justice for victims and the potential implications for victims were detailed extensively. At the same time, this chapter also emphasized that the needs and wishes of victims of international crimes in the aftermath of mass victimization may vary significantly and may also change over time. The variation might depend on the nature and consequences of victimization, the (cultural, social, political, economic, etc.) context in which the victims find themselves in, the particular characteristics of victims (for instance, gender, age, education, financial situation, etc.).

By employing this taxonomy on reparative justice, the next chapters (chapters three to six) focused on an assessment of the four international courts' contribution to reparative justice for victims of international crimes through their reparations regimes. Each of the chapters feature comprehensive analyses. They depict the institutional evolution of each court, focusing on their establishment, approach to victims and their rights, as well as characteristics of their reparations regimes. Furthermore, they illustrate how each court transposed their reparations regime throughout their practice on reparations for international crimes and gross human rights violations as well as reflect on what the potential implications for victims under their jurisdiction might be. Finally, they assess how each court may potentially contribute to reparative justice for victims through their reparations regimes. To scrutinize each court's practice on reparations, this thesis employed a qualitative data analysis software – Atlas.ti – which enabled robust and systematic identification, coding and analysis of all elements pertaining to procedural justice and substantive justice throughout the courts' entire practice on reparations for mass atrocities. In total, over 135 judgements and 150 other documents were coded and analyzed.

[2301] Theo van Boven, 'Victims' Rights to a Remedy and Reparation: the New United Nations Principles and Guidelines' in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhof Publishers, 2009) 22; See also Dinah Shelton, *Remedies in International Human Rights Law* (third Edition, Oxford University Press, 2015) 16; Luke Moffett, *Justice for Victims at the International Criminal Court* (Routledge Research in International Law, 2014)

[2302] E.g. Allan Lind, Tom R. Tyler, *The Social Psychology of Procedural Justice, Critical Issues in Social Justice* (Springer Science and Business Media, 1988); Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996); Malini Laxminarayan, *The Heterogenity of Crime Victims: Variations in Procedural and Outcome Preferences* (Wolf Legal Publishers, 2012)

Chapter three was devoted to the ICC. After scrutinizing the ICC's practice on reparations in its three cases where reparations were ordered, namely Lubanga, Katanga, and Al Mahdi and assessing its contribution to reparative justice for victims of international crimes through its reparations regime, the chapter concluded that the ICC's potential contribution to reparative justice entails numerous complexities. The inclusion of victims and victims' rights, as well as a reparations regime within the mandate of the ICC have all represented progressive developments in the international criminal justice arena. The 'justice for victims' narrative attached to its reparations regime constituted and still constitutes an important ambition of the Rome Statute's infrastructure. However, the current empirical analysis elicited that this ambition is yet to be fully realized. Hard choices, compromises, and unclear legal provisions, all permeating the Rome negotiations, have been carried into the reparations regime and currently loom over the Court's practice and its potential to contribute to reparative justice. The cases adjudicated before the ICC entail complex situations, large number of victims and highly volatile security situations on the ground. Amidst it all, the victims' harm and preferences in relation to reparations are one more imperative that the different actors at the ICC need to navigate, and as this analysis showcased, they are only now starting to learn how to do it. As concluded, reparative justice for the victims must be guided by consideration of victims, their suffering and their preferences, informed by needs and harm. However, its attainment ultimately depends on how the actors that purport to provide reparative justice to victims enforce their mandates in relation to victims and reparations as well as on clearly defining what imperatives might detract them from their goals.

Chapter four was devoted to the ECCC and consisted in an analysis and assessment of the ECCC and its practice in regard to three cases, namely, *Case 001*, *Case 002/01*, and *Case 002/02*. As in the case of the ICC, the ECCC's contribution to reparative justice was characterized as a challenging endeavor. While reparative justice for civil parties in the context of the ECCC has certain positive attributes, the merits cannot be singularly attributed to the Court. As the analysis revealed, reparative justice emerged as a result of concerted efforts of actors from both inside and outside the Court, eliciting a proactive approach to tackling limitations relating to financial resources, Court capacity, legal framework and the implementation of reparations. The analysis highlighted the ECCC's historical achievement to enable civil parties to narrate their stories during proceedings, as well as to allow over 4000 civil parties to participate and benefit from reparations. However, the ECCC's practice on reparations demonstrated the difficult role of reparations within international criminal trials, with a focus on the causal link between tangible reparations and the guilt of the accused.

