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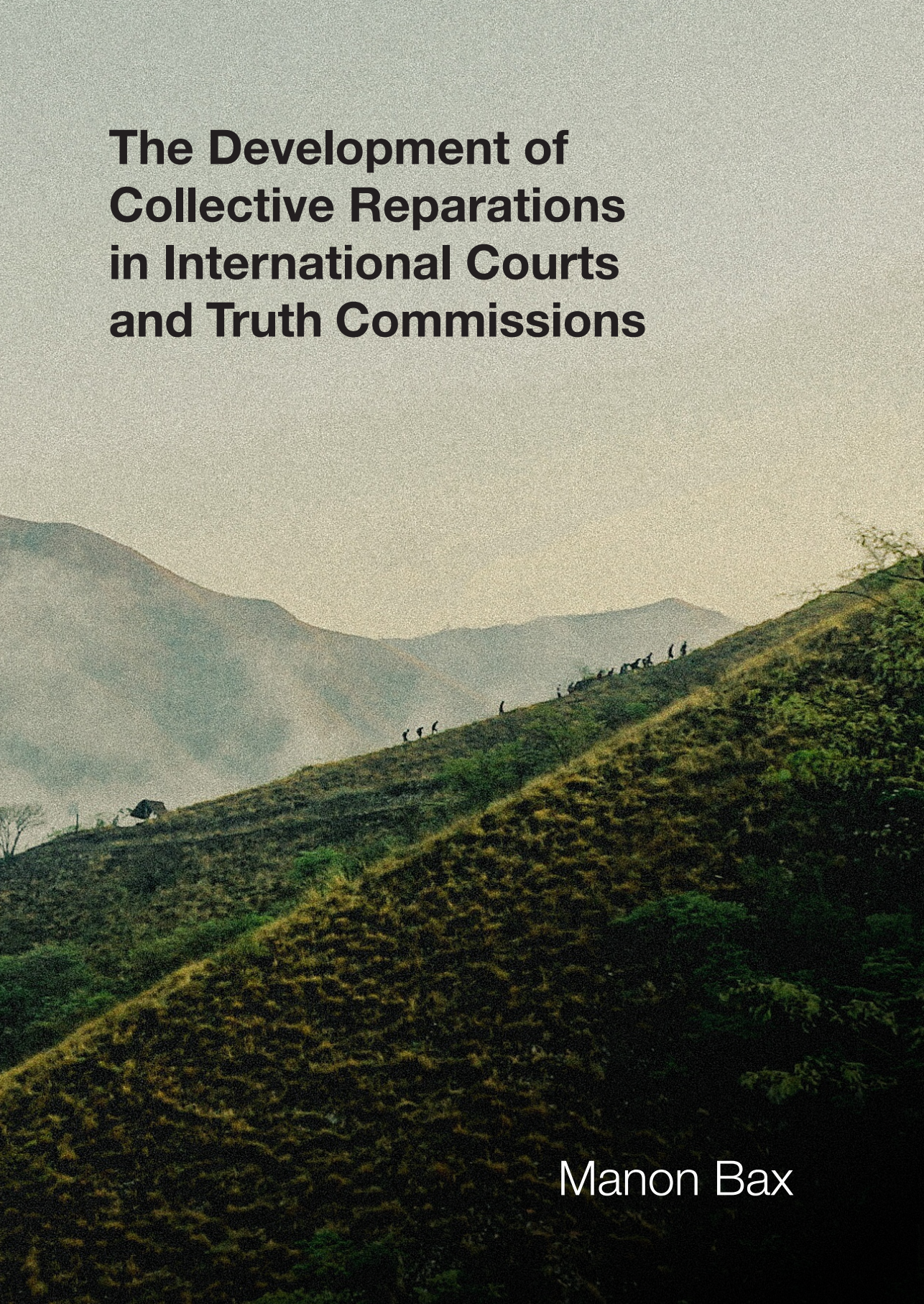
The Development of Collective Reparations in International Courts and Truth Commissions



Manon Bax

THE DEVELOPMENT OF COLLECTIVE REPARATIONS IN INTERNATIONAL COURTS AND TRUTH COMMISSIONS

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THE DEVELOPMENT OF COLLECTIVE REPARATIONS IN INTERNATIONAL COURTS AND TRUTH COMMISSIONS

Proefschrift ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof. dr. W.B.H.J. van de Donk, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de Aula van de Universiteit op

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door

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AU	African Union
DRC	Democratic Republic of Congo
DRIP	Draft Reparations and Implementation Plan
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTJ	International Center for Transitional Justice
ILC	International Law Commissions
ILO	International Labor Organization
LRV	Legal representative for victims
NGO	Non-governmental organization
OAS	Organization of American States
OPCV	Office for Public Council for Victims
PCIJ	Permanent Court of International Justice
RPE	Rules of Procedure and Evidence
TFV	Trust Fund for Victims
UN	United Nations
VPRS	Victims Participation and Reparations Section (ICC)
VSS	Victims Support Section (ECCC)

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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

The picture on the cover of this book depicts a group of schoolchildren who have just started the walk up the steep trail from Río Negro towards Cerro Pacoxom in Guatemala. In 1982, inhabitants of Río Negro, primarily women and children, were forced by the army and civilian defense patrols to walk the same trail. On the way, the women and children were beaten, raped, and killed if they could not continue walking. After arriving in Cerro Pacoxom, at least 177 inhabitants, including 107 children, were brutally killed and left in a mass grave or thrown into a ravine.[1] Almost forty years later, NGOs facilitate trips for schoolchildren to visit Río Negro where they walk the same trail to learn more about Guatemala's violent past and the massacres that took place during its internal conflict. Survivors of the massacre are the guides during these walks. The group of schoolchildren that is shown on the cover participated in one of these trips facilitated by NGOs.

In May 2019, I walked the same trail during a research trip that I made together with Mijke de Waardt in relation to the VIDI project 'What's Law Got to Do with It'.[2] The walk up to Cerro Pacoxom is a poignant and thought-provoking experience that impacted me and this dissertation. As a lawyer, I am trained to read and analyze legal sources objectively, even though these sources may involve the most horrendous crimes and contain horrific details. After speaking to survivors, witnessing the obscene poverty and the lack of implemented reparations, I became more critical of reparations ordered by courts that lack an enforcement mechanism or funds for the ordered reparations. Nevertheless, the selected cases, the awarded reparations and collective reparations within the courts and truth commissions were analyzed and described as objectively as possible, which was maintained by the use of qualitative content analysis. The visit to Río Negro showed me that these memorialization sites and events are a powerful tool to educate the population of a state or region on their violent past. Several courts and truth commissions have recognized the value of such

[1] See *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 76-79; Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 54, 71 and 160-161.

[2] A project aimed at understanding whether, and if so how, reparations awarded through international justice procedures contribute to a sense of justice amongst survivors. Neither the impact of the right to reparation on the experience of victims of atrocities nor the mechanisms or procedures by which this impact is supposed to be reached have been subjected to rigorous scrutiny. In the empirical part of this study, the impact of reparations that are awarded by the particular courts is compared with the impact of other justice efforts (domestic judicial cases, national administrative reparation programs) and development assistance and civil society justice-related activities on the lives of survivors.

memorialization sites and ordered the preservation of and visits to sites of historical repression and violence in order to educate the general public.[3]

The preservation of and visits to the sites of repression and violence were ordered by the courts and truth commissions in order to address the harm suffered by victims of international crimes or gross human rights violations. It is a basic principle of law that harm should be remedied, and all legal systems include provisions that recognize this principle.[4] These remedies consist of procedural remedies, including equal and effective access to justice, and substantial remedies.[5] The two categories of remedies are incorporated in national law (for instance, in tort law and criminal law) and in international law (for instance, in the law on state responsibility, human rights law and international criminal law).

This dissertation focuses on substantive remedies that address the harm caused by mass atrocities,[6] in this thesis referred to as reparations.[7] More specifically, this research examines the reparations that are ordered by international courts and truth commissions. According to De Greiff, these courts and truth commissions relate to two different contexts: a juridical and a non- or quasi-juridical setting.[8] Reparations are present in both contexts, yet these have different aims and restrictions. The reparations in the first context are ordered before a court and restricted to a specific court case. Such reparations aim to remedy the harm that the victims suffered due to the crimes that the offender or state was found responsible for. The courts order reparations on a case-to-case basis. The latter context, on the other hand, relates to reparations that are designed outside of a court setting, for instance in a reparations program or by a truth commission.[9] These reparations often target a broader group of

[3] See for instance, *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454 and 4457; The Truth and Justice Commission (Mauritius), *Report of the Truth and Justice Commission. Volume 1* (November 2011) 423.

[4] See for instance, Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' 27 Hastings International & Comparative Law Review 157, 157.

[5] Reparation Principles, rule 11; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 16.

[6] I use terms as 'this dissertation', 'this analysis', 'my analysis', 'this research', 'this study', 'my PhD research' throughout this book in order to refer to the content, analysis and findings of my dissertation.

[7] Depending on the legal field, these substantial remedies are referred to as 'reparations', 'remedies' or 'redress'. In this dissertation, the term 'reparations' is used as it is the term that is most frequently used in international law and scholarly writing.

[8] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 452-453.

[9] The reparations programs are sometimes established after a truth commission recommended a similar program. See for instance, the *Plan Integral de Reparaciones* (Integral Plan of Reparations) as recommended by the Peruvian truth commission. Yet, the recommendations of a truth commission are not a prerequisite for the development of such programs by a national government of international organization. See for instance, the several German reparation programs to survivors of the Holocaust or the United Nations Compensation Commission established after the Iraq-Kuwait conflict of 1990-1991. For more information regarding these reparations programs see for instance, Lisa J Laplante, 'From Theory to Practice: Implementing Reparations in Post-Truth Commission Peru' in Barbara R Johnston and Susan Slyomovics (eds), *Waging War, Making Peace: Reparations and Human Rights* (Walnut Creek 2009); Gideon Taylor and others, 'The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2nd edn, Brill Nijhoff 2020); Hans van Houtte, Hans Das and Bart Delmartino, 'The

victims, namely the victims of a specific conflict or state practice. This often results in an extensive program that is designed to reach a complex and wide group of victims.

Reparations in both contexts materialize before different legal, quasi- and non-legal institutions, each with its own objectives, mandates and limitations. These institutions involve a range of violations and crimes, and consequently have to order reparations that address different types of harm. In addition to repairing harm,[10] reparations may have additional aims, such as the prevention of future crimes,[11] the transformation of the situation of marginalized victims,[12] or the (modest) contribution 'to the reconstruction or the constitution of a new political community'.[13] Consequently, reparations can take many different forms.

The 2005 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 UN Reparation Principles) reflect the status quo of reparations in international law.[14] As explored in part 2 of this dissertation, the UN Reparation Principles are not only a reflection of reparations in international law, these are also a source of inspiration for courts and truth commissions. In addition, the UN Reparation Principles were influential in establishing the reparations framework of the ICC.[15] Several international courts and truth commissions have referred to the UN Reparation Principles,[16] some have even

United Nations Compensation Commission' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006).

[10] Redressing and repairing the harm suffered by victims is central to reparations. See, Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 57 (footnote 348).

[11] This is reflected in the reparations category of guarantees of non-repetition; Reparation Principles, rule 23. See furthermore, Lisa J Laplante, 'Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention' (2004) 22 Netherlands Quarterly of Human Rights 347, 356.

[12] See for instance, Ruth Rubio-Marín, 'Introduction: A Gender and Reparations Taxonomy' in Ruth Rubio-Marín (ed), *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 17; 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, 1185

[13] According to Pablo De Greiff, reparations designed during transitional periods aim to reconstruct the political community by recognizing victims as citizens that are equal participants in the political community, and by ensuring that its laws integrate the interests of all citizens that are affected by the particular law. See Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 454-466.

[14] The preamble of the Reparation Principles emphasized that 'the Basic Principles and Guidelines contained herein 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'. See furthermore, Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 6.

[15] Christoph Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court' (2017) 17 International Criminal Law Review 351, 368-371; 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, 7.

[16] See for instance, *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, SC Ch (3 February 2012) para 649 and 661; *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the

referred to the draft version.[17] Most references have been made to the principles that elaborated the five categories of reparations; restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Restitution reflects the traditional understanding of reparations. *Restitutio in integrum* (full restitution) originated in Roman law and constituted the obligation to restore the *status quo ante* (the state of affairs that existed prior to the violations).[18] Restitution corresponds with Aristotle's theory of corrective justice, which is discussed in depth in chapter 2. In contemporary international law, restitution is still regarded as the starting point of reparations.[19] According to Pablo De Greiff, restitution is the ideal behind reparations in the human rights courts.[20] Nevertheless, restitution is often impossible in situations of mass atrocities, because some acts simply cannot be undone, such as murders, sexual violence, and torture. In other cases, it is undesirable to return someone to the situation as existed before the violations took place. For instance, when he or she comes from a situation of marginalization, or when someone has built a new life in another country and does not want to return to his or her previous location. Naomi Roht-Arriaza referred to the unattainability of restitution as the '[b]asic paradox at the heart of reparations'.[21]

Compensation is another form of reparation that, together with restitution, 'historically constituted the basic foundations for the concepts of reparations'.[22] The fundamental *Chorzów* ruling of the Permanent Court of International Justice (hereinafter PCIJ) held that compensation 'to the value which a restitution in kind would bear' was required in case restitution was not possible.[23] Compensation entails the provision of monetary benefits for economically assessable damages, including physical or mental harm, material harm as the loss of property or of an earning capacity, immaterial suffering, and costs for legal or expert assistance.

Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012), para 177 and 185; Truth, Justice, and Reconciliation Commission (Kenya) 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 99.

[17] See for instance, Human Rights Violations Investigation Commission (Oputa Panel, Nigeria) 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 20; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 232.

[18] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 298.

[19] See for instance, *"White Van" (Paniagua-Morales et al.) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 76 (25 May 2001) para 76 ('Reparation of the damage resulting from the violation of an international obligation requires, whenever possible, the full restitution'); *Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania* (Ruling on Reparations) ACHPR Application No 006/2013 (18 March 2016) para 16. See furthermore, James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 481.

[20] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 455.

[21] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157, 158.

[22] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 29.

[23] *Case Concerning the factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Reports Series A No 9, 47.

Rehabilitation aims to restore a victim's health, reputation, and independence, and may consist of medical, educational, social, and legal services.[24] Furthermore, rehabilitation can also be ordered to restore the community as a whole, for instance by (re)building the local infrastructure and facilities, or by restoring the ties between community members.[25]

Restitution, compensation and rehabilitation usually have a financial or material character, and are consequently classified as material reparations. Satisfaction and guarantees of non-repetition have a non-pecuniary nature and are characterized as symbolic reparations.[26] These symbolic reparations include tangible modalities, such as the erection of monuments and museums, and measures that are not tactile such as the declaration of responsibility or a national day of remembrance.[27] Both forms of symbolic reparation are of a collective nature; even when the reparations are ordered to individual victims, the symbolic reparations have repercussions for the larger community.[28]

Satisfaction aims to restore the victims' rights and dignity through the cessation of the violations, the verification of the facts and the full disclosure of the truth,[29] judicial rulings, public apologies, the prosecution of persons responsible for the violations, commemoration, and education of the general public on the violent past. As the name indicates, **guarantees of non-repetition** are of a preventative nature; the State has to make reforms and adjustments to its law and practice to ensure that the violations will not happen again. The UN Reparations Principles provide a list of potential guarantees of non-repetition, including the strengthening of the judiciary, the reorganization of the military and security forces so that it is under civilian control, the reform of laws that contributed to the violations, and the provision of human rights education. Several scholars argue that in line with their preventive nature, guarantees of non-repetition should also address the underlying structural causes of the violence.[30]

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[24] Some scholars have a narrower understanding of rehabilitation that is restricted to the restoration of the victim's health, and that only includes medical care. Clara Sandoval Villalba, 'Rehabilitation as a Form of Reparation Under International Law' (REDRESS 2009) 10; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 394-395.

[25] Clara Sandoval Villalba, 'Rehabilitation as a Form of Reparation Under International Law' (REDRESS 2009) 9.

[26] Frédéric Mégret, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparation' (2009) 16 International Review of Victimology 127, 127-128.

[27] Robin Adèle Greeley and others, 'Repairing Symbolic Reparations: Assessing the Effectiveness of Memorialization in the Inter-American System of Human Rights' (2020) 14 International Journal of Transitional Justice 165, 166.

[28] Frédéric Mégret, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparation' (2009) 16 International Review of Victimology 127, 132; Diana Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018) 89.

[29] This also includes the truth about the whereabouts of the disappeared and missing persons.

[30] See for instance, Andrea Durbach and Louise Chappell, 'Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations' (2014) 16 International Feminist Journal of Politics 543, 546-

The line between satisfaction and guarantees of non-repetition is often blurred; because satisfaction measures often incorporate a deterrent effect.[31] For instance, the education of the general public on the committed mass atrocities and the subsequent suffering is believed to prevent future crimes.[32] One distinction between the two symbolic measures relates to the required involvement of the state; guarantees of non-repetition are typically obligations that can only be fulfilled by a state, while several satisfaction measures can also be provided by third parties.[33] In addition, guarantees of non-repetition are intrinsically future oriented, while satisfaction is primarily focused on the past violations and only secondarily on the future.[34]

Hence, reparations can take many different forms, including measures of an individual and collective nature.[35] Historically, when reparations were awarded to citizens,[36] these were awarded individually and primarily consisted of compensation.[37] This is in line with the international human rights framework, which initially centered around the protection of individual rights.[38] Consequently, an individual right to reparations has emerged in international human rights law, humanitarian law and international criminal law, which primarily focuses on the vindication of individual rights and individual harm.[39] Both individual and collective reparations are ordered when victims claim their individual right to reparations, though there seems to be a favoring of the individual form by the courts.[40] Nevertheless, as this dissertation explores, there

548; Sarah Williams and Emma Palmer, 'Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia' (2016) 10 International Journal of Transitional Justice 311, 318.

[31] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 397.

[32] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, A CH (3 March 2015) para 43; *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 128.

[33] For instance, third parties can erect monuments, organize memorials, open museums, and create education programs.

[34] Frédéric Mégret, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparation' (2009) 16 International Review of Victimology 127, 130.

[35] Principle 13 of the Reparation Principles emphasizes that '[i]n addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate'.

[36] For a long time, states were the sole subjects of international law and reparations were therefore primarily an inter-state affair. Only in exceptional cases did individuals receive reparations.

[37] The historical development of reparations in international law is further discussed in chapter 2, section 2.

[38] See for instance, Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization: Key Challenges Involved' in Rianne Letschert and others (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 155; Richard Falk, 'Reparations, International Law, and Global Justice: A new Frontier' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 495.

[39] See for instance, Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 42; Diana Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018) 10; Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization: Key Challenges Involved' in Rianne Letschert and others (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 155; 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 Nijhoff 2009) 84.

[40] The bias towards individual reparations is not only caused by the influence of human rights law, the focus on the guilt and responsibility of an individual offender, and difficulties in enforcing collective reparations without

is a growing recognition of collective reparations in international law, which is reflected in the case law of several international courts and in various truth commission reports. This trend is furthermore recognized by international organizations, including the UN,[41] and the International Law Association, [42] and in academic literature. [43] Three categories of rationales have inspired this development of collective reparations, including principled, practical and legal motivations.

The first category of rationales relates to the harm and needs that are addressed by the reparations. Since, mass atrocities are typically committed on a massive scale and are often targeted against a specific group,[44] these often result in harm of a collective nature and not only of an individual nature. Collective harm arises in situations where individuals are targeted specifically because they belong to a specific group or community, for instance because they belong to a particular religious, cultural, or ethnic group.[45] In addition, mass atrocities harm collectivities per se, by destroying the community ties, the isolation and terrorization of certain groups, and the creation of distrust between members of a community.[46] Because of such damage to the social cohesion of a community, the needs of the community are different from

cooperation of the state contribute to the prevalence of individual(ized) reparations. Frédéric Mégret, 'The Case for Collective Reparations before the International Criminal Court' in Jo-Anne Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014) 174; Nader Iskandar Diab, 'Challenges in the Implementation of the Reparation Award against Hissein Habré. Can the Spell of Unenforceable Awards Across the Globe be Broken?' (2018) 16 Journal of International Criminal Justice 141, 149 and 157.

[41] Office of the UN High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States. Reparation Programmes' (2008) HR/PUB/08/1; UNGA 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Repetition' (14 October 2014) A/69/518, para 38-42.

[42] It is interesting to note that the International Law Association's 2008 Draft Declaration of International Law Principles on Compensation for Victims of Armed Conflict did not mention collective reparations at all, while the Declaration of 2010 states that 'there are some developments that indicate that international law endorses collective reparations'. International Committee on Reparation for Victims of Armed Conflict, 'Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)' in International Law Association Report of the Seventy-Fourth Conference (The Hague 2010) (International Law Association, The Hague Conference 2010), commentary to article 6; International Committee on Reparation for Victims of Armed Conflict, 'Draft Declaration of International Law Principles on Reparation for Victims of War' in International Law Association Report of the Seventy-Third Conference (Rio de Janeiro 2008) (International Law Association, The Hague Conference 2008).

[43] See for instance, Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731; Diana Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018).

[44] Tapia Navarro, 'Collective Reparations and the Limitations of International Criminal Justice to Respond to Mass Atrocity' (2018) 18 International Criminal Law Review 67, 68; Frédéric Mégret, The Case for Collective Reparations before the International Criminal Court' in Jo-Anne Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014) 181.

[45] One can think of the collective harm caused by genocide and the forced displacement and killings of a certain indigenous community; Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731, 734; Luc Huyse, 'Victims' in David Bloomfield, Teresa Barnes and Luc Huyse (eds), *Reconciliation after Violent Conflict* (International Institute for Democracy and Electoral Assistance (IDEA) 2003) 54.

[46] Hugo van der Merwe, 'Reparations through Different Lenses: the Culture, Rights and Politics of Healing and Empowerment after Mass Atrocities' in Jo-Anne Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014) 202; Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157, 169.

the individual needs.[47] Since individual reparations focus predominantly on the individual harm and needs, individual reparations deal insufficiently with the collective aspects of harm.[48] Therefore, mass atrocities, especially when they disrupted the community and resulted in massive victimization, cannot be fully repaired by the mere provision of individual reparations.[49]

A second category of rationales for collective reparations involves practical reasons. The practical reasons that are cited to justify a collective approach to reparations relate to the impracticability of repairing the harm of each victim separately in the aftermath of mass atrocities. In the words of Pablo De Greiff, 'the capacity of the state to redress victims on a case-by-case basis is overtaken when the violations cease to be the exception and become very frequent'.[50] The high number of victims of mass atrocities may likely exceed the capacity of the responsible party to repair their harm in full.[51] Especially because states that faced or still face violent conflict[52] often lack resources (monetary, trained personnel as judges and doctors, as well as facilities as hospitals) while facing multiple problems as well as the obligation to provide reparations.[53] Collective reparations are occasionally perceived as more cost-efficient than individual reparations, as they 'maximise the use of minimal resources available to fund reparations'.[54] There are several additional problems that institutions face when trying to award reparations. As it is impossible in situations of mass atrocities to address all victims, only victims who meet particular criteria receive reparations. However, such criteria can be problematic as it often results in an intra-community distinction between beneficiaries and non-beneficiaries, which may have disruptive effects on the community.[55] In addition, individual reparations require an individualized

[47] Brandon Hamber, *Transforming Societies after Political Violence Truth, Reconciliation, and Mental Health* (Springer 2009) 75; Rianne Letschert, *Tussen Recht en Realiteit: Duurzaam Herstel na Massavictimisatie* (inaugural address,Tilburg University 2012) 48.

[48] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157, 169 and 181.

[49] Brandon Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 569.

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

[51] See for instance, Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization: Key Challenges Involved' in Rianne Letschert and others (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 154.

[52] Reparations are not only awarded after a conflict or oppressive rule has ended, but these are occasionally also made available in areas that are still ravaged by violence. For instance, the ICC ordered reparations for mass atrocities committed in the Ituri region in the DRC, though the conflict in the region is still ongoing. See for an overview, International Crisis Group, 'DR Congo: Ending the Cycle of Violence in Ituri' (*International Crisis Group,* 15 July 2020) <https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/292-republique-democratique-du-congo-en-finir-avec-la-violence-cyclique-en-ituri> accessed 5 August 2022.

[53] See for instance, International Center for Transitional Justice (ICTJ), 'The Rabat Report. The Concept and Challenges of Collective Reparations' (ICTJ 2009) 58; Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization: Key Challenges Involved' in Rianne Letschert and others (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 169; Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012) 254.

[54] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, TFV (1 September 2011) para 22.

[55] Lisa Magarrell, 'Reparations in Theory and Practice' (ICTJ, 2007) 6.

assessment of harm, a process that is time- and money consuming.[56] A collective approach to reparations may circumvent these limitations of individual reparations in the aftermath of mass atrocities, since collective reparations may be awarded to a group or community without an identification of each individual member.[57]

The last rationale for the increasing attention for collective reparations relates to the growing recognition of collective human rights. The last decades have seen an increasing recognition of collective human rights, including the right to development, the right to peace, and the right to a clean environment.[58] In addition, the collective rights of indigenous peoples have been increasingly addressed in international law.[59] One of these rights relates to the protection of the ancestral lands of indigenous peoples; their ownership of these lands needs to be respected and protected.[60] The IACtHR has ruled on several cases involving the violation of collective land rights of indigenous peoples, [61] and principally redressed these through collective reparations.[62] Hence, the violations of collective rights were often remedied through collective reparations.

1.2 PROBLEM STATEMENT AND RESEARCH QUESTION

Even though collective reparations have received increasing recognition in theory and practice, neither a legal definition nor a framework of collective reparations has yet been established.[63] Instead, the notion of collective reparations has emerged, which is based on the allocation of a variety of collective measures by a range of distinct institutions that developed different understandings of collective reparations. These

[56] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157; Tapia Navarro, 'Collective Reparations and the Limitations of International Criminal Justice to Respond to Mass Atrocity' (2018) 18 International Criminal Law Review 67, 69.

[57] For instance, the ICC's Trust Fund for Victims claimed that it was an advantage of collective reparations that they do not need an individual application process; a procedure that is costly, resource-intensive, time-consuming, stressful for victims, and sometimes even impossible. See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, TFV (1 September 2011) para 20 and 291; *The Prosecutor v Bosco Ntaganda* (Observations on the Responses and Observations Submitted on the Initial Draft Implementation Plan) ICC-01/04-02/06-2687-Red, TFV (28 June 2021) para 21.

[58] These are often marked as the third generation of human rights or the solidarity rights. William Schabas, *Customary International Law of Human Rights* (Oxford University Press 2021) 327- 340.

[59] See for instance, UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (13 September 2007) UN Doc A/RES/61/295 (UN Declaration on the Rights of Indigenous Peoples); International Labour Organization (ILO) Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention Concerning Indigenous Peoples).

[60] ILO Convention Concerning Indigenous Peoples, Article 13-16; UN Declaration on the Rights of Indigenous Peoples, article 26 and 29.

[61] For an overview see, Jo M Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6 Human Rights Law Review 281.

[62] This will be further discussed in Chapter 4.

[63] See for instance, Tapia Navarro, 'Collective Reparations and the Limitations of International Criminal Justice to Respond to Mass Atrocity' (2018) 18 International Criminal Law Review 67, 72; Francesca Capone, 'Is anybody playing?: the right to reparation for child victims of armed conflict' (PhD thesis, Tilburg University 2013) 18.

institutions range from regional human rights courts, international criminal tribunals, truth commissions to reparations programs. These institutions cover both the juridical and non- or quasi-juridical reparation contexts as distinguished by Pablo De Greiff.[64] The particular context of the relevant institutions appears to result in competing claims to dilemmas relating to collective reparations, since orders for collective reparations have been established by mechanisms with differing objectives, mandates, and limitations. The mechanisms can produce different conclusions concerning, for instance, the aim, the collective measures, the elements distinguishing collective from individual reparations, and the beneficiaries of collective reparations. Thus, the mechanisms represent a diversity in standards and procedures of formulating and applying collective reparative measures. In other words, the current legal understanding of collective reparations varies among institutions with a reparation mandate, potentially resulting in conflicting applications of collective reparations.

The aim of this dissertation is to explore the legal development of collective reparations in both the juridical and the non- or quasi-juridical setting. The objective of this study is to analyze case law and truth commission reports in depth in order to see if it is possible to come to a thorough understanding of collective reparations and their development. The analyses scrutinize how each court and truth commission defines and applies collective reparations, and the underlying reasoning for a specific approach to collective reparations. After the development of collective reparations in each court and truth commission is mapped, this dissertation establishes an overall description of the development of collective reparations. This is done through a comparison of the procedures regarding collective reparations in the three courts and a subsequent juxtaposition of the courts' approaches and that of the truth commissions.

This dissertation not only contributes to the crystallization of a legal framework of collective reparations, it also aims to evaluate the developing practice on collective reparations. This evaluation is done in light of the ongoing scholarly debate regarding the relation between (collective) reparations and assistance or development; there are many linkages between the two and both fields may overlap.[65] As a consequence, the line between reparations and assistance may be blurred. This may be problematic as reparations and assistance have different objectives. Reparations are provided because victims have a legal entitlement that their harm is redressed by the wrongful

[64] Pablo de Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 452-453.

[65] See for instance, Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 186-192; 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* (Social Science Research Council 2009) 171-207; Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 88-107; Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

party.[66] Hence, reparations aim to address the harm suffered by victims, and include a declaratory function, in which the responsibility for the wrongdoing as well as victimhood are recognized.[67] Assistance is provided because of a general state obligation to provide basic services to all its citizens, and is as such intended to satisfy basic and urgent needs of citizens.[68] Several scholars argued that assistance has a lower reparative capacity than reparations, because people receive goods and services as citizens, and not as victims with a right to reparation.[69] However, it is unclear whether victims that received goods and services know whether they received reparations or assistance. Consequently, this thesis developed a scheme to assess the development of the definitions and applications of collective reparations before the different courts in relation to assistance.[70]

Lastly, the dissertation explores several implications arising from the findings of this study. These include implications for victims, the courts, truth commissions, other actors involved in the design of reparation programs, and for academics. As such, this dissertation will reflect on how the developing procedures for awarding collective reparations impact victims and their legal certainty, will discuss whether the inclusion of a reparation regime within the mandates of international courts is suitable in case of mass atrocities, and will highlight some lacunae in academic research.

This study is led by the following overarching research questions:

> *How have international courts and truth commissions, that are mandated to provide or recommend collective reparations, perceived and applied collective reparations for victims of mass atrocities, and how can the differences and similarities between the institutions be explained?*

By answering these two interlinked questions, this dissertation will provide a comprehensive overview of the development of collective reparations. This overview

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[66] See for instance, 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* (Social Science Research Council 2009) 172.

[67] See for instance, Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114; Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

[68] See for instance, Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

[69] See for instance, Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114; 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 Nijhoff 2009) 91; Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

[70] The scheme to evaluate the collective reparations will be further introduced in chapter 2.

is innovative because it is not restricted to the approach to collective reparations in a particular court or legal field, but also includes international criminal courts, human rights courts, and truth commissions. As will become clear, these different courts and legal fields interact and consider each other's decisions, resulting in synergy and cross-fertilization. This dissertation shows that this is particularly true for the conceptualization of (collective) reparations in the different courts. Consequently, it is argued that a deeper understanding of the development of collective reparations can only be achieved when the analyses of the case law of the international courts and truth commission reports are integrated.

This dissertation explores the interpretation and application of collective reparations within a legal and in a non-legal context. The case law of the Inter-American Court of Human Rights (hereinafter IACtHR), the International Criminal Court (hereinafter ICC) and the Extraordinary Chambers within the Courts of Cambodia (hereinafter ECCC) is analyzed. In addition, the collective reparations as recommended by 15 truth commissions operating in a quasi-legal context are examined.

1.3 KEY CONCEPTS

In order to fully grasp the findings of the study on collective reparations, it is necessary to assess the meaning of the key concepts of this study: collective reparations, victims, and mass atrocities. This section will shortly introduce these key concepts.

COLLECTIVE REPARATIONS

Since collective reparations are developed and applied on an ad-hoc basis, there is not yet one established legal definition. The term collective may refer to different aspects of the reparations; these may address collective harm, target collective beneficiaries and/or consist of collective goods.[71] Collective reparations can take many different forms as they range from purely material to essentially symbolic measures or a combination of the two. In addition, the collective reparations can be awarded to the broader community or society, or to specific groups within the community, such as children, women, or victims of a specific crime.[72] Several scholars refer to the definition provided by Friedrich Rosenfeld,[73] stating that collective

[71] Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731, 733.
[72] UNGA 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (14 October 2014) UN Doc A/69/518, 11.
[73] See for instance, Christoph Sperfeldt, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia' (2012) 12 International Criminal Law Review 457, 471; Diana Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018) 23-24; Alina D Balta, 'What's Law got to Do with It? Assessing International

reparations are 'the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law'.[74] Yet, according to Friedrich Rosenfeld, these benefits have to be indivisible and cannot be enjoyed individually. This condition is too narrow, and would exclude collective reparations that were ordered or recommended by several courts and truth commissions.[75] Since the analyses are led by the interpretations of the courts and truth commissions, this dissertation works with a broader understanding of collective reparations. Hence, based on the definitions of Friedrich Rosenfeld and the institutions, this dissertation will use the term collective reparations as reparations that address collective harm, target collective beneficiaries, and/or consist of collective goods.

VICTIMS

The understanding of the concept of victims was guided by the definition as provided by the UN Reparation Principles. Accordingly:

> victims are 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 dependents of the direct victim and the persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[76]

MASS ATROCITIES

This study revolves around collective reparations for victims of international crimes, gross human rights violations, and serious violations of humanitarian law. As international criminal courts, the ICC and ECCC are mandated to investigate and prosecute international crimes, namely genocide, crimes against humanity, war crimes, and occasionally the crime of aggression.[77] The jurisdiction *ratione materiae* of the IACtHR is broader and includes the State's breaches of a range of human rights

Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 28.

[74] Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731, 732-733.

[75] The courts and commissions' understanding of collective reparations and its benefits is described at length in chapters 4-7.

[76] Reparation Principles, rule 8.

[77] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), article 6-8; Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (signed on 10 August 2001, amended on 27 October 2004) NS/RKM/1004/006 (ECCC Law), article 4-7.

that are included in the American Convention on Human Rights,[78] including gross human rights violations.[79] Truth commissions generally focus on acts of excessive violence and state repression. Most analyzed commissions had a mandate to make an inquiry into gross human rights violations in general, while a few were ordered to inquire into the widespread violations of a specific human right, primarily forced disappearances.[80] Similarly, all courts and truth commissions that are included in this study focus on mass atrocities, an umbrella term for international crimes, gross human rights violations, and serious violations of humanitarian law.[81]

Mass atrocities are distinct from conventional crimes, because the state is actively or passively involved through the acts or omissions of its agents, the scale of the violations lead to mass victimization, and the victims are often dehumanized and not regarded as victims at the time of the violations.[82]

1.4 OUTLINE

This dissertation consists of three parts, each part is further divided in chapters.

Part 1 consists of the first three chapters, and establishes the foundation of this research. Chapter 1 incorporates the introductory chapter, which submits the initial framework of this dissertation. The theoretical framework underlying this study is provided in chapter 2. First, this chapter provides the relevant background to understand how reparations in international law and transitional justice developed from primarily a state-to-state practice, to the inclusion of individuals and collectivities. Second, it presents Aristotle's theory on particular justice and Dixon's framework to distinguish reparations from assistance. Both are used to evaluate the development of the definitions and applications of collective reparations before the courts and truth

[78] This includes, for instance, the right to life, the right to humane treatment, the right to privacy, and the freedom of association.