Chapter five entailed an assessment of the ECtHR and its practice on reparations for victims of gross human rights violations. For the purpose of this chapter, 74 cases adjudicated before the ECtHR were analysed, including cases against eight countries, namely, Russia, Turkey, Romania, Armenia, Croatia, Bosnia and Herzegovina, and the UK. The chapter showed that the ECtHR's potential contribution to reparative justice for victims through its reparations regime is extremely limited, as it appears of secondary rather than primary importance for the Court. The analysis revealed that the ECtHR appears concerned with reparative justice for victims in that its core work revolves around finding States in violation of human rights and directing them to provide just satisfaction to victims. However, its interpretation of the legal basis and subsequent approach towards victims and reparations elicit that providing reparative justice for victims by means of reparations is not the priority of the Court. As the chapter concluded, the ECtHR's limited contribution to reparative justice appears to be a lost opportunity for the ECtHR to have a bigger

impact on the lives of victims in conflicts in Europe. At the same time, more empirical research into the victims' experience with and perception of the ECtHR is also paramount given its scarcity, to understand the impact the ECtHR actually has on the victims under its jurisdiction.

Chapter six was devoted to the IACtHR and consisted in an analysis and assessment of the IACtHR and its practice in 38 cases against Colombia, Guatemala, Peru, El Salvador, Suriname, Brazil, Mexico and Bolivia. The analysis revealed that the Courts' potential contribution to reparative justice for victims under its jurisdiction can be appraised as positive, particularly due to a *pro-homine* approach the Court adopts in the interpretation of its reparations regime. The analysis also exposed several challenges and caveats, including the scarce implementation and the limited number of potential beneficiaries of reparative justice, due to the fact that the Inter-American Human Rights System to which the Court pertains features very complex selection processes in what concerns individual petitions. In addition, the scarcity of empirical research is also problematic, as it would generate a better understanding of how the victims themselves perceive the Court and the Inter-American System and would enable a better appraisal of the court's practice. However, as concluded, the IACtHR and its progressive approach appear a testament to the importance of embracing a victim-centered approach in the interpretation of the reparations mandate, if a Court is indeed placing the harmed individual at the center of its processes and outcomes.

The final chapter put forward a general reflection on how international courts that are mandated to provide reparations may contribute to reparative justice for victims of mass atrocities. The first section of the chapter adopted a comparative approach to highlight in a comprehensive manner the differences and similarities across courts, focusing on their underlying legal frameworks and reparations regimes, the diverse interpretation of concepts that inform them, and the potential consequences for the victims. The comparison focused on both differences between ICL-based courts such as the ICC and the ECCC versus IHRL-based courts such as the ECtHR and the IACtHR and differences between courts governed by the same body of law. In addition, the section highlighted several aspects that help to explain their potential contribution to reparative justice through the reparations regimes. By and large, this section put forward one of the most complex and comprehensive overviews existing in the literature to date, highlighting the legal characteristics, standards, and practices around reparations in the context of international courts, combined with an articulation of the aspects that help to explain the courts' potential contribution to reparative justice.

In the second part, the chapter pondered on possible implications flowing from this research's findings. First, it argued for a need to rethink the notions and elements pertaining to procedural justice and substantive justice utilized in this study to conceptualize reparative justice in the context of international courts. It posited that studying the courts' contribution to reparative justice as procedural justice and substantive justice requires more robust theoretical notions that go beyond the courts' formal roles and account for:

1) The role of legal representatives, internal and external actors in the realization of both procedural and substantive justice;
2) The challenges inherent in the realization of procedural justice and substantive justice in the context of mass atrocities; and

3) The importance of embedding the victims' experiences and views to understand if the notions of procedural justice and substantive justice are relevant to them as well as how relevant.