[79] This dissertation focuses on reparations for mass atrocities, thus the analysis of the IACtHR is restricted to cases focusing on human rights violations that incorporate mass atrocities. Therefore, this study includes the IACtHR cases that dealt with gross human rights violations, which are comparable to international crimes. See, 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' (United Nations Audiovisual Library of International Law 2010), 2; Lori Damrosch, 'Gross and Systematic Human Rights Violations' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011) para 12-14.

[80] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routlegde 2011) 75-76; Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 33.

[81] According to Marina Aksenova, mass atrocities refer to the international crimes as well as widespread human rights violations that 'shake the consciousness of humanity as a whole'. Marina Aksenova, '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 to International Criminal Law* (Hart Publishing 2020) 4-5.

[82] Antony Pemberton and others, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) International Criminal Law Review 339, 343.

commissions, especially in relation to the limits of collective reparations, in other words, where collective reparations ends and assistance begins. [83] The methodology of this dissertation is introduced in chapter 3. The first part of this chapter is dedicated to the comparative analyses of this dissertation. It contains an introduction to comparative law, and a description of the three related comparisons as included in this study; a comparison of the three courts, a comparison of the fifteen truth commission reports, and a juxtaposition of the courts and truth commissions. The courts' case law and the truth commission reports are analyzed using qualitative content analysis. The second part of chapter 3 discusses the qualitative content analysis of this dissertation.

Part 2 comprises the core of the dissertation, and includes the analyses of the case law of the three courts and the truth commission reports. Chapter four covers the analysis of the IACtHR, chapter five examines the ICC, and chapter six considers the ECCC. Lastly, chapter seven examines the collective reparations before fifteen truth commissions. These chapters in part 2 each depict how collective reparations were defined, categorized, and ordered or recommended. Special consideration is given to the beneficiaries of the collective reparations, the objectives, and other characteristics that were used by the institutions to distinguish collective from individual reparations. Furthermore, the chapters explore how the understanding and application of collective reparations developed within each institution. Lastly, each chapter appraised the changing approach towards collective reparations in relation to Aristotle's theory on particular justice and Peter Dixon's framework relating to the distinction between reparations and assistance.

Part 3 incorporates the concluding chapter of this dissertation. Chapter 8 incorporates a comparison of the notion of collective reparations and its understanding and application before the three courts. The results of this comparison are thereafter juxtaposed with the findings of the analysis of the truth commissions. The differences and similarities between the three courts, and between the courts and truth commissions are explored, followed by a critical assessment of the distinct developments of collective reparations. Lastly, this chapter draws some general conclusions about the concept of collective reparations within international law and additionally puts forward some final implications of this research.

[83] In addition to assistance, scholars use terms as development aid, developmental sectors, and non-judicial measures. For consistency purposes, I use the term assistance in this dissertation.

CHAPTER 2: SETTING THE STAGE: REPARATIONS IN A BROADER CONTEXT

2.1 INTRODUCTION

In order to fully grasp the development of collective reparations, this chapter places collective reparations in a broader context. Therefore, this chapter first provides an overview of the historical development of reparations as well as the role of individuals in international law. This overview shows how reparations developed from a state-to-state practice to a practice that increasingly includes individuals. Thereafter, this chapter introduces the theory of Aristotle and the framework of Peter Dixon, which are used to assess the collective reparations before the courts and truth commissions.

2.2 DEVELOPMENT OF REPARATIONS

The development of reparations in international law cannot be separated from the general development of international law and the position of individuals therein. Therefore, this section will first provide a short overview of the evolution of international law, including the standing of individuals and of reparations in international law. This section is divided in four paragraphs, each containing a time period that had a distinct understanding of international law and reparations. Namely the period between the Peace of Westphalia and the First World War, the period between the First and the Second World War (the Interbellum), the decades after the Second World War till the end of the Cold War, and lastly the period after the Cold War.

2.2.1 PEACE OF WESTPHALIA TO THE FIRST WORLD WAR

Even though international law did not change at one specific point in time, the Peace of Westphalia (1648) is seen by many international lawyers as the departing point of modern international law, which consists of a secular system of equal sovereign states.[84] Nevertheless, at that time there was no real international community, and cooperation was limited. In addition, at that time, the international legal order regarded states as the only subjects of international law, while individuals were merely the

[84] Bardo Fassbender, 'Peace of Westphalia (1648)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011) para 18 and 22; Shavana Musa, 'Victim Reparation under the Ius Post Bellum: A Historical and Normative Perspective' (PhD thesis, Tilburg University 2016) 8-9. It is good to keep in mind that the Peace of Westphalia as the beginning of international law is inspired by euro-centric believes of the 18th and 19th century. See Rüdiger Wolfrum, 'International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006) para 4.

objects of state power.[85] This was reflected in the non-existence of international human rights law, international criminal law, and humanitarian law.[86] The latter started to slowly emerge at the end of the nineteenth century.[87]

As international law was still in its early stages, reparations for individuals were mostly negated in the period up to the First World War. However, there were some exceptions to this rule, namely restitution clauses in peace treaties and admiralty courts.[88] Especially in the seventeenth and eighteenth century, it was accepted to include a restitution clause in peace treaties, which were primarily restricted to immovable goods such as realty and annuity.[89] The restitution clauses were mostly applicable to the belligerent states, however some of these treaties explicitly included private individuals.[90] In addition, some other private individuals (mainly neutral and non-belligerent merchants, and seamen that were harmed by wrongful privateering) had the option to request restitution or compensation before a permanent admiralty court, also known as a maritime court.[91] Hence, the scarce reparations that were actually provided to individuals in the period up to the First World War were limited to restitution and compensation.

[85] Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 54.

[86] Paul Gorden Lauren, 'The Foundations of Justice and Human Rights in Early Legal Texts and Thought' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 290 and 291; Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 234.

[87] The establishment of the International Committee of the Red Cross in 1863 and its first Geneva Convention of 1864 on the Condition of the Wounded in Armies in the Field marked the beginning of the humanitarian protection of individuals during war. In addition, the laws of war were codified during the Hague Peace Conferences in 1899 and 1907. Especially Convention II respecting the Laws and Customs of War on Land of 1899, which was revised in Convention IV of 1907, has considerable importance for the development of humanitarian law. See, Robert Kolb, 'The Protection of the Individual in Times of War and Peace' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History in International Law* (Oxford University Press 2012) 324.

[88] During the nineteenth century, the doctrine of diplomatic protection developed, which stipulated that harm inflicted on an individual by a foreign state was actionable by the state of the nationality of the individual. Nevertheless, the claims arising from diplomatic protection were inter-state claims; the state controlled the claim, received the awards, and was bound by the decisions of the commissions. In other words, diplomatic protection did not result in individual rights, and individuals could not claim reparations without the assistance of its own state. See, Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 54.

[89] Shavana Musa, 'Victim Reparation under the Ius Post Bellum: A Historical and Normative Perspective' (PhD thesis, Tilburg University 2016) 20 and 21.

[90] For case studies of wars that had ended with reparation provisions for individuals, see Shavana Musa, 'Victim Reparation under the Ius Post Bellum: A Historical and Normative Perspective' (PhD thesis, Tilburg University 2016).

[91] Most European states, such as France, England, Spain and the Dutch Republic, had an admiralty court within their territory. See, Shavana Musa, 'Victim Reparation under the Ius Post Bellum: A Historical and Normative Perspective' (PhD thesis, Tilburg University 2016) 23 and 24.

2.2.2 INTER-WAR PERIOD

The horrors of the First World War shocked the Western world and forced states to reconsider the way they cooperated with each other. This led, amongst others, to the establishment of the League of Nations and the Permanent Court of International Justice (hereinafter the PCIJ).[92] The legal international order remained focused on states as subjects of international law, while individuals were still merely considered as objects of international law without direct rights or obligations under international law.[93] Moreover, international human rights law and international criminal law were still absent from the international legal order, and humanitarian law did not protect individuals as such. Nevertheless, there were some initiatives after the First World War that laid the groundwork for the impending development of these fields. In the field of international human rights law, a system for minority protection was developed by the League of Nations. This system was limited to some states, primarily in Central and Eastern Europe where the former Habsburg and Ottoman empires had collapsed.[94] In addition, a system for the protection of refugees started to emerge.[95] The developments in the other two fields were even less substantial. Even though the Versailles Peace Treaty did include provisions regarding the individual responsibility for war crimes and the establishment of an international tribunal,[96] prosecutions were limited to a few trials under German national law.[97] Humanitarian law was further expanded with the Geneva Conventions of 1929, which related to warfare and the protection of prisoners of war. Hence, the protection of the civilian population was still lacking in humanitarian law.[98]

The gradual but increasing attention for individuals in international law was also reflected in the provisions on reparations for individuals after the First World War. Even though reparations were still predominantly a state-to-state practice that mostly excluded individual claims, some measures set the foundation for the gradual

[92] Martti Koskenniemi, 'History of International Law, World War I to World War II' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011) para 1-4.
[93] This position of individuals in international law during the inter-war period was confirmed in the PCIJ advisory opinion in the case of Jurisdiction of the Courts of Danzig. The PCIJ stated that, 'according to a well established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals'. Yet the PCIJ added an intermediate step; there is an exception to this principle in case the parties to the treaty intended to create individual rights and obligation**.** *Jurisdiction of the Courts of Danzig* (Advisory opinion) [1928] PCIJ Reports Series B No 15, 17-18.
[94] Anna Meijknecht, 'Minority Protection System between World War I and World War II' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010) para 7-8.
[95] The 1933 Convention relating to the International Status of Refugees was the first legally binding treaty in international law that protected refugees. Dieter Kugelmann, 'Refugees, League of Nations Offices' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010) para 7.
[96] Article 227 of the Treaty of Versailles provided for the prosecution of Kaiser Wilhelm II at a special tribunal, while article 228 stated that the Allied Forces could prosecute persons who were accused of war crimes before military tribunals. Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles (signed 28 June 1919) 225 CTS 188 (Treaty of Versailles).
[97] Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 234.
[98] Hans-Peter Gasser and Daniel Thürer, 'International Humanitarian Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2011) para 12.

development of reparations. These measures arose in two different spheres: before the PCIJ and in the aftermath of the First World War. The PCIJ provided an important ruling that affirmed the general principle recognizing the state's obligation to repair the harm caused by a wrongful act.[99] In addition, the PCIJ described 'reparation in an adequate form' as '[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear'.[100] Thus, reparations before the PCIJ were limited to restitution and compensation. A rule that was also reflected in the reparation mechanisms set up after the First World War. The Versailles Peace treaty included a 'war guilt clause' stipulating that Germany and its allies were responsible for all the loss and damage of the war.[101] Consequently, all Allied and Associate Powers could set up a Mixed Arbitral Tribunal between themselves and Germany.[102] Some of these Mixed Arbitral Tribunals were set up as inter-state mechanisms, while other tribunals accepted claims for compensation by individuals. These claims could be pressed directly by the individuals without the assistance of the state of nationality. They had full control in pursuing their own rights and were the beneficiaries of the compensation that was awarded.[103]

2.2.3 Second World War to the end of the Cold War

The developments that were set in motion after the First World War were further enhanced after the Second World War. The cooperation between states as well as the attention for the position of individuals in international law increased. The general conviction after 1945 was that the system of the League of Nations and the PCIJ had failed. These were consequently replaced by, respectively, the United Nations (hereinafter UN) and the International Court of Justice (hereinafter ICJ).[104] In addition, the horrors of the Second World War and the Holocaust underlined the need for protection of individuals.[105] This was reflected in the rise of international criminal law, humanitarian law and international human rights law immediately after the Second World War had ended. First, individual responsibility for crimes against peace, war crimes and crimes against humanity was enforced in the aftermath of the Second

[99] *Case Concerning the factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Reports Series A No 9, 21; Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 70.
[100] *Case Concerning the factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Reports Series A No 9, 47.
[101] Treaty of Versailles, article 231. In addition, article 232 of the Treaty of Versailles states that 'Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property'. See for instance, Richard M Buxbaum, 'A Legal History of International Reparations' (2005) 23 Berkeley Journal of International Law 314, 319 and 320.
[102] Treaty of Versailles, article 304 (a).
[103] Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 73 and 83.
[104] Martti Koskenniemi, 'History of International Law, World War I to World War II' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011) para 1.
[105] Martti Koskenniemi, 'History of International Law, World War I to World War II' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011) para 15.

World War in the International Military Tribunal of Nuremburg and the International Military Tribunal of the Far East.[106] Second, humanitarian law additionally included the protection of citizens with the signing of the fourth 1949 Geneva Convention on the protection of civilian persons in time of war.[107] Third, the newly established UN has been influential in the development of international human rights, starting with the adoption of the Universal Declaration of Human Rights in 1948, a non-binding document that did not confer any rights on individuals.[108] While it was the intention that this declaration would be accompanied by a binding covenant, the Cold War slowed down the legislative process and it took almost twenty years before the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights were signed. Thereafter, it took another ten years before the conventions entered into force.[109] Furthermore, this period between the Second World War and the end of the Cold War witnessed the conclusion of several international human rights treaties.[110] In addition, human rights law developed even further on a regional level in Europe and the Americas. Both adopted a convention on human rights and created monitoring mechanisms. Europe established a court on human rights, while the Americas installed a commission and a court.[111]

Even though the attention for individuals in international law increased, the possibilities for victims to claim reparations were still limited. Nevertheless, two mechanisms that provided reparations to individuals evolved after the Second World War. First, the aftermath of the Second World War encountered one of the biggest reparations programs for individuals after the German government concluded several bilateral and multilateral agreements to compensate the victims of the Holocaust.[112] As a result, victims could claim compensation, including one-time payments and

[106] Charter of the International Military Tribunal of Nuremberg (signed on 8 August 1945) 82 UNTS 279, article 6; Charter of the International Military Tribunal of the Far East (signed on 19 January 1946) TIAS No 1589, article 5.
[107] Robert Kolb, 'The Protection of the Individual in Times of War and Peace' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History in International Law* (Oxford University Press 2012) 328.
[108] Ed Bates, 'History' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014); Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 306.
[109] Christian Tomuschat, 'International Covenant on Civil and Political Rights (1966)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2010) para 1-6.
[110] On the international field these consisted of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
[111] See for more information, Jo M Pasqualucci, 'The Americas' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014); Steven Greer, 'Europe' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014).
[112] Gideon Taylor and others, 'The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2nd edn, Brill Nijhoff 2020) 205-206; Ariel Colonomos and Andrea Armstrong, 'German Reparations to the Jews after World War II: A Turning Point in the History of Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006).

lifetime pensions, and occasionally restitution of property.[113] Second, the European Court of Human Rights (hereinafter ECtHR) was established in 1959, which includes a mandate to provide reparations to individuals. The initial article 50 of the European Convention on Human Rights (hereinafter ECHR) gave the court the opportunity to 'afford just satisfaction to the injured party'. [114] Just satisfaction has been narrowly interpreted by the ECtHR; at first it was restricted to declaratory judgements, which was later broadened to include monetary compensation.[115]

2.2.4 Post-Cold War

The late 1980's and early 1990's were marked by several transitions, because military dictatorships and totalitarian regimes were collapsing throughout South-America, East Europe, the former Soviet Union and Africa. During these political movements from illiberal rule to democracy, the field of transitional justice emerged.[116] Transitional justice can be defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.[117] Transitional justice consists of a wide variety of mechanisms, including criminal procedures, truth commissions, reparation programs and reforms of the police and justice system.[118]

The development of transitional justice was also reflected in international law, especially in the proliferation of international criminal law and international human rights law. After the Cold War had ended, almost fifty years after the Nuremburg and Tokyo trials, several international criminal courts were established. Most were created by the UN, sometimes in cooperation with the state, in order to address the crimes of a specific conflict.[119] Furthermore, the statute for the establishment of a permanent

[113] 205-206 and 212.
[114] After the revision of the ECHR in 1998, article 50 was renumbered as 41. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[115] Matti Pellonpää, 'Individual Reparation Claims under the European Convention on Human Rights' in Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual* (Kluwer Law International 1999) 112; Antoine Buyse, 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law' (2008) 68 Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht 129, 144; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 209-211.
[116] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321, 326.
[117] Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice* (Cambridge University Press 2006) 2.
[118] Some definitions use a broader range of transitional justice mechanisms, such as programs to address the root causes of the conflict**.** See, Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice* (Cambridge University Press 2006) 2.
[119] For instance, the 1993 International Criminal Tribunal for Yugoslavia, the 1994 International Criminal Tribunal for Rwanda, the 1996 Special Court for Sierra Leone and the 2003 Extraordinary Chambers in the Court

international criminal court was adopted in 1998, which resulted in the creation of the International Criminal Court (hereinafter ICC) in 2002.[120] In addition, the expansion of international and regional human rights continued after the end of the Cold War: several international human rights treaties were adopted,[121] the existing regional human rights systems extended,[122] and three additional regions adopted human rights conventions and bodies to protect these human rights.[123]

The increasing recognition of the position of individuals in international law is reflected in the development of reparations for individuals. In 2004, the ICJ confirmed that individuals that suffered harm may be entitled to reparations, consisting of restitution and compensation.[124] However, other institutions went beyond the *Chorzów* dictum and developed reparative measures that consisted of rehabilitation, satisfaction and guarantees of non-repetition.[125] In addition, the number of institutions where individuals can claim reparations increased after the Cold War. Even though, several international criminal courts redirected individuals and their claims to national courts or truth commissions,[126] the ICC, the Extraordinary Chambers in the Court of Cambodia (hereinafter ECCC), and the Extraordinary African Chambers (hereinafter EAC) have allowed individuals to claim reparations, including symbolic and material collective reparations.[127] As regards to regional human rights, options to claim

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of Cambodia. See for more information, M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Brill 2013).

[120] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

[121] The following core international human rights treaties were adopted: the International Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Convention on the Rights of Persons with Disabilities (2006) and the Convention for the Protection of All Persons from Enforced Disappearance (2006).

[122] For instance, the number of member states of the ECHR grew from 23 in 1989 to 47 in 2000 and in 1998 the ECtHR became a full-time court, resulting in its 10.000th ruling in 2008. See, 'Our Member States' (*Council of Europe*) <http://www.coe.int/en/web/about-us/our-member-states> accessed 18 August 2022; Dinah Shelton and Paolo Carozza, *Regional Protection of Human Rights* (2nd edn, Oxford University Press 2013) 155.

[123] In Africa, the African Charter on Human and Peoples' Rights established a commission and was later followed by a human rights court. The Arab Charter on Human Rights is monitored by a human rights committee, while the Southeast Asian Commission on Human Rights adopted a non-binding human rights declaration. See Dinah Shelton and Paolo Carozza, *Regional Protection of Human Rights* (2nd edn, Oxford University Press 2013)157-159.

[124] '[T]he Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned'. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 2004, para 152.

[125] The variety in reparations is often categorized as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. See UNGA 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (16 December 2005) UN Doc A/RES/60/147 (Reparation Principles); Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 452.

[126] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts. Incompatible Values?' (2010) 8 Journal of International Criminal Justice 79, 87 and 90-91; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 112 and 114-115.

[127] Chapters 5 and 6 will further discuss the ICC and ECCC and their approach to collective reparations. The EAC is not included in this dissertation as the Court did not order collective reparations. See Nader Iskander Diab, 'Too Soon Until It Got Too Late: Making Reparations a Reality for Hissène Habré's Victims' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity. Systems in Place and Systems in the Making* (2nd edn, Brill 2020) 507.

reparations opened for individuals in the European, Inter-American and African system. Especially the IACtHR developed an innovative and wide-ranging framework of reparations, including collective reparations.[128] In the European system, 'just satisfaction' remained restricted to compensation and in some cases restitution.[129] With reparations as one of its pillars, the emergence of transitional justice resulted in more opportunities for reparations for individuals. This was, amongst others, reflected in the advance of national and international administrative mass claims commissions, of which several were open to individuals, and that included claims for compensation and restitution.[130] Another pillar of transitional justice, truth telling, also had an effect on the development of reparations for individuals. Truth telling is often done through truth commissions; 'official, temporary bodies established to investigate a pattern of violations over a period of time that conclude with a final report and recommendations for reforms'.[131] These recommendations often include a wide range of reparative measures.[132]

2.3 CLARIFYING THE NOTION OF REPARATIVE JUSTICE

The increasing attention for victims in the aftermath of violent conflict and authoritative rule has been reflected in the expansion of theories and approaches to address the victims' needs. These steps towards addressing victims' needs are justified by referring to concepts that are often linked to notions of justice.[133] These include reparative justice,[134] retributive justice, punitive justice,[135] and restorative justice.[136] It is my observation that these concepts are ambiguous and slippery; they are so-called

[128] Chapter 4 will further discuss the IACtHR and its approach to collective reparations.
[129] Antoine Buyse, 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law' (2008) 68 Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht 129, 145.
[130] See for instance the United Nations Claims Commission following Iraq's invasion of Kuwait; Hans Van Houtte, Hans Das and Bart Delmartino, 'United Nations Compensation Commission' in Pablo De Greiff (ed), *The Handbook onf Reparations* (Oxford University Press 2006); the Bosnia-Herzegovina Commission for Real Property Claim for Displaced Persons and Refugees (1995) and the Kosovan Housing and Property Claims Commission (1999); Howard Holtzmann, 'Mass Claims' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) para 11; Rudolf Dolzer, 'Mixed Claims Commissions' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011) para 10.
[131] Priscilla Hayner, 'Truth Commissions: a Schematic Overview' (2006) 88 International Review of the Red Cross 295, 295.
[132] The recommended reparations of fifteen truth commissions will be further discussed in chapter 7.
[133] According to Lisa Laplante, 'at its core, the concept of reparations revolves around ideas of justice'. Lisa J Laplante, 'Just Repair' (2015) 48 Cornell International Law Journal 513, 530.
[134] Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of Violent Conflict' in Koen de Feyter and others, *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 71-75.
[135] See *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012), para 177.
[136] According to Jemima Garcia-Godos: '[r]estorative justice seeks to repair or restore the injustice done, which is why victim reparations are commonly linked to restorative justice in the language of transitional justice'. Jemima García-Godos, 'Victim Reparations in Transitional Justice – What is at Stake and Why' (2008) 26 Nordisk Tidsskrift for Menneskerettigheter 111, 120. See furthermore, Margaret Urban Walker, 'Restorative Justice and Reparations' (2006) 37 Journal of Social Philosophy 377, 382-387.

moving targets. These concepts are often used without definition or explanation. For example, the ICC claimed that the reparations it ordered should 'afford justice to the victims' without explaining what this should entail or what it actually means.[137] The institutions and scholars have built on the work of predecessors when using these concepts and each has used its own interpretation, often without making the used definitions explicit. Furthermore, other complications have arisen as these concepts have often been used as single concepts without acknowledging that the different concepts may coincide.

The theory underlying the legal principle that wrongs have to be remedied can be traced back to the ancient Greeks, especially to Aristotle (384 - 322 BCE). In his *Nicomachean Ethics,* Aristotle distinguished two types of particular justice: [138] distributive and corrective justice. [139] The theory of the latter form of justice materialized in private law, especially in torts and contracts.[140] Nevertheless, as this research shows, the theory of corrective justice is used as the basis for reparations in public international law, including human rights law and international criminal law.[141] This dissertation uses the theory of Aristotle to define reparative justice.[142]

2.4 Evaluating the development of collective reparations

In order to respond to the complicated nature of mass atrocities reparations transformed, including changes to the reparative measures, objectives, beneficiaries and procedures. Hence, a wide variety of reparative measures evolved, of which several are rather similar to assistance projects.[143] As a consequence, the fields of reparations and assistance have moved towards each other, with many linkages and concurrences between them.[144] However, reparations and assistance are distinct and

[137] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012) para 179.
[138] Aristotle makes a distinction between universal and particular (in)justice. Universal justice answers to the virtue as a whole, while particular justice relates to goods that are divisible and of limited supply, such as honor, money and safety. As such it relates to the getting of one's fair share of good and bad things, the pleasure that arises from gain, while at the same time that gain corresponds with someone else's loss. Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.2, 1130a-1130b.
[139] Corrective justice is also referred to as rectifying, rectifactory, or commutative justice.
[140] See for instance, Marc A Loth, 'Corrective and Distributive Justice in Tort Law' (2015) 22 Maastricht Journal of European and Comparative Law 788, 794; Lisa J Laplante, 'The Plural Justice Aims of Reparations' in Susanne Buckley-Zistel and others (eds), *Transitional Justice Theories* (Routledge 2014) 70; Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 The University of Toronto Law Journal 349, 349.
[141] See furthermore, Dinah Shelton, Remedies in International Human Rights Law (3rd edn, Oxford University Press 2015) 19.
[142] This theory is further discussed in section 2.4.1.
[143] In addition to assistance, scholars use terms as development aid, developmental sectors, and non-judicial measures. For consistency purposes, I use the term assistance in this dissertation.
[144] See for instance, Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 186-192; Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo De Greiff and Roger Duthie (eds), *Transitional Justice and*

have different objectives. Reparations are based on the victims' legal entitlement that their harm is redressed by the wrongful party.[145] Therefore, reparations aim to address the harm suffered by victims, and fulfill a declaratory function in which the responsibility for the wrongdoing as well as victimhood are recognized.[146] Assistance is based on needs instead of rights, as it is provided out of a general state obligation to provide basic services to all its citizens. As such, assistance is intended to satisfy basic and urgent needs of citizens.[147] Several scholars argued that assistance has a lower reparative capacity than reparations, because people receive goods and services as citizens, and not as victims with a right to reparation.[148] Therefore, this dissertation includes an evaluation of the development of collective reparations in light of the relation between reparations and assistance.

The first tool for this assessment consists of Aristotle's theory on particular justice, the theory that underlies most other theories relating to reparative justice. The first form of justice as distinguished by Aristotle, corrective justice, relates to the undoing of injustice. Reparations come close to corrective justice. The second form of particular justice, distributive justice, concerns the equal division of goods in a society. Distributive justice is not linked to wrongful acts, harm or victim status. Instead, this comes closer to assistance. This research shows that many reparations combine elements of corrective and distributive justice. Therefore, I propose that corrective and distributive are not two distinct forms of justice, which will be elaborated further in section 2.4.3.

The second tool consists of Peter Dixon's framework that provides guidance in the assessment of court-ordered reparations as reparations or as assistance. The framework of Peter Dixon consists of five prepositions to distinguish reparations from

Development: Making Connections (Social Science Research Council 2009) 171-207; Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 88-107; Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

[145] See for instance, 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* (Social Science Research Council 2009) 172.

[146] See for instance, Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114; Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

[147] See for instance, Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

[148] See for instance, Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114; 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 Nijhoff 2009) 91; Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

assistance: responsibility, recognition, process, form, and impact.[149] These five elements are used to evaluate the reparation programs of each of the three courts.

This section first elaborates on Aristotle's theory of particular justice, including the difficulties in using the theory of corrective justice in situations of mass atrocities, and the scale of particular justice. Thereafter, Peter Dixon's framework and its prepositions are introduced.

2.4.1 ARISTOTLE'S THEORY ON PARTICULAR JUSTICE

Distributive justice deals with the division of goods and evils between numerous members in a society.[150] For Aristotle, goods do not primarily refer to wealth, instead it also includes honors, institutions and political power.[151] In order to be just, this division should be equal and fair, meaning that it should be based on the intermediate between the two unequals.[152] However, this does not mean that there should be a strictly equal distribution. Instead, 'awards should be 'according to merit'; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit'.[153] The question which merit or quality of a person is relevant for the fair allocation of goods and burdens is most controversial, as Aristotle left this question open in his Nicomachean Ethics.

The other form of particular justice, corrective justice, relates to the undoing of injustice in transactions. Aristotle discerned two types of transactions; those with a voluntary origin (such as sale, loans and other actions in which, according to the law, people are free to set their own terms) and those with involuntary origins. The latter category can be further divided into clandestine transactions (for instance theft) and transactions with force (such as murder, assault, abuse and mutilation).[154] Contrary to distributive justice, the injustice for corrective justice does not relate to the merits of the two parties (the wrongful party and the wronged party).[155] Instead, it applies to the inequality of the transaction. In the words of Aristotle, 'the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received

[149] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 95-102.
[150] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 The University of Toronto Law Journal 349, 351. This is contested by Samuel Fleischacker who claimed that distributive justice primarily related to the division of political power; who can vote and who can hold office? Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press 2004) 20.
[151] Michael Sandel, *Justice: What's the Right Thing to Do?* (Farrar, Straus and Giroux 2009) 29.
[152] Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.3, 1131a.
[153] Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.2, 1130b.
[154] Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.2, 1131a.
[155] A difference between corrective and distributive justice is that corrective justice is limited to two parties (a wrongful and a wronged one), whereas distributive justice includes all members of the group, community or society who should equally share benefits and burdens. See, Ernest J. Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 The University of Toronto Law Journal 349, 351.

it'.[156] Whether the two parties are good or bad persons is irrelevant. When someone is wronged or injured, there is an unequal division of suffering and benefits. It is up to the judge to rectify this inequality by taking away the gain of the offender and restoring it to the victim.[157] In other words, the aim of the rectification is restoring the equality of the transaction, either the equalization of goods or evils.[158] As Charles Young described it, equality is 'the difference between the victim's position after the correction and his position before the correction is equal to the difference between the perpetrators before the correction and her position after the correction'.[159] In the words of Aristotle, corrective justice 'consists in having an equal amount before and after the transaction'.[160]

The interpretation of Aristotle's explanation of corrective justice has been contested by his commentators. Several authors claimed that corrective justice implies that the victim and offender have to be brought back to the situation they were in before the transaction took place.[161] In other words, corrective justice emphasizes, in first instance, restitution to the *status quo ante*. However, Thomas Brickhouse did not agree when it came to involuntary transactions.[162] Instead, he stressed that corrective justice is not about the *status quo ante*, but merely about the restoration of an equal relationship. In case of an involuntary transaction, the equal relation is restored when the offender has suffered the same evils through punishment.[163]

Jean Hampton argued that the creation of an inequal relationship between the offender and victim causes what she called moral injury. The wrongful act of the offender did not only cause harm (for instance, material, physical and psychological

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[156] Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.4, 1132a.
[157] Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.4, 1132a.
[158] According to Brickhouse, for voluntary transactions the rectification is an equalizing of goods, while an involuntary transaction leads to the equalizing of evils. Thomas Brickhouse, 'Aristotle on Corrective Justice' (2014) 18 Journal of Ethics 187, 191, 196 and 199.
[159] Charles Young, 'Aristotle's Justice' in Richard Kraut (ed), *The Blackwell Guide to Aristotle's Nicomachean Ethics* (Blackwell 2006) 186.
[160] Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.4, 1132b.
[161] Lesley Brown claimed that it is 'crystal clear that the judge's task in 'equalizing' is to make the position of each party equal to what it was before the offence'. Lesley Brown, 'Explanatory Notes' in Lesley Brown (ed), *The Nicomachean Ethics* (Oxford University Press 2009) 230, comment on 1132b. For other endorsement of the restitution *status quo ante* as corrective justice, see Izhak Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press 2009) 8; Charles Young, 'Aristotle's Justice' in Richard Kraut (ed), *The Blackwell Guide to Aristotle's Nicomachean Ethics* (Blackwell 2006) 185-186.
[162] When it comes to voluntary transactions, Thomas Brickhouse claimed that: '[f]or rectification of that kind, then, there is a sense in which there is a restoration of the *status quo ante*'. Thomas Brickhouse, 'Aristotle on Corrective Justice' (2014) 18 Journal of Ethics 187, 200.
[163] This disagreement in the reading of corrective justice can be traced back to Aristotle's writing on reciprocity. Thomas Brickhouse identified reciprocity as linked to corrective justice: reciprocity serves as the normative principle that fills in what is actually needed to restore the equal relationships. While other authors labeled reciprocity as a third form of particular justice. Even though Aristotle explicitly identified only two forms of particular justice in chapter II, he later claimed that ''reciprocity' fits neither distributive nor rectifactory justice'. Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.2, 1130b and 5.4, 1132b. See furthermore, Thomas Brickhouse, 'Aristotle on Corrective Justice' (2014) 18 Journal of Ethics 187, 192 and 200; Jeffrey Hause, 'Aquinas on Aristotelian Justice' in Tobias Hoffmann (ed), *Aquinas and the Nicomachean Ethics* (Cambridge University Press 2013) 155-156; Lesley Brown, 'Explanatory Notes' in Lesley Brown (ed), *The Nicomachean Ethics* (Oxford University Press 2009) 230, comment on 1132b.

harm), it also caused moral injury by damaging the acknowledgement and realization of the victim's value, while the offender put a value on himself that was superior to that of the victim.[164] Retribution should address the moral injury 'through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity'.[165] Antony Pemberton referred to this as positive retribution whereby retribution is not limited to the punishment of the offender, but also includes the acknowledgement of the suffering of the victim.[166] According to Jean Hampton, '[c]orrective justice compensates victims for harms, whereas retributive justice compensates victims for moral injuries'.[167] Hence, both forms of justice include compensation, yet they address a different form of damages. Jean Hampton went even further and proposed that corrective justice may even be an aspect of retributive justice since punishment may include remedies for the suffered harm.[168] In other words, though Jean Hampton agreed with Thomas Brickhouse that the equal relation between the offender and victim should be restored, she labeled this as retributive justice.

This dissertation uses the understanding of corrective justice that revolves around the correction of the suffered harm; the victim is restored to the situation he/she was in before the crime took place. Nevertheless, this research examines collective reparations that were ordered in a criminal or human rights court. These courts have different objectives. In addition to the order of reparations and the assessment of harm, these also included retribution and the appraisal of the wrongful nature of the acts committed by states and individuals. It is therefore not always possible to clearly divide the different goals of the courts (for instance retribution and restoration of harm). As we will see in the chapters discussing the analyses within the different courts and truth commissions, some ordered reparation measures include aspects of 'positive retribution' where the punishment of the wrongful party aims to restore an equal relation between the value of the offender or wrongful state and the victims.

[164] Jean Hampton, 'Correcting Harms verses Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659, 1676-1679.
[165] Jean Hampton, 'Correcting Harms verses Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659, 1686.
[166] Antony Pemberton, 'Een Victimologisch Fundament voor het (Straf)Recht: Vergelden, Verbinden en Verhalen' (2021) 48 Delikt en Delinkwent 604, 612.
[167] Jean Hampton, 'Correcting Harms verses Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659, 1698. The notion of retributive justice is in line with Shelton who claimed that retribution restores the 'moral autonomy between wrongdoer and victim and between wrongdoer and the community'. Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 19.
[168] Jean Hampton, 'Correcting Harms verses Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659, 1697.

2.4.2 REPARATIONS AND ARISTOTLE'S THEORY

Corrective justice as developed by Aristotle deals with transactions, which include involuntary transactions consisting of crimes such as murder and theft. The transactions, both voluntary and involuntary, primarily take place between two identities, such as individuals, companies or even states. In international law, reparations were initially an undertaking between a state that committed a wrongful act and a harmed state. Building on this practice, avenues opened where individuals could order reparations from a state and at a later stage also from individuals who were found guilty before an international criminal court. Even though the characteristics of reparations have evolved in international law, corrective justice remained at the forefront; restitution and, if impossible, compensation were for a long time the only forms of reparation in international law and they are still prevalent. Moreover, as we will see in the following chapters, the analyzed courts have used restitution and compensation as the starting point for their description of reparations.[169] In other words, the theory that is applied for torts and contracts in private law is also used in other legal fields, for instance in international human rights law and international criminal law. The conceptual basis underlying the reparations remained for a large part the same, even when the wrongful acts and subsequent suffering varied considerably. As an ideal, corrective justice is indisputable as it attempts to neutralize the suffering of the victim, while it makes sure that the offender or wrongful state do not benefit from the crimes.[170] However, its practicality in situations of mass atrocities is disputable. The shortcomings of corrective justice in relation to mass atrocities are shortly discussed.

First, corrective justice presupposes that the benefits of the wrongful party are equal to the losses of the victim, which is a premise that is difficult to maintain in situations of heinous crimes. For instance, María Eustaquia Uscap Ivoy (a victim who survived the attacks on the Río Negro village in Guatemala in 1982) has, amongst others, suffered from multiple rapes, lost family members and her community, witnessed the attacks, and was thereafter abducted to the village of Xococ. The individual harm of María, both material and immaterial, is disproportional to the probable benefits of the offenders, making it difficult to balance the harm and benefits. In addition to individual harm, mass atrocities often result in collective harm. Massive and systematic violations often destroy or transform communities and its knowledge, capacities, culture, and group identity.[171] María additionally suffered collective harm together with the other members of her community, since their community was

[169] See for instance, *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 228; *The Prosecutor v Thomas Lubanga Dylio* (Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, A Ch (18 July 2019) para 107.

[170] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 456.

[171] Hugo Van der Merwe, 'Reparations through Different Lenses: the Culture, Rights and Politics of Healing and Empowerment after Mass Atrocities' in Jo-Anne Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014) 202.

attacked and destroyed, whereby elderly people who passed on the indigenous culture were killed. In addition, the community suffered a moral injury, because the acknowledgement and realization of the value of the community was damaged, while the offenders put a value on themselves that was superior to that of the members of that particular community.[172] In other words, the combination of individual and collective harm further increases the tension between the suffering of the victims and the benefits of the offenders. Another presumption of corrective justice is that the violations are exceptions in a society with a reasonably just distribution of goods and a working legal system. These isolated cases can be restored on a case-by-case basis before a court or similar legal institution.[173] However, mass atrocities cannot be regarded as exceptions.

Second, the harm of the victim and the benefits gained by the offender do not merely run the risk of disbalance, the suffered harm is also difficult to correct. Restitution is often impossible (for instance, the death cannot be brought back to life) or unfavorable (for instance, when victims are brought back to a situation of inequality), whereas compensation presupposes that harm can be quantified. Some forms of harm are indeed quantifiable (for instance the loss of a house) while others are not, for instance how much money can correct the harm of the loss of a child or the suffering of torture? In addition, mass atrocities mostly consist of 'behavior whose meaning, appropriately understood by members of the cultural community in which the behavior occurs, represents her value as less than the value she should be accorded'.[174] Consequently, the victims' value is damaged, resulting in moral injury. In addition, as mentioned before, the suffering of victims is often not limited to individual harm, instead, they may suffer a combination of individual and collective harm. Like individual harm, collective harm is often difficult to monetize, for instance how much money can correct the destruction of community ties, or the loss of trust in the government or the police. Consequently, the measuring of harm and moral suffering is complicated and one can question whether it is desirable.[175]

Third, the context of the violations influences the feasibility of a corrective justice approach. Mass atrocities are often committed in states weakened by conflict or an oppressive regime. For instance, the infrastructure of the state, such as healthcare, education, the judiciary, and the supply of clean water is damaged and need to be repaired. The limited resources of the state have to be divided between the rebuilding

[172] Jean Hampton, 'Correcting Harms verses Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659, 1676-1679.
[173] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 457; Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625, 638; Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 116.
[174] Jean Hampton, 'Correcting Harms verses Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659, 1670.
[175] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 474.

of the state's infrastructure and the repairing of the harm of the victims. Furthermore, the violations committed during violent conflict or an authoritative regime are not committed in isolation, instead they form part of wide-spread violations that result in mass-victimization. Restitution and/or compensation in proportion to the harm for all victims of the conflict or regime simultaneously is often impossible due to the high number of victims and the lack of resources.

Consequently, corrective justice might not be the answer in these situations of mass atrocities. The difficulty of translating corrective justice to situations where victims suffered harm during a violent conflict or authoritative regime resulted in a broadening of the underlying normative aims and ideals of reparations in the second half of the twentieth century. The reparations are no longer strongly limited to the restoration of the victim's harm.[176] Instead, reparations should additionally aim to confirm the status of victims, both as human beings and as equal citizens.[177] In addition, another ideal is that reparations should address the moral injury of the community or society. Reparations should improve the trust between citizens and between citizens and the state, and affirm that there is an inclusive political order that protects all its citizens.[178] This is especially important in states that are characterized by inequality where the poor and marginalized citizens often carry the greatest burden of the violations. Reparations should thus not only address harm that resulted from a specific violation, they also have to focus on the social and political problems that caused the violations or that might be the result of the violations. Reparations should thus not be merely backward-looking, but also forward-looking; they should address the root causes of the violations and prevent new violations from happening. In other words, reparative justice should not be limited by corrective justice, it should rather be combined with distributive justice.

The broadening of the underlying aims of reparations is reflected in a broader variety of ordered reparations in international law. Reparations have changed throughout the years, from only including corrective justice, to a combination of corrective and distributive justice. The reparations that combine both corrective and distributive justice elements come in many different forms, and they can be individual or collective, and material, symbolic or a combination of the two. Some are primarily

[176] Ruth Rubio-Marín, 'Gender and Collective Reparations in the Aftermath of Conflict and Political Repression' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 383.

[177] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157, 160; Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 460; Brandon Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 571; Ernesto Verdeja, 'A Critical Theory of Reparative Justice' (2008) 15 Constellations 208, 218.

[178] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 462-464; Ruth Rubio-Marín, 'Gender and Collective Reparations in the Aftermath of Conflict and Political Repression' in Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009) 383; Margeret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotondi (eds), *Theorizing Transitional Justice* (Ashgate Press 2015) 218.

addressing the direct harm of individual victims, whereas others are more focused on the collective harm of a community or broader society.

The shift from strictly corrective reparations to reparations that include distributive elements may pose a risk that the concept of reparations is stretched so far that some of the ordered reparations are only reparations in name. This risk is especially high for reparation measures that are designed to address the underlying causes of the conflict and to prevent future conflicts, for instance through projects that aim to alter the social, economic, and political relations so that marginalized groups run a lower risk of being victimized again.[179] It is up for debate whether these measures fall within the scope of reparations.[180] This is especially relevant for reparations before human rights courts and truth commissions which are ordered against a state. Because distributive and corrective justice both result in two different obligations of a state; repairing the victims of gross violations of human rights and humanitarian law and the equal distribution of goods and opportunities amongst its citizens, regardless of their status of victims.[181] Consequently, the second obligation does not recognize the violations and victims as such. In addition, distributive justice does not make a distinction between victims and other poor and marginalized persons, instead they get access to social services on the basis of their poverty, and not on the basis of their victimhood. In situations where victims and offenders live in the same communities, offenders and bystanders may benefit from the same social services as victims do.[182] Short of corrective justice, the forward-looking measures are merely distributing resources, power, and opportunities, without recognizing and addressing the victims' suffering.[183] In other words, reparations should always be grounded in corrective justice, potentially combining this with aspects of distributive justice.[184] Hence, it is essential that the reparations with distributive aspects are perceived as a symbol for the acknowledgement of the violations, the victims and their harm.[185]

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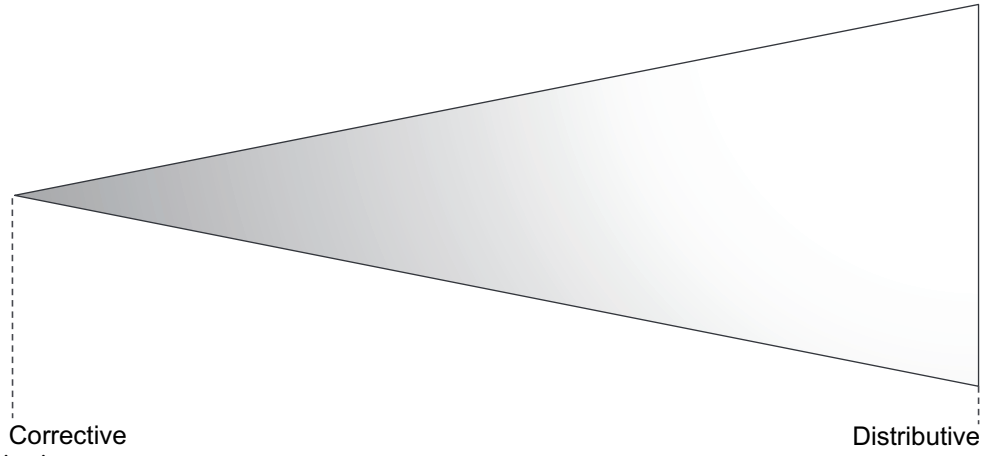
[179] Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 109.
[180] Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 120.
[181] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157, 188; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 229.
182 Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157, 188.
[183] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 470.
[184] Ruth Rubio-Marin, 'The Gender of Reparations in Transitional Societies' in Ruth Rubio-Marin (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press 2009) 107; Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625, 639; Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108,122-123.
[185] 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 Nijhoff 2009) 91; Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive

2.4.3 SCALE OF PARTICULAR JUSTICE

Accordingly, this research shows that corrective and distributive justice are not two distinct forms of justice, instead these overlap and reparations can include elements of both forms of justice. In order to show the relation between corrective and distributive justice in reparations, this dissertation introduces the scale of particular justice. This scale shows the transition between corrective and distributive justice, as is shown in diagram 1.

Diagram 2.1: The scale of particular justice



The reparations that were ordered or recommended in the last decades took a wide variety of forms, and all of these different forms of reparations fit the scale of particular justice. Some forms of reparations have a narrow interpretation, such as restitution and compensation, and fit the scale on the left side. These forms are often individual and material. More to the right of the spectrum are reparations that combine corrective and distributive elements, such as vocational training or medical treatment. There is a wide variety of reparations that combine both forms of justice, including individual and collective, and material and symbolic reparative measures. The broadest interpretation of reparations is seen on the right side of the scale; the programs that address the inequality that caused the conflict or that were reason for the victims to

Justice' (2009) 27 Netherlands Quarterly of Human Rights 625, 645; Peter Dixon, 'Reparations and the Politics of Recognition' 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) 327; Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114.

be targeted as such. However, in order to fit the scale, there has to be a corrective element to these programs. This can even be limited to a meager symbolic recognition of the violations, for instance by naming the school after one of the victims.

2.4.4 THE DISTINCTION BETWEEN REPARATIONS AND ASSISTANCE

Even though international courts have often used corrective justice as starting point for reparations, Aristotle's theory of particular justice is a stretch in cases involving mass atrocities. In order to respond to the complicated nature of reparations after mass atrocities, reparations shifted from merely corrective justice to a combination of corrective and distributive justice. In order to grasp the development of collective reparations and to assess the extent to which reparations shifted from corrective to distributive justice, Aristotle's theory on particular justice is used. This is complemented by an assessment whether reparations can be distinguished from assistance. The framework of Peter Dixon guides this evaluation, which consists of five elements that distinguish reparations from assistance: responsibility, recognition, form, process and impact.

The first two elements, responsibility and recognition relate to the two expressive functions of reparations: a vindicatory and an exemplifying function.[186] The acknowledgement of the wrongfulness of the acts and the responsibility of the offenders serve the vindicatory function of reparations.[187] Contrary to assistance, reparations are based on the legal ***responsibility*** to redress the harm that resulted from a wrongful act and these are consequently ordered against the wrongful party.[188] The relation between the responsibility of the wrongful party and reparations embodies a crucial symbolic element of denunciation of the wrongful acts.[189] Hence, victims receive reparations because they are entitled to receive redress for the harm they suffered due to wrongful behavior, while individuals may benefit from assistance by virtue of their needs and/or vulnerability.[190] The group of individuals who may have access to assistance programs is larger than the group of victims. All members of a

[186] Margaret Urban Walker, 'The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things' in Alice MacLachlan and Allen Speight (eds) *Justice, Responsibility and Reconciliation in the Wake of Conflict* (Springer 2013) 208-220.
[187] Margaret Urban Walker, 'The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things' in Alice MacLachlan and Allen Speight (eds) *Justice, Responsibility and Reconciliation in the Wake of Conflict* (Springer 2013) 208 and 212.
[188] See for instance, Frédéric Mégret, 'Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes' (2010) 36 Brooklyn Journal of International Law 123, 136; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 147.
[189] See for instance, Brandon Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 566; Kirsten J Fisher, 'Messages from the Expressive Nature of ICC Reparations: Complex-victims in Complex Contexts and the Trust Fund for Victims' (2020) 20 International Criminal Law Review 318, 342.
[190] Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press 2020) 362.

community or region including those who are not a victim may be targeted for assistance.[191]

The exemplifying function of reparations concerns the public ***recognition*** of victimhood and the harm suffered.[192] As such, reparations acknowledge 'the experience of suffering and harm and may express recognition, relief, and support of victims or victimized communities'.[193] This '[a]cknowledgement is crucial to provide an opportunity for vindication of victims' suffering and means-making in understanding the impact of violence on themselves'.[194] The recognition of victimhood and suffering that are embraced in the provided reparations furthermore expresses how the relation between the victim and the offender was at the time of the violations and how this should be in the future.[195]

Reparations are not limited to the reparative modalities itself, instead the approach to the development and implementation of the reparations is also of fundamental importance to reparations.[196] This ***process*** of designing and implementing reparations, especially the role of victims within this process, is another factor that differentiates reparations from assistance. It is essential that victims have a voice in the development and implementation of the reparations.[197] Consultation and participation of victims is indispensable.

The fourth element that differentiates reparations from assistance relates to the unique form of reparations. Reparations address the harm the victims have suffered,

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[191] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

[192] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157, 159 ('Reparations are the embodiment of a society's recognition, remorse and atonement for harms inflicted. This atonement quality separates reparations from mere post-conflict settlements'); Ernesto Verdeja, 'Reparations in Democratic Transitions' (2006) 12 Res Publica 115, 126 ('Reparations indicate a moral acknowledgement of wrongful suffering'); 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* (Social Science Research Council 2009) 172.

[193] Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press 2020) 358.

[194] Luke Moffett and Clara Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) Leiden Journal of International Law 1, 17.

[195] Margaret Urban Walker, 'The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things' in Alice MacLachlan and Allen Speight (eds) *Justice, Responsibility and Reconciliation in the Wake of Conflict* (Springer 2013) 208 and 217.

[196] See for instance, Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 42 Stanford Journal of International Law 279, 283; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 37; Jo-Anne Wemmers, 'The Healing Role of Reparation' in Jo-Anne Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014) 226; Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 36-41.

[197] See for instance, Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157, 186 ('One key idea underlying community development as reparations is that the community must have a voice in deciding its priorities').

and, according to Peter Dixon, this may result in a different **form** of reparations that is 'more symbolically or materially significant'.[198]

The last distinguishing characteristic of reparations is linked to the alleged benefits of reparations that result from the other four elements, especially the expressive functions of reparations. According to Peter Dixon, '[t]he principle of impact suggests that because of their potent symbolic value, reparations have a greater, or at least different, impact vis-à-vis assistance measures.[199] Therefore, the **impact** of reparation is stronger and more substantial than assistance, at least in theory as empirical evidence is largely absent.[200]

[198] Peter Dixon acknowledges a lack of empirical research regarding the perceived differences in impact of reparations and assistance. Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 100.

[199] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 101.

[200] According to Margaret Walker, these 'expressive burdens of reparation efforts are heavy, and we should expect that they are often not fully met'. This limits the exclusive symbolic impact of the ordered reparations. Margaret Urban Walker, 'The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things' in Alice MacLachlan and Allen Speight (eds) *Justice, Responsibility and Reconciliation in the Wake of Conflict* (Springer 2013) 220.

CHAPTER 3: METHODOLOGY

This chapter elaborates on the methodological considerations of the analyses of different courts and truth commissions and their application and interpretation of the concept of collective reparations. In order to get a better understanding of the concept of collective reparations and its development in the different international institutions, a comparative analysis is carried out. Furthermore, the analyses of the case law and truth commission reports is conducted through qualitative content analysis.[201] The methodologies for the comparative analysis and the qualitative content analysis are described in this chapter. Yet, in case the methodological considerations are specific to a particular institution, these deliberations will be further discussed in the chapter of the relevant court or truth commission.

3.1 COMPARATIVE ANALYSIS

In this dissertation, the rules and decisions of three international courts are treated comparatively in order to get a better understanding of the concept of collective reparations in international law and its development in different branches of international law. These three courts belong to two different branches of international law: international criminal law (the International Criminal Court (hereinafter ICC) and the Extraordinary Chambers within the Courts of Cambodia (hereinafter ECCC)) and human rights law (Inter-American Court of Human Rights (hereinafter IACtHR). Even though they belong to different branches that are governed by distinctive laws, rules and actors, they also share similarities that are important for this study, because all 'of them apply norms and obligations under international law that are directly applicable to individuals'.[202] Furthermore, there is interaction, synergy and cross-fertilization between various courts and the different branches.[203] This is particularly true for the conceptualization of (collective) reparations in the different courts. For instance, the courts refer to the case law of each other in their decisions on reparations. According to Antônio Cançado Trinidade, former judge of the ICJ and the IACtHR, 'jurisprudential

[201] According to Mark Hall and Ronald Wright, the spread of ideas within the legal system can especially be studied through the analysis of court decisions. Mark A Hall & Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 63, 92-93.

[202] Carsten Stahn and Larissa van den Herik, ''Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in Larissa van den Herik & Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill 2012) 47.

[203] See for instance, William A Schabas, 'Synergy or Fragmentation?: International Criminal Law and the European Convention on Human Rights' (2011) 9 Journal of International Criminal Justice 609, 632; Mireille Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' (2003) 1 Journal of International Criminal Justice 13, 15.

cross-fertilization is much needed by, and relevant to, contemporary international tribunals, in their common mission of realization of justice', including reparations.[204]

Even though truth commissions are quasi-legal institutions and not part of international law, there is still cross-fertilization between international courts and truth commissions. For instance, the ECCC referred to the Guatemalan truth commission and the IACtHR to the truth commission of El Salvador. [205] Furthermore, several truth commissions referred to the IACtHR and ICC.[206] In addition, the study of Christine Evans showed that 'truth commissions have made important contributions to the right of victims to receive reparations'.[207] In order to be able to gain a better understanding of the development of collective reparations, this dissertation adopts an approach that integrates the analysis of international courts and truth commissions. In addition, I will also juxtapose the results of the comparison of the three courts with the truth commissions' interpretations of collective reparations.

This study makes use of a comparative approach as developed within comparative law. This dissertation includes three related comparisons; a comparison of the three courts, a comparison of the reports of fifteen truth commissions, and the juxtaposition of the courts and the truth commissions. Each comparison demands a slightly different approach and faces different methodological considerations, these will be discussed separately. Prior to the introduction of the methodological considerations specific to each comparison, the overarching methodology of comparative law will be presented.

3.1.1 Comparative Law

The starting point for the exploration of a suitable methodology for the comparison of the three courts respectively the fifteen truth commissions was comparative law. However, comparative law is primarily focused on the comparison between domestic legal systems, and not on international legal frameworks, neither its application by national actors, such as courts, nor by international actors.[208] In the last decades, the field of 'comparative international law' has emerged, which 'entails identifying, analyzing, and explaining similarities and differences in how actors in different legal

[204] Antônio A Cançado Trinidade, 'The Continuity of Jurisprudential Cross-Fertilization in the Case-Law of International Tribunals in their Common Mission of Realization of Justice' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2018* (Oxford University Press 2019) 279.
[205] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 660; *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 66, 73 and 84.
[206] See for instance, Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 19-20.
[207] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 224.
[208] Colin B Picker, 'International Law's Mixed Heritage: A Common/Civil Law Jurisdiction' (2008) 41 Vanderbilt Journal of Transnational Law 1083, 1086.

systems understand, interpret, apply, and approach international law'.[209] A method that is 'relevant in identifying, analyzing, and explaining similarities and differences in the *interpretation and application* of international law'.[210] Nevertheless, 'comparative international law' primarily concentrates on the application of international law by state actors, such as national courts. International actors may be included in 'comparative international law' studies, yet their interpretation of international law is compared to that of national actors.[211]

The comparison of the application of international law solely by different international actors, as is done in this dissertation, does not fit the scope of 'comparative international law'. Instead, the research area of fragmentation looks at the different interpretations of international law by international institutions,[212] including prominent regional actors such as the IACtHR.[213] International law is clustered into various branches, including international public law, human rights law, international criminal law, and international humanitarian law, which are governed by different specific treaties, normative rules and implementation organs, such as courts. These branches and their respective normative rules 'conflict, overlap, reinforce one another, or operate in parallel'.[214] Moreover, these normative differences do not only surface between the different branches of international law, but also between different actors from one branch.[215] Consequently, two courts from the branch of international criminal law, for instance the ICC and ECCC, might have a different understanding of the concept of 'collective reparations'. Furthermore, fragmentation is twofold: institutional fragmentation relates to the relation between different international actors, such as courts, and substantial fragmentation concerns the laws and rules specific to these branches and how these respond to specific problems.[216] This study looks at

[209] Anthea Roberts and others, 'Comparative International Law: Framing the Field' (2015) 109 The American Journal of International Law 467, 469.
[210] Anthea Roberts and others, 'Conceptualizing Comparative International Law' in Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018) 7 (italics of the quote appear in the original text).
[211] Anthea Roberts and others, 'Conceptualizing Comparative International Law' in Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018) 9.
[212] See for instance, Paul B Stephan, 'Comparative International Law, Foreign Relations Law, and Fragmentation: Can the Center Hold?' in Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018) 63; Anthea Roberts and others, 'Conceptualizing Comparative International Law' in Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018) 9.
[213] Christopher McCrudden, 'Comparative International Law and Human Rights: A Value-Added Approach' in Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018) 445.
[214] William E Butler, 'Comparative International Law' (2015) 10 Journal of Comparative Law 241, 251.
[215] Carsten Stahn and Larissa van den Herik, ''Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in Larissa van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill 2012) 88.
[216] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682, para 133 and 489. These two forms of fragmentation are also referred to as 'conflicts of laws' and 'conflicts of norms'; Ralf Michaels and Joost Paulwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 Duke Journal of Comparative & International Law 349, 351.

both forms of fragmentation; the relation between the three courts and their case law, and how the courts respond to the right to reparation in cases of mass atrocities.

The discrepancy between fragmentation and comparative (international) law arises from the role of national actors in the comparison; these are disregarded in the former and included in the latter. Even though fragmentation differs from comparative law, its methodology is borrowed 'from comparative law; it involves comparing, for example, how and why different international law bodies have taken similar or contrasting approaches in interpreting relatively similar norms'.[217]

There is no unified methodology for comparative law, nor is there agreement on the methods that could be used.[218] Instead there are several approaches, and the aim of the study and its subsequent research question direct the selection of the appropriate one.[219] The classic method for comparative law is the functional approach,[220] which does not only focus on the similarities and differences of the law in books, but also on the function of these rules. Therefore, the starting point is a societal problem and the varying legal approaches to that problem are compared.[221] Consequently, the functional approach often involves the comparison of 'judicial decisions as responses to real life situations'.[222] The functional method compares these different solutions and examines the similarities and differences.[223] Furthermore, the explanation of the results of the comparison is not limited to legal factors, rather extra-legal and cultural factors are also taken into account.[224]

Yet, my comparison of the three courts respectively the fifteen truth commissions is not guided by a problem *per se*, but the interpretation and application of an abstract legal concept, collective reparations, is the starting point.[225] Hence, this study does not fall within the strictly defined scope of the functional comparative methodology. Since, the term of 'functions' is controversial and a strict understanding excludes many interesting questions for comparisons, Uwe Kishel proposed to

[217] Christopher McCrudden, 'Comparative International Law and Human Rights: A Value-Added Approach' in Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018) 445.
[218] Mark van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 1, 1; Maurice Adams and John Griffiths, 'Against 'Comparative Method': Explaining Similarities and Differences' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press 2012) 281.
[219] Maurice Adams and John Griffiths, 'Against 'Comparative Method': Explaining Similarities and Differences' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press 2012) 279-280.
[220] However, there is not one functional method, instead functionalism has different meanings and fulfills different objectives. See Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 368-385.
[221] Mark van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 1, 28.
[222] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019) 347.
[223] Uwe Kishel, *Comparative Law* (Andrew Hammel tr, Oxford University Press 2019) 89.
[224] Uwe Kishel, *Comparative Law* (Andrew Hammel tr, Oxford University Press 2019) 8.
[225] Uwe Kishel refers to this as concept comparison. Uwe Kishel, *Comparative Law* (Andrew Hammel tr, Oxford University Press 2019) 162.

rename the methodology as 'contextual comparative law'.[226] He argued that the core of functional comparative law is the context of the legal norm. The aim is to clarify the underlying reasons for the similarities and differences, 'by taking into account all relevant information about factors such as the legal, societal, historical, and political background'.[227] Mark Van Hoecke had a different understanding of comparative law and he argued that there are six different methods of comparative law that are not mutually exclusive.[228] Indeed, the law-in-context method is complementary to the functional method,[229] and the combination of these two methods is rather close to 'contextual comparative law'. Hence, in order to get a better understanding of the concept of collective reparations, the law has to be placed in context. This can be done by using sources from other fields, such as history, sociology, victimology, and anthropology; a more interdisciplinary approach.[230] This research intents to come as close as possible to the contextual comparison. Due to the high number of analyzed institutions, it is not feasible to include all relevant information about the legal, societal, historical, and political backgrounds of the three courts and all fifteen truth commissions. Nevertheless, with collective reparations as the starting point of this research, the context of the institutions, their jurisprudence and reports, is as far as possible taken into consideration.

3.1.2 Stages of comparative analysis

There is no step-by-step approach for comparative research, nevertheless, Gerhard Dannemann distinguished three stages of enquiry. These consist of the selection of the international institutions that will be compared, the description of the selected courts and case law, and the analysis of the differences and similarities. This section shortly introduces the methodological considerations of the three comparisons based on the three stages.

3.1.2.1 Comparison of the international Courts

Selection

The first stage consists of the selection of the institutions that will be compared, as well as of the sources that will be used for the comparison. The selection of the institutions and the sources in general will be justified in this section. However, the

[226] Uwe Kishel, *Comparative Law* (Andrew Hammel tr, Oxford University Press 2019) 174.
[227] Uwe Kishel, *Comparative Law* (Andrew Hammel tr, Oxford University Press 2019) 173-174.
[228] Mark van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 1, 8-9.
[229] Mark van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 1, 16.
[230] See for instance, John C Reitz, 'How to Do Comparative Law' (1998) 46 The American Journal of Comparative Law 617, 627; Anthea Roberts and others, 'Comparative International Law: Framing the Field' (2015) 109 The American Journal of International Law 467, 472.

selection of the specific case law within the respective courts that will be analyzed will be discussed separately for each institution in the related chapters.

The selection of institutions is directed by the research question for this study, which includes the most important selection criteria, namely institutions governed by international law mandated to order or recommend collective reparations. Hence, institutions with a mandate limited to individual reparations, such as restitution and compensation, or that do not have the ability to provide reparations at all are excluded from the analysis. There are only two institutions within international criminal law with a mandate to provide collective reparations to the victims: the ICC and the ECCC. The other international criminal tribunals lack a mandate to order reparations, have a mandate limited to individual reparations or did not order collective reparations despite its mandate to order this form of reparations.[231] Furthermore, only one of the five regional human rights bodies has included collective reparations in its reparation orders: the IACtHR. Even though, the other human rights bodies also have an obligation to provide remedies to victims of human rights violations, these bodies do either not have the mandate to provide the reparations themselves, or they have only awarded reparations of an individual nature. For example, the African Court of Human and Peoples' Rights may order reparations that remedy a proven violation of the African Charter consisting of compensation and other forms of reparation.[232] However, after the African Court issued its first ruling in 2009, it has only sporadically ordered reparations, which primarily consisted of individual reparations.[233] Hence, the ICC, ECCC and IACtHR were selected for the comparative analysis.

The comparison is primarily based on the reparation decisions of the three courts that include collective reparations. This was complemented by other primary legal sources, such as treaties and internal rules, and secondary sources consisting of scholarly literature. In line with the contextual comparative method, these secondary sources are not limited to legal experts. Instead, scholarly literature from other disciplines is included in the comparative analysis.

DESCRIPTION

The second stage is twofold: the description of the courts and the description of the similarities and differences between them. The description of the courts is broader

[231] The Extraordinary African Chambers had a mandate to order collective reparations, yet the requested collective reparations were denied. See Nader Iskandar Diab, 'Challenges in the Implementation of the Reparation Award against Hissein Habré. Can the Spell of Unenforceable Awards Across the Globe be Broken?' (2018) 16 Journal of International Criminal Justice 141.

[232] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 1 January 2004) OAU Doc OAU/LEG/MIN/AFCHPR/PROT.1 rev.2, article 27(1).

[233] In addition, the case law of the African Court of Human and Peoples' Rights does till this date not include cases involving mass atrocities and more than five direct victims, a criterion that is used for the selection of cases. See chapter 4.2.1 describing the case selection for the analysis of the IACtHR.

than the description of the case law, because the context of the institutions and the particular cases is portrayed as well.[234] This part of the description phase will be included in the specific chapter of each court, while the description of the similarities and differences between the courts will be part of chapter 8. Several scholars claim that the separation of the descriptions of each institution and the actual comparison is feeble, instead every section should be as comparative as possible.[235] Nevertheless, I have opted for this structure because the description of each court does include an analysis of the case law of that particular court; an internal comparison. It is my opinion that the combination of the internal and external comparison would make reading the text unnecessarily complicated.

ANALYSIS

Although the differences and similarities are listed in the second phase, the third stage contains the exploration of the possible explanations for these differences and similarities.[236] This stage is essential for the deepening of the understanding of collective reparations and its development. This is also the stage that makes the description of the context absolutely crucial, since the differences and similarities cannot simply be explained merely by the legal framework of the different courts. Instead, other aspects of the courts and the background of the particular cases before them are needed for this clarification.[237] The explanations for the similarities and differences will be addressed in chapter 8, together with the description of these similarities and differences.

3.1.2.2 COMPARISON OF THE TRUTH COMMISSIONS

SELECTION

The last centuries have seen a sufficient number of truth commissions.[238] When using Priscilla Hayner's definition, a total of over 40 truth commissions can be identified.[239]

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[234] George Mousourakis, *Comparative Law and Legal Traditions: Historical and Contemporary Perspectives* (Springer 2019) 110.
[235] John C Reitz, 'How to Do Comparative Law' (1998) 46 The American Journal of Comparative Law 617, 634; Uwe Kishel, *Comparative Law* (Andrew Hammel tr, Oxford University Press 2019) 189.
[236] Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences' in Mathias Reimann & Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 416.
[237] John C Reitz, 'How to Do Comparative Law' (1998) 46 The American Journal of Comparative Law 617, 626.
[238] Depending on the definition that is used by scholars, the number of truth commissions ranges from 30 to approximately 70. See Elin Skaar, 'Transitional Justice for Human Rights: The Legacy and Future of Truth and Reconciliation Commissions' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals and Courts* (Springer 2018) 406.
[239] A total number of 40 truth commissions were finalized before January 2020. Additionally, several new truth commissions, for instance in Colombia, Bolivia and Honduras, have been established in the years after the publication, nevertheless these did not result in an official report yet. See, Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commisions* (2nd edn, Routlegde 2011) appendix 2, chart 1.

This list was used as a starting point for the selection of the truth commissions.[240] The number of truth commissions was restricted through the use of three selection criteria. The first and main selection criteria revolved around the availability and accessibility of these reports. Hence, in case the final report was not publicly available, the commission was excluded from this study.[241] However, non-official publications, for instance by a local NGO,[242] were included. Secondly, only reports that were fully available in English were included.[243] Lastly, the reports of the selected commissions had to include recommendations to prevent the violations from happening again and/or to address the harm of the victims. These recommendations included, implicitly or explicitly, reparations that were both of an individual and/or collective nature, as well as material and/or symbolic reparations. Accordingly, the recommendations of truth commissions may contribute to a better understanding of the development of collective reparations in these commissions. As a result, a total of 15 truth commissions were selected for the analysis, these can be found in table 3.1.

Table 3.1: Selected truth commissions

Country	Name of truth commission
Argentina	National Commission on the Disappearance of Persons
Chile	National Commission on Truth and Reconciliation (Rettig Commission)
Chad	Commission of Inquiry into the Crimes and Misappropriations Committed by the Ex-President Habré, His Accomplices and/or Accessories
El Salvador	Commission on the Truth for El Salvador
Sri Lanka	Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons
South Africa	Truth and Reconciliation Commission

[240] All of the truth commissions in Priscilla Hayner's list investigated mass atrocities with more than five direct victims, thus the first selection criterion that it used throughout the book was met by all.

[241] Some truth commissions reports were not publicly available because they were only handed to the government or President (for instance, the 1974 Ugandan Commission of Inquiry into the Disappearance of People in Uganda since the 25th January, 1971), sometimes only an administrative report was made available (the 2007 DRC Truth and Reconciliation Commission) or only a summary (the 2008 Paraguay Truth and Justice Commission), while others were not found (for instance, the 2012 Togo Truth, Justice and Reconciliation Commission and the 2011 Honduras Truth and Reconciliation Commission).

[242] See for instance the report of the 2002 Nigerian Human Rights Violations Investigation Commission that was made available by the Nigerian Democratic Movement.

[243] Sometimes only a summary of the report was published in English (for instance, the 2004 South Korean Presidential Truth Commission on Suspicious Deaths of the Republic of Korea, and the 2006 Moroccan Equity and Reconciliation Commission). These were excluded from the analysis.

Guatemala	Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer (Historical Clarification Commission)
Nigeria	Human Rights Violations Investigation Commission (Oputa Panel)
Sierra Leone	Truth and Reconciliation Commission
Timor-Leste	Commission for Reception, Truth and Reconciliation
Indonesia and Timor-Leste	Commission for Truth and Friendship
Liberia	Truth and Reconciliation Commission
Mauritius	Truth and Justice Commission
Kenya	Truth, Justice, and Reconciliation Commission
Canada	Truth and Reconciliation Commission

The primary sources for the comparative analysis of the truth commissions are their reports, especially the sections, chapters or volumes relating to the recommendations. These sources are accompanied by other primary sources, such as the acts establishing the commissions, and secondary sources including scholarly literature.

DESCRIPTION

As this dissertation primarily encompasses a legal study, the prime focus of this research is on the international courts. Consequently, the collective reparations within the courts are explored in separate chapters, while the truth commissions are discussed in one chapter. The analysis of the understanding and application of collective reparations is therefore narrower than that of the courts. Contrary to the description of the different courts, the fifteen commissions and the contexts in which they operate are discussed in an integrated fashion. Instead of discussing the context separately for each commission, the different aspects relating to the context of the commissions, for instance their mandate and the level of involvement of international actors, are presented by describing the variation between the commissions in that particular aspect, a so-called dovetailed comparison.[244] The same goes for the description of the (collective) reparations in the fifteen truth commissions, these are

[244] Uwe Kishel, *Comparative Law* (Andrew Hammel tr, Oxford University Press 2019) 192.

also discussed in an integrated manner. The differences and similarities in the interpretation of collective reparations are hence presented directly next to each other.

Since there is some variety between the commissions and their approach towards the reparations the commissions are divided in different sets based on variables, for instance, a set with commissions that included collective material reparations, and a set with those who did not include them. Consequently, depending on the underlying sub-question, the commissions of a particular set are compared and the other commissions are excluded for that particular part of the comparison.[245]

ANALYSIS

In the same chapter, the possible explanations for the similarities and differences are explored. However, the 15 commissions show a wide variety in characteristics and these operate in contrasting contexts. Given that this analysis is part of a bigger study where the main focus is on the courts, there is no time to analyze all possible explanations. Therefore, based on scholarly literature and my own observations of the different reports, I have identified as many influential variables as possible.