Second, for international courts mandated to provide reparations to enhance their potential contribution to reparative justice, it was recommended that:

1) International courts expand the number of beneficiaries of reparative justice;
2) International courts provide adequate support for victims to actualize their statutory rights and prerogatives, which might include support to the legal representatives, the Victims' Units, TFV and other relevant actors;
3) International courts flesh out an accountability mechanism for the various actors actualizing the victims' rights and prerogatives before courts;
4) International courts reduce the length of proceedings;
5) International courts award reparations that respond as much as possible to the victims' harm and where possible, their preferences;
6) Deeper reflection on the possibilities to actualize the reparations regimes when international courts are established;
7) Lower expectations are attached to reparations in the context of international courts.

Finally, the section reflected on the suitability of including a reparations regime and aspirations of reparative justice within the mandate of international courts to respond to mass atrocities. The suitability was considered amid the thesis' central finding that affording reparative justice to victims of mass atrocities in the context of international courts is rife with challenges while, on the other hand, given the complexity of the task at hand, all efforts are bound to fall short of coming to grips with mass atrocities and their consequences. Notwithstanding this finding, the thesis put forward legal and moral arguments to highlight the importance of including reparations regimes and aspirations of reparative justice within the mandates of international courts. At the same time, it highlighted the importance of employing additional efforts to those of international courts to afford reparative justice to victims of mass atrocities. These efforts could consist in efforts by States, NGOs, other actors, as well as potentially the establishment of other mechanisms, such as Truth and Reconciliation Commissions. Ultimately, the findings of this thesis are helpful to manage the expectations that victims and the outside world place on international courts and their reparative regimes, but are also a reality check for international courts and the narratives they put forward.

Acknowledgments

Reaching the moment of writing the acknowledgments of my PhD thesis certainly feels special. Well into my PhD trajectory, I started having various reflections on the process of writing a PhD, the challenges it entails, and the mental and emotional strength required to complete such a process. I came to various 'realizations', which I did not consider before starting my PhD. One is that writing a PhD is not a sprint, but can be equated to a marathon. You are in it for the long run (more than four years to be precise) and this means that its completion requires consistency, devotion, and strength to carry on and not to give up when it gets difficult. Another realization and then guiding thought that I had during challenging moments was that the 'only way out was through'. Feeling stuck or lacking inspiration on how to proceed or how to frame certain debates made the process feel painful at times. However, realizing that 'the only way out is through' urged me to look for and find ways to overcome these impasses. Sometimes this required additional reading, talking to my supervisors or a friend, taking a break, or simply calling it a day and starting anew the next day. A third realization I had is the absolute necessity of creating a 'support system' to help navigate the challenges in a healthy and sustainable way. For me, this has been a mix of sports, meditation, friends, and time-off. I came to realize that they are not a luxury but a necessity.

In line with the latter point, I have been fortunate enough to benefit throughout my PhD trajectory from the trust, support, and expertise of a multitude of amazing people. I will do my best to be as exhaustive as possible but I apologize in advance for any omission.

First, I would like to wholeheartedly thank my PhD supervisors, Prof. Rianne Letschert, Prof. Antony Pemberton, and Dr. Mijke de Waardt. Rianne, thank you very much for everything – from hiring me to be part of the fascinating VIDI project, to imparting with me your expert knowledge and sensitive approach to victims of mass atrocities, and sharing your optimism, strength and can-do attitude. Your model of leadership and confidence in people is truly inspiring! I never left a meeting with you without feeling energized and motivated. Antony, thank you very much for your support and inspiring work. The depth of your knowledge never ceases to impress me, and I have learnt a great deal from your brilliant writings and approach to victimology. Mijke, you have been an amazing day-to-day supervisor! I benefited greatly from your inspired feedback, learned from your in-depth and careful manner of considering academic debates, and was inspired by your progressive approach to important topics within transitional justice. More importantly, I want to thank you for your friendship and support, especially when things have been difficult. The three of you were a great supervisory team! I am very grateful for the trust you have put in me, for allowing me to grow, and for your unwavering support that enabled me to go to Cambodia, to undertake research visits abroad and to participate in various conferences, including the World Society of Victimology Symposium in Hong Kong in June 2018.