3.1.3 JUXTAPOSING COLLECTIVE REPARATIONS IN COURTS AND TRUTH COMMISSIONS

The international courts (international legal institutions) and the truth commissions (quasi-legal institutions with a national focus) are too different to compare. Therefore, the interpretation of collective reparations in the three courts will be juxtaposed with those of the truth commissions. This means that the application of collective reparations in the fifteen commissions will not be compared *per se* to that of the three courts, and there will be no searches for differences, similarities and the reasons for these. Instead, these will be used as an illustration of how collective reparations are used differently or similarly in truth commissions. Hence, the trends of the development and interpretation of collective reparations within the different courts respectively the truth commissions are juxtaposed to see whether there are similar trends in international criminal law, international human rights law and in transitional justice, specifically the truth commissions.

[245] See for instance, Dirk Berg-Schlosser and Gisèle de Meur, 'Comparative Research Design: Case and Variable Selection' in Benoît Rihoux and Charles Ragin (eds), *Configurational Comparative Methods: Qualitative Comparative Analysis (QCA) and Related Techniques* (Sage 2009) 24.

3.2 QUALITATIVE CONTENT ANALYSIS

The comparative analyses consist of examinations of a high number of diverse sources; several rulings of three different international courts, reports of fifteen truth commissions, other legal documents as treaties, and scholarly literature. In order to explore the approaches, criteria, considerations, and conditions used towards collective reparations in these institutions, a high number of primary sources from different institutions have to be analyzed. In my opinion, it is favorable to use a systematic approach for an analysis of this nature. Consequently, I decided to conduct a qualitative content analysis, a research methodology that originated in social science.

Qualitative content analysis is close to doctrinal research, yet it consists of a more systematic methodology with set rules for the selection, coding and analysis of the legal texts.[246] In addition, it offers tools to analyze a high number of decisions in order to draw conclusions about patterns and themes in case law.[247] These are useful for the internal comparison of each court and for the external comparisons between the truth commissions respectively the courts. Therefore, qualitative content analysis is suitable for legal research that deals with a high number of legal documents from different institutions. Another reason for the use of qualitative content analysis is that it not only aims to describe the law, instead it aims to explore, explain, understand or interpret the law.[248] Hence, the qualitative content analysis considers the underlying patterns, relations between key criteria, transitions over time, and the context of the courts, commissions, and their rulings. Lastly, the availability of computer software to assist qualitative content analysis makes it possible to store all the data, codes and variables in one file. Segments that were coded some time ago, can still be easily retrieved in the software program. The data can be retrieved on the basis of a code or variable, for instance, all cases that include a specific reparative measure across all institutions are shown. An option that is beneficial for the comparison of the fifteen truth commissions respectively the three courts. In addition, these programs provide the researcher tools to (statistically) analyze the data and to present this data in a visually attractive style.

The research design of qualitative content analysis consists of three main steps; the selection of the legal texts to be coded, the coding of these texts, and the analysis itself. The selection of the legal texts differs per institution and will therefore be described in the chapters of each court or commission. The coding as well as the data analysis is more general and is introduced in the following two sections.

[246] For more information on qualitative content analysis in legal research, see Manon Bax, 'Qualitative Content Analysis for the study of legal instruments: Unraveling the Concept of Collective Reparations in Legal and Quasi-Legal Institutions' in Alice Bosma and Sanne Buisman (eds), *Methoden van Onderzoek in het Strafrecht, de Criminologie en de Victimologie* (Wolters Kluwer 2018).
[247] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012) 942.
[248] Frans L Leeuw and Hans Schmeets, *Empirical Legal Research. A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing 2016) 158.

Nevertheless, in case the analysis of a specific institution diverges from the general procedure, these will be described in the specific chapter.

This research used a combination of inductive and deductive coding techniques. A code book was developed, starting with codes derived from literature, the inductive codes, which were generated according to the themes that were deemed to be relevant for the development of collective reparations. The code book has been discussed with other researchers and was tested on case law and reports of the different institutions. During the testing of the codes, new key concepts were found in the texts and these deductive codes were added to the code book. These codes were organized in a hierarchical organization where sub codes were attached to a higher code.[249]

The selected legal texts were read and subsequently coded in MAXQDA 2018,[250] a software program that is developed for qualitative data analysis. The analysis of the coded segments, both regarding the context as well as those relating to the interpretation and application of collective reparations, was assisted by MAXQDA2018. The coded decisions were searched for patterns in the decisions, such as statements and rulings that are repeated or that changed. In addition, attention was paid to the similarities and differences between cases. Several functions of the program were used to analyze the data, such as the retrieval of coded segments, frequency tables of codes and variables, and crosstabs (a table displaying the relationship between variables and codes). In addition, several lexical searches and extended lexical searches were completed. The findings were written down and presented in a narrative form. Lastly, the same tools were used to assist the comparisons of the three courts, the fifteen truth commissions, and the juxtaposition of the courts and commissions.

[249] A list with the code categories can be found in annex A. The code book can be requested by the author.
[250] For more information on MAXQDA, see Nicholas Woolf and Christina Silver, *Qualitative Analysis Using MAXQDA. The Five Level QDA Method* (Routledge 2018).

CHAPTER 4: THE INTER-AMERICAN COURT OF HUMAN RIGHTS

4.1 INTRODUCTION

The Inter-American Court of Human Rights (hereinafter referred to as IACtHR or Court) is often renowned by scholars for its innovative and comprehensive regime on reparations.[251] Accordingly, the Court has awarded a wide range of reparative modalities, consisting of measures remedying the harm caused by the violation and dissuasive measures that prevent its recurrence,[252] monetary and non-monetary reparations, and reparations that are directed towards individuals and collectives.[253] In addition, this innovative character of the IACtHR is also present in cases involving indigenous peoples, both in the protection of indigenous rights,[254] and the remedying in case these are violated.[255] Moreover, the IACtHR has awarded a wide range of both individual and collective reparations.[256]

By analyzing the Court's judgments in 41 cases, this chapter aims to gain a better understanding of collective reparations, including the underlying reasons for a

[251] 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 (stating that 'the system has crafted the most comprehensive and holistic approach to reparations under international human rights law'); Arturo Carrillo, 'The Relevance of Inter-American Human Rights Law' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 507 (describing the reparations within the Inter-American system as 'the most advanced of any international legal regime'); Ignacio Alvarez and others, 'Conference: Reparations in the Inter-American System: A Comparative Approach Conference' (2007) 56 American University Law Review 1375, 1376 (referring to 'the most comprehensive legal regime on reparations developed in the human rights field of human rights'); David Attanasio, 'Extraordinary Reparations, Legitimacy, and the Inter-American Court' (2016) 37 University of Pennsylvania Journal of International Law 813, 815.

[252] See for instance, Judith Schonsteiner, 'Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights' (2007) 23 American University International Law Review 127, 130.

[253] See for instance, David Attanasio, 'Extraordinary Reparations, Legitimacy, and the Inter-American Court' (2016) 37 University of Pennsylvania Journal of International Law 813, 820.

[254] The case of the *Mayagna (Sumo) Community of Awas Tingni v Nicaragua* (2001) was the 'first judgement by an international tribunal to recognize the communal property rights of indigenous peoples and to also mandate a state to protect those rights'. Leonardo Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of *Awas Tingni v Nicaragua*' (2007) 24 Arizona Journal of International & Comparative Law 609, 609. See furthermore, Jo M Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6 Human Rights Law Review 281, 320 (stating that the Inter-American system is 'at the forefront of the progressive development of international indigenous rights').

[255] Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2014) 25 Duke Journal of Comparative & International Law 1, 3 (referring to the IACtHR as 'a world leader in the adjudication and redress of indigenous claims, influencing authorities across the globe').

[256] Diana Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018) 141.

collective approach, its beneficiaries, and the changes through time. In other words, it aspires to find the underlying patterns of the decisions on collective reparations.

This chapter starts with a short introduction of the IACtHR and its legal framework. Thereafter, the methodology specific to this chapter and the selected cases are introduced. Subsequently, the results of the analysis of the primary sources, the judgements will be discussed, starting with an extensive overview of the different categories of reparations in the IACtHR, followed by a detailed synopsis of the awarded collective reparations and the beneficiaries. These results will be enriched with secondary sources including scholarly literature. Lastly, the conclusion focuses on the changing terminology the Court has used in relation to (collective) reparations, the development of collective reparations before the IACtHR, and how this development relates to the distinction between assistance and reparations.

4.1.1 The Inter-American system of human rights

The IACtHR is the highest authority within the Inter-American Human Rights system as erected by the Organization of American States (hereinafter OAS). Together the Court and the Inter-American Commission of Human Rights (hereinafter the Commission) are dedicated with the enforcement of international human rights law. The Commission is the monitoring mechanism at first instance, the IACtHR does not have the capacity to receive petitions directly as petitions have to be submitted to the Commission first.[257] The Commission processes and investigates the admissible petitions and tries to reach a friendly settlement between the two parties; the petitioners and the state.[258] In case this procedure is unsuccessful, the Commission may make recommendations to the state or, in case the state accepted the Court's jurisdiction, it may submit the case to the IACtHR.[259] In case of the latter, the IACtHR will decide whether the state indeed violated human rights provisions as set forth in the Inter-American system. Furthermore, when the state is deemed to be responsible for the violations, either when the state accepts its responsibility or when the Court decides so, the Court shall order reparations.[260]

4.1.2 Judiciary

The IACtHR consists of seven judges, who are each elected for a term of six years with the possibility of one reelection.[261] However, in case a judge is unable to attend

[257] American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) article 61.
[258] ACHR, article 48.
[259] ACHR, article 50.
[260] ACHR, article 63 (1).
[261] ACHR, article 52 (1) and 54 (1).

the deliberations, the IACtHR will rule the case with six or even five judges.[262]The judges have to be nationals of the member states of the OAS, hence not necessarily of a state that signed the American Convention on Human Rights (hereinafter ACHR).[263] When a case submitted before the Court involves a judge's home state, the judge has to recuse himself/herself and he/she will be replaced.[264]

The election procedure for new judges starts with the nominations of the member states of the ACHR. Each member state may nominate up to three candidates, both nationals and candidates from other states that are member of the OAS.[265] These candidates should meet the requirements that are set for the IACtHR judges: they should be 'jurists of the highest moral authority', with 'recognized competence in the field of human rights', and they should have the necessary qualifications for the highest judicial positions.[266] The member states elect the judges from the group of nominated candidates during the General Assembly of the OAS. The vote is by secret ballot, and the judges are elected by absolute majority.[267]

The election procedure of the judges in the IACtHR is met with criticism, because the procedure lacks transparency, dialogue with civil society, and control by an independent organ, both in the national and international selection procedure.[268] In addition, each member state has its own nomination procedure, which results in a wide variety of the criteria the candidates should meet, for instance regarding the minimum age, the minimum years of experience, and the interpretation of 'highest moral authority' and 'competence in human rights law'.[269] Consequently, states may nominate candidates that fit their own agenda, instead of focusing on their competences.[270] Several judges have previously held a position in the government of

[262] For instance, the case of *Ituango Massacres v Colombia* was decided with six judges, while the case of *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* was decided with five judges; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006); *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (28 November 2007).
[263] ACHR, article 52 (1).
[264] ACHR, article 55.
[265] When a State nominates three candidates, at least one of them needs to be a national of another member State. ACHR, article 53.
[266] ACHR, article 52.
[267] ACHR, article 53.
[268] Oswaldo Ruiz-Chiriboga, 'The Independence of the Inter-American Judge' (2012) 11 The Law and Practice of International Courts and Tribunals 111, 118.
[269] Oswaldo Ruiz-Chiriboga, 'The Independence of the Inter-American Judge' (2012) 11 The Law and Practice of International Courts and Tribunals 111, 116; Aida Torres Pérez, 'The Independence of International Human Rights Courts: The Case of the Inter-American Court of Human Rights' (Seminario en Latinoamérica de Teoría Constitucional Política (SELA) 2013) <https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Torres_CV_Eng20130524.pdf> accessed 18 August 2022, 13.
[270] Aida Torres Pérez, 'The Independence of International Human Rights Courts: The Case of the Inter-American Court of Human Rights' (Seminario en Latinoamérica de Teoría Constitucional Política (SELA) 2013) <https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Torres_CV_Eng20130524.pdf> accessed 18 August 2022, 13; Laurence Bourgorgue-Larsen, 'Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members' (2015) 5 Notre Dame Journal of International and Comparative Law 29, 57.

their state, for instance as Minister of Justice.[271] There is also criticism over the procedure for the election of the judges in the General Assembly of the OAS where vote trading is an issue. As such, states vote for the candidate of another state in exchange for support for their own candidates for other international positions.[272] As a result, bigger and more powerful states are more successful in getting judges elected than smaller states.[273] Accordingly, the procedure affects the (perceived) independence and impartiality of the judges, which might subsequently influence the independence and even legitimacy of the IACtHR.

4.1.3 The Inter-American legal framework of reparations

The IACtHR derives its authority to award reparations from article 63 (1) of the ACHR. In the draft version of the ACHR, this provision only included compensation.[274] The Guatemalan representative successfully submitted a proposal for a broader provision on reparations.[275] This is reflected in the current article 63 (1), which states that in case a right or freedom that is protected by the Convention is violated, the Court shall ensure that the injured party can enjoy their right or freedom again, the consequences

[271] Patricia Pérez Goldberg, who is a judge at the time of writing, was Minister of Justice in Chile from 2012 to 2014. 'Patricia Pérez Goldberg' (*Inter-American Court of Human Rights*) <https://www.corteidh.or.cr/tablas/jueces/PPG.pdf > accessed 6 May 2022. See furthermore, Aida Torres Pérez, 'The Independence of International Human Rights Courts: The Case of the Inter-American Court of Human Rights' (Seminario en Latinoamérica de Teoría Constitucional Política (SELA) 2013) <https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Torres_CV_Eng20130524.pdf> accessed 18 August 2022, 13.

[272] Oswaldo Ruiz-Chiriboga, 'The Independence of the Inter-American Judge' (2012) 11 The Law and Practice of International Courts and Tribunals 111, 119; Aida Torres Pérez, 'The Independence of International Human Rights Courts: The Case of the Inter-American Court of Human Rights' (Seminario en Latinoamérica de Teoría Constitucional Política (SELA) 2013) <https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Torres_CV_Eng20130524.pdf> accessed 18 August 2022, 14; Laurence Bourgorgue-Larsen, 'Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members' (2015) 5 Notre Dame Journal of International and Comparative Law 29, 57.

[273] For instance, states as Mexico, Costa Rica, and Colombia have had multiple judges in the IACtHR, while states as Bolivia, Guatemala and El Salvador never had a judge in the Court. See Aida Torres Pérez, 'The Independence of International Human Rights Courts: The Case of the Inter-American Court of Human Rights' (Seminario en Latinoamérica de Teoría Constitucional Política (SELA) 2013) <https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Torres_CV_Eng20130524.pdf> accessed 18 August 2022, 14; Laurence Bourgorgue-Larsen, 'Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members' (2015) 5 Notre Dame Journal of International and Comparative Law 29, 57.

[274] Draft American Convention on Human Rights (22 September 1969) Doc. 5, article 52 ('the Court shall be competent to determine the amount of compensation to be paid to the injured party').

[275] An explanation of the underlying reasoning for the broadening of the reparations provision is lacking in the legislative history of the ACHR, however it was suggested that the drafters intended to enhance human rights and complement the IACtHR with extensive remedial powers. See for instance, Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (second edn, Cambridge University Press 2012) 190; Thomas Antkowiak & Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017) p. 289; Alina D. Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (DPhil thesis, Tilburg University 2020) 259-260.

of the violation are remedied, and fair compensation is paid.[276] Consequently, the Court has wide-ranging reparative powers that combines compensation with other measures that remedy the violations.

The Court considered the ACHR provision on reparations to be a (fundamental or basic) principle of (contemporary) international law.[277] In 31 out of the 41 analyzed cases, it even evaluated it as a codification of 'customary law which, moreover, is one of the fundamental principles of current international law'.[278] Yet, the question whether the right to reparations is indeed customary law, is still highly debated by academics.[279] Interestingly, the IACtHR supported this claim by referring to its own case law.[280] The only exception is the first analyzed case, in *Aloeboetoe et al. v. Suriname,* when the Court referred to the 1928 Permanent Court of International Justice case of the *Factory at Chorzów* and the 1950 International Court of Justice advisory opinion in the case of the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*.[281]

Accordingly, a state that is responsible for an unlawful act is consequently obliged to ensure that the consequences of the violation cease to exist and to repair the damage caused.[282] Even though the obligation to repair the damage derives from the wrongful act, the IACtHR can only award reparations that are linked to the proven violations that fall within the jurisdiction of the Court.[283] The reparations should consist of measures that eliminate the effect of the violations.[284] Even though the Court claims

[276] ACHR, article 63 (1).
[277] See for instance, *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 76 ('unwritten law that is one of the basic principles of contemporary international law'); *La Cantuta v Peru* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 162 (29 November 2006) para 200 ('fundamental principle of international law'); *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 223 ('principle of international law').
[278] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 43.
[279] The other analyzed Courts (ICC and ECCC) refer to the obligation to repair harm as a principle of public international law, yet the term customary law is not mentioned. *The Prosecutor v Germain Katanga* (Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, A Ch (8 March 2018) para 178; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C CH (3 February 2012) para 646.
[280] See for instance, *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 346, footnote 257.
[281] *Aloeboetoe et a. v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 43. In the second analyzed case, the IACtHR referred to the Permanent Court of International Justice case of the *Factory at Chorzów* and the International Court of Justice advisory opinion in the case of *Reparation for Injuries Suffered in the Service of the United Nations.* However, this was only to support the premise that the obligation to repair is a fundamental principle of international law, and not of customary law. See *El Amparo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 28 (14 September 1996) para 14.
[282] ACHR, article 63 (1). See furthermore, James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 94.
[283] For instance, the IACtHR could not grant restitution of property because the alleged violation of the right to property did not fall within the Court's jurisdiction. See *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 295.
[284] *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 198. See furthermore *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 171;

that it has the legal obligation to remove all the effects of the illicit act, in one of its first rulings it acknowledged that the legal context differs from practice:

> Every human act produces diverse consequences, some proximate and others remote. An old adage puts it as follows: causa causæ est causa causati. Imagine the effect of a stone cast into a lake; it will cause concentric circles to ripple over the water, moving further and further away and becoming ever more imperceptible. Thus it is that all human actions cause remote and distant effects. To compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured.[285]

The answer provided by the Court is that reparations are provided for 'the immediate effects of such unlawful acts, but only to the degree that has been legally recognized'.[286]

4.1.4 JURISDICTION OF THE IACTHR

According to art. 62 (3) of the ACHR, the IACtHR has jurisdiction over 'all cases concerning the interpretation and application of the provisions of the Convention' as long as the state has accepted the Court's jurisdiction. Thus, the Court's jurisdiction *ratione personae* in the passive sense is restricted to states that have either accepted the jurisdiction *ipso facto* or only for a specific case.[287] Moreover, the IACtHR holds that it can also examine violations of 'other Inter-American instruments that grant it jurisdiction'.[288] The Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, also known as the Convention of *Belém do Pará*, are two

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Pueblo Bello Massacre v Colombia (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 229; *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (28 November 2007) para 118.

[285] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 48.

[286] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 49.

[287] ACHR, article 62 (1) and 62 (3). See furthermore, Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 130. American States that did not accept the jurisdiction of the IACtHR consist of the USA, Canada, Antigua and Barbuda, Bahamas, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts and Nevis, Saint Lucia, and St Vincents and the Grenadines. In addition, Trinidad and Tobago, and Venezuela denounced the ACHR. See Inter-American Court of Human Rights, 'Annual Report 2020' (*Inter-American Court of Human Rights*) <https://www.corteidh.or.cr/docs/informe2020/ingles.pdf> accessed on 18 August 2022, p 16.

[288] *González et al ("Cotton Field") v Mexico* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 205 (16 November 2009) para 37. See furthermore, Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 122.

of the Inter-American instruments that fall within the jurisdiction *ratione materiae* of the Court and of which several articles were violated in several of the analyzed cases.[289] International instruments that are not part of the Inter-American system fall outside the jurisdiction of the IACtHR. Nevertheless, on occasion, the Court used some international treaties, such as the Geneva Conventions, as complementary instruments for the analysis and interpretation of the Convention.[290] Consequently, the Court could not examine the full extent of the violations in some cases when they related to crimes that were not covered in the instruments that granted jurisdiction. As is pointed out in the case of *Rodríguez Vera et al. v. Colombia,* 'facts of this case are inserted in a context of events that are more serious, complex and extensive than those submitted to its jurisdiction, in which hundreds of individuals, in addition to the presumed victims in this case, were victims'.[291] Some international crimes, such as genocide and war crimes, do not fall within the jurisdiction of the Court. However, the Court acknowledged these crimes and stated that it 'constitute an aggravated impact that entails international responsibility of the State, which this Court will take into account when it decides on reparations'.[292]

The Court only has jurisdiction *ratione temporis* over cases that took place after the state accepted the jurisdiction of the IACtHR.[293] In several cases, the violent events occurred before this date and the Court could not examine the violations committed during these events.[294] Nevertheless, the Court still has jurisdiction over the aftermath of the attack, for instance, when the state fails to investigate the event and to prosecute the responsible people.[295] In case of forced disappearances, the violation continues as long as the whereabouts of the victims are unknown.[296] Thus

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[289] The Inter-American Convention to Prevent and Punish Torture was, amongst others, examined in *Barrios Family v Venezuela* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 237 (24 November 2011) para 260; *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 301. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women was, amongst others, examined in *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 141; *Women Victims of Sexual Torture in Atenco v Mexico* (Judgement on Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 371 (28 November 2018) para 36.

[290] See for instance, *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Cost) IACtHR Series C No 252 (25 October 2012) para 141.

[291] *Rodríguez Vera et al v Colombia* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014) para 80.

[292] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 51.

[293] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 137.

[294] See for instance, *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 222.

[295] The failure to investigate and prosecute is regarded as a violation of the right to humane treatment. See *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 92.

[296] *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 121; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 112.

even when the victims disappeared during a time the state did not accept the Court's jurisdiction, the continuing violations fall within the jurisdiction of the IACtHR. Moreover, the Court stated that:

> it has needed to take into account the context and other facts that exceed its jurisdiction, because the political and historical context is decisive for establishing the legal consequences of the case, including both the nature of the violations of the Convention and the corresponding reparations.[297]

Only the Commission and state parties have jurisdiction *ratione personae* in the active sense and can accordingly bring cases before the IACtHR; individuals lack the possibility to directly seize the Court.[298] Nevertheless, they might have the opportunity to lodge a petition before the Commission regarding a complaint of a violation of the ACHR.[299] According to article 44 of the ACHR, 'any person, or group of persons or any nongovernmental entity legally recognized in one or more member states of the Organization [of American States]' can file a petition, even when they are not directly or indirectly victimized by the violation or when they are authorized by the victims. The permission of the victims and their relatives is needed when an NGO or other group of persons represents them before the IACtHR.[300] Consequently, many cases before the Commission and subsequently the IACtHR involve (international) NGOs in the role as petitioners, representatives, or both.[301]

4.1.5 THE ROLE OF VICTIMS IN THE IACTHR

In the early days of the IACtHR, the role of victims was limited. Even though victims could, and still can, bring cases before the Commission, they did not have input in the continuing of the proceedings. They could do nothing in case the Commission did not

[297] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 55.
[298] ACHR, article 61 (1).
[299] ACHR, article 40.
[300] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 133.
[301] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 133. See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 5 and 49 (where the Center for Legal Action on Human Rights (CALDH) brought the case before the Commission, and represented the victims before the Court); *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 1 and 7 (the Center for Justice and International Law (CEJIL) was co-petitioner and one of the victims' representatives in this case).

forward the case to the IACtHR, and when they Commission did submit the case, the victims could not participate in the proceedings before the Court.[302]

Throughout the years, the Court has made several changes to increase the role of the victims within the proceedings. This was primarily done through the amendments of the Rules of Procedure of the IACtHR, yet at times also those of the Commission.[303] After its first reparations decision in the case of *Velásquez Rodríguez,* it became clear to the Court that they had to amend the 1980 Rules of Procedure in order to decide the cases that came before it. Consequently, the position of the lawyers of the victims was included, and in case these lawyers represented the Commission, the Court should be informed as it can ask these attorneys to submit briefs relating to the reparations.[304] However, this latter provision caused some problems during the reparation proceedings, as the Commission and the attorneys of the victims presented contradictory arguments and evidence.[305] This was addressed in the 1996 amendment, which gave the representatives of the victims and their relatives the possibility to present their own arguments and evidence during the reparations phase, independently from the Commission.[306]

This right was broadened in the next amendment of 2000 as it recognized *locus standi in judicio* for the victims, their relatives, and their representatives throughout the proceedings.[307] Therefore, the victim is allowed to autonomously bring arguments, evidence, and requests before the Court as soon as the case is admitted, thus the participation is no longer limited to the reparations phase.[308] In case there are multiple victims, relatives and representatives, a common intervener will be appointed who is the only person to present the requests, arguments and evidence.[309] The victims should select the common intervener, and when they cannot agree on a representative, the Court will appoint someone.[310] At the same time, the Commission

[302] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 18.
[303] The Rules of Procedure of the two Inter-American organs were amended around the same periods; 1980, 1991/1992, 1996, 2000, 2003, and 2009.
[304] Rules of Procedure of the Inter-American Court on Human Rights (adopted by the Court in January 1991) article 22 (2) and 44(2).
[305] Clara Sandoval-Villalba, 'The Concepts of 'Injured Party' and 'Victim'', in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff, 2009) 255.
[306] Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in September 1996) article 23.
[307] Organization of American States, 'Establishment of the Legal Assistance Fund of the Inter-American Human Rights System' (3 June 2008) General Assembly Res AG/Res 2426 (XXXVIII-O/08) preamble. See furthermore, Clara Sandoval-Villalba, 'The Concepts of 'Injured Party' and 'Victim'', in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff, 2009) 262.
[308] Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in November 2000) article 24.
[309] Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in November 2000) article 24 (2).
[310] Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in November 2000) article 24 (2) and (3).

amended its Rules of Procedure and changed its procedure for the referral of cases to the Court. In its 2000 Rules of Procedure, the starting point of the Commission is to refer the case when the involved State has accepted the jurisdiction of the IACtHR, except when 'there is a reasoned decision by an absolute majority of the members of the Commission to the contrary'.[311] The position of the victims and their representatives is one of the fundamental elements that the Commission should 'give fundamental consideration' when deciding on the referral of the case.[312]

The enhancement of the role of the victims continued in the Court's amendment of 2009, which featured several changes to the position of both the victims and the Commission. In these new rules, the IACtHR limited the Commission's role during the Court proceedings; the Commission is no longer the representative of victims once the case is admitted.[313] Previously, the Commission represented the victims that lacked legal representation.[314] In order to make sure that underprivileged victims who cannot afford a legal representative can still be represented before the Court, the Inter-American defender and the Legal Assistance Fund were established. The Court can appoint an Inter-American defender who will represent victims without legal representation during the proceedings.[315] Furthermore, as of June 2010, impoverished victims can request the Court for the reimbursement of costs and expenses from the Legal Assistance Fund,[316] which is externally funded.[317]

4.2 METHODOLOGY

The analysis of the case law of the IACtHR is in line with the general methodology of this study as described in chapter 3. In accordance with the analyses of the case law

[311] Rules of Procedure of the Inter-American Commission on Human Rights (adopted by the Commission in December 2000) article 44 (1).
[312] Rules of Procedure of the Inter-American Commission on Human Rights (adopted by the Commission in December 2000) article 44 (1).
[313] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 20.
[314] Inter-American Court of Human Rights, 'Statement of Motives for the Reform of the Rules and Procedure' (*Inter-American Court of Human Rights* 2009) <http://www.corteidh.or.cr/sitios/reglamento/nov_2009_motivos_ing.pdf> accessed on 21 July 2019, 3.
[315] Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in November 2009) article 37. In the period up to 31 December 2020, an Inter-American defender was appointed in 24 cases. Inter-American Court of Human Rights, 'Annual Report 2020' (*Inter-American Court of Human Rights*) <https://www.corteidh.or.cr/docs/informe2020/ingles.pdf> accessed on 18 August 2022, 164.
[316] Organization of American States, 'Establishment of the Legal Assistance Fund of the Inter-American Human Rights System' (3 June 2008) General Assembly Res AG/Res 2426 (XXXVIII-O/08) article 2 (c); Rules for the Operation of the Victim's Legal Assistance Fund of the Inter-American Court of Human Rights (adopted by the Court on 4 February 2010). In 89 cases between 2010 and 2020 the victims received access to the Legal Assistance Fund. Inter-American Court of Human Rights, 'Annual Report 2020' (*Inter-American Court of Human Rights*) <https://www.corteidh.or.cr/docs/informe2020/ingles.pdf> accessed on 18 August 2022, 158.
[317] On 31 December 2020, three parties had contributed to the Funds, whereby Norway was responsible of 82% of the budget, Denmark for 12% and Colombia for 6%. Inter-American Court of Human Rights, 'Annual Report 2020' (*Inter-American Court of Human Rights*) <https://www.corteidh.or.cr/docs/informe2020/ingles.pdf> accessed on 18 August 2022, 155.

of the other courts, the coding and systematic analysis was restricted to the argumentation of the Court. The input of the other parties (such as, the Commission, the representatives of the victims, and the state) were only, where relevant, used to illustrate certain findings.[318] In this section, the methodological considerations that are specific to this chapter are discussed, including the selection criteria for the IACtHR decisions, as well as the cases that were included in the analysis.

4.2.1 CASE SELECTION

As of 1 May 2022, the IACtHR ruled in 317 cases.[319] However, not all cases were included in the qualitative content analysis. First, only the cases that were deemed to be relevant for this research were selected. This dissertation focuses on the development of collective reparations for victims of mass atrocities. In contrast to the ICC and ECCC, the IACtHR also deals with human rights violations that do not relate to mass atrocities. The IACtHR cases that involve mass atrocities were included in the analysis.[320] Two selection criteria were used: the investigated human rights violations had to be similar to international crimes (such as (systematic) murder, forced disappearances, and torture), and in relation to the scale of the violations, the cases had to involve at least five direct victims.

In addition, a link between collective reparations and indigenous peoples was expected. Indigenous peoples are defined as descendants of the populations who inhabited the lands before they were concurred or colonized, and who preserve their culture, language, religion and/or social, economic and political institutions.[321] Indigenous communities are often organized in a social structure that is of a communal nature.[322] Furthermore, several international documents recognize the collective rights of indigenous peoples, such as land rights.[323] It is therefore probable that the violations of these rights resulted in collective harm that will be remedied in a collective

[318] The submissions of the victims and their representatives may include valuable information regarding the views and concerns of victims relating to reparations, yet this thesis focuses on the development of collective reparations before the IACtHR and not on the reparations requested by the victims. Even though the views and concerns of victims are important, they are beyond the scope of the systematic analysis of this thesis.

[319] In case there was an interpretation of judgement, the original decision and its interpretation are counted as one case.

[320] For instance, cases only focusing on a violation of the right to a fair trial, with the dismissal of judges, or other employees without a possibility of appeal, or with the prohibition on IVF treatment were excluded.

[321] International Labour Organization (ILO) Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention Concerning Indigenous Peoples) article 1(1)(b).

[322] Nieves Gómez, 'Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities' in Frederico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008) 143-144.

[323] See for instance, ILO Convention Concerning Indigenous Peoples, article 14; UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (adopted 13 September 2007) U.N. Doc. A/RES/61/295 (UN Declaration on the Rights of Indigenous Peoples) preamble; Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017) 271-273.

fashion.[324] Consequently, cases involving indigenous lands were included. Lastly, due to language barriers, only cases available in English were included. In sum, of the 371 cases, 41 cases were coded and analyzed following the qualitative content analysis.[325] An overview of the selected cases can be found in table 4.1.

[324] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. Final Report Submitted by Theo van Boven, Special Rapporteur' (2 July 1993) E/CN.4/Sub.2/1993/8, para 14 ('This coincidence of individual and collective aspects [of victimized persons] is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly').

[325] The case of *Barrios Altos v Peru* met the criteria; however, the case was excluded for the analysis because the Court did not award reparations in this case. Instead, it evaluated the agreement on reparations between the Inter-American Commission on Human Rights, the representatives, and the State. Nevertheless, the case will be used as an illustration. *Barrios Altos v Peru* (Judgement on Reparations, and Costs) IACtHR Series C No 87 (30 November 2001).

Table 4.1: Selected cases of the Inter-American Court of Human Rights

Cases	Year	Context of violation[326]
Aloeboetoe et al. v. Suriname	1993	Specific attack
El Amparo v. Venezuela	1996	Specific attack
"White Van"(Paniagua-Morales et al.) v. Guatemala	2001	Structural violations
"Street Children" (Villagrán-Morales et al.) v. Guatemala	2001	Structural violations
Mayagna (Sumo) Awas Tingni Community v. Nicaragua	2001	Land claims
Caracazo v. Venezuela	2002	Structural violations
Las Palmeras v. Colombia	2002	Specific attack
19 merchants v. Colombia	2004	Specific attack
Plan de Sánchez Massacre v. Guatemala	2004	Massacre
Moiwana Community v. Suriname	2005	Massacre
Yakye Axe Indigenous Commuity v. Paraguay	2005	Land claims
"Mapiripán Massacre" v. Colombia	2005	Massacre
Pueblo Bello Massacre v. Colombia	2006	Massacre
Sawhoyamaxa Indigenous Community v. Paraguay	2006	Land claims
Ituango Massacres v. Colombia	2006	Massacre
Montero-Aranguren et al (Detention Center of Catia) v. Venezuela	2006	Specific attack
Miguel Castro-Castro Prison v. Peru	2006	Specific attack
La Cantuta v. Peru	2006	Specific attack
Rochela Massacre v. Colombia	2007	Specific attack
Saramaka People v. Suriname	2007	Land claims
"Las Dos Erres" Massacre v. Guatemala	2009	Massacre
Xákmok Kásek Indigenous Community v. Paraguay	2010	Land claims

[326] The definitions as introduced on page 75 are used.

Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil	2010	Structural violations
Barrios Family v. Venezuela	2011	Structural violations
Kichwa Indigenous People of Sarayaku v. Ecuador	2012	Land claims
Río Negro Massacres v. Guatemala	2012	Massacre
Massacres of El Mozote and Nearby Places v. El Salvador	2012	Massacre
Gudiel Álvarez et al. ("Diario Militar") v. Guatemala	2012	Structural violations
Santo Domingo Massacre v. Colombia	2012	Massacre
The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia	2013	Land claims
The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama	2014	Land claims
Rodríguez Vera et al. v. Colombia	2014	Specific attack
The Punta Piedra Garifuna Community and its Members v. Honduras	2015	Land Claims
The Garifuna Community of Triunfo de la Cruz and its Members v. Honduras	2015	Land claims
Kaliña and Lokono peoples v. Suriname	2015	Land claims
Favela Nova Brasilia v. Brazil	2017	Specific attack
Vereda la Esperanza v. Colombia	2017	Structural violence
The Xucuru Indigenous Peoples and its Members v. Brazil	2018	Land claims
Women Victims of Sexual Torture in Atenco v. Mexico	2018	Specific attack
The Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina	2020	Land claims
Olivares Muñoz et al. v. Venezuela	2020	Specific attack

4.3 THE SELECTED CASES

In order to better understand the patterns and developments regarding (collective) reparations within the IACtHR, the 41 selected cases will be introduced based on the year of the judgement, the level of state involvement, the acceptance of responsibility, the violated articles, the context of the violations, the victims, and beneficiaries.

YEAR OF THE JUDGEMENT

Even though the first judgement on merits of the IACtHR already appeared in 1988,[327] most selected cases were decided in the 21st century. In its early years, the Court ruled upon the merits of the case and the relevant reparations in two separate decisions. Of the 41 selected cases, the Court ruled upon the merits in five cases in the 1990's. Yet, only two reparations judgements that are included in the analysis were issued in the 1990's.[328] It is not surprising that mostly 21st century cases were selected, because only 20 judgements on merits and 15 reparation decisions were issued before 2000. In addition, the productivity of the Court has increased, and the number of judgements has risen after the turn of the century. This is linked to a rise in the number of contentious cases that are submitted by the Commission.[329]

STATE INVOLVEMENT AND RESPONSIBILITY

The jurisdiction of the IACtHR is currently accepted by 20 states.[330] Trinidad Tobago and Venezuela denounced the ACHR and consequently withdrew from the jurisdiction in 1998, respectively 2012.[331] Nevertheless, the IACtHR has jurisdiction over the violations committed during the period between the acceptance and denunciation of the Court's jurisdiction.[332] Yet of the 22 states that fall under the jurisdiction of the Court, less than 2/3 are reflected in the selected cases. Additionally, more than 50% of the selected cases involve only three different states; Colombia (ten cases), Guatemala (six cases) and Venezuela (four cases).

The IACtHR deemed the state responsible in all 41 cases. In ten cases, the state accepted its responsibility fully, in 15 cases it accepted responsibility partially, and in 16 cases the state responsibility was not accepted. Even though the states were responsible for the violations of the ACHR, not all violations were directly committed by state officials. In six cases,[333] all against Colombia, the attacks against

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[327] *Velásquez-Rodríguez v Honduras* (Judgement on Merits) IACtHR Series C No 4 (29 July 1988).

[328] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993); *El Amparo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 28 (14 September 1996). In three cases, the decision on merits was provided in 1998 and 1999 and the ruling on reparations in the 21st century (2001 and 2002).

[329] See Inter-American Court of Human Rights, 'Annual Report 2020' (*Inter-American Court of Human Rights*) <https://www.corteidh.or.cr/docs/informe2020/ingles.pdf> accessed on 18 August 2022, 41. According to Thomas Buergenthal (retired judge at the IACtHR), the Commission was at first reluctant to refer cases to the IACtHR**.** See Thomas Buergenthal, 'New Upload: Remembering the Early Years of the Inter-American Court of Human Rights' (2005) 37 New York University Journal of International Law and Politics 259, 269.

[330] The Americas consist of 35 independent States, these are all members of the OAS. Organization of American States (OAS), 'Member States' (*Organization of American States*) <https://www.oas.org/en/member_states/default.asp> accessed on 1 September 2022.

[331] Organization of American States (OAS), 'American Convention on Human Rights' (*Organization of American States*) <http://www.oas.org/en/iachr/mandate/basics/conventionrat.asp> accessed on 30 April 2019.

[332] For instance, in 2020 the Court ruled on violations committed in Venezuela 2003. See *Olivares Muñoz et al v Venezuela* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 415 (10 November 2020).

[333] In *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20

the civilians were committed by paramilitary groups.[334] In five of these cases, state officials, namely military and law enforcement authorities, collaborated and supported the paramilitaries. In the sixth case, the state did not actively support the paramilitary, yet it did not protect the civilians.[335] In addition, in all six cases, the state did not sufficiently investigate and prosecute the responsible persons.

TYPE OF CASES: VIOLATIONS OF ACHR

The general obligation to respect the rights and freedoms recognized in the ACHR, as laid down in its first article, was violated in 40 of the 41 cases.[336] The second general obligation as covered by article 2 ACHR that compels states to adopt domestic laws in order to ensure the exercise of the rights and freedoms of the Convention, was violated in roughly 50% of the cases. Of the 24 civil and political rights of the ACHR, 20 articles were at least once violated in the analyzed cases. The rights that were most often violated were the right to judicial protection, article 25 ACHR (98%); the right to a fair trial, article 8 ACHR (88%); the right to humane treatment, article 5 ACHR (73%) and the right to life, article 4 ACHR (68%). Furthermore, the right to property, article 21 ACHR, was violated in 49% of the cases. 13 of the 20 cases that dealt with a violation of article 21 ACHR covered the right to collective or communal property. One of the more recent analyzed cases dealt with the violation of another collective right, namely the 'interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, adequate food, and water contained in article 26 of the American Convention'.[337]

CONTEXT OF THE VIOLATIONS

Similar to the ICC and ECCC, the IACtHR deals with specific incidents, even when they are part of an internal conflict or a widespread, long-term government policy. For instance, some of the analyzed cases dealt with massacres that were committed

November 2013), attacks were also committed by the paramilitary, yet at the same time, the army was also attacking the same area. Therefore, this case is counted as 'violence by state officials'.

[334] *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004); *"Mapiripán Massacre" v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005); *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006); *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006); *Rochela Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 163 (11 May 2007); *Vereda la Esperanza v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 341 (31 August 2017).

[335] *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 140-142.

[336] The only exception, to the unsatisfaction of two of the judges, is the case of *Las Palmeras v Colombia* (Judgement on Merits) IACtHR Series C No 90 (6 December 2001) Joint separate opinion of Judges AA Cançado Trindade and M Pacheco Gómez, 1.

[337] *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 289.

during an internal conflict or as part of a governmental policy. Nevertheless, the Court decided on the human rights that were violated during a particular incident, for instance the massacre in one particular village, instead of the underlying state policy.[338] The Court took the internal conflict or governmental policy into account as context of the violations, yet the conflict or policy was not examined in its entirety for the Court's decision of state responsibility. Since primarily cases were selected that dealt with gross human rights violations that constituted international crimes, most of these were committed during an internal conflict, the ruling of an oppressive (military) regime, or as a governmental policy.

The 41 selected cases can be divided into four categories: cases regarding land disputes regarding indigenous lands (13 cases), cases involving structural violations or widespread patterns of human rights violations (seven cases), massacres (nine cases), and cases concerning 'specific attacks' with more than five deceased (12 cases). The categories of massacres and specific attacks have some overlap, since these both consist of human rights violations that were part of an internal conflict or governmental policy, yet where the Court examined only a specific incident.[339] The difference between the two is that massacres are planned assaults on entire communities whereby the people that were present in the village were targeted indiscriminately. Whereas 'specific attacks' target a group of people because they were expected to be a threat to state officials, for instance as expected members of the guerilla,[340] as (political) prisoners,[341] or as a judicial commission that investigated murders committed by the army.[342]

[338] See for instance the Guatemalan cases of *Plan de Sánchez* and *Río Negro*, both cases dealt with massacres in a specific area of several neighboring villages. Yet these massacres were committed during a civil war in which the Guatemalan army, security forces and paramilitary structures committed 626 massacres that are considered to be part of a genocide. *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) and *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012); Daniel Rothenberg, *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 45 and 77.

[339] See for instance the case of the *Miguel Castro-Castro Prison* where the Court only examined the violent attack on a prison by the military and police forces, even though the attack took place during an internal conflict. *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 197.

[340] See for instance the case of the *19 Merchants* that dealt with the killing of merchants who were expected to have sold weapons to the guerilla. *19 Merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 85(b).

[341] See for instance the case of the *Miguel Castro-Castro Prison*, which investigated the attack directed at prisoners who were either suspected or convicted for terrorism and treason. *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 197 (13) and 197 (17).

[342] In the case of the *Rochela Massacre v Colombia,* a judicial commission investigated the extrajudicial killings in the case of *19 Merchants v Colombia*. *Rochela Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 163 (11 May 2007) para 101 (9).

The different types of human rights violations and the context of these violations resulted in a variation of the victim population per case. First, the number of victims in the case before the Court differed.[343] There is a wide range relating to the number of victims that was directly attacked (for instance, killed, disappeared or maimed), which ranges from five victims in the case of *"Street Children" v. Guatemala* to 389 (presumably) executed victims in *Rio Negro Massacres v. Guatemala.*[344] Furthermore, the Court stated that several rights of the relatives of the direct victims, the so-called indirect victims, were violated, including their right to humane treatment (suffering caused by not knowing what happened to loved ones) and their right to a fair trial.[345] The circle of relatives who were considered to be victims and consequently beneficiaries was limited to parents, siblings, spouses or companions, and children.[346] Consequently, the number of victims in this second group is connected to the number of direct victims, since more direct victims lead to a larger group of relatives who can be considered to be victims and beneficiaries. The number of beneficiaries increases further in several of the massacre cases, because, in addition to the relatives of the direct victims, the survivors of the massacre were included in the group of beneficiaries. In the case of *Río Negro Massacres v. Guatemala* this resulted in a group of 715 beneficiaries that were identified at the time of the ruling, including 681 survivors.[347] The Court ruled that an identification mechanism should be established to identify other beneficiaries, so the total numbers of beneficiaries is likely to be even higher.

Second, another distinction is the inclusion of groups as victims and consequently beneficiaries. In most cases, the direct victims and subsequently the beneficiaries were specified individuals. However, in the cases relating to land restitution, the 'members of the community as a whole' were regarded as the victims and beneficiaries.[348]

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[343] This refers to the victims that were recognized as such by the Court in the specific case. The total number of victims might be higher in several instances, yet these victims were not included in the Court proceedings and ruling.

[344] *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 69; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) Annex I to V.

[345] The relatives of the direct victims were acknowledged as indirect victims (they suffered because a relative was murdered or forcibly disappeared), but also as direct victims (their right to humane treatment and a fair trial was directly violated). See for instance, *19 Merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 229.

[346] *Pueble Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 235. However, the Court made an exception in the case of the *Street Children*, where a grandmother was accepted as (only) immediate family of one victim. *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 83c.

[347] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 249.

[348] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 207; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 189.

Lastly, the prevalence of vulnerable victims also varied in the selected cases. Here, vulnerability refers to groups that are especially vulnerable to abuses of human rights and humanitarian law. In the selected cases, three groups of vulnerable victims were identified: children, women, and indigenous and tribal peoples. Even though the Court made a distinction between indigenous and tribal communities; indigenous peoples are indigenous to the land they inhabit, while tribal peoples are not. Nevertheless, the Court also stressed its similarities by claiming that they

> share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.[349]

Therefore, the Court treated indigenous and tribal peoples similarly during the reparation phase. Consequently, in this analysis, the two groups will be combined under the name of 'indigenous peoples'.

The vulnerable group that was most prevalent in the selected cases were children (49%), followed by indigenous peoples (42%), and women (29%). All cases regarding land restitution involved indigenous peoples. Even though children and women were victimized as member of the indigenous community, they were also separately included as group of victims in four land restitution-cases. In these cases, the special gravity of the situation for the children and women was highlighted by the Court.[350] Moreover, children were victimized in all of the nine massacre cases, and in five out of seven structural violations cases. The only exception for the prevalence of children as vulnerable victims is for cases involving an isolated attack, since they were only directly victimized in two out of twelve cases.

4.4 Reparations in the IACtHR

In its first decision on reparations, the case of *Velásquez-Rodríguez v. Honduras,* the IACtHR affirmed that '[t]he objective 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'.[351] The IACtHR has been given leeway in deciding how to repair

[349] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 79.
[350] See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 172; *Xákmok Kásek Indigenous Community v Paraguay* (Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 259.
[351] *Velásquez-Rodríguez v Honduras* (Judgement on Merits) IACtHR Series C No 4 (29 July 1988) para 134.

the harm suffered by the victims, since article 63 (1) ACHR only states that in addition to fair compensation, reparations should remedy the consequences of the violation. It is up to the Court to decide on how this is best accomplished.

Hence, the Court had many options when it came to 'fully redress the damages'.[352] Even though prior case law had established precedent, the cases had to be examined individually when it came to the formulation of the appropriate reparations.[353] My analysis shows that the type of reparative measures that should be awarded in a specific case depended on different factors that changed over time. Of the selected cases, the first two were not specific about the criteria for the nature and amount of the reparations. In the following 11 cases,[354] the Court stated repeatedly that the awarded reparations depended on the pecuniary and non-pecuniary damages and that the reparations could not enrich or impoverish the victims and their relatives.[355] Thereafter, the Court was again silent on the criteria for the reparations.[356] However, since the case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*,[357] the Court had to consider the facts of the case, the violations, the proven damages and the measures that were requested by the parties when it decided on the reparations.[358] Thus, in several cases, the Court had to regard the recommendations made by the Commission and those of the state, as well as the requests made by the representatives of the victims. Nevertheless, on occasion it also provided a reparative measure that was not recommended nor requested, namely the publication of the judgement.[359]

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[352] *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 226.

[353] *El Amparo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 28 (14 September 1996) para 34.

[354] The only exception is the case of *Plan de Sánchez* where the Court did not discuss the criteria for the reparations. *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004).

[355] See for instance, *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 78; *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 416.

[356] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007); *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009); *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010).

[357] It is unclear why this case turns out to be a turning point in the jurisprudence of the IACtHR regarding the criteria for appropriate reparations as the Court does not give explanations.

[358] *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 246. See furthermore, *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 270; *Olivares Muñoz et al v Venezuela* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 415 (10 November 2020) para 142.

[359] See for instance, *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 298; *Santo Domingo Massacre v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 259 (30 November 2012) para 303; *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 337-338.

In addition, when deciding on the reparations, the Court had to take into account what had previously been done to restore the harm of the victims. In some cases, the state had provided some reparations to victims as was agreed upon in the friendly settlement before the Commission,[360] as part of a domestic reparations program set up to repair the conflict during which the violations of the case took place,[361] or as an order by a national court.[362] When specific reparative measures had already been implemented by the state before the decision, the Court deemed it unnecessary to provide the same measure again,[363] or lessened the amount of the compensation.[364] While in other cases, the Court reminded the state to implement the promised measures.[365] However, not all actions of the state can be considered as reparations. The Court made a distinction between reparations on the one side, and initiatives that fall within the general obligations of a state towards its citizens (such as a sufficient public health care system) on the other side. The latter were positively evaluated by the Court, yet they did not remove the state's obligation to repair the damage.[366] Furthermore, in some cases where the Court ordered the establishment of a development fund for the wronged community, it explicitly differentiated the fund from the State's general development obligations.[367]

[360] *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 281; *Women Victims of Sexual Torture in Atenco v Mexico* (Judgement on Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 371 (28 November 2018) para 333.

[361] *Santo Domingo Massacre v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 259 (30 November 2012) para 336; *Rodríguez Vera et al v Colombia* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014) para 590; *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 309; *Vereda la Esperanza v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 341 (31 August 2017) para 291.

[362] *Las Palmeras v Colombia* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002).

[363] In this case, El Salvador had already conducted the act of acknowledgement of responsibility in a, according to the Court, appropriate and proportionate fashion. *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) 357.

[364] For instance, in the case of *La Cantuta v Peru* where non-pecuniary compensation was already paid for the direct victims' harm caused by the abduction and execution, so the Court only awarded non-pecuniary compensation for the relatives' harm caused by the disappearances and executions. *La Cantuta v Peru* (Judgement on Merits, Reparations, and Cost) IACtHR Series C No 162 (29 November 2006) para 217 and 218.

[365] *Rochela Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 163 (11 May 2007) para 240.

[366] This is especially prevalent in the category of rehabilitation that consists of several social services. For instance, the distinction between the public health care system and medical care for victims. *Santo Domingo Massacre v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 259 (30 November 2012) para 307; *Gudiel Álvarez et al ("Diario Militar") v Guatemala* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 253 (20 November 2012) para 338.

[367] See for instance, *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 332; *The Xucuru Indigenous Peoples and its Members v Brazil* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 346 (5 February 2018) para 212.

4.4.1 CLASSIFYING THE ORDERED REPARATIONS

Due to its great leeway in awarding reparations, the IACtHR awarded a wide variety of reparative measures. These were often classified on the basis of the categories as set by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (hereinafter UN Reparation Principles): restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[368] My analysis shows that the use of these categories changed over time. In the earliest of the analyzed cases, the IACtHR only used the term compensation.[369] While in the second case, reparations were divided between compensation and non-pecuniary reparations; though the latter category was limited to the State's recognition of responsibility, the judgement on merits, and the judgement on reparations.[370]

In the following cases, decisions from 2001 to 2007, a distinction was made between compensation and 'other forms of reparations'.[371] The categories of satisfaction and guarantees of non-repetition were slowly introduced. These were first introduced by the victim representatives and the Commission.[372] In later cases, starting with the case of *Las Palmeras v.Colombia,* the IACtHR also used these terms, yet only in reference to the requests of the victims representatives,[373] or they defined 'other forms of reparations' as satisfaction, even when it also included medical and psychological care, a housing program, or a development program, which are rehabilitation measures, or land restitution.[374] From *Moiwana Community v. Suriname* (2005) till *La Cantuta v. Peru* (2006)*,* the heading of 'other forms of reparations' was followed by a clarifying subheading of 'measures of satisfaction and guarantees of non-repetition'.[375] In the two cases of 2007, the heading was changed into measures of satisfaction and guarantees of non-repetition.[376] Yet, the awarded measures were

[368] See UNGA 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (16 December 2005) UN Doc A/RES/60/147 (Reparation Principles).
[369] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993).
[370] *El Amparo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 28 (14 September 1996) para 62.
[371] See for instance, *"White Van" (Paniagua-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 76 (25 May 2001); *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004).
[372] *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 94-96.
[373] *Las Palmeras v Colombia,* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002) para 65.
[374] *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 253 and 278; *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 105, 107 and 110; *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 209 and 214.
[375] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) page 76.
[376] *Rochela Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 163 (11 May 2007) page 80; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) page 56.

rarely specifically framed as either measures of satisfaction or guarantees of non-repetition. In addition, measures of rehabilitation and restitution also fell within the category of 'other forms of reparations', thus in the categories of satisfaction and guarantees of non-repetition. Nevertheless, the public recognition of state responsibility,[377] an apology,[378] and the translation and publication of the Court's ruling[379] were in line with the UN Reparation Principles, framed as measures of satisfaction. Still, these were occasionally referred to as both satisfaction and guarantees of non-repetition.[380]

Montero-Aranguren et al (Detention Center of Catia) v. Venezuela marked the first time the IACtHR framed a reparation measure as a guarantee of non-repetition according to the categorization of the Reparations Principles, namely the improvement of incarceration conditions to conform to the international standards.[381] Restitution was repeatedly named as starting point, however, as it is often impossible in case of gross human rights violations, it was not used as a separate category of reparations until *Xákmok Kásek Indigenous Community v. Paraguay.*[382] When the IACtHR ordered land restitution in cases decided before this case, it was discussed under the heading of 'other forms of reparations' that consisted of satisfaction and guarantees of non-repetition.[383] It was even qualified as a measure consisting of a guarantee of non-repetition.[384]

The 2009 case of *"Las Dos Erres" Massacre v. Guatemala* can be seen as a tipping point for the Court, because it was the first case that the Court acknowledged the five categories and discussed them separately.[385] This discussion of the distinct categories as seen in the Reparations Principles was seen in all the following cases.[386]

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[377] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 216.
[378] *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 277.
[379] See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 227; *La Cantuta v Peru* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 162 (29 November 2006) para 237. The publication of the translated ruling was ordered in *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 196.
[380] See for instance, *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 277; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 406.
[381] *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (28 November 2007) para 145.
[382] *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 281-295.
[383] *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 215.
[384] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 194.
[385] *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 226.
[386] Nevertheless, when measures from a specific category were not awarded nor requested by the victims' representatives and the Commission, the category was sometimes named in the heading, but not discussed in the ruling. See for instance, *Santo Domingo Massacre v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 259 (30 November 2012).

Interestingly, the obligation to investigate was discussed as a separate category in most cases after 2009. This category consisted of the satisfaction measure concerning the obligation of the state to investigate, prosecute and punish the responsible persons, and was often combined with another satisfaction measure; the exhumation and reburial of missing victims.[387] In the case of *"Las Dos Erres" Massacre v. Guatemala* it also included guarantees of non-repetition, including law review and human rights training for police forces.[388]

4.4.2 CATEGORIES OF REPARATIONS

RESTITUTION

When awarding reparations, the Court used full restitution (*restitutio in integrum*) as starting point.[389] Restitution is the 'reestablishment of the situation prior to the violation',[390] which is impossible in cases of international crimes where people have been killed and tortured.[391] In these cases, the Court had to provide other reparative measures, namely monetary compensation, rehabilitation, satisfaction and guarantees of non-repetition.[392] The IACtHR did not request the restoration of individual victims to the situation they were in before the serious human rights violations took place. However, the Court did order states to restore communities making it a collective form of restitution, which will be further discussed in section 4.5.

[387] See for instance, *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 268.
[388] *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 242 and 253.
[389] See for instance, *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 228; *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 280.
[390] See for instance, *"Mapiripán Massacre" v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005) para 244; *"White Van" (Paniagua-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 76 (25 May 2001) para 76.
[391] See for instance, *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 60; *Gudiel Álvarez et al ("Diario Militar") v Guatemala* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 253 (20 November 2012) para 21.
[392] See for instance, *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 248; *Rodríguez Vera et al v Colombia* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014); *Rodríguez Vera et al v Colombia* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014); *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 226.

COMPENSATION

Monetary compensation was provided in all the analyzed cases, and the Court even regarded it a necessity in case of death.[393] The Court distinguished between compensation for pecuniary damages and for non-pecuniary damages. Pecuniary damages consisted of the real monetary losses of the victims, covering 'the income of the victims, the expenses incurred as a result of the events and the pecuniary consequences that may have a cause-effect link with the events in the instant case'.[394] Thus, on the one hand the loss of (future) earnings,[395] and on the other hand the expenses that resulted from the violations, such as costs for the search of the whereabouts of disappeared persons, the costs of exhumation and burials, the loss of land, livestock, homes, and property.[396] An exception were the costs for the actions taken by the victims to achieve justice, both before domestic courts as well as the Inter-American system, and these were reimbursed as part of reparations yet they were differentiated from compensation.[397] Non-pecuniary damages were the 'harmful effects of the facts of the case that are of neither a financial nor patrimonial nature and, therefore, cannot be assessed in monetary terms'.[398] According to the Court, these consisted of 'the suffering and the harm caused to the direct victims and their relatives, the erosion of values of great significance to people, as well as the alterations of a non-pecuniary nature, in the living conditions of the victim or the victim's family'.[399] Consequently, non-pecuniary damages consisted of several different types of harm: such as physical and mental suffering,[400] the change in family

[393] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 46.
[394] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 216.
[395] See for instance, *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 88; *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 423 and 425.
[396] See for instance, *Barrios Family v Venezuela* (Judgement on Merits, Reparations, and Costs). IACtHR Series C No 237 (24 November 2011) para 361-364; *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 427-428; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 374-375.
[397] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 115. See furthermore, *Barrios Family v Venezuela* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 237 (24 November 2011) para 379.
[398] *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 84.
[399] See for instance, *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 305; *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 31.
[400] See for instance, *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 100; *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 87.

dynamics,[401] the loss of culture and a cultural identity,[402] and damage to a victim's life plan.[403] Contrary to pecuniary damages, proof for the non-pecuniary damages was not necessary as long as the close family relation was proven.[404] The Court held it evident that children, spouses, parents and siblings suffer non-pecuniary harm when a loved-one is killed.[405]

In all 41 analyzed cases, the Court ordered the wrongful state to pay compensation to the victims and their relatives. These amounts were often individual in nature and constituted of a set amount per victim based on their situation prior to the violations,[406] the types of victimization,[407] the actual damages,[408] and the relation between the deceased and the relatives.[409] The compensation for pecuniary damages was frequently awarded separately from compensation for non-pecuniary damages.[410] However, this started to change with the case of the *Rio Negro Massacres v. Guatemala* when the Court awarded compensation without making a distinction

[401] See for instance, *"Mapiripán Massacre" v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005) para 284; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 385.

[402] See for instance, *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 195; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 200.

[403] See for instance, *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 89; *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No. 211 (24 November 2009) para 284.

[404] *Las Palmeras v Colombia* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002) para 55 ('The Court deems that it is necessary to prove the moral damage invoked, except in the case of very close relatives of the victim, or of persons linked to him or her as spouses or permanent companions').

[405] *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 229.

[406] When establishing the compensation for material damages, the Court used the annual income of the victims before the violations to calculate the missed income. See for instance, *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 89. In addition, in case the victim is a minor at the time of the violation, the Court takes that into account when setting the amount for compensation. See for instance, *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 102; *"Mapiripán Massacre" v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005) para 288.

[407] For instance, in the case of *the Rio Negro massacre,* the Court set a different amount for victims that were displaced and for victims that survived the massacre, while supplementing additional funds for victims of slavery or sexual violence. *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 309.

[408] For instance, the actual costs of medical treatment and medicines, or the expenses made for the search of the missing people were taken into account when setting the compensation amount. *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 79 and 80.

[409] In some cases, there were different sums set for different family members. For instance, in the case of *Caracazo,* parents, children, and spouses were awarded US$ 5,000 and siblings US$ 2,000. *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 107.

[410] The case of *Las Palmeras* was an exception. Since the identity of the victim, and thus the actual damages, were unknown, the Court awarded US$ 100,000 for all damages without making a distinction between pecuniary and moral damages. *Las Palmeras v Colombia* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002) para 47.

between both pecuniary and non-pecuniary damages.[411] Several subsequent cases followed the *Río Negro* case and included compensation for the combined pecuniary and non-pecuniary damages. This was especially apparent in the cases involving collective harm, even when the compensation was ordered in an individual manner.[412] On the occasion that the collective harm was the result of indigenous land disputes, the Court ordered collective compensation, indeed of the 13 cases focusing on land restitution, 12 were compensated in a collective manner.[413] Section 4.5 will further elaborate on the provided forms of collective compensation.

Even though the need for compensation was emphasized, the Court did not consider it enough to adequately repair the victims. Thus, the payment of compensation needed to be complemented by other forms of reparations.[414] This was especially apparent when it came to non-pecuniary damages, as it is impossible to appoint a precise monetary equivalent to this form of damage. Consequently, non-pecuniary damages had to be addressed by, on the one hand, material reparations, such as compensation and other goods and services that can have an assessed monetary value. The Court and the UN Reparation Principles referred to these goods and services as rehabilitation. On the other hand, symbolic reparations that have a public scope and ramifications for the community were also needed to repair non-pecuniary damages. These symbolic measures can be divided in satisfaction, including measures to commemorate the victims and recognize the crimes, and guarantees of non-repetition, consisting of those measures that prevent future violations.[415] These other forms of reparations were particularly relevant for cases that were characterized by grave violations, severe effects, and damages of a collective nature.[416]

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[411] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 309.

[412] When an indigenous community was victimized through massacres, the compensation was provided on an individual basis, even when the Court acknowledged the collective nature of the community and the harm it had suffered. *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 179 and 194.

[413] The case of *The Afro-Descendant Communities* was an exception, as there was already a national reparations program in place. The Court ordered the state to give the victims in this case priority access to the national program, which also included collective reparative measures. *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 475.

[414] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 93; *Rodríguez Vera et al v Colombia* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014) para 549; *"Mapiripán Massacre" v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005) para 214.

[415] See for instance, *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002); *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 94; *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 244; *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 80.

[416] See for instance, *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 272; *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October

REHABILITATION

In 26 of the 41 selected cases, the Court awarded rehabilitative measures. The IACtHR ordered a variety of rehabilitation measures, which can be divided in four categories: health care, education, infrastructure, and the safeguard to enable the safe return of displaced people. Of these categories, health care, including both medical and psychological care, was the most prevalent among the selected cases, including cases from all four crime categories. Health care was usually provided in an unspecified manner and consisted of 'free, immediate, adequate and effective medical and psychological treatment, through its specialized public health institutions to the victims that request this'.[417] The manner in which this should be executed depended on the requests of the victims, their complaints in relation to the facts of the case, and on their cultural needs.[418] Furthermore, the state had to provide money for medical treatment for the victims that were living abroad.[419] Reparative measures in the other three rehabilitation categories were primarily awarded in a collective form and will therefore be discussed in section 4.5. The only exception was the awarding of scholarships, which is a reparation measure of an individual nature as these are provided to specific persons. These were only awarded in three cases.[420]

SATISFACTION

Satisfaction aims to repair the non-pecuniary damages in a publicly visible way so that these modalities may have repercussions for the community at large.[421] Measures of satisfaction are not of a pecuniary or material nature, instead they are non-pecuniary

2012) 305; *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 441.

[417] *Barrios Family v Venezuela* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 237 (24 November 2011) para 329.

[418] See for instance, *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 289; *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 449.

[419] *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 450; *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 269; *Rodríguez Vera et al v Colombia* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014) para 569.

[420] In the case of *Vereda la Esperanza,* the scholarships were ordered under the heading of satisfaction. *Vereda la Esperanza v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 341 (31 August 2017) para 286. See furthermore, *Barrios Family v Venezuela* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 237 (24 November 2011) para 336; *Women Victims of Sexual Torture in Atenco v Mexico* (Judgement on Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 371 (28 November 2018) para 351.

[421] See for instance, *"Mapiripán Massacre" v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005) para 294; *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (28 November 2007) para 136.

and symbolic.[422] The Court considered this to be especially important in cases that were characterized by the extreme gravity of the facts and the collective nature of the harm.[423] Consequently, the IACtHR ordered measures of satisfaction in 39 out of the 41 analyzed cases. [424] The satisfaction measures dealt with truth finding, accountability, commemorations, and the creation of awareness. These modalities were designed to have repercussions for the community at large and were subsequently of a collective nature. These will therefore be further discussed in section 4.5.

GUARANTEES OF NON-REPETITION

The last category of reparations consists of guarantees of non-repetition, the measures that aim to 'prevent further violations of human rights like the ones committed in the instant case'.[425] As such these measures are directed at the state that committed the violations, and its actors, such as the police, military, and judiciary. 28 of the 41 selected cases included guarantees of non-repetition. The most prevalent guarantees of non-repetition were law reviews (14 times) and the training of state officials (13 times). In addition, several measures that were awarded in one to three cases dealt with the protection of rights, especially the rights of indigenous peoples.[426] As these measures are all collective in nature, these will be further discussed in section 4.5.

4.5 AWARDED COLLECTIVE REPARATIONS IN THE IACTHR

The IACtHR is renowned for its innovative approach to reparations including those of a collective nature.[427] It is therefore surprising that the Court hardly used the term

[422] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 93; *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 264.
[423] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 93; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 396; *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 435.
[424] Only in two early cases did the Court not provide at least one of the several available measures of satisfaction. *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993); *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001).
[425] *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (28 November 2007) para 143.
[426] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 231; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 174 and 194; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 279.
[427] See for instance, Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731, 739; Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American

'collective reparations', indeed, the Court only used the term in the case of *Río Negro Massacres v. Guatemala.*[428] In six other cases the term was used when the Court referred to the requests of the Commission,[429] the agreement of the friendly settlement,[430] an expert witness,[431] or the national reparation program.[432] Furthermore, in the case of *The Garifuna Community of Triunfo de la Cruz and its Members v. Honduras,* collective reparations were only discussed in the concurring opinion of Judge Humberto Antonio Sierra Porto.[433] Moreover, the Court twice referred to 'reparations of a collective nature',[434] once to 'collective forms of reparations',[435] and once to 'communal measures'.[436] In addition, the special collective significance of the reparations was acknowledged in one case.[437]

Even though the Court did not really refer to the reparations it awarded as measures of a collective nature, it did provide 'measures with public scope and impact', mostly in the form of satisfaction.[438] These were regarded to be especially important due 'to the extreme gravity of the facts and the collective nature of the damage produced'.[439] In addition, in some cases, especially those revolving around land restitution, the reparations were awarded to the 'members of the community as a

Court and Reparations for Indigenous Peoples' (2014) 25 Duke Journal of Comparative & International Law 1, 2.

[428] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 251.

[429] *Santo Domingo Massacre v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 259 (30 November 2012) para 298; *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 211; *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 2.

[430] *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 224.

[431] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 38 (e).

[432] *Vereda la Esperanza v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 341 (31 August 2017) para 289-291.

[433] *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015).

[434] *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 397; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 188.

[435] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 189.

[436] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 194.

[437] *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 188.

[438] See for instance, *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 396; *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 285.

[439] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 93. See furthermore, *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 210; *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 305.

whole'.[440] In most cases, these members did not have to be individually named as injured parties before the Court.[441] Therefore, the IACtHR did provide collective reparations; measures that were awarded to a group, community or society, and that were indivisible between the individual members.

The IACtHR is at times inconsistent when categorizing the ordered reparations. This is especially visible for the symbolic reparations as the line between satisfaction and guarantees of non-repetition is thin; they both aim to repair non-pecuniary damages with public repercussions that might have a deterrent effect. Consequently, some identical measures were categorized as satisfaction in some cases and as guarantees of non-repetition in other cases.[442] However, inconsistencies were also apparent in other categories. For instance, in the case of *Río Negro Massacres v. Guatemala,* the Court ordered rehabilitation measures consisting of the improvement of the infrastructure in the community and the implementation of social services as satisfaction.[443] To ensure consistency throughout this research, the categorization of the UN Reparation Principles was used in case there were conflicting labels used for the reparative measures.[444] Therefore, the collective reparations ordered by the IACtHR will be discussed in line with the five categories of the UN Reparation Principles: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[445]

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[440] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 86. See furthermore, *Yakye Axe Indigenous Community v. Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 188.

[441] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 188 ('given the size and geographic diversity of the Saramaka people, and particularly the collective nature of reparations to be ordered in the present case, the Court does not find it necessary in the instant case to individually name the members of the Saramaka people in order to recognize them as the injured party'). In earlier cases, the Court included a list with all the identified members of the indigenous community. See for instance, *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 189; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 204.

[442] The Court referred to the publication of the judgement as guarantees of non-repetition in *Caracazo v Venezuela*, while it did refer to the publication as a measure of satisfaction in other cases. *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 128; *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 279; *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 273. The same applied to the public acknowledgement of the State's responsibility, in *Plan de Sánchez Massacre v Guatemala* it was referred to as guarantees of non-repetition, while it is categorized as satisfaction in *Ituango Massacres v Colombia*. *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 100; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 406.

[443] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 284.

[444] Reparation Principles, rule 22.

[445] See Reparation Principles, rules 19-23; Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 453.

COLLECTIVE RESTITUTION

The collective forms of restitution awarded by the IACtHR all revolved around the traditional lands of tribal people,[446] and indigenous peoples.[447] The Court highlighted the special connection of indigenous and tribal communities with their traditional lands, as their 'relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations'.[448] Moreover, it recognized that property and possession can have a collective meaning for indigenous and tribal peoples.[449] This form of collective property is protected under article 21 of the ACHR.[450] In several analyzed cases, the Court ruled on the violation of collective property rights by either the state or third parties such as logging and mining companies.[451] These violations resulted in the involuntary expulsion of the

[446] Even though tribal people are not indigenous to the lands, the Court acknowledged the '"all-encompassing relationship" to their traditional lands, and [that] their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole'. *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 133. Furthermore, the Court held that the right to collective property applies to both indigenous and tribal peoples indistinctively. See *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 91.

[447] In the case of *Massacres of El Mozote and Nearby Place,* the Court awarded restitution in the form of a social developmental plan, guarantees that displaced victims can return, and a housing project. However, these measures are referred to as rehabilitation in the other cases, as well as in the Reparations Principles. Therefore, these will be analyzed in the section on collective rehabilitation. *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 339, 345 and 346.

[448] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 149. See furthermore, *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 85; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 282; *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 102.

[449] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 120; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 149.

[450] *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 137 ('[T]he close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them, must be safeguarded by Article 21 of the American Convention'). See furthermore, *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 87.

[451] See for instance, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 103; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 88.

community,[452] difficulties in surviving as community since the traditional way of living was threatened,[453] and intimidation and violence against the community.[454]

The Court considered it important to ensure the protection of the indigenous communities' property rights of the ancestral lands.[455] Evidently, this reparative measure was widespread in cases concerning violations of the right to collective property, and all 13 cases that included land restitution involved cases where the state violated the collective right to land. Moreover, of the 13 cases specifically considering land disputes, only the case of *Kichwa Indigenous Peoples of Sarayaku v. Ecuador* did not include land restitution.[456] In addition, three of the selected cases dealt with massacres of indigenous peoples, yet only in one of these three cases was land restitution awarded.[457] An explanation for this is that the right to collective property was violated in the case of the *Moiwana Community v. Suriname,*[458] whereas it was not discussed in the other two cases. In the case of *Plan the Sánchez Massacre v. Guatemala*, Guatemala accepted its responsibility for the violation of the right to private property, such as burned and plundered houses and stolen goods, while the right to collective property was not discussed at all.[459] In the case of the *Rio Negro Massacres v. Guatemala,* the IACtHR did not have jurisdiction *ratione temporis* over the facts relating to the collective property.[460] Consequently, 'the Court cannot grant the restitution of the *Canchún Chitucán* property as a measure of reparation, because it was determined in this Judgment that the Court did not have competence to rule on the alleged violation of the right to property to which this measure of reparation has a causal nexus'.[461]

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[452] See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 150; *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 125.