In addition, I am grateful to my PhD Committee members Prof. Marc Groenhuijsen, Dr. Carla Ferstman, Prof. Stephan Parmentier, Dr. Ekaterina Trendafilova, and Prof. Naomi Roht-Arriaza. They have kindly evaluated my PhD thesis and provided me with great feedback, food for thought, and highlighted ways to further improve my work. Thank you.

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As I hinted at above, throughout my PhD trajectory, I have had the amazing opportunity to significantly widen my horizons in multiple ways. I carried out research visits at the Law Department of the European University Institute and at iCourts of University of Copenhagen. To this end, I would like to thank the people there for making this possible. Special thanks to the wonderful team at iCourts, who provided me with valuable feedback and great discussions to improve my thesis, particularly my chapter on the ECtHR. In addition, I have had the chance to travel to Cambodia, which has not only enriched my research work on the ECCC, but most importantly, it exposed me to the reality of victims of international crimes. Due to this experience, I acquired a new understanding of the importance of victimological work. I am especially grateful to Christoph Sperfeldt who offered his guidance and advice in relation to my research visit in Cambodia and to Sopheap Taing who was of immense help on the ground. Sopheap also provided me with extraordinary support in carrying out another project I developed in Cambodia, a photo-book featuring life stories and portraits of 12 victims of the Khmer Rouge Regime. I am also grateful to several people at the ECCC and at the ICC whom I informally interviewed to clarify some of my findings and to better contextualize my research.

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Finally, I cannot even begin to convey my gratitude to my friends and family. Living abroad for seven years has definitely brought about a multitude of challenges, one of which is the challenging endeavor of making stable friendships. Nevertheless, I have been lucky and managed to befriend amazing people. Special thank you to Klaudia and Antonis, for your friendship through all the fun game nights and dinners and to Dovile and Petar, thanks for all the fun talks over pizza or Greek food and red wine. Dovile, thanks for all the 'soul' discussions by Amsterdam canals! Many thanks to the rest of the great friends in Amsterdam, including Dana & Per, Kristina, Nastija, and Gaga, for all the fun outings.

In addition to my friends in Amsterdam, I am one of those lucky people who benefitted from the unwavering support of long-lasting friendships. I truly could not have asked for better friends than you – thanks Claudia, Ramona, and Diana for always being there, despite the distance and all our different approaches to life. Our friendship is one for the books, literally and figuratively.

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I completed and wrote the concluding chapter of my thesis as the Covid-19 crisis hit and unfolded, and this has certainly been an added difficulty to an already challenging process – but I managed to bring to a successful completion this project. I am proud of myself, and grateful to the universe and all the people that have contributed in small or big ways to this incredible journey that is a PhD. Thank you!