[453] See for instance, *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 146; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 74-75.

[454] *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 129.

[455] See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) 215-217.

[456] In this case, the state had already returned the land to the indigenous community, however it reserved, amongst others, the right to subsurface natural resources. Therefore, the Court could no longer restore the land rights, instead it ordered consultation rights for the Sarayaku People. *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 61 and 299.

[457] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 209.

[458] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para. 135.

[459] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 42 (42).

[460] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 37-39.

[461] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 295.

The state was either obliged to 'delimit, demarcate, and grant collective title over the territory',[462] or to 'ensure Community members' right to ownership of their traditional lands and, consequently, to the use and enjoyment of those lands'.[463] In other words, the state had to identify the land and its boundaries, recognize the right of the community to this land, and make sure they can enjoy it. This process had to take place with the participation of the community members, occasionally through their leaders, and sometimes with the neighboring indigenous communities.[464] In addition, the customary law, customs and values of the indigenous community had to be taken into account during the land restitution procedure.[465] Furthermore, in order to make sure that the community could actually enjoy the lands after the title was granted, the state had to refrain from 'acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property'.[466] In addition, when the violation of article 21 ACHR resulted in damage to the environment and the land, the state had to rehabilitate this land, for instance by reforesting,[467] or by removing explosives, waste, and machinery.[468] In several more recent cases that dealt with land restitution, the Court conferred another measure to ensure the effective use of the lands by obliging the state to work towards an agreement with the indigenous community, other tribal peoples in the area and private third parties on the 'peaceful and harmonious

[462] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 194. See furthermore, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 164; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 279.

[463] *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 281. See furthermore, *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 209; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 210.

[464] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 164; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 283; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 281; *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 210.

[465] See for instance, *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 217; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 194; *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 232.

[466] See for instance, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 164; *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 211; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 291; *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 264.

[467] *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 290.

[468] *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 293-294.

coexistence in the territory in question that respect the uses and customs of the Kaliña and Lokono peoples, and that guarantee their relationship with their traditional areas'.[469]

The obligation to grant the communities the title to their ancestral lands often clashes with the private individual ownership of third parties, such as companies. The state exercises discretion in balancing the property rights of the different actors.[470] In this respect, the state had to take the disadvantages resulting from recognizing one property right over the other into account. Additionally, the Court highlighted the importance of the ancestral lands for the indigenous communities for their survival as a group with a distinctive culture.[471] Nevertheless, this did not mean that a land dispute should always be resolved to the benefit of the indigenous communities.[472] In case the state considered it impossible or undesirable to return the ancestral lands to the communities, it had to grant alternate lands. These alternatives should be selected in consensus with the community, and their customs and values.[473] Furthermore, the granted lands should be safe, and 'sufficient to ensure preservation and development of the community's own manner of live'.[474] In addition to the granting of the title over the ancestral or alternative lands, in the cases of *the Kaliña and Lokono peoples v. Suriname* and *the Punta Piedra Garifuna Community v. Honduras*, the Court obliged the State to guarantee the community members' effective access and use of the ancestral lands that were part of a nature reserve, so that maintaining the reserves did not unnecessarily affect their collective rights.[475] To reinforce the importance of the

[469] *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 283. See furthermore, *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 326; *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 263.

[470] Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27 Wisconsin International Law Journal 51.

[471] *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 146-147.

[472] The Court confirmed this in the Interpretation of Judgement on 'the territories to identify'. *Yakye Axe Indigenous Community v Paraguay* (Interpretation of Judgement) IACtHR Series C No 142 (6 February 2006) para 26. See furthermore, Jo M Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6 Human Rights Law Review 281, 300.

[473] See for instance, *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 194; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 286; *The Xucuru Indigenous Peoples and its Members v Brazil* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 346 (5 February 2018) para 224.

[474] *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 217. See furthermore, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 212; *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 460.

[475] Thus, the community did not get the title over the ancestral lands that were part of nature reserves, only access to the lands. See *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 286; *The Punta Piedra Garifuna Community and its Members v*

titling of land to indigenous peoples, either of ancestral or alternate lands, the Court ordered a fine of US$ 10,000 to the leaders of the community for each month of delay in the implementation. [476]

COLLECTIVE COMPENSATION

As discussed in section 4.4.1, compensation was awarded in all the analyzed cases, mostly consisting of individual compensation. The exception was the category of cases that dealt with land disputes; of the 13 analyzed cases in this category, 12 cases included compensation in a collective manner. [477] The Court ordered collective compensation in order to redress the violation of collective property rights and the poor living conditions due to their resettlement or damaged lands.[478] Furthermore, in the case of *the Sawhoyamaxa Indigenous Community v. Paraguay* collective compensation to address the violated land rights was combined with individual compensation for the relatives who had suffered harm due to death of loved ones.[479]

In its first land dispute case (the case of *the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*), the Court ordered the state to invest US$ 50,000 in 'works or services of collective interest for the community' as non-pecuniary compensation.[480] In the following cases, the Court used different approaches to provide collective compensation. Either the money was allocated to the leaders of the community or an association, or it was put into a community development funds. Compensation for material damages, especially the costs made in order to recover the land, had to be paid to the leaders of the community, so the community could invest the money as it pleased. [481] Instead, the chosen approach for the compensation of material and

Honduras (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 345.

[476] *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 288.

[477] The case of the *Afro-descendant Communities* is the exception, because there was already a national reparations program in place. The Court ordered the state to give the victims in this case priority access to the national program, which also included collective reparative measures. *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 475.

[478] See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 202; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 221.

[479] People, especially children and the elderly, died because of the poor living and health conditions that were present in their resettlement locations. See *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 73(74) and 226.

[480] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 167.

[481] *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 195; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 218; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 318.

immaterial damages was repeatedly a community development funds.[482] The amount to compensate the material damages was often limited to the costs made for the process of land recovery, which resulted in an amount that was only a fraction of the compensation for non-pecuniary damages.[483] The Court had an ambiguous flexibility in determining the amount of compensation, since non-pecuniary damages cannot be estimated in an objective manner, and the standards it used to estimate the immaterial damages were often relatively modest.[484]

In several cases involving land claims, the state was ordered to create and implement a development fund and to subsequently allocate a sum ranging from US$ 675,000 up to US$ 2,000,000 for material and immaterial damages.[485] This funds had to be used for the implementation of projects in the fields of education, housing, agriculture and health care that were benefitting the members of the community.[486] In other words, the collective compensation had to be used for the realization of rehabilitative projects, which were separately ordered as rehabilitation in other cases. At first, this development program had to be developed by an implementation

[482] An exception is the case of the *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama,* where the Court ordered that the compensation for pecuniary and non-pecuniary damages were given to the representatives of the different indigenous communities. *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 240 and 247. For examples of cases that include compensation in the form of a development funds, see for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 224; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 323; *The Xucuru Indigenous Peoples and its Members v Brazil* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 346 (5 February 2018) para 212.

[483] An exception is the case of the *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members,* where the pecuniary and non-pecuniary damages were identical. *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 240 and 247. See for examples of cases with a considerable difference between the two types of damages, *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 199 and 201 (US$ 75,000 vs US$ 600,000); *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 317 and 323 (US$ 90,000 vs. US$ 1,000,000).

[484] Some cases included compensation of US$ 1,000,000 to US$ 1,250,000 for non-pecuniary damages, yet this is relatively modest when compared with cases with a smaller number of victims. For instance, in the case of *Olivares Muñoz et al. v Venezuela* the compensation for non-pecuniary damages ranged from US$ 25,000 to US$ 50,000 for direct victims and US$ 15,000 to relatives of the deceased victims. The compensation per victim is higher in the latter case. *Olivares Muñoz et al v Venezuela* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 415 (10 November 2020) para 187-189. See furthermore, Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017) 298-300.

[485] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 201 (US$ 675,000); *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 240 and 247 (US$ 1,000,000 for pecuniary damages and US$ 1,000,000 for non-pecuniary damages); *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 342 (US$ 2,000,000).

[486] *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 205; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 201.

committee consisting of three representatives: one chosen by the community, one by the state and one by both parties.[487] Interestingly, in three more recent cases the implementation committee was no longer required. Instead, the state had to choose an authority for the implementation, and the community a representative for the dialogue with the state 'so that the fund is implemented in accordance with the will of the Peoples'.[488] Furthermore, in the case of *Xucuru Indigenous Peoples and its Members v. Brazil* the community had to reach consensus on the use of the funds, without the involvement of a delegate of the state,[489] whereas, in the case of *the Kichwa indigenous people of Sarayaku v. Ecuador* the Court did not allocate the compensation to the community leaders or a development fund, instead both material and immaterial damages were given to the association of Sarayaku People.[490]

COLLECTIVE REHABILITATION

The rehabilitative measures ordered by the IACtHR can be divided in four categories: health care, education, infrastructure, and the facilitation of a safe return of displaced people. All of these had, to some extent, a collective component. The most frequently ordered category, health care, was often provided on an individual basis as medical and psychological treatment for victims. However, the Court has occasionally awarded specific collective forms of health care, such as the establishment of a health center in the community, providing vaccinations, training of medical personnel, and transportation for patients.[491] These more concrete measures were awarded to indigenous communities, mainly to the *Sawhoyamaxa, Xákmok Kásek* and *Maya Achí*. This focus on indigenous peoples was also apparent in the provision of the rehabilitation measures other than health care, especially for education and infrastructure. The education measures that were of a more collective nature

[487] *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 205 and 206; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 224 and 225; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 202; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 323 and 324.

[488] *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 297.

[489] *The Xucuru Indigenous Peoples and its Members v Brazil* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 346 (5 February 2018) para 212.

[490] The association of Sarayaku People (*Tayjasaruta or Tayja Saruta-Sarayacu*) was recognized as the traditional community assembly. See *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 55 and 317.

[491] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 230; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 301; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 284; *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 110.

consisting of the opening of a school in the community and the provision of sufficient education staff and material, were awarded to indigenous people.[492]

Measures to directly improve the infrastructure of the community, such as housing, roads, and sewage systems were awarded in cases concerning land disputes (three times) and massacres (six times). Six out of these nine cases dealt with indigenous victims. The only three cases with non-indigenous victims were the massacres in *Pueblo Bello, Ituango* and *El Mozote*, where the Court ordered housing programs for the survivors of the massacres.[493] In the massacre cases involving indigenous communities and the case of *El Mozote*, the IACtHR ordered a range of infrastructure programs in order to improve the roads, water and food supply, sewage system, housing, and affordable electricity.[494] In *Plan de Sanchez, Río Negro,* and *El Mozote,* these programs were ordered directly, while in *Moiwana* the state had to establish a development fund for the improvement of the infrastructure of the community.[495] These infrastructure measures, including *Moiwana's* development fund, were combined with individual compensation. In the three cases regarding land claims, the communities received collective compensation through a development fund as well as a specific infrastructure program. The developmental funds had to be implemented on the lands that were returned to the community.[496] As long as the land had not been restituted and the community thus remained landless, the state had to make sure that the community members had access to some of the basic infrastructural facilities, such as clean drinking water and adequate sanitation.[497]

The last category of rehabilitation measures, the fulfillment of the conditions that were needed for displaced people to safely return to the community, was mostly

[492] See for instance, *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 96; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 230; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 284.

[493] *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 276; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 407; *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 346.

[494] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 105 and 110; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 284; *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 339.

[495] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 214; *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 339.

[496] *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 205; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 224 - 230; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 323.

[497] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 230.

awarded to non-indigenous communities,[498] who were the victim of massacres.[499] In addition, this measure was only awarded during a short period; it was only provided between 2004 and 2006.[500]

SATISFACTION

The IACtHR often ordered a reparative measure that was often discussed in light of non-material damages: the ruling itself.[501] The Court claimed that, according to international case law,[502] the judgement of the IACtHR is 'in and of itself, a form of reparation'.[503] The Court argued that the judgment contributes to the 'preservation of the historical memory, to the redress of the damage inflicted upon the next of kin of the victims and, moreover, it also contributes to avoid the repetition of similar events'.[504] Nevertheless, the judgement in itself was deemed to be insufficient to restore the harm of the victims in case of gross human rights violations, and other forms of reparations were needed to address non-material harm.[505]

In line with the reparative nature of the ruling, the state was repetitively tasked to publish a fragment of the judgement. At first, between 2001 and 2005, the publication was only ordered in half of the cases.[506] As of 2006, the publication was

[498] Moiwana was the only case out of five that included indigenous peoples. *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 212.

[499] The case of *19 merchants* was the only exception to this rule. *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 279.

[500] It was first awarded in the case of *19 merchants*, and for the last time in the case of the *Ituango massacres*; *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 279; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 404.

[501] This modality was ordered in 39 cases, sometimes under the heading of satisfaction. See for instance, *Las Palmeras v Colombia* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002) para 74.

[502] Only in the two earliest analyzed cases were references made to jurisprudence of the European Court of Human Rights, thereafter references were only made to case law of the IACtHR itself and after 2011 it highlighted its own jurisprudence as international jurisprudence. *El Amparo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 28 (14 September 1996) para 35; *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 88; *Barrios Family v Venezuela* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 237 (24 November 2011) para 327.

[503] See for instance, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 166; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 220.

[504] *La Cantuta v Peru* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 162 (29 November 2006) para 57.

[505] *El Amparo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 28 (14 September 1996) para 35.

[506] Between 2001 and 2005, the publication was ordered in four out of ten cases. *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 128; *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 103; *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 227; *"Mapiripán Massacre" v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005) para 318. In addition, in the 1993 case of *Aloeboetoe et al v Suriname* and

required in all cases,[507] even when the measure was not requested by the parties.[508] In all these cases, the publication needed to be done in a newspaper with national circulation and in the official gazette.[509] With changing technologies, the requested publication sources were extended with first radio broadcasting,[510] followed by television broadcasting,[511] and since 2009 the publication always has to be published on an official website of the state.[512] In the 2017 case of *Favela Nova Brasilia v. Brazil,* the state was additionally ordered to use social media platforms to promote the website that published the judgement.[513]

Another satisfaction measure that was often awarded is the state's public acknowledgement of the responsibility, which was ordered in 24 of the 41 cases.[514] Surprisingly, whether the state had acknowledged its responsibility, fully or partially, before the Court, did not really affect the provision of this reparative measure, because the public acknowledgement was still ordered in 50% of the cases where the state did accept its responsibility fully. In addition, it was only required in 56% of the cases without the acceptance, while it was requested in 67% of the cases where the state accepted the responsibility partially. Contrarily, an apology to the victims was only required when there was a denial of full responsibility, as it was ordered twice in case of a partial acceptance, and twice in a case where the acknowledgement was absent.[515]

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the 1998 case of *El Amparo v Venezuela* the publication was not ordered. *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993); *El Amparo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 28 (14 September 1996).

[507] The Court did not order Colombia to publish the judgement in the case of the *Rochela Massacre*, as the state was already obliged to do so under the Court-approved partial agreement on reparations between Colombia, the IACHR, and the representatives. *Rochela Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 163 (11 May 2007) para 277 and 281.

[508] See for instance, *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 270; *The Xucuru Indigenous Peoples and its Members v Brazil* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 346 (5 February 2018) para 198.

[509] See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 227; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 196.

[510] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 236; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 196-197.

[511] See for instance, *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 447; *Rodríguez Vera et al v Colombia* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014) para 573.

[512] All the analyzed cases after the Case of *"Las dos Erres"* included the obligation to publish the judgement on an official website. *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 256.

[513] *Favela Nova Brasilia v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 333 (16 February 2017) para 300.

[514] El Salvador did already acknowledge its responsibility in a public setting before the Court delivered its judgement. *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 374.

[515] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 216; *Pueblo Bello Massacre v Colombia* (Judgement on Merits,

According to the Reparations Principles, the 'effective measures aimed at the cessation of continuing violations' are a form of satisfaction.[516] The IACtHR regarded the situation of impunity as a 'chronic repetition of human rights violations' since victims and their next of kin have a right to know the truth about what happened.[517] Consequently, in order to end these violations, the Court repeatedly ordered the state to investigate the facts, identify the perpetrators and prosecute them accordingly. This was ordered in all cases regarding structural violations, in 11 out of 12 concerning isolated attacks,[518] and in eight out of nine considering massacres whereby the only exception is a case where the State already started investigations and subsequent prosecutions.[519] This measure was less prevalent for cases considering land restitution, which was only ordered in three out of 13 cases.[520] As part of the obligation to investigate and to end a continuing violation of the right to know the truth, the state had to exhume and identify the bodies of the disappeared in most cases revolving around forced disappearances.[521] The recovered remains had to be returned to the next of kin so that they could bury their loved ones according to their believes, irrespectively from the presence of indigenous culture.[522] Moreover, in cases of abducted children who might possibly be still alive, the state was ordered to launch a website with a database of the lost children.[523]

The last form of satisfaction measures that were often awarded consisted of commemoration projects, such as the eradication of monuments or the inclusion of

Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 277; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 406.

[516] Reparation Principles, rule 22.

[517] *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 266. See furthermore, *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 203.

[518] The only exception is the 1993 case of *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993).

[519] *Santo Domingo Massacre v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 259 (30 November 2012) para 160 and 297.

[520] *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 440; *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 353; *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 267.

[521] See for instance, *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 267; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 265; *Vereda la Esperanza v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 341 (31 August 2017) para 275.

[522] The importance of a burial according to the believes of the next of kin is accepted in cases with indigenous victims but also in cases without them. See for instance, *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 267; *Rodríguez Vera et al v Colombia* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014) para 56.

[523] See for instance, *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 271.

names in a monument or plaque.[524] These projects were only awarded in the selected cases that were decided after 2001. Furthermore, these commemorative projects were often provided in cases involving massacres: 46% of the commemoration projects were awarded to remember the victims of the massacres, making up for 2/3 of the massacre cases.[525] This measure was absent in the cases specifically focusing on land claims.

GUARANTEES OF NON-REPETITION

In 27 analyzed judgments, the Court ordered 61 guarantees of non-repetition. Almost half of the ordered guarantees of non-repetition consisted of two measures: human rights training for the security forces and law reform. Since state agents were directly or indirectly involved in the violations of several cases, the Court deemed it important that military, police and judicial officials received training on human rights and humanitarian law.[526] The training program was ordered in 13 cases and for all types of violations. However, it was relatively more often awarded in cases concerning massacres and specific attacks (both 31%), than structural violations (23%) and land restitution (15%). Furthermore, in two more recent cases that dealt with specific attacks that included sexual violence, the Court ordered training of the police officers regarding the treatment of victims of sexual violence.[527] The other prevalent measure to prevent future violations of human rights, the law reform, was more focused on cases of land restitution. In these cases, the state had to implement 'legislative, administrative, and other measures as may be required to recognize, protect, guarantee and give legal effect to the right of the members of the [indigenous] people to hold collective title of the territory they have traditionally used and occupied'.[528]

The other awarded guarantees of non-repetition were only awarded on one to four occasions. These can roughly be divided in two groups: measures to protect the rights of indigenous peoples and a rest category. The measures that aimed to protect the rights of indigenous peoples included, amongst others, the implementation of programs where people could officially register and receive identification

[524] See for instance, *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 218; *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 454; *Favela Nova Brasilia v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 333 (16 February 2017) para 306.

[525] In addition, until 2009, commemoration projects were always awarded in cases concerning massacres.

[526] See for instance, *"Mapiripán Massacre" v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 134 (15 September 2005) para 316; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 409.

[527] *Favela Nova Brasilia v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 333 (16 February 2017) para 324; *Women Victims of Sexual Torture in Atenco v Mexico* (Judgement on Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 371 (28 November 2018) para 355.

[528] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 194.

documents,[529] the legal recognition of the juridical personality of the indigenous community,[530] the consultation of indigenous peoples when a development, investment or activity might impact their territory,[531] and the sharing of the benefits derived from activities undertaken within the territory of the indigenous peoples.[532] The rest category of guarantees of non-repetition ranges from measures to improve the living conditions of prisoners,[533] to the protection of witnesses and victims within criminal procedures,[534] and to the creation of an independent investigating body to monitor the force used by the police.[535]

4.6 BENEFICIARIES OF COLLECTIVE REPARATIONS

The beneficiaries of collective reparations can roughly be divided into two groups: indigenous communities and the society at large. The material collective reparations, consisting of restitution, compensation and rehabilitation, were primarily awarded to indigenous communities.[536] Whereas satisfaction and guarantees of non-repetition aimed to reach the victims and victimized communities, as well as a broader group of people; the society. These two groups will be further discussed hereafter.

[529] *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 231; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 308.
[530] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 174 and 194; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 279.
[531] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 194; *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 299; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 305; *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 345; *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 355.
[532] *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 305.
[533] *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (5 July 2006) para 146.
[534] *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 280; *Rochela Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 163 (11 May 2007) para 297.
[535] *Favela Nova Brasilia v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 333 (16 February 2017) para 319; *Women Victims of Sexual Torture in Atenco v Mexico* (Judgement on Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 371 (28 November 2018) para 356.
[536] The only exceptions were housing programs and the fulfillment of conditions so that displaced people could return home, these were also awarded to non-indigenous communities. See for instance, *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 279; *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 276.

4.6.1. THE SOCIETY AS BENEFICIARY OF COLLECTIVE REPARATIONS

As discussed before, the measures of satisfaction and guarantees of non-repetition have 'public scope and repercussions',[537] or they 'seek to impact the public sphere'.[538] Nevertheless, the Court did not clarify who they intended as the public for these measures. As satisfaction had to be 'public or publicly visible',[539] the targeted public depended on who has access or who was able to see or understand the measure. Most satisfaction measures aimed at a national public in order to raise public awareness about the events and to prevent the reoccurrence of the acts committed in the case.[540] At the same time, these measures specifically included the victimized community as beneficiary.

The publication of the judgement is a method to inform the society about the crimes that were committed, which was ordered in all analyzed cases. This publication had to be done in the national gazette and in a newspaper with national circulation, thus aiming at a national audience.[541] However, in cases where the victimized community was indigenous, the national publication had to be complemented by the local distribution of the decision, either through a local newspaper or a radio broadcast in the indigenous language.[542] The society can also be informed through a public declaration of responsibility and an additional apology. Still, the main targeted audience were the victims and their relatives, and they had to be included in the ceremony,[543] and the acknowledgement had to be done in both the national and local indigenous language.[544] Nevertheless, the ceremony of the statement of responsibility

[537] See for instance, *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 253.
[538] See for instance, *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 201.
[539] See for instance, *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (5 July 2006) para 136.
[540] See for instance, *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 273. See furthermore, Judith Schonsteiner, 'Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights' (2007) 23 American University International Law Review 127.
[541] See for instance, *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 128; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 298.
[542] For instance, *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 275 (local distribution of publication); *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 196 (radio broadcasts).
[543] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 100; *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 274.
[544] See for instance, *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 297; *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 219.

and apology had to be disseminated via the national media,[545] thus also aiming to inform the national society.

Monuments are places where the victims' relatives can pay homage to the murdered persons and where they can keep their memories alive.[546] In addition to the victims, the society was also targeted as the public of these places of commemoration, as they were often ordered to raise awareness and to prevent the grave violations from happening again in the future.[547] However, most monuments had to be built in the place where the violations took place, which was occasionally in remote areas. It is the question whether these monuments are actually accessible to people outside the victimized communities, and thus whether they have the potential to educate the society about the gross violations committed. Another measure aimed to educate society is the production of a documentary about the gross human rights violations. These had to be distributed widely among victims, schools and universities, and broadcasted on national tv during primetime, 'with the ultimate objective of informing Salvadoran society of these facts',[548] and 'for the recovery and reestablishment of the historical memory in a democratic society'.[549]

The obligation to investigate, prosecute and punish the responsible persons, and the requirement to exhume and identify the disappeared persons aim to impact the public sphere. The remains of victims and the places they were buried consist of valuable evidence about what happened during the murders, making the exhumations important for the investigation of the crimes.[550] Furthermore, the IACtHR ordered the state to publish the results of the proceedings, so that the national society 'may know the truth about the facts of the case'.[551] Consequently, this benefitted the 'society as a whole, because, by knowing the truth about such crimes, it can prevent them in the future'.[552] Nevertheless, these two measures were, above all, aimed at the victims.

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[545] See for instance, *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 277; *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 216.

[546] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 104.

[547] See for instance, *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 253; *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 278.

[548] *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 365.

[549] *Gudiel Álvarez et al ("Diario Militar") v Guatemala* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 253 (20 November 2012) para 345.

[550] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 266.

[551] *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 399; *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 205.

[552] *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 259. See furthermore, *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 269.

The Court acknowledged that victims and their relatives have 'the right to know the truth (…), and its recognition is an important measure of reparation'.[553]

Several guarantees of non-repetition had repercussions for the national society, as they aimed to prevent the gross human violations from happening again. By adapting the national laws so that they conform to the international standards of human rights protection, or the training in human and humanitarian law of state officials, future violations should be prevented.[554] These measures were thus not directly addressed to the victims and their relatives, but to the society at large.

4.6.2 INDIGENOUS COMMUNITIES AS BENEFICIARIES OF COLLECTIVE REPARATIONS

As seen in section 4.5, material collective reparations were generally awarded to indigenous communities.[555] The Court justified the repairing of indigenous peoples in a collective way by referring to the characteristics of indigenous communities, the suffering of collective harm, and the recognition of collective rights. In addition, the IACtHR seemed to make a distinction between indigenous communities who have been victims of land claims and those who were victims of massacres.

CHARACTERISTICS OF INDIGENOUS COMMUNITIES

The IACtHR claimed that both the Court itself and the states 'should take into consideration the characteristics which differentiate the members of the indigenous peoples from the general population and which conform their cultural identity'.[556] The same applied to tribal communities.[557] The Court indicated a range of characteristics that it considered relevant for its judgements and subsequent order for reparations. Several references were made to the distinctive community organization,[558] the

[553] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 97.
[554] *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (5 July 2006) para 143; *Caracazo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 95 (29 August 2002) para 127.
[555] The IACtHR even awarded collective reparations ('reparations that have a community scope') in a case focusing on the rape of one indigenous woman by the military. *Fernández Ortega et al v Mexico* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 215 (30 August 2010) para 267.
[556] *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 60. See furthermore, *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 264.
[557] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 82.
[558] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 85 (the communities have 'their own traditional authorities and forms of community organization, centered on consensus and respect'); *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 81 (each clan (lö) recognizes the political authority of various local leaders); *The Kuna Indigenous People of Madungandí and the*

linguistics,[559] and economic processes.[560] In the latter category, the Court focused on the 'traditional' use of the natural resources, such as artisanal hunting, fishing and gathering.[561] However, the IACtHR's emphasis on the traditionally used natural resources limited the community's possibilities to use the land in a non-traditional way, for instance mining of valuable resources or drilling for oil.[562] Furthermore, the IACtHR often referred to the culture of the indigenous communities, especially the spiritual relationship with the land and the 'close relationship between the living and the dead',[563] and the importance of rites, customs, and rituals for the organization of the community.[564] The relation of indigenous peoples with their ancestral lands is the characteristic that is principally stressed by the Court.[565] This relation with the land is twofold; the community's strong cultural connection with the ancestral lands, and the importance of the land for the subsistence of the community.[566] In addition, the IACtHR accepted the indigenous communities' understanding of collective property and

Emberá Indigenous People of Bayano and their Members v Panama (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 60 (Their highest authority is a General Congress, and the representation of the General Congress before the Central Government and the autonomous entities is a *Cacique* elected by the said Congress).

[559] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 85 ('Maya-Achí linguistic community'); *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 50.9 (Southern Enxet mother tongue); *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 51 (Kichwa-speaking groups).

[560] See for instance, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 103 (e) ('family farming and communal agriculture'); *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 54 ('collective family-based farming, hunting, fishing and gathering within their territory following their ancestral customs and traditions. Around 90% of their nutritional needs are met by products from their own land and the remaining 10% with goods from outside the community').

[561] See for instance, *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 87; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 32; *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 88.

[562] Ariel Dulitzky, 'When Afro-Descendants Became "Tribal Peoples": The Inter-American Human Rights System and Rural Black Communities' (2010) 15 UCLA Journal of International Law and Foreign Affairs 29, 47.

[563] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 85. See furthermore, *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 57; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 65.

[564] See for instance, *Plan de Sánchez Massacre v Guatemala,* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 85; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 79.

[565] This is partly caused by the prevalence of cases that consider indigenous land claims; 11 out of 14 analyzed cases involving indigenous peoples revolved around land disputes.

[566] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 73(10); *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 282; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 160.

possession, thus the ownership of the ancestral lands 'is not centered on the individual, but rather on the community as a whole'.[567]

COLLECTIVE HARM

Since the indigenous communities are closely connected to their ancestral lands and identify as members of the community, they may suffer collective harm. The IACtHR did acknowledge the 'collective nature of the damage occurred'.[568] On the one hand, it accepted the collective harm caused by the destruction of the indigenous culture, such as the loss of traditional practices, ceremonies and rites, and the death of oral transmitters of the culture.[569] On the other hand, it recognized that the lack of access to the ancestral lands, the environmental damage and destruction of these lands affected the whole community. Both the food supply and the subsistence of the cultural practices and characteristics were affected.[570] This resulted in 'the loss of their roots and their community ties',[571] and 'alterations to the very fabric of their society'. [572]

COLLECTIVE RIGHTS

In *Kichwa Indigenous People of Sarayaku v. Ecuador,* the IACtHR indicated that indigenous communities are collective subjects of international law. Consequently, these communities exercise some of the rights from the ACHR in a collective manner.[573] This is especially relevant to the right to property (article 21 of the ACHR), since 'it is the opinion of this Court that article 21 of the Convention protects the right

[567] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 133. See furthermore, *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 89; *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 149. See furthermore, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No. 79 (31 August 2001) para 149; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 87; *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 145.

[568] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 93.

[569] See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 50; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 162.

[570] See for instance, *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 282; *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 278-285.

[571] *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 453.

[572] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 200.

[573] *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 145.

to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property'.[574] This made the IACtHR the first international court that accepted the right to collective property, including indigenous lands.[575]

In the case of the *Garifuna Community of Triunfo de la Cruz and its Members v. Honduras,* the Court stressed that the collective property rights were not restricted to the land, instead the use and enjoyment of 'the beaches and coastal seas, as well as other resources traditionally used' had to be guaranteed.[576] Moreover, the Court considered the recognition of (collective) ownership of the lands and resources as insufficient, instead the effective use and enjoyment of the lands by the community had to be protected.[577] The underlying argument was that the ancestral land consisted of the 'fundamental basis of their cultures, their spiritual life, integrity, and economic survival'.[578] Thus, the ownership and enjoyment of the ancestral land was regarded as a necessity for the survival of the indigenous community.[579] In addition, the indigenous communities may have the understanding that the ancestral lands belong to the community and not to its individual members.[580] In the most recent analyzed case, the IACtHR expanded the protection of the collective right to the use and enjoy indigenous lands.[581] As such, the Court ruled that the State's failure to protect the indigenous lands from harmful actions by third parties did not only violate the right to property, but also the interdependent rights to a healthy environment, to adequate food and water, and to participate in cultural life.[582]

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[574] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 148.

[575] Gerald Torres, 'Indigenous Peoples, Afro-Indigenous Peoples and Reparations' in Frederico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press 2008) 128.

[576] *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 137.

[577] *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 143.

[578] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 148. See furthermore, *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 85.

[579] *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 346. See furthermore, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 143 ('The free development and transmission of their culture and traditional rites have thus been threatened').

[580] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 133; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 87.

[581] This decision marked the first contentious case of the IACtHR that dealt with the rights protected in article 26. *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 201.

[582] *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 243. See furthermore, Maria Antonia Tigre, 'Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina' 115 American Journal of International Law 706, 711; Diego Mejía-Lemos, 'The Protection of the Environment through International

When the IACtHR interpreted article 21 and 26 of the ACHR, it was bound by article 29(b) of the ACHR, which made sure that the Court's interpretation of the human rights in the ACHR did not restrict the 'enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party'. Consequently, the Court examined the national legislation on indigenous peoples.[583] In addition, the Court referred to the International Labor Organization (hereinafter ILO) Convention No. 169 (Indigenous and Tribal Peoples Convention), which obliged the State to respect the indigenous peoples' connection to its ancestral lands, and 'in particular the collective aspects of this relationship'.[584] However, Suriname lacked national legislation regarding indigenous rights, nor did it adopt the ILO Convention No. 169. Therefore, the Court interpreted article 21 ACHR in light of articles 1 and 27 of the International Covenant on Civil and Political Rights (hereinafter ICCPR).[585]

The violations of the right to collective property and the right to a healthy environment were repaired in a collective manner, through land restitution to the community,[586] improvement of the current living conditions,[587] the development and implementation of an action plan protecting the environmental resources and guaranteeing the provision of basic goods such as water and food,[588] and the compensation had to benefit the community as a whole.[589] Indeed, in cases considering land claims, individual compensation was only awarded to the relatives of people who were deceased due to the poor living conditions caused by the forced resettlement of the community.[590]

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[583] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 122; *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 347; *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 204-205.

[584] *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 136.

[585] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 95; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 122-124.

[586] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 210.

[587] Until the community can move back to its ancestral or alternate land, the state had to make sure the community has access to basic goods and services. *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 301.

[588] *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 332-333.

[589] Either paid to the community leaders to be spend in line with the community's needs. See *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 195. Or paid to a community developmental funds. See *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 172 (28 November 2007) para 199-201.

[590] *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 226; *The Afro-Descendant Communities Displaced from the Cacarica*

Hence, the IACtHR recognized the special characteristics of indigenous peoples, their collective ownership of the ancestral lands, and the need to repair this collectively. However, it remained unclear whether these collective reparations were awarded to the community or to its members. In the first analyzed cases, the Court defined the members of the community as the injured parties, and thus the beneficiaries of the reparations.[591] Even when the Commission argued that the community and its members should be the beneficiaries, the Court only accepted the members.[592] Consequently, the members of the community had to be individually identified as members in order to be a beneficiary of the ordered reparations.[593] In these cases, most of the (collective) reparations were awarded to the members of the community,[594] yet sometimes land restitution and measures of satisfaction were awarded to the community as a whole.[595]

The case of *Kichwa Indigenous People of Sarayaku v. Ecuador* marked the first case where the Court defined the indigenous community as the injured party and beneficiary.[596] Remarkably, in the following case, even though it consisted of an indigenous land claim, the injured parties in the case of *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* were the identified displaced persons and the children born in the displacement.[597] Thereafter, the Court mostly repeated its *Kichwa Indigenous People of Sarayaku v. Ecuador* decision by recognizing the community and its members as the injured parties.[598] Accordingly, the Court recognized 'that human rights violations

River Basin (Operation Genesis) v Colombia (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 476.

[591] *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 189; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 278.

[592] *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 201 and 204; *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 185 and 189.

[593] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 176.

[594] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 86; *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 221.

[595] *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 194; *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 217.

[596] *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 284. See furthermore, Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017) 290.

[597] *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 431. In the case of *Río Negro Massacres,* the injured parties are the persons identified as survivors and as direct victims, yet this case revolves around a massacre instead of a land dispute. *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 249.