Foligno, August 2020

Annexes

Annex 1 – International Criminal Court – List of cases and Documents
Al Mahdi case (Appeals Chamber: Judgement on the appeal of the victims against the "Reparations Order") ICC-01/12-01/15-259-Red2 (8 March 2018)
Al Mahdi case (Trial Chamber: Trial Hearing) (24 August 2016)
Al Mahdi case (Trial Chamber: Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016)
Al Mahdi case (Trial Chamber, Reparations Order) ICC-01/12-01/15-236 (17 August 2017)
Al Mahdi case (Trial Chamber: First Transmission and Report on Applications for Reparations) ICC-01/12-01/15 (16 December 2016)
Al Mahdi case (Legal Representatives of Victims: Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation) ICC-01/12-01/15-190-Red-tENG (3 January 2017)
Al Mahdi case (Trial Chamber: Second Transmission and Report on Applications for Reparations) ICC-01/12-01/15 (24 March 2017)
Al Mahdi case (Legal Representative of Victims: Final submissions of the Legal Representative on the implementation of a right to reparations for 139 victims under article 75 of the Rome Statute) ICC-01/12-01/15 (14 July 2017)
Al Mahdi case (TFV: Public redacted version of "Corrected version of Draft Implementation Plan for Reparations, With public redacted Annex I) ICC-01/12-01/15-265-Corr-Red (18 May 2018)
Al Mahdi case (Le Représentant légal des victimes: Observations du Représentant légal des victimes relatives au projet de plan de réparation déposé par le Fonds au profit des victimes en exécution de l'Ordonnance de réparation en vertu de l'article 75 du Statut) ICC-01/12-01/15-271-Red (30 mai 2018)
Al Mahdi case (Trial Chamber: Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations) ICC-01/12-01/15-273-Red (12 July 2018)
Al Mahdi case (TFV: Public redacted version of "Updated Implementation Plan", submitted on 2 November 2018, ICC-01/12-01/15-291-Conf-Exp) ICC-01/12-01/15-291-Red2 (22 November 2018)
Al Mahdi case (Le Représentant légal des victims: Observations du Représentant légal des victimes sur la version mise à jour du plan de mise en œuvre des réparations du Fonds au profit des victims) ICC-01/12-01/15-315-Red (15 janvier 2019)
Al Mahdi case (TFV, Public redacted version of Decision on the Updated Implementation Plan) ICC-01/12-01/15-324-Red (4 March 2019)
Katanga and Chui case (Trial Chamber: Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims) ICC-01/04-01/07-1491-Red-tENG (23 September 2009)
Katanga case (Trial Chamber: Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014)
Katanga case (Registry: Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August) ICC-01/04-01/07-3512-Anx1-Red2 (21 January 2015)
Katanga case (Le Représentant Légal Commun Du Groupe Principal Des Victims: Observations des Victimes Sur Les Réparations) ICC-01/04-01/07-3514 (27 janvier 2015)
Katanga case (Trial Chamber: Decision on the "Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve" and future stages of the proceedings) ICC-01/04-01/07-3546-tENG (8 May 2015)
Katanga case (Trial Chamber: Observations of the victims on the principles and procedures to be applied to Reparations) ICC-01/04-01/07-3555-tENG (15 May 2015)
Katanga case (Legal Representatives of Victims: Report on the implementation of Decision No. 3546, including the identification of harm suffered by victims as a result of crimes committed by Germain Katanga) ICC-01/04-01/07-3687-tENG (13 May 2016)
Katanga case (Le Représentant légal des victimes: Observations des victimes sur la valeur monétaire des préjudices allégués) ICC-01/04-01/07 (30 septembre 2016)
Katanga case (Legal Representatives of Victims: Propositions des victimes sur des modalités de réparation dans la présente affaire) ICC-01/04-01/07-3720 (8 décembre 2016)
Katanga case (Trial Chamber: Delivery of Decision on Reparations) (24 March 2017)