[598] See for instance, *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR

may simultaneously affect individual and collective spheres'.[599] The case of the *Xucuru Indigenous Peoples and its Members v. Brazil* was an exception where the Court only recognized the community as the beneficiary, and not its members.[600]

PROTECTION OF INDIGENOUS CULTURE

In addition to the reparations that aimed to directly repair the violation of collective ownership, the IACtHR also ordered reparations that should 'help strengthen the cultural identity of the indigenous and tribal peoples, guaranteeing the control of their own institutions, cultures, traditions and territories in order to contribute to their development in keeping with their life projects, and present and future needs'.[601] Consequently, the Court ordered Guatemala to study, protect, and disseminate the Maya-Achí culture.[602] The importance of the indigenous language was furthermore recognized by the requirement of bilingual language in the schools that the states had to open in the communities.[603] Furthermore, in the case of the *Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina* that included a violation of the right to participate in cultural life, the Court earmarked money from the development funds for 'actions addressed at the recovery of the indigenous culture' and 'the documentation, teaching and dissemination of the history of the traditions of the indigenous communities victims'.[604]

4.7 FINAL REMARKS: THE DEVELOPMENT OF COLLECTIVE REPARATIONS

The collective reparations that were ordered by the IACtHR evolved. This section will first give an overview of this transformation by highlighting the different measures, the underlying reasons for the order, and the beneficiaries. Thereafter, this section will

Series C No 284 (14 October 2014) para 209; *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 257.

[599] Gabriela Cristina Braga Navarro, 'The judgment of the case Xucuru People v. Brazil: Inter-American Court of Human Rights Between Consolidation and Setbacks' (2019) 16 Brazilian Journal of International Law 203, 219.

[600] *The Xucuru Indigenous Peoples and its Members v Brazil* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 346 (5 February 2018) para 187.

[601] *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 272.

[602] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 110; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 285.

[603] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 230; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 303 (e); *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 221.

[604] *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 339.

examine the Court's slight move from purely corrective to a combination of corrective and redistributive justice. Lastly, the distinction between the ordered community development funds and programs, and the general obligations of the state will be discussed.

4.7.1 THE DEVELOPMENT OF COLLECTIVE REPARATIONS

The qualitative analysis covered 41 reparation decisions of the IACtHR from the period 1993 to 2020, during which the scope of (collective) reparations ordered by the Court expanded. The first analyzed case, *Aloeboetoe et al. v. Suriname,* only included two measures of collective reparations: the reopening of a school and of a medical dispensary.[605] In the succeeding cases, the Court awarded a variety of collective measures that covered all categories of the UN Reparation Principles.

My analysis of the IACtHR case law reveals that the development of material collective reparations is closely connected to the presence of indigenous peoples. Collective forms of restitution and compensation were only ordered in cases involving victimized indigenous communities, and most collective rehabilitation measures were awarded to these communities.

Restitution was only ordered in cases involving indigenous peoples where the right to (collective) property was violated. The measure of land restitution did not change much after the first case concerning indigenous lands, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. In all cases, the state was required to identify the land and its boundaries, to recognize the right of the community to this land, and to refrain from actions that negatively affected the enjoyment of the land rights. Furthermore, the participatory position of the community members as well as their customs and values had to be taken into account during the land restitution procedure.[606] The more recent cases saw two small modifications in the provision of land restitution. First, the official title and effective use of the lands was combined with the obligation to return the land to its previous form, thus removing the machineries, explosives and waste.[607] Second, the State was required to reach an agreement with the indigenous community, other tribal peoples in the area and private third parties to assure that

[605] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 96.
[606] See for instance, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 164; *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 210; *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 232.
[607] *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 294; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 290.

these parties could harmoniously coexist and simultaneously respect the indigenous culture and lands.[608]

Compensation was ordered in all analyzed cases, mostly in an individual manner. My analysis identifies two changes in the ordered measures of compensation. First, in its earlier decisions, the Court ordered two separate amounts of compensation: one to address the pecuniary damages and one for the non-pecuniary damages. Later, the Court often awarded one amount for both categories of damages, which were no longer measured separately. Second, in the cases concerning indigenous land claims the compensation was of a collective nature, which was either allocated to the leaders of the community or directed to a community development funds. While the first option was prevalent in the earlier cases,[609] the second option was dominant in the more recent cases.[610] The Court took a paternalistic approach to the development funds, where it determined the areas of investment, instead of the victims or representatives of the community. In addition, the Court required an implementation committee that included state officials. [611] Even though the implementation committee was not required in three more recent cases, the state was still obliged to 'appoint an authority (…) to administer this funds'.[612] The 2018 case of *The Xucuru Indigenous Peoples and its Members v. Brazil* was an exception, and the members of the community had to reach consensus on 'the use of this fund for any measure that is considered pertinent to benefit the indigenous territory and its inhabitant'.[613] Hence, the community members could decide on the priority areas for investment without involvement of the state in the execution of the funds, other than funding. The future will tell whether this decision will be a turning point in the

[608] *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 326; *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 263; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 283.

[609] Of the six cases up to 2012, one had a development fund for the material and immaterial damages and three combined a development fund for immaterial damages with immaterial damages that were directly allocated to the leaders of the communities. See *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 205; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 224; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 199-201; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs)IACtHR Series C No 214 (24 August 2010) para 323.

[610] The case of *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members* was the only case out of the six cases decided after 2015 that allocated the compensation to the representatives of the respective communities. See *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 240.

[611] Ariel Dulitzky, 'When Afro-Descendants Became "Tribal Peoples": The Inter-American Human Rights System and Rural Black Communities' (2010) 15 UCLA Journal of International Law and Foreign Affairs 29, 55; Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2014) 25 Duke Journal of Comparative & International Law 1, 78.

[612] *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 297.

[613] *The Xucuru Indigenous Peoples and its Members v Brazil* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 346 (5 February 2018) para 212.

development of collective reparations, especially of compensation in the form of a development funds.[614]

The most frequently ordered modality of rehabilitation consisted of free access to medical and psychological care, which was often provided on an individual basis. However, in cases involving indigenous peoples, the Court developed a wider range of particular rehabilitation measures. Over time the Court provided specific modalities to improve the community's health care system, such as the provision of a fully equipped ambulance,[615] a vaccination program,[616] and a communication system to contact the health organizations.[617] As well as measures to improve the community's access to education, such as the opening of a school in the community and the provision of sufficient education staff and material.[618] Furthermore, the Court ordered a range of measures to improve the living conditions in the communities by establishing funds and programs for the development of the infrastructure.[619] In three of the first four cases involving indigenous land claims, the Court combined infrastructure projects (rehabilitation) with development funds (compensation), while in the eight land dispute cases decided after 2010, the Court solely ordered the establishment of a development funds.

Satisfaction was ordered in all analyzed cases. My analysis does not show a wide expansion of the ordered satisfaction measures, as most satisfaction measures had already been awarded by 2005. The only exception was the production and broadcasting of a documentary covering the violations, which was ordered for the first time in 2009.[620] Nevertheless, my analysis shows two minor developments in the modality regarding the publishing of the IACtHR's judgement. First, all cases after 2005 included the satisfaction measure relating to the publication of the judgement,[621]

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[614] The subsequent ruling did not include the independent decision power of the community members and included the areas of investment as well as the requirement of the implementation committee. *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 339-340.

[615] *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 284.

[616] See for instance, *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 230.

[617] *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 306.

[618] See for instance, *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 96; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 230; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 284.

[619] See for instance, *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 214; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 323; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 284.

[620] *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 263.

[621] The Court did not order Colombia to publish the judgement in the case of the *Rochela massacre*, as the state was already obliged to do so under the Court-approved partial agreement on reparations between Colombia, the

while this was only in 40% of the cases till 2005. Second, over the years, the means of communication increased from only a publication in national newspapers,[622] to the broadcasting on radio,[623] broadcasting on tv,[624] the publication on an official website,[625] to the use of social media.[626]

Lastly, my analysis does not show a significant transformation in the ordered guarantees of non-repetition. Nevertheless, the Court added some measures of guarantees of non-repetition that addressed a specific situation; for instance, the improvement of prison conditions in a case considering killed prisoners,[627] the training of police officers in procedures relating to victims of sexual violence in cases considering these crimes,[628] and the recognition of the juridical personality of an indigenous community in case where the community could not exercise their collective rights due to a lack of juridical capacity.[629]

In addition to the broadening of the ordered measures, the Court made remarkable changes in three reparation decisions. The first changing point was the case of *"Las Dos Erres" Massacre v. Guatemala*, as it marked the first decision that included a separate discussion of all the categories of reparations.[630] This change coincided with the amendment of the legal framework that ended the victims' representation by the Commission, and with a change in the lay-out of the Court decisions. Secondly, the 2010 case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* marked the second changing point, as the IACtHR broadened its mandate for the awarding of reparations

IACHR, and the representatives. *Rochela Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 163 (11 May 2007) para 277 and 281.

[622] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 103; *Barrios Family v Venezuela* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 237 (24 November 2011) para 332.

[623] See for instance, *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 227; *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 196-197.

[624] See for instance, *Miguel Castro-Castro Prison v Peru* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 160 (25 November 2006) para 447; *Rodríguez Vera et al v Colombia* (Judgement on Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No 287 (14 November 2014) para 573.

[625] See for instance, *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 256; *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 273.

[626] *Favela Nova Brasilia v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 333 (16 February 2017) para 300.

[627] *Montero-Aranguren et al (Detention Center of Catia) v Venezuela* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 150 (5 July 2006) para 146.

[628] *Favela Nova Brasilia v Brazil* (Judgement on Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No 333 (16 February 2017) para 324; *Women Victims of Sexual Torture in Atenco v Mexico* (Judgement on Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 371 (28 November 2018) para 355.

[629] See for instance, *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 171.

[630] *"Las Dos Erres" Massacre v Guatemala* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 211 (24 November 2009) para 226.

in this case. Thereafter, it was no longer restricted to the damages, but could now base the reparations order on the facts of the case, the violations, the damages, and the requests of victims. Subsequently, the requirement that reparations could not enrich or impoverish the victims was dropped. Lastly, the third turning point was the 2012 *Kichwa Indigenous People of Sarayaku v. Ecuador* case, marking the first case that regarded the community as such as the injured party and thus as the beneficiary. In addition, it signified the first time that the community got full control over the assets of the collective compensation.[631]

The development of collective reparations was closely associated with the changes the Court made towards the position of the victims within the proceedings. Initially, the victims had no role before the Court and were represented by the Commission.[632] However, the representation of the victims was only one of the Commission's objectives, and its primary mandate consisted of the promotion and defense of human rights.[633] Hence, there was a possibility that the interests of the victims were not fully safeguarded in case these clashed with the interests of the Commission. Therefore, the role of the lawyers of the victims expanded. First, the lawyers assisted the Commission with the representation,[634] thereafter the lawyers could independently present their arguments and evidence,[635] and since 2009 the Commission no longer represented the victims. Victims who lacked legal assistance could request funding from the Legal Assistance Fund to cover the costs of the proceedings, and the Inter-American defender could be appointed to represent those victims.[636]

Not only the position of victims changed, the Court also interpreted the term 'victim' differently throughout the analyzed cases. The ACHR does not mention the term 'victims', instead it only refers to 'injured parties'.[637] Likewise, the first Rules of Procedure of the Court did not refer to victims. Thereafter, the Rules of Procedure define victims as 'the person whose rights under the Convention are alleged to be violated'.[638] In the older analyzed cases, the Court interpreted this terminology strictly

[631] *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 273. See furthermore, Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017) 300.
[632] Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2012) 18.
[633] ACHR, article 41.
[634] Rules of Procedure of the Inter-American Commission on Human Rights (adopted by the Court in January 1991) article 22 (2) and 44(2).
[635] As of 2000, these arguments can be brought before the Court during the entire proceedings and not only during the reparations phase. Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in September 1996) article 23; Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in November 2000) article 24.
[636] Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in November 2009) article 37; Organization of American States, 'establishment of the Legal Assistance Fund of the Inter-American Human Rights System' (3 June 2008) General Assembly Res AG/Res 2426 (XXXVIII-O/08) para 2 (c).
[637] ACHR, article 63 (1).
[638] Rules of Procedure of the Inter-American Commission on Human Rights (adopted by the Court in January 1991) article 2 (o). Since 2000, the Rules of Procedure make a distinction between the 'victim' ('whose rights

by only including the direct victims of the case.[639] This changed with the case of *"Street Children" (Villagrán-Morales et al.) v Guatemala*, marking the first case that the relatives of the deceased or disappeared persons were regarded as victims in their own right. They were direct victims of the violations of the right to humane treatment (article 5), the right to fair trial (article 8), and/or the right to judicial guarantees (article 25).[640] As a result, the relatives of the deceased or disappeared were remedied as direct victims, which led to higher amounts of compensation, especially for non-monetary damages.[641] Furthermore, in the earlier cases involving indigenous land claims, the members of the community were the victims.[642] At first, the members of the community were individually identified as such,[643] then the Court ruled that the community members did not have to be individually named during the reparation proceedings.[644] Thereafter, the indigenous community and its members were often identified as the victims and subsequently as the beneficiaries.[645] This opened the door for collective reparations, especially for the material forms of restitution and compensation.

The strengthened position of the victims in the proceedings for the IACtHR was reflected in the awarded reparations. The parties in the proceedings before the Court presented their requests, arguments and evidence for the appropriate reparations.[646] Hence, the increased participation of the victims in the (reparations) proceedings gave them more opportunities to voice their requests for reparations. The Court often followed the requests of the parties when deciding on the appropriate reparations.[647]

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have been violated') and the 'alleged victim' (whose rights are allegedly violated). See Rules of Procedure of the Inter-American Court of Human Rights (adopted by the Court in November 2000) article 2 (27) and 2 (33).

[639] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 51; *El Amparo v Venezuela* (Judgement on Reparations and Costs) IACtHR Series C No 28 (14 September 1996) para 29.

[640] See for instance, *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 3 (4); *Las Palmeras v Colombia* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002) para 1 (4).

[641] Clara Sandoval-Villalba, 'The Concepts of 'Injured Party' and 'Victim'', in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff 2009) 258.

[642] See for instance, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 166.

[643] The annex to the judgement included a list with all the identified members of the indigenous community. See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 189; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 204.

[644] See for instance, *Saramaka People v Suriname* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 172 (28 November 2007) para 188.

[645] See for instance, *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 273.

[646] During the reparation phase, the Commission made recommendations, the representatives of the victims made requests, and the state presented their observations. See for instance, *The Garifuna Community of Triunfo de la Cruz and its Members v Honduras* (Judgement Merits, Reparations and Costs) IACtHR Series C No 305 (8 October 2015) para 258.

[647] See for instance, *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 301, 309, 310 and 312. However, sometimes the Court awarded reparations that were not requested, or denied requests. See for instance, *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August

In case the victims requested a wider variety of reparations that matched their needs, the chances were that the Court would follow and award a wider range of reparations. Furthermore, several measures of reparations were introduced by victim representatives.[648] Indeed, my analysis shows that the IACtHR's innovative approach to reparations can similarly be credited to the victims and their representatives.[649]

Concludingly, the expansion in attention for the victims in the Inter-American system went hand in hand with the development of collective reparations in the IACtHR. In its early decisions, the Court's main focus was on the direct victims and individual compensation, which was occasionally complemented by collective rehabilitative measures, such as the opening of a school,[650] or symbolic measures, such as commemoration.[651] However, as the victims' role in the proceedings expanded and more cases involving indigenous peoples were decided, the awarded (collective) reparations became more diverse. Especially the cases involving indigenous peoples presented a wide range of collective reparations, both material and immaterial measures.

4.7.2 EVALUATING THE COLLECTIVE REPARATIONS

The IACtHR ordered a wide variety of reparative measures, including different material and immaterial collective reparations. This section is set to evaluate the collective reparations ordered by the IACtHR. First, Aristotle's theory on particular justice is used to assess how notions of corrective and distributive justice are reflected in the reparations. Second, the IACtHR occasionally ordered funds or projects to improve the affected communities, a modality that comes close to distributive justice and general obligations of the state. These particular reparations are evaluated on the basis of Peter Dixon's framework consisting of five elements that distinguish reparations from assistance.

2010) para 298 ('Although the representatives did not request this measure of reparation, the Court finds that it is relevant and important as a measure of satisfaction'); *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 375 ('However, the Court does not consider it appropriate to order the measure requested by the representatives').

[648] *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 94-96; *Las Palmeras v Colombia* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002) para 65.

[649] See furthermore, Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 318.

[650] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 96.

[651] *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 103.

As described in chapter 2, Aristotle made a distinction between corrective and distributive justice.[652] Several observations can be made regarding the reparations in the IACtHR in relation to Aristotle's theory. First, the purest form of corrective justice is restitution as it aims to return the victim to the situation from before the violation. This was recognized by the Court by using restitution as the starting point in its decision on reparations.[653] Moreover, when restitution was not possible, which was often the case, the IACtHR ordered reparative measures to safeguard the violated rights and to repair the consequences.[654] This was predominantly done by establishing a payment of compensation,[655] a reparative measure that was ordered in all analyzed cases. Hence, these measures were primarily backward-looking, since they were based on the violation in the past, and not on the future. In other words, the IACtHR used corrective justice when deciding on reparations. The corrective justice perspective was strengthened by the requirement that reparations were not intended to impoverish or enrich the victims.[656] Thus, following Aristotle's corrective justice, the balance before and after the violations had to be the same.

Even though corrective justice remained the basis for the ordered reparations, it appeared that there was a slight shift towards distributive justice on the scale of reparative justice. This shift was threefold; the change in the criteria for the determination of the appropriate reparations, the aim to prevent the violations from happening again, and the focus on development aid.

First, the 2010 case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* changed the criteria the Court had to use when deciding on the appropriate reparations. Earlier cases had to base the decision on reparations on the pecuniary and non-pecuniary damages, while these reparations could not impoverish or enrich the victims and their relatives.[657] In the case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil,* the Court removed the constraint that reparative measures could not impoverish or enrich.[658] Furthermore, the damages were not the only indicator for

[652] Both forms of justice are part of the overarching particular justice. Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014) 5.2,1130a-1130b.
[653] See for instance, *"White Van" (Paniagua-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 76 (25 May 2001) para 76; *Gudiel Álvarez et al ("Diario Militar") v Guatemala* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 253 (20 November 2012) para 321.
[654] See for instance, *The Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 270 (20 November 2013) para 412.
[655] *Las Palmeras v Colombia* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002) para 38.
[656] See for instance, *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 223.
[657] See for instance, *Moiwana Community v Suriname* (Judgement on Preliminary Obligations, Merits, Reparations and Costs) IACtHR Series C No 124 (15 June 2005) para 171; *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 348.
[658] *Gomes Lund et al ("Guerrilha do Araguaia") v Brazil* (Judgement on Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para 246.

the appropriate reparations, instead the facts of the case, the proven violations, the damages, and the victims' requests had to be taken into account. Hence, the Court made room for a shift towards more distributive aspects in the reparations.

Second, the IACtHR often awarded measures of satisfaction and to a lesser extent guarantees of non-repetition that aimed to raise societal awareness about the crimes, and intended to prevent these from reoccurring in the future; forward-looking objectives.[659] Nevertheless, these measures also tried to correct the wrongful 'transaction' in the past by addressing the causes of the violations, such as the lack of knowledge about human rights in the army, national laws that did not protect human rights sufficiently, and the poor prison conditions. Hence, these measures combined corrective justice with distributive justice.

Lastly, violations that targeted a specific community (cases of land claims and massacres) were often repaired with community repair. This was done by the provision of basic goods and services, a community program for the infrastructure, and/or a community development fund. Most communities that were victimized through massacres or whose ownership of the lands was not recognized were already in a marginalized position, and basic services were often not available in the villages. In these cases, returning the victims to the situation as existed before the violations would mean that they could return to their ancestral lands, yet this would often be without basic infrastructure, such as access to water and electricity, education, and health care. In order to repair these communities and to strengthen their position, the Court aimed to improve their living conditions.[660] David Attanasio argued that reparations consisting of community development was 'simply an expansion of a corrective justice perspective on reparations', as it was still 'aimed at eliminating or compensating for the effects of harm caused'.[661] The harms suffered by the community included physical (material) and psychological (immaterial) damages, including damages to the social fabric of the community and their way of life.[662] As my analysis shows, the Court did indeed address the harm suffered by the community, but the community development projects similarly targeted the marginalized position of the victimized communities. Hence, these measures were also forward-looking and went beyond the mere restoration of the 'transaction'; community development combined distributive and corrective justice

[659] See for instance, *19 merchants v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 109 (5 July 2004) para 253; *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 278.
[660] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 110.
[661] David Attanasio, 'Extraordinary Reparations, Legitimacy, and the Inter-American Court' (2016) 37 University of Pennsylvania Journal of International Law 813, 867-868.
[662] David Attanasio, 'Extraordinary Reparations, Legitimacy, and the Inter-American Court' (2016) 37 University of Pennsylvania Journal of International Law 813, 867-868.

REPARATIONS VS GENERAL OBLIGATION OF THE STATE

In cases involving indigenous peoples, the IACtHR ordered several forms of community development: development funds and development programs. The development fund was earmarked for projects in the areas of, amongst others, health, education, food security, and community infrastructure,[663] and the same areas were covered by the development programs. However, it is a general obligation of the state to deliver crucial services to its citizens, such as health care and education.[664] In case of reparations consisting of measures for community development, the obligation of a state to repair its wrongful actions may likely blend in with the general obligation of the state.[665] The IACtHR acknowledged this possible overlap between the two obligations by repeatedly stressing that the ordered development projects and development funds should be implemented 'in addition to the public works financed by the national budget allocated to that region or municipality'.[666] This section will discuss to what extent the ordered community development, through funds and projects, can be distinguished from the state's obligation to deliver similar services to its general population by using the five elements as identified by Peter Dixon:[667] responsibility, recognition, process, form, and impact.[668]

[663] *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgement on Merits, and Reparations) IACtHR Series C No 245 (27 June 2012) para 323; *Kaliña and Lokono peoples v Suriname* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 309 (25 November 2015) para 296.

[664] Article 26 of the ACHR obliges States to adopt measures to achieve 'the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards' as set forth in the Charter of the OAS. The rights to, for instance, health, food, and education are also protected by the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). See for instance, Eduardo Ferrer Mac-Gregor, 'Social rights in the jurisprudence of the Inter-American Court of Human Rights' in Christina Binder et al (eds) *Research Handbook on International Law and Social Rights* (Elgar 2020) 173.

[665] See for instance, Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 188; Thomas M Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 351, 386-387; Rianne Letschert and Theo van Boven, 'Providing Reparation in Situations of Mass Victimization. Key Challenges Involved' in Rianne Letschert et al (eds) *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 177.

[666] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 110; *The Xucuru Indigenous Peoples and its Members v Brazil* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 346 (5 February 2018) para 211; *The Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) para 338.

[667] Peter Dixon developed these five elements to distinguish reparations from assistance, yet it is my understanding that these are also useful in the evaluation of development projects as reparations.

[668] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 95-102.

1. Reparations are based on the legal **responsibility** to repair the harm that resulted from a wrongful act and are consequently ordered against the wrongful party.[669] This element of responsibility incorporates a strong symbolic component of condemnation of the wrongful acts.[670] Indeed, the IACtHR ordered the state to remedy the damages that its wrongful acts caused.[671] Whereas, the essential services that were provided by the states under their general obligation were not linked to the wrongful acts nor to the states' responsibility for these acts or omissions.
2. The second element is closely linked to the first element of responsibility, since reparations are not only an acknowledgement of the responsibility for the wrongful act, they also serve as a public **recognition** of victimhood and the harm suffered.[672] Furthermore, reparations exclusively target victims, whereas the state's general obligation intent to reach all members of a community or region including those who are not a victim.[673] Even though the development funds and projects targeted communities and its (unidentified) members, these reparations were linked to the violations and the subsequent harm. The Court acknowledged the collective harm that was suffered by indigenous communities, including the destruction of the indigenous culture and the lack of access to their ancestral lands that affected the entire community.[674] The reparations consisting of community development aimed to address the collective harm of the community,[675] and hence incorporated a recognition of victimhood and suffering. Nevertheless, these developmental programs have to be framed as reparations so that victims know it is indeed different from the services provided by the state on the basis of its general obligation.[676]
3. The **process** of designing and implementing the reparations is another factor that differentiates reparations from services delivered due to the state's general obligation. Reparations are not limited to the reparative

[669] 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* (Social Science Research Council 2009) 172; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 147.
[670] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 96-97.
[671] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 52.
[672] 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* (Social Science Research Council 2009) 172.
[673] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.
[674] See for instance, *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 50; *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 162.
[675] See for instance, *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 110.
[676] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 189.

modalities itself, instead the process through which they are received is also essential when repairing victims.[677] When the Court ordered a development fund, it imposed the requirement that the community members were included in the implementation process 'to ensure that the fund is implemented in keeping with the community's wishes'.[678] Even though, in most cases, the community members had to decide on the implementation together with representatives of the state, they were involved in the process. This was different for the development projects where the Court decided which specific services had to be delivered to the community.[679] Hence, the development projects as reparation and as general state obligation both did not involve victims in the design and implementation. Instead, the difference is the architect of the development project; the reparations were designed by the Court and the other projects by the state.

4. Reparations address the harm the victims have suffered, and, according to Peter Dixon, this should result in a different **form** of reparations that is 'more symbolically or materially significant'. [680] Nevertheless, the community development as reparation covered the services that also fall within the general obligation of the state. For instance, the Court ordered the opening of a health centre in the village of *Plan de Sánchez* as part of the development program,[681] while the state is obliged to adopt measures to ensure access to essential health care for all its citizens. [682] The development funds were often earmarked for projects in the same areas (education, health care, infrastructure), yet the form of these projects may differ from the services derived from the general obligation of the state because the victims have had input in its design and implementation. Lastly, development projects that were implemented as reparations and as general obligation of the state were both financed and realized by the state.
5. Since reparations are connected to the responsibility of the state and the recognition of victimhood and suffered harm, these are believed to have an

[677] See for instance, Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 42 Stanford Journal of International Law 279, 283; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 37; 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; Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 36-41.

[678] *The Punta Piedra Garifuna Community and its Members v Honduras* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 304 (5 October 2015) para 334.

[679] See for instance, *Yakye Axe Indigenous Commuity v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 221; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 301.

[680] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 100.

[681] *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004) para 110.

[682] Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), article 10 (2) (a).

exclusive symbolic component.[683] Hence, in theory the **impact** of community development as reparation may be more significant than that of the services provided by the State under its general obligation.[684] However, it remains to be seen whether this difference is existent in practice. In case the victims do not know whether the school in the community is opened as reparation or as a general obligation of the state, it is questionable whether the impact will be different.

These five features primarily distinguished development as reparations from the state's general obligation on a theoretical level, while in practice these were quite similar. Both covered the same development areas, and both were financed and realized by the state. The main difference is the reparation's connection to the state's violations of human rights and the victims' suffering. In case the community development was ordered through a funds, there was another distinctive factor: the community were (moderately) involved in the design and implementation.

Additionally, the State's obligation to repair its wrongful acts also conflated with its general obligation to respect and ensure human rights as covered in article 1 (1) of the ACHR. This was especially apparent for the obligation to investigate, prosecute and sentence the responsible persons. In the cases decided since 2009, this was incorporated in the decision as a sixth separate category of reparations. According to the Reparations Principles, the investigation into the facts of the case, the sanctioning of the liable persons, and the exhumations and reburials of the disappeared, are measures of satisfaction.[685] However, Thomas Antkowiak and Alejandra Gonza argued that the state's obligation to investigate and prosecute derived from the general obligation of a state to respect and ensure human rights.[686] Moreover, the International Law Commission's Articles on State Responsibility distinguished guarantees of non-repetition, including the investigation and prosecution, from reparations.[687] Of all the analyzed cases, only the case of *Pueblo Bello Massacre v. Colombia* did not revolve around the lack of justice for the victims; it was the only case where the right to judicial

[683] See for instance, Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114; 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 Nijhoff 2009) 91; Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

[684] At this moment, empirical evidence that distinguishes the impact of reparations from assistance is lacking. Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 101.

[685] Reparations Principles, rule 22 (b), (c) and (f).

[686] Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2017) 301.

[687] International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (2001) Un Doc A/56/49(Vol. I)/Corr.4 (Articles on State Responsibility) article 30 and 31.

guarantees and protection was not violated.[688] Consequently, the IACtHR ordered the investigation and prosecution in this case on the basis of article 1 (1) ACHR.[689] In the other cases, the right to judicial guarantees and protection was violated, and had thus to be remedied under article 63 (1) ACHR. This is in line with James Crawford's commentary to the International Law Commission's Articles; he clarified that guarantees of non-repetition as described under article 30, may also amount to a measure of satisfaction as defined in article 37.[690]

[688] *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 173.
[689] *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 297.
[690] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) commentary to article 30, para (11) and to article 37, para (5).

CHAPTER 5: THE INTERNATIONAL CRIMINAL COURT

5.1 INTRODUCTION

The International Criminal Court (hereinafter ICC or Court) is often described as a victim-centered court,[691] because one of the Court's objectives is to do 'justice to the victims'.[692] Contrary to its predecessors that limited the participatory role of victims to that of witnesses and the reparations regime to referrals to national procedures,[693] the ICC incorporates victims' rights regarding participation, protection, reparations and assistance.[694]

One of the instruments of the ICC to do justice to the victims is its reparations mandate,[695] or in the words of the Court:[696] '[t]he reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system'.[697] This chapter examines the reparations mandate whereby the focus is on the ICC's understanding of collective reparations. In doing so, this chapter analyzes decisions of the Court made during the reparations phase, which will be complemented by the submissions of the Trust Fund for Victims (hereinafter

[691] See for instance, Christine van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 479; Liesbeth Zegveld, 'Victims as a Third Party: Empowerment of Victims?' (2019) 19 International Criminal Law Review 321, 322; Rosie Fowler, '*Great Expectations:* A Critique of the International Criminal Court's Commitment to Victims of Sexual and Gender-Based Violence' (2021) 2 Journal of International Criminal Law 28, 28.

[692] See for instance, Alina Balta, Manon Bax and Rianne Letschert, 'Trial and (Potential) Error: Confliction Visions on Reparations Within the ICC System' (2019) 29 International Criminal Justice Review 221, 222-224; Rosie Fowler, '*Great Expectations:* A Critique of the International Criminal Court's Commitment to Victims of Sexual and Gender-Based Violence' (2021) 2 Journal of International Criminal Law 28, 28.

[693] See for instance, Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 88-89.

[694] Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 68, 75 and 79.

[695] See for instance, International Criminal Court Assembly of State Parties, 'Report of the Court on the Strategy in Relation to Victims' (10 November 2009) ICC-ASP/8/45 ('It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims'); *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 71 ('Reparations in the present case must (…) afford justice to the victims by alleviating the consequences of the wrongful acts'); *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 15 ('it is by virtue of the reparation proceedings that the Court (…) delivers to them justice by alleviating, as far as possible, the consequences of the wrongful acts').

[696] Even though the Court speaks through multiple Trial Chambers and an Appeal Chamber, for readability, this chapter refers to the different Chambers together as Court. The particular Chamber that gave the opinion or quote can be found in the footnote, whereby the author of the court document is in bold.

[697] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06, **T Ch I** (7 August 2012) para 178; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 14.

TFV), including fillings on reparations and Draft Implementation and Reparations Plans (hereinafter DRIP).

This chapter starts with introductions of the ICC's reparations regime, the methodological considerations specific to this chapter, and the selected cases. Thereafter, the results of the analysis of the Court documents will be discussed, including the Court's interpretation of reparations in general and collective reparations specifically. Therefore, this chapter provides an overview of the reparations ordered by the Court, and of the beneficiaries of the Court ordered reparations. Furthermore, the TFV's perception of collective reparations and the specific reparation projects that were proposed by the TFV based on the reparation order of the ICC are discussed. The results of the analysis of the primary sources, the Court documents, will be enriched with secondary sources including scholarly literature. The chapter concludes with a discussion of the development of collective reparations before the ICC and how the relation between the ICC and the TFV influenced this development. Furthermore, it explores how the development of collective reparations before the ICC relates to Aristotle's theory of particular justice. The last part of this chapter discusses the relation between collective reparations ordered by the Court and implemented by the TFV, and the assistance projects established by the TFV.

5.1.1 Organizing the ICC

In 1948, after the Second World War had ended and the Nuremberg trials had finished, the UN requested the International Law Commissions (hereinafter ILC) to investigate the option of 'establishing an international judicial organ for the trial of persons charged with genocide or other crimes (…)'.[698] Thereafter, the establishment of a permanent international criminal court was considered regularly,[699] however this did not result in the actual establishment until the 1998 Rome Statute of the International Criminal Court (hereinafter Rome Statute) entered into force on 1 July 2002 after sixty states had ratified the Statute. At this moment, 123 countries are state parties to the Rome Statute.[700]

The ICC consists of three judicial stages. First, a Pre-Trial Chamber deals with the investigation phase and the confirmation proceedings where it has to decide whether there is enough evidence for the charges and if so, confirm the charges and

[698] UNGA 'Adoption to the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) UN Doc A/RES/3/260 (III).
[699] For an overview of the steps towards the establishment of the ICC from the Second World War to 1998, see William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 8-22.
[700] 'The State Parties to the Rome Statute' (*International Criminal Court*) <https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 2 September 2022.

commit the case to the Trial Chamber.[701] The Trial Chamber decides whether the suspect has to be convicted, and after a conviction is issued, it decides on the sentence and the reparations order for the victims.[702] In case the convicted person and/or the Prosecutor appeals the decision of the Trial Chamber, the Appeals Chamber confirms, reverses or amends the decisions regarding the conviction, sentence and reparations of the Trial Chamber.[703]

5.1.2 JUDICIARY

The judges of the different Chambers are elected for a non-renewable period of nine years after an election process.[704] The Assembly of state parties uses a voting procedure, the so-called minimum voting requirements.[705] As such, the state parties have to vote for a minimum number of candidates from each geographical area, female candidates, and candidates that either have a background in criminal law and procedure, or in international law.[706] This voting procedure is designed to make sure that the requirements of article 36 (8) of the Rome Statute to have a fair representation of the geographical areas, legal systems and gender are met. At the moment of writing, the required fair representation is almost achieved. Nine out of eighteen judges are female; a perfect balance.[707] All geographical areas are covered and the judiciary almost reflects the composition of member states.[708] The judiciary consists of judges with a background in civil law, as well as a background in common law.[709] Further requirements for the candidate judges are that he/she is 'of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices',[710] and only one national per

[701] Rome Statute, article 56, 57, 58 and 61; Christoph Safferling, *International Criminal Procedure* (Oxford University Press 2012) 319-325.
[702] Rome Statute, article 75 and 76.
[703] Rome Statute, article 81 and 82. See for an elaboration on the Appeals Chambers functions, Volker Nerlich, 'The Role of the Appeals Chamber' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 966-977.
[704] Rome Statute, article 36 (9) (a).
[705] International Criminal Court Assembly of State Parties, 'Informal Guide and Commentary to the Procedure for the Nomination and Election of Judges of the International Criminal Court' (5 May 2017) UN Doc ICC-ASP/16/INF.2, para I (B).
[706] This latter category is often referred to as list A (criminal law background) and list B (background in international human rights and/or humanitarian law). Of the 18 judges, a minimum of nine judges have to come from list A and a minimum of five from list B**.** See Rome Statute, article 36 (3) (b) and art 36 (5).
[707] In 2018, of the 47 judges who had ever served at the ICC, 20 were female; 42,55%. Hence, the gender division shifted to a more equal division. See, Juan-Pablo Pérez-León-Acevedo, 'The Contribution of Female Judges to the Victim Jurisprudence of the International Criminal Court' in Freya Baetens (ed), *Identity and Diversity on the International Bench: Who is the Judge?* (Oxford University Press 2020) 368.
[708] The only exception is the overrepresentation of the category of western Europe and other States (ie Canada and Australia); they make up 20% of the Member States opposed to 31% of the judiciary. See for an overview of the ICC judges, 'Current Judges' (*International Criminal Court*) <https://www.icc-cpi.int/judges/judges-who-s-who> accessed 2 September 2022.
[709] 13 judges come from a state with a civil law system, four from a state with a common law system, and one judge comes from a state that based its law system on a combination of common and civil law (Canada).
[710] Rome Statute, article 36 (3).

member state is allowed to be elected.[711] Each member state may put one candidate forward, yet not all states have a 'transparent, structured, and independent national processes to identify highly qualified candidates'.[712] In order to make sure that the highest qualified candidates would be elected as judges, the Assembly of State Parties established the Advisory Committee on Nominations in 2011.[713] Nevertheless, according to several scholars, the election procedure continues to be an inevitably political process and vote trading remains an issue in the election procedures in the Assembly of State Parties.[714]

5.1.3 THE ICC FRAMEWORK ON REPARATIONS

The negotiators of the Rome Diplomatic Conference could not come to an agreement on specific elements of the reparation regime.[715] Consequently, the negotiators used a 'fundamental compromise formula' whereby an agreement was reached on an issue in general lines and the language was held 'constructively ambiguous', so the judges had to fill in the specifics of the provisions.[716] Hence, the Rome Statute is not very detailed in its provision on reparations. Article 75 of the Statute contains the basic provision regarding reparations within the ICC: after a conviction has been issued, the Court may order reparations to the victims of the crimes of which the person was convicted. These reparations may consist of restitution, compensation and rehabilitation, yet this list is not exhaustive.[717] Furthermore, the Court is entrusted with the task to establish principles underlying its interpretation of the reparations mandate, including the determination of the scope of the damages.[718] The Rules of Procedure and Evidence (hereinafter RPE) supplemented the Rome Statute only sparsely; it merely added that reparations might be provided on an individual or collective basis,

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[711] Rome Statute, article 36 (7).
[712] Jonathan O'Donohue, 'The ICC and the ASP' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 128.
[713] International Criminal Court Assembly of State Parties, 'Report of the Bureau on the establishment of an Advisory Committee on nominations of judges of the International Criminal Court' (30 November 2011) ICC-ASP/10/36. This was adopted by the Assembly of Member State Parties by resolution ICC-ASP/10/Res.5; International Criminal Court Assembly of State Parties, 'Strengthening the International Criminal Court and the Assembly of States Parties' (21 December 2011) ICC-ASP/10/Res.5, para 19.
[714] Ruth Mackenzie, 'The Selection of International Judges' in Cesare PR Romano, Karen J Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 751-752; Jonathan O'Donohue, 'The ICC and the ASP' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 128.
[715] 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) 1206; Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 65-67.
[716] Claus Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1 Journal of International Criminal Justice 603, 605-606; Sergey Vasiliev, 'Victim Participation Revisited – What the ICC is Learning about Itself' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 1143-1144.
[717] Rome Statute, article 75 (2).
[718] Rome Statute, article 75 (1).

or a combination thereof.[719] The Court was tasked to fill the lacuna left in the Rome Statute, whereby it was given much leeway in deciding on the substantive reparations to be awarded, as well as on the underlying principles.[720]

After the ICC rendered its first conviction in the case against *Thomas Lubanga Dylio* (hereinafter Lubanga), the principles relating to reparations were established. The principles that were established in the case against *Lubanga* were applied by the Court in subsequent cases,[721] though the Trial Chamber added several new principles to the list in the *Ntaganda* case.[722] According to the Appeals Chamber in the *Lubanga* case, the principles on reparations should consist of 'general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers'.[723] The principles on reparations mainly echo the Statute and the RPE; reparations can be awarded individually, collectively or both, and aside from restitution, compensation and rehabilitation, other modalities such as symbolic, preventive and transformative measures may be provided.[724] In addition, the reparation principles comprehensively address various aspects of reparations, such as the beneficiaries, the liability of the convicted person, requirements of the substantive reparations as well as the procedure,[725] the implementation of the awarded reparations, and supervision thereof.

During the drafting of the principles, the Court examined the legal framework, relevant case law, and submissions relating to reparations from the defense, the prosecution, the Registry, the TFV, Victim Representatives, and several NGO's.[726] In

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[719] International Criminal Court Assembly of State Parties, 'Rules of Procedure and Evidence' (adopted by the on 9 September 2002) ICC-ASP/1/3 and Corr. 1 (RPE) rule 97 (1).

[720] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, **A CH** (18 July 2019) para 142; *The Prosecutor v Germain Katanga* (Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 Entitled "Order for Reparations pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, **A Ch** (8 March 2018) para 64.

[721] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 30; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 26.

[722] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 29.

[723] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 55.

[724] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 33-34; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 78 and 82.

[725] For instance, the principle that reparations may not discriminate nor stigmatize the victims, the principle that the approach to reparations should be victim-centered, as well as a gender inclusive and sensitive. *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 16-18; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 42, 45 and 60.

[726] These NGOs consisted of UNICEF, Women's Initiatives, the International Center for Transitional Justice, *Fondation Congolaise pour la Promotion des Droits Humains et la Paix* (FOCDP) and *Avocats Sans Frontières* (ASF), whereby the latter represented several other NGOs. *The Prosecutor v Thomas Lubanga Dylio* (Judgement

the case against *Ntaganda*, the Court requested and received submissions regarding reparations from the same actors, it additionally included suggestions from experts through two expert reports,[727] scholarly literature, and from the government of the DRC.[728] It is noticeable that the input from victims is limited. As will be discussed further in section 5.1.6, victims may present their views during the reparation procedure, yet they can only do this through a legal representative for victims (hereinafter LRV).[729] For their submission regarding reparations in the *Lubanga* case, the legal representatives of V01 only conferred with twelve victims in order to come to its suggestions.[730] Furthermore, the lack of direct input of victims was also present in the expert reports in the *Ntaganda* case where the views of victims were primarily presented by the LRV and local NGOs.[731] The limited role of victims in the design of the reparation principles is in stark contrast with the ICC's reparation principle incorporating a victim-centered approach to reparations.[732]

The specific reparative modalities that are awarded are determined in the reparations order that is established on a case-by-case basis. At a minimum, this

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on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 13.

[727] Rule 97(2) of the RPE states that 'the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations'. According to the Trial Chamber in *Lubanga*, these experts should include specialists in child and gender issues, and professionals from both the DRC and the international community. *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 264. The Court issued two expert reports for its reparations order in the case against *Ntaganda*. These experts consisted of two lawyers, an agricultural engineer and an obstetrician/gynecologist with either experience with NGOs and civil society in Ituri and the DRC or with reparation programs. The Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare only included 'victims through their legal representative'. *The Prosecutor v Bosco Ntaganda* (Experts Report on Reparation) ICC-01/04-02/06-2623-Anx1-Red2, **Registry** (30 October 2020); *The Prosecutor v. Bosco Ntaganda* (Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare) ICC-01/04-02/06-2623-Anx2-Red2, **Registry** (30 October 2020). The names of the experts that conducted the expert reports in the *Al Mahdi* case were redacted, only the report of the UN Special Rapporteur in the Field of Cultural Rights was made publicly available**.** *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision Appointing Reparations Experts and Partly Amending Reparations Calendar) ICC-01/12-01/15-203-Red, **T Ch VIII** (19 January 2017) para 4**;** *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Transmission of Experts' Reports pursuant to Trail Chamber Decision ICC-01/12-01/15-203-Red of 17 January 2017) ICC-01/12-01/15-214-AnxI-Red, **Registry** (19 January 2017).

[728] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 14.

[729] Rome Statute, article 68 (3); RPE, rule 91 (2).

[730] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 29.

[731] The Experts Report on Reparation did not include the views of victims as they did not receive a list with a sample of potential beneficiaries from the Registry in time and they could not take a field visit due to Covid-19, instead, they held a roundtable with several NGOs. The Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare only included 'victims through their legal representative'. *The Prosecutor v Bosco Ntaganda* (Experts Report on Reparation) ICC-01/04-02/06-2623-Anx1-Red2, **Registry** (30 October 2020); *The Prosecutor v Bosco Ntaganda* (Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare) ICC-01/04-02/06-2623-Anx2-Red2, **Registry** (30 October 2020**)**.

[732] A victims-centered approach to reparations 'requires full and meaningful consultation and engagement with victims, giving them a voice in the design and implementation of reparations programmes and allowing them to shape the reparation measures according to their needs'. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 45.

reparation order should include five fundamental components: the order must be made against the convicted person (1); whose liability for the reparations should be set (2); the ordered reparation modalities and underlying reasons should be listed (3); the harm that resulted from the crimes for which the liable person was convicted should be made clear (4); as well as the criteria for the identification of the beneficiaries (5).[733] The Court can order reparations that are individual, collective, or a combination thereof, and additionally has to specify specific modalities of reparations that it deems relevant in the case at hand. Based on the identified modalities of reparations, the TFV designs a DRIP, whereby it has some leeway in deciding which modalities should ultimately end up in the implementation plan.[734] The Court has to approve the proposed implementation plan before the TFV can start the actual implementation.[735] In the words of the Trial Chamber in the *Lubanga* case, 'reparations in this case will be dealt with principally by the TFV, monitored and overseen' by the Court.[736]

Since the reparations are awarded in a criminal court, the reparations are inherently linked to a conviction.[737] Consequently, the reparations should remedy the harm that resulted from the crimes for which the person was convicted.[738] Furthermore, the order for reparations is made against the convicted person,[739] and he/she is liable for the reparations, notwithstanding his/her indigency.[740] In case the convicted person is declared indigent, which is the case for all cases that have thus far reached the reparations phase,[741] the TFV may use its resources to implement the

[733] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 1; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 31.

[734] In case the TFV decides that an identified modality 'is not appropriate, it is instructed to include in its draft implementation plan an explanation regarding the reasons'. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 212.

[735] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Order approving the Proposed Plan of the Trust Fund for Victims in Relation to Symbolic Collective Reparations) ICC-01/04-01/06-3251, **T Ch II** (21 October 2016) para 16-17.

[736] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 261.

[737] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 65.

[738] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 267.

[739] Rome Statute, article75 (2).

[740] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 104; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 245.

[741] Bemba was not declared indigent, yet the reparations proceedings were terminated after his acquittal in appeal. *The Prosecutor v Jean-Pierre Bemba Gombo* (Registrar's Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo) ICC-01/05-01/08-76, **Registry** (25 August 2008); *The Prosecutor v Jean-Pierre Bemba Gombo* (Final Observations on Reparations Following the Acquittal of Mr Jean-Pierre Bemba) ICC-01/05-01/08-3648, **TFV** (6 July 2018) para 5.

awarded reparations.[742]In case the TFV is unable or unwilling to use its funding for the implementation, the reparations will not be realized. Its practical inability to enforce its reparation orders in respect of indigent persons is 'the court's Achilles' heel'.[743]

The Court barely reflected on the nature of the right to reparations. In its first reparations decision it claimed that the reparations regime of the ICC 'reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims'.[744] Furthermore, in the *Katanga* case, the Court stated that reparations should redress the harm suffered by the victims, which it connected to a 'general principle of public international law'.[745] These claims were supported by referrals to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (hereinafter UN Reparation Principles),[746] the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity,[747] the Permanent Court of International Justice case of the *Factory at Chorzów* from 1928, and case law of the Inter-American Court of Human Rights (hereinafter IACtHR).

5.1.4 The Trust Fund for Victims

The aforementioned task of the TFV to draft a DRIP, and to subsequently implement this plan, embodies only half of the TFV's two-folded mandate regarding reparations. In addition to its reparations mandate that focuses on the implementation of the Court-ordered reparations, the TFV has a so-called assistance-mandate. The TFV acknowledged that there are similarities between its two mandates as they both adopt a harm-based approach,[748] and both are essential to the TFV in reaching its overall objective of ensuring that '[v]ictims and their families overcome harm, lead a dignified life, and contribute towards reconciliation and peace-building within their

[742] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 62.
[743] Owiso Owiso, 'The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process' (2019) 19 International Criminal Law Review 505, 528.
[744] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 177.
[745] *The Prosecutor v Germain Katanga* (Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, **A Ch** (8 March 2018) para 178.
[746] UNGA 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (16 December 2005) UN Doc A/RES/60/147 (Reparation Principles).
[747] UNCHR 'The Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1.
[748] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 277.

communities'.[749] The activities under both mandates may strengthen each other in reaching this objective.[750] Contrary to the similarities between the two mandates, which were only occasionally mentioned, the TFV underlined the differences between the two mandates more often. The reparations mandate is guided by the Court's proceedings, is only initiated after a conviction is issued, and is restricted to the harm victims suffered as a consequence of the crimes for which the offender was convicted; a narrow scope. Subsequently, this mandate requires a thorough screening of victims to give them their eligibility status.[751] On the other hand, the assistance mandate has a wide scope as it is not linked to a conviction and may be set up prior to such a ruling or even prior to the start of judicial proceedings. Instead, the assistance may be provided to all victims within 'the entire geographical, temporal and material scope of the Court's jurisdiction',[752] and it does not need the costly and time-consuming eligibility-screening procedure.[753] Even though its assistance mandate covers the situations that fall within the ICC's jurisdiction, at this moment, the TFV only implements or designs assistance projects in situations that are brought before the Court (the Democratic Republic of Congo (hereinafter DRC), Uganda, the Central African Republic, Côte D'Ivoire, Mali, and Kenya) or that are under investigation (Georgia).[754] The support provided by the TFV under its assistance mandate might consist of physical, psychological and material aid.[755] Section 5.7 will further elaborate on the TFV and its understanding of (collective) reparations.

5.1.5 THE JURISDICTION OF THE ICC

The ICC was set up as a court of last resort; investigations and subsequent trials are only initiated when the state who has national jurisdiction over the crime is unable or unwilling to prosecute.[756] One of the reasons for the establishment of the ICC was to end impunity for the offenders of the most serious crimes that concern the international

[749] 'TFV Strategic Plan 2020-2021' (*TFV,* July 2020) <https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Strategic%20Plan%202020-2021.pdf> accessed 19 August 2022, 6; 'TFV Strategic Plan 2014-2017' (*TFV,* August 2014) <https://www.trustfundforvictims.org/sites/default/files/imce/1408%20TFV%20Strategic%20Plan%202014-2017%20Final%20ENG.pdf> accessed 19 August 2022, 15.

[750] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 130.

[751] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the reparations proceedings) ICC-01/04-02/06-2635-Red, **TFV** (18 December 2020) para 59.

[752] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 277. See furthermore, International Criminal Court Assembly of State Parties 'Regulations of the Trust Fund for Victims' (3 December 2005) ICC-ASP/4/Res.3, para 42.

[753] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the reparations proceedings) ICC-01/04-02/06-2635-Red, **TFV** (18 December 2020) para 59.

[754] 'Assistance Programmes' (*Trust Fund for Victims*) <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes> accessed 21 May 2021.

[755] 'Assistance Mandate' (*Trust Fund for Victims*) <https://www.trustfundforvictims.org/node/50 > accessed 21 May 2021.

[756] Rome Statute, article 17.

community as a whole.[757] According to article 5 of the Rome Statute, the most serious crimes consist of war crimes, crimes against humanity, genocide, and the crime of aggression.[758] The jurisdiction *ratione materiae* of the ICC is limited to these four crimes. By adapting the Rome Statute, the member states automatically accepted the jurisdiction of the ICC; violations that took place in the territory of a member state (*ratione loci*) or that were committed by a national from a member state (*ratione personae*) can be prosecuted by the ICC.[759] As the jurisdiction of the Court is accepted through ratification of the Rome Statute, the ICC has jurisdiction *ratione temporis* for crimes committed after 2005 or after the state ratified the Statute.[760] In case the crime took place in a state which did not ratify and consequently accepted the Court's jurisdiction, or when the offender is a national of a non-member state, the state may accept the jurisdiction of the ICC for the specific crime at hand.[761]

5.1.6 THE ROLE OF VICTIMS

The ICC is the first international criminal tribunal that provided extensive rights to victims,[762] including the right to reparations, protection, and participation.[763] The right to reparations is discussed at length in this chapter, while the right to protection and to participation are addressed in this section.

The right to protection focuses on the safety, well-being, dignity and privacy of victims and witnesses.[764] The Victims and Witness Unit was established to offer protection and support to the witnesses and victims who appear before the ICC.[765] In order for victims to participate in the proceedings, the victim has to fill out a standardized application form.[766] The Victims Participation and Reparations Section

[757] Rome Statute, preamble.
[758] The crime of aggression was included in the jurisdiction of the ICC, yet the crime was not clearly defined in the Rome Statute. Consequently, the jurisdiction over the crime of aggression could not be exercised until a provision with the definition and criteria was adopted. The provisions of the crime of aggression were included in the 2010 Kampala amendments on the crime of aggression. On 14 December 2017, the jurisdiction over the crime of aggression, determined by the Kampala amendments, was officially activated as of 17 July 2018. International Criminal Court Assembly of State Parties 'Activation of the Jurisdiction of the Court over the Crime of Aggression' (14 December 2017) ICC-ASP/16/Res.5; Roger S Clark, 'The Crime of Aggression' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 778-781.
[759] Rome Statute, article 12 (1) and (2).
[760] Rome Statute, article 11.
[761] Rome Statute, article 12 (3).
[762] See for instance, Sergey Vasiliev, 'Victim Participation Revisited – What the ICC is Learning about Itself' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 1135; Gaelle Carayon and Jonathan O'Donohue, 'The International Criminal Court's Strategies in Relation to Victims' (2017) 15 Journal of International Criminal Justice 567, 567-568; Diana Odier-Contreras Garduno, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018) 175.
[763] Rome Statute, article 68 and 75.
[764] Rome Statute, article 68 (1); RPE, rule 87 and 88.
[765] Rome Statute, article 43 (6).
[766] RPE, rule 89 (1); ICC, Regulations of the Court (adopted by the judges of the Court on 26 May 2004, last amended on 12 November 2018) ICC-BD/01-05-16, regulation 86 (1) and (2).

(hereinafter VPRS) was established to provide assistance to victims,[767] primarily in relation to their applications. As such, the VPRS helps victims completing their application forms, reviews these forms, and transfers the completed forms complemented by a summary of all applications to the Court that will decide on the status of the victims.[768] The VPRS is under-resourced, has multiple tasks,[769] and an increasing workload due to a rise of victim applications.[770] As a result, the Court's deadlines for the acquisition of the applications were often not met,[771] affecting the number of victims that could be approved by the Chamber and thus actually exercise their right to participation.[772]

Even though victims have a right to participate, they cannot directly participate in the proceedings before the ICC, instead they are represented by a LRV who may present the views and concerns of the victims at different stages of the proceedings.[773] The LRV are assisted by the independent Office for Public Council for Victims (hereinafter OPCV).[774] When multiple victims are involved in a case, which applies to all cases before the ICC, they will be represented by a common LRV.[775] By representing a large group of victims, the LRV has to distil 'generalizable "interests" from the more unwieldy and personal "views and concerns"'.[776] Hence, the LRV tends to homogenize the group of victims and presents their views and concerns as one, while it is likely that the represented group of victims is diverse with a range of different opinions.[777] Consequently, views and concerns that oppose the majority view are

[767] Regulations of the Court, regulation 86 (9).
[768] RPE, rule 89; Regulations of the Court, regulation 86 (5) and (6). See furthermore, Sergey Vasiliev, 'Victim Participation Revisited – What the ICC is Learning about Itself' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 1150; Mélissa 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.
[769] The VPRS is furthermore tasked to inform victims of their rights to participation and reparation before the ICC, and of the application process to obtain a legal representative. See Mélissa 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.
[770] International Criminal Court Assembly of State Parties, 'Report of the Court on the Revised Strategy in Relation to Victims: Past, Present and Future' (5 November 2012) ICC-ASP/11/40, para 40.
[771] International Criminal Court Assembly of State Parties, 'Report of the Court on the Revised Strategy in Relation to Victims: Past, Present and Future' (5 November 2012) ICC-ASP/11/40, para 40; Sergey Vasiliev, 'Victim Participation Revisited – What the ICC is Learning about Itself' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 1151.
[772] Sergey Vasiliev, 'Victim Participation Revisited – What the ICC is Learning about Itself' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 1151.
[773] Rome Statute, article 68 (3); RPE, rule 91 (2).
[774] Regulations of the Court, regulation 81 (4). In addition, the OPCV may at times represent victims directly; Regulations of the Court, regulation 81 (4) (e).
[775] RPE, rule 90 (2).
[776] Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76 *Law and Contemporary Problems* 235, 250.
[777] 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; Liesbeth Zegveld, 'Victims as a Third Party: Empowerment of Victims?' (2019) 19 International Criminal Law Review 321, 336; Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 90.

likely to be lost.[778] Interestingly, the LRV acknowledged this by claiming that 'victims in this context should not be treated as a single group and instead they should be regarded as individuals'.[779] However, the question remains how the LRV plans to represent a group of hundreds or even thousands of victims as individuals, which is, in my opinion, a practically impossible task. Hence, victims merely have the possibility to participate in the Court proceedings in an indirect manner, with the (common) LRV as the link between the victims and the Court. One can wonder whether the right to participation is not just a right to representation.

As for victims' participation in the Court, the (common) LRV represent them during all trial stages, yet they are more at the forefront during the reparations stage. During the proceedings prior to the reparations stage, the primary focus is on the prosecution and the defense, while this focus shifts towards the victims in the reparations stage.[780] Accordingly, the Court argued that victims who are eligible for reparations 'should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective'.[781] Nevertheless, in this stage the participation continues to be indirect and victims are represented by the (common) LRV.

Both the Court and the TFV have to consult with victims on issues relating to the nature of collective reparations, the modalities of reparations, the method of implementation, and the priorities of the beneficiaries.[782] These consultations should be meaningful for the victims and accessible to all victims, therefore barriers for victims, such as gender-specific obstacles should be removed.[783] According to the Court, the consultations during the reparations phase are indispensable, because they are crucial to ensure that reparations have a broad and real significance, are meaningful to victims, have the intended impact, and are perceived as such. They are also necessary to promote ownership of the process, and to prevent any group of victims from being excluded or marginalised'.[784] As seen in section 5.1.3, the input of victims in the development of the reparation principles and order is limited and primarily indirect through the LRV and NGOs.

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[778] Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' (2017) 5 Restorative Justice: An International Journal 198, 209**.**

[779] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06, **T Ch I** (7 August 2012) para 29.

[780] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06, **T Ch I** (7 August 2012) para 267.

[781] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 29.

[782] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 48 and 250.

[783] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 250.

[784] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 47.

Furthermore, when victims make proposals for reparations, these have to be taken into account when the TFV designs its reparations and implementations plan.[785] The TFV indeed consulted with the victims after the reparations order was handed down and the DRIP had to be designed. In the *Lubanga* case, the TFV conducted consultations with over 1340 victims, relatives and representatives of affected communities in 22 locations in Ituri, and in the *Katanga* case consultations were held with approximately 120 victims.[786] Due to the volatile security situation in Ituri, the TFV only consulted with 33 victims for the design of the DRIP in the *Ntaganda* case.[787]

5.2 METHODOLOGY

In line with the analysis of the other courts and commissions, the case law and other court documents of the ICC were examined through a qualitative content analysis.

This analysis was conducted through the computer software of MAXQDA, which provides several features to analyze the data. Due to the limited number of cases that reached the reparations stage at the ICC in comparison to the other analyzed courts, fewer features were used.[788] Even though the advantages of the used method over doctrinal research may not show as clearly in this chapter, the method was beneficial for the handling of over forty court documents of different actors. The documents were systematically coded, making it easier to retrieve data. In addition, the added value of the qualitative content analysis for the analysis of the ICC documents will also surface in chapter 8 where the development of collective reparations in the different institutions will be discussed. The methodology of this analysis was done pursuant to the general methodology as described in chapter 3. Nevertheless, there were several methodological considerations that were specific to the ICC, including the selection of the cases and Court decisions that were included in the analysis, as well as some limitations specific to this chapter. This section elaborates further on these considerations.

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[785] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 204.

[786] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 32; *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 21. The DRIPs in the cases against *Al Mahdi* and *Ntaganda* do not mention the number of victims that were consulted**.** *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 29 ('held several meetings with victims'); *The Prosecutor v Bosco Ntaganda* (Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) para 24 ('has started consultations with victims themselves').

[787] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 60.

[788] Especially the MAXQDA tools to (statistically) analyze the data, such as cross tabs and code frequencies, were not as fruitful as in the IACtHR and TRC chapters**.**

5.2.1 CASE AND MATERIAL SELECTION

At the moment of writing, five persons have been convicted before the ICC. Reparations can only be awarded after a conviction, and currently reparations were awarded in four cases.[789] On February 4th 2021, Dominic Ongwen was convicted for 61 counts of war crimes and crimes against humanity,[790] though at this moment there are no decisions made in the reparations stage. Since this research investigates the development of collective reparations, only the four cases with decisions in the reparations stage were included in the analysis.[791]

In addition to the case selection, the documents that were included in the qualitative content analysis had to be selected. First of all, only documents that consider reparations were included. In light of the analyses of the other courts, the initial selection criterium was that only decisions of the Court were included. Consequently, filings of, for instance, the defense, the OPCV, and the LRV were excluded.[792] However, since the TFV has such a distinctive role in the development of (collective) reparations, for instance, it has to design the DRIP for each case, and it is entrusted with the implementation of the reparations, it was decided to include several documents that were filed by the TFV. These particularly consist of the reports on reparations prior to the reparations decisions, the (revised) DRIPs, as well as filings requested by the Court containing information regarding collective and symbolic reparations. The Court decisions primarily involve the reparation orders, both in first instance and appeals, and the decisions regarding the proposed DRIPs. As a result, 45 documents were included in the qualitative content analysis, consisting of 21 Court documents and 24 documents of the TFV. The material that was included and hence coded and analyzed can be found in Annex B. Hence, the analyzed Court documents include decisions of different actors; several Trial Chambers, the Appeals Chamber, and the TFV. In order to make clear who the author is of the document that is discussed, the actor will be showed in bold in the reference in the footnotes.

[789] The reparation proceedings in the case against *Bemba* were discontinued after his acquittal in appeal. See *The Prosecutor v Jean-Pierre Bemba Gombo* (Final Observations on Reparations Following the Acquittal of Mr Jean-Pierre Bemba) ICC-01/05-01/08-3648, **TFV** (6 July 2018) para 5.

[790] *The Prosecutor v Dominic Ongwen* (Trial Judgement) ICC-02/04-01/15, **T Ch IX** (4 February 2021).

[791] Even though the ICC did not decide on the reparations in the *Bemba* case, the TFV did submit two files with observations on reparations after Bemba's initial conviction and later acquittal. These two documents are included in the analysis of the TFV's understanding of collective reparations. Yet, for the general analysis regarding the development of collective reparations before the Court, the case of *Bemba* was excluded.

[792] The submissions of the LRV may include valuable information regarding the views and concerns of victims relating to reparations, yet this thesis focuses on the development of collective reparations before the ICC and not on the reparations requested by the victims. Even though the views and concerns of victims are important, they are beyond the scope of the systematic analysis of this thesis. For an overview of the victims' submissions on reparations in relation to the awarded reparations, see Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 108-130.

5.2.2 LIMITATIONS

The Court documents incorporating reparations, especially those relating to the DRIPs, may include sensitive information. This sensitivity is heightened because, at the moment of writing, the reparations are still being implemented in the four cases. The information that might cause confusion about the reparations for the victims and their communities, or that might endanger the security and safety of victims, Court and TFV staff have to be redacted.[793] This has influenced the availability of Court documents and consequently imposed limitations to the analysis of the development of collective reparations within the ICC. Several documents, for instance the Court's decision regarding the TFV's DRIP in the *Katanga* case, were not publicly available at the time of writing. In addition, several documents were only available in a redacted version whereby text was made unreadable or was simply left out. A list with the documents that were only available in a redacted version can be found in Annex B.

5.3 SELECTED CASES

This section introduces the four cases based on the crimes the offenders were convicted for, the context of these crimes, and the victims and beneficiaries in the four cases.

5.3.1 CRIMES

The cases before the ICC up to this point dealt with war crimes (article 8 of the Rome Statute) and crimes against humanity (article 7 of the Rome Statute). In the four cases included in the analysis, all offenders were convicted for war crimes. Lubanga and Al Mahdi were both convicted for only one crime: Lubanga for the conscription, enlistment, and use of child soldiers,[794] and Al Mahdi pleaded guilty to the war crime of attacking protected buildings, in this case religious buildings.[795] Katanga and Ntaganda were both convicted for war crimes and crimes against humanity. Katanga was convicted for four counts of war crimes, consisting of the attack of a civilian population, murder, the destruction of property and pillaging, and murder as a crime

[793] See for instance, *The Prosecutor v Germain Katanga* (Draft implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 39-40; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 42.

[794] *The Prosecutor v Thomas Lubanga Dylio* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, **T Ch I** (14 March 2012) para 916.

[795] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171, **T Ch VIII** (27 September 2016) para 30 and 52.

against humanity.[796] Ntaganda was convicted for thirteen counts of war crimes; (attempted) murder, the attack of a civilian population as well as ordering their displacement, rape and sexual slavery, the conscription and use of child soldiers, the destruction of property, and the attack of protected buildings. He was furthermore convicted for an additional five counts of crimes against humanity: (attempted) murder, persecution, forcible deportation of a civilian population, rape and sexual violence.[797]

International crimes are committed in a collective context and systematic matter,[798] which results in a high number of perpetrators. The ICC focuses on prosecuting the 'bigger fish'; the persons who have a position in the army or fighting party that gives them the opportunity to order, organize, or control their subordinates.[799] Hence, the suspects may not have committed the crimes physically, making it often difficult to link the suspect to the actual crime.[800] Article 25 (3) of the Rome Statute describes different modes of individual criminal responsibility, making it possible to prosecute the persons who did not commit the crimes directly or on their own, the so-called non-physical or remote perpetrator.[801] As such, a person can be held accountable for acts he committed himself (direct perpetration), he committed together with others (co-perpetration), or that were committed through other persons (indirect perpetration).[802] Furthermore, a person who ordered, solicited or induced a crime that did occur or where the attempt failed, or who facilitated or contributed to the commission of a crime can be prosecuted and held responsible and liable for these crimes (responsible as accessory).[803] Individual criminal responsibility might also apply to omissions, and a military commander or superior who did not prevent his forces or subordinates from committing crimes is individually responsible for these crimes (superior responsibility).[804] The offenders in the four analyzed cases were

[796] Katanga was furthermore acquitted for the crimes of rape and sexual slavery, both as war crime and as crime against humanity. See *The Prosecutor v Germain Katanga* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436, **T Ch II** (20 April 2015) XII Disposition.
[797] *The Prosecutor v Bosco Ntaganda* (Judgement) ICC-01/04-02/06-2359, **T Ch VI** (8 July 2019) para 1199.
[798] Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court. A Commentary* (3rd edn, Beck/Hart 2016) 985.
[799] See for instance, Barbara Goy, Individual Criminal Responsibility before the International Criminal Court. A Comparison with the Ad Hoc Tribunals (2012) 12 International Criminal Law Review 1, 1. For a critical account on whether the prosecuted persons from the DRC are indeed 'bigger fish', see Pascal Kalume Kambale, 'A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo' in Christian De Vos, Sara Kendall & Carsten Stahn (eds), Contested Justice: The Politics and Practice of International Criminal Court Interventions (Cambridge University Press 2015) 179-185**.**
[800] Barbara Goy, 'Individual Criminal Responsibility before the International Criminal Court. A Comparison with the Ad Hoc Tribunals' (2012) 12 International Criminal Law Review 1, 2.
[801] Elies van Sliedregt, 'Perpetration and Participation in Article 25(3)' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 499.
[802] Rome Statute, article 25(3)(a); Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court. A Commentary* (3rd edn, Beck/Hart 2016) 987-1001.
[803] Rome Statute, article 25(3)(b) – 25(3)(d).
[804] Rome Statute, article 28. Jean-Pierre Bemba Gombo is thus far the only person who was convicted on the ground of superior responsibility, though he was acquitted in appeal. See *The Prosecutor v Jean-Pierre Bemba Gombo* (Judgement Pursuant to Article 74 of the Statute) ICC-01/05-01/08-3343, **T Ch III** (21 March 2016) para 742; *The Prosecutor v Jean-Pierre Bemba Gombo* (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, **A Ch** (8 June 2018) para 196-197.

convicted on different modes of individual responsibility. Ntaganda was the only one who was convicted as a direct perpetrator, on three counts, while he was convicted for the remaining fifteen counts as an indirect perpetrator.[805] Lubanga and Al Mahdi were both convicted as co-perpetrators,[806] whereas Katanga was convicted as an accessory.[807]

5.3.2 CONTEXT

As discussed before, the four analyzed cases all dealt with war crimes, meaning that the crimes had to be committed during an armed conflict, either during an international or a national conflict.[808] In this chapter, all cases dealt with war crimes committed during non-international armed conflicts. Al Mahdi was convicted for war crimes committed during a conflict between the Malian army and armed organized groups.[809] Two of these groups, *Ansar Dine* and *Al-Qaeda in the Islamic Maghreb*, took control of Timbuktu where they committed the crimes that resulted in the criminal proceedings against Al Mahdi.[810] The other three cases were all set in the same conflict; an ongoing battle between several regional rebel factions in the region of Ituri,[811] the DRC.[812] This conflict is often characterized as a conflict that is primarily ethnically motivated with warring parties organized along ethnicity lines, primarily the Hema, Lendu and Ngiti, and that largely targeted people from other ethnic groups.[813] The Prosecutor and

[805] *The Prosecutor v Bosco Ntaganda* (Judgement) ICC-01/04-02/06-2359, **T Ch VI** (8 July 2019) para 1199.
[806] *The Prosecutor v Thomas Lubanga Dylio* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, **T Ch I** (14 March 2012) para 917 and 1351-1357; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171, **T Ch VIII** (27 September 2016) para 53-56 and 58.
[807] *The Prosecutor v Germain Katanga* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436, **T Ch II** (20 April 2015) XII Disposition.
[808] Nevertheless, the Rome Statute makes a distinction between the crimes committed during an international armed conflict and a national conflict. Rome Statute, article 8. See furthermore, Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court. A Commentary* (3rd edn, Beck/Hart 2016) 312-314.
[809] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171, **T CH VIII** (27 September 2016) para 49.
[810] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171, **T Ch VIII** (27 September 2016) para 31. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud is currently at trial for war crimes and crimes against humanity committed during the same conflict. 'Questions and Answers – Opening of the Trial in the Al Hassan Case, 14 July 2020' (*ICC,* July 2020) <https://www.icc-cpi.int/itemsDocuments/200713-al-hassan-qa-trial-openingENG.pdf> accessed 4 June 2021.
[811] The conflict in Ituri involved the governments, armies and rebels from the DRC, Uganda and Rwanda. Moreover, most rebel factions present in Ituri, including the UPC where Lubanga and Ntaganda were active, were 'under the effective strategic control of the Ugandan army and later the Rwandan army'**.** See, Pascal Kalume Kambale, 'A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo' 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) 180.
[812] Mathieu Ngudjolo Chui was acquitted for crimes committed during the same conflict, and the charges against Callixte Mbarushimana were not confirmed by the Pre-Trial Chamber. Furthermore, Sylvestre Mudacumura was indicted for his role in the same conflict, yet he is still at large. 'Democratic Republic of Congo: Situation in the Democratic Republic of Congo (*ICC*) <https://www.icc-cpi.int/drc> accessed 4 June 2021.
[813] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, **T Ch I** (14 March 2012) para 76; *The Prosecutor v Bosco Ntaganda* (Judgement) ICC-01/04-02/06-2359, **T Ch VI** (8 July 2019) para 433-436. See furthermore