Katanga case (TFV: Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March) ICC-01/04-01/07-3751-Red (25 July 2017)
Katanga case (Office of Public Counsel for Victims: Observations on the Trust Fund for Victims' Draft Implementation Plan Relevant to the Order for Reparations) ICC-01/04-01/07-3762-tENG (11 September 2017)
Katanga case (Trial Chamber: Observations relatives au projet de plan de mise en œuvre déposé par le Fonds au profit des victimes en exécution de l'Ordonnance de réparation en vertu de l'article 75 du Statut (ICC-01/04-01/07-3751-Red) ICC-01/04-01/07 (12 septembre 2017)
Katanga case (TFV: Request to reclassify documents and proposal of redactions to apply to certain documents with five confidential annexes (I – V) and one confidential ex parte (VI)) ICC-01/04-01/07 (22 November 2018)
Lubanga case (Trial Chamber: Decision on victims' participation) ICC-01/04-01/06-1119 (18 January 2008)
Lubanga case (Trial Chamber: Decision on 'indirect victims') ICC-01/04-01/06-1813 (8 April 2009)
Lubanga case (Trial Chamber, Judgement pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012)
Lubanga case (Legal Representatives of Victims: Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10, ICC-01/04-01/06) ICC-01/04-01/06-2864-tENG (18 April 2012)
Lubanga case (Legal Representatives of Victims V02: Observations of the V02 group of victims on sentencing and reparations) ICC-01/04-01/06-2869-tENG (18 April 2012)
Lubanga case (TFV: Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872 (25 April 2012)
Lubanga case (Trial Chamber: Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06 (7 August 2012)
Lubanga case (Représentants légaux du groupe de victimes V01: Document à l'appui de l'appel contre la « Decision establishing the principles and procedures to be applied to reparations » du 7 août 2012) ICC-01/04-01/06 (5 février 2013)
Lubanga case (Office of Public Counsel for Victims, V02 team of legal representatives: Document in support of the appeal against Trial Chamber I's 7 August 2012 Decision establishing the principles and procedures to be applied to reparation) ICC-01/04-01/06 (5 February 2013)
Lubanga case (Appeals Chamber: Annex to Order For Reparations) ICC-01/04-01/06-3129-AnxA (3 March 2015)
Lubanga case (Appeals Chamber: AMENDED order for reparations) ICC-01/04-01/06-3129 (3 March 2015)
Lubanga case (TFV: Filling on Reparations and DIP) ICC-01/04-01/06-3177-Red (3 November 2015)
Lubanga case (TFV: Draft Implementation Plan for collective reparations to victims) ICC-01/04-01/06-3177-AnxA (3 November 2015)
Lubanga case (Legal representatives of victims V01: Observations of V01 Group of Victims on the "Filing on Reparations and Draft Implementation Plan" filed by the Trust Fund for Victims) ICC-01/04-01/06-3194-tENG (1 February 2016)
Lubanga case (Legal representatives of victims V02: Observations of Team V02 on the draft implementation plan for reparations submitted by the Trust Fund for Victims (TFV) to Trial Chamber II on 3 November 2015) CC-01/04-01/06-3195-tENG (1 February 2016)
Lubanga case (Trust Fund for Victims: Public Redacted version of Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals) ICC-01/04-01/06-3223-Red (19 September 2016)
Lubanga case (Trial Chamber: Reparations Hearing) (11 and 13 October 2016)
Lubanga case (Trial Chamber: Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations) ICC-01/04-01/06-3251 (21 October 2016)
Lubanga case (Trial Chamber: Order instructing the Trust Fund for Victims to Submit Information regarding Collective Reparations) ICC-01/04-01/06-3262 (8 December 2016)
Lubanga case (TFV: First report on the implementation of symbolic collective reparations as per the Trial Chamber II Order of 21 October 2016) ICC-01/04-01/06 (23 January 2017)
Lubanga case (TFV: Information regarding Collective Reparations) ICC-01/04-01/06-3273 (13 February 2017)
Lubanga case (Trial Chamber: Order approving the proposed programmatic framework for collective service based reparations submitted by the Trust Fund for Victims) ICC-01/04-01/06-3289 (6 April 2017)

Lubanga case (TFV: Second progress report on the implementation of symbolic collective reparations as per the Trial Chamber II order of 21 October 2016 with one public Annex 1, and one confidential ex parte Annex A available to the Registrar only) ICC-01/04-01/06 (21 April 2017)
Lubanga case (Legal Representatives of Victims: Submissions on the Evidence Admitted in the Proceedings for the Determination of Mr Thomas Lubanga Dyilo's Liability for Reparations) ICC-01/04-01/06-3359-tENG (8 September 2017)
Lubanga case (Legal Representatives of Victims: Observations of the V02 Team in Compliance with Order No. ICC-01/04-01/06-3345) ICC-01/04-01/06-3363-tENG (8 September 2017)
Lubanga case (TFV: Third progress report on the implementation of collective reparations as per the Trial Chamber II orders of 21 October 2016 and 6 April 2017) ICC-01/04-01/06-3377 (15 November 2017)
Lubanga case (Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable) ICC-01/04-01/06-3379-Red-Corr-tENG (21 December 2017)
Lubanga case (TFV: Observations in relation to locating and identifying additional victims pursuant to the Trial Chamber's decision of 15 December 2017) ICC-01/04-01/06 (15 January 2018)
Lubanga case (TFV: Observations in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018) ICC-01/04-01/06-3398 (21 March 2018)
Lubanga case (TFV: Fourth progress report on the implementation of collective reparations as per Trial Chamber II's orders of 21 October 2016 and 6 April 2017) ICC-01/04-01/06 (13 April 2018)
Lubanga case (TFV: Fifth progress report on the implementation of collective reparations as per Trial Chamber II's orders of 21 October 2016 and 6 April 2017) ICC-01/04-01/06 (2 October 2018)
Lubanga case (TFV: Notification of the Board of Directors' decision on the Trial Chamber's supplementary complement request pursuant to regulation 56 of the Regulations of the Trust Fund for Victims) ICC-01/04-01/06 (2 October 2018)
Lubanga case (TFV: Further information on the reparations proceedings in compliance with the Trial Chamber's order of 16 March 2018) ICC-01/04-01/06 (4 December 2018)

Annex 2 – Extraordinary Chambers in the Courts of Cambodia – List of cases and Documents
Case 001 (Transcripts of Hearings, Trial day 35) Nº 001/18-07-2007-ECCC/TC (29 June 2009)
Case 001 (Transcripts of Hearings, Trial day 36) Nº 001/18-07-2007-ECCC/TC (30 June 2009)
Case 001 (Transcripts of Hearings, Trial day 37) Nº 001/18-07-2007-ECCC/TC (1 July 2009)
Case 001 (Transcripts of Hearings, Trial day 38) Nº 001/18-07-2007-ECCC/TC (2 July 2009)
Case 001 (Transcripts of Hearings, Trial day 39) Nº 001/18-07-2007-ECCC/TC (6 July 2009)
Case 001 (Transcripts of Hearings, Trial day 40) Nº 001/18-07-2007-ECCC/TC (7 July 2009)
Case 001 (Transcripts of Hearings, Trial day 41) Nº 001/18-07-2007-ECCC/TC (8 July 2009)
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Case 001 (Transcripts of Hearings, Trial day 42) Nº 001/18-07-2007-ECCC/TC (13 July 2009)
Case 001 (Transcripts of Hearings, Trial day 58) Nº 001/18-07-2007-ECCC/TC (12 August 2009)
Case 001 (Transcripts of Hearings, Trial day 59) Nº 001/18-07-2007-ECCC/TC (17 August 2009)
Case 001 (Transcripts of Hearings, Trial day 60) Nº 001/18-07-2007-ECCC/TC (18 August 2009)
Case 001 (Transcripts of Hearings, Trial day 61) Nº 001/18-07-2007-ECCC/TC (19 August 2009)
Case 001 (Transcripts of Hearings, Trial day 62) Nº 001/18-07-2007-ECCC/TC (20 August 2009)
Case 001 (Transcripts of Hearings, Trial day 64) Nº 001/18-07-2007-ECCC/TC (25 August 2009)
Case 001 (Transcripts of Hearings, Trial day 65) Nº 001/18-07-2007-ECCC/TC (26 August 2009)
Case 001 (Transcripts of Hearings, Trial day 66) Nº 001/18-07-2007-ECCC/TC (27 August 2009)
Case 001 (Transcripts of Hearings, Trial day 70) Nº 001/18-07-2007-ECCC/TC (14 September 2009)
Case 001 (Transcripts of Hearings, Trial day 73) Nº 001/18-07-2007-ECCC/TC (23 November 2009)
Case 001 (Transcripts of Hearings, Trial day 74) Nº 001/18-07-2007-ECCC/TC (24 November 2009)
Case 001 (Transcripts of Hearings, Trial day 75) Nº 001/18-07-2007-ECCC/TC (25 November 2009)
Case 001 (Civil parties' Co-Lawyers: Joint Submission on Reparations) 001/18-07-2007-ECCC/TC (14 September 2009)
Case 001 (Trial Chamber: Judgment) 001/18-07-2007/ECCC/TC (26 July 2010)

Case 001 (Supreme Court Chamber: Appeals Judgment) 001/18-07-2007-ECCC/SC (3 February 2012)
Case 002/01 (Transcripts of Hearings, Trial day 6) Nº 002/19-09-2007-ECCC/TC (7 December 2011)
Case 002/01 (Transcripts of Hearings, Trial day 12) Nº 002/19-09-2007-ECCC/TC (10 January 2012)
Case 002/01 (Transcripts of Hearings, Trial day 13) Nº 002/19-09-2007-ECCC/TC (11 January 2012)
Case 002/01 (Transcripts of Hearings, Trial day 101) Nº 002/19-09-2007-ECCC/TC (23 August 2012)
Case 002/01 (Transcripts of Hearings, Trial day 102) Nº 002/19-09-2007-ECCC/TC (27 August 2012)
Case 002/01 (Transcripts of Hearings, Trial day 103) Nº 002/19-09-2007-ECCC/TC (28 August 2012)
Case 002/01 (Transcripts of Hearings, Trial day 104) Nº 002/19-09-2007-ECCC/TC (29 August 2012)
Case 002/01 (Transcripts of Hearings, Trial day 104) Nº 002/19-09-2007-ECCC/TC (29 August 2012)
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Case 002/01 (Transcripts of Hearings, Trial day 131) Nº 002/19-09-2007-ECCC/TC (14 November 2012)
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Case 002/01 (Transcripts of Hearings, Trial day 135) Nº 002/19-09-2007-ECCC/TC (5 December 2012)
Case 002/01 (Transcripts of Hearings, Trial day 136) Nº 002/19-09-2007-ECCC/TC (6 December 2012)
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Case 002/01 (Transcripts of Hearings, Trial day 172) Nº 002/19-09-2007-ECCC/TC (29 April 2013)
Case 002/01 (Transcripts of Hearings, Trial day 183) Nº 002/19-09-2007-ECCC/TC (23 May 2013)
Case 002/01 (Transcripts of Hearings, Trial day 184) Nº 002/19-09-2007-ECCC/TC (27 May 2013)
Case 002/01 (Transcripts of Hearings, Trial day 185) Nº 002/19-09-2007-ECCC/TC (29 May 2013)
Case 002/01 (Transcripts of Hearings, Trial day 186) Nº 002/19-09-2007-ECCC/TC (30 May 2013)
Case 002/01 (Transcripts of Hearings, Trial day 187) Nº 002/19-09-2007-ECCC/TC (4 June 2013)
Case 002/01 (Transcripts of Hearings, Trial day 214) Nº 002/19-09-2007-ECCC/TC (16 October 2013)
Case 002/01 (Les co-avocats principaux pour les Parties Civiles: Demande Definitive De Reparations Des Co-Avocats Principaux Pour Les Parties Civiles En Application De La Regle 80bis Du Reglement Interieur Et Annexes Confidentielles) 002/19-09-2007-CETC/CPI (8 Octobre 2013)
Case 002/01 (Trial Chamber: Judgment) 002/19-09-2007/ECCC/TC (7 August 2014)
Case 002/01 (Appeals Chamber: Appeal Judgement) 002/19-09-2007-ECCC/SC (23 November 2016)
Case 002/02 (Transcripts of Hearings, Trial day 231) Nº 002/19-09-2007-ECCC/TC (22 January 2015)
Case 002/02 (Transcripts of Hearings, Trial day 233) Nº 002/19-09-2007-ECCC/TC (26 January 2015)
Case 002/02 (Transcripts of Hearings, Trial day 234) Nº 002/19-09-2007-ECCC/TC (27 January 2015)
Case 002/02 (Transcripts of Hearings, Trial day 237) Nº 002/19-09-2007-ECCC/TC (4 February 2015)
Case 002/02 (Transcripts of Hearings, Trial day 238) Nº 002/19-09-2007-ECCC/TC (5 February 2015)
Case 002/02 (Transcripts of Hearings, Trial day 239) Nº 002/19-09-2007-ECCC/TC (6 February 2015)
Case 002/02 (Transcripts of Hearings, Trial day 239) Nº 002/19-09-2007-ECCC/TC (6 February 2015)
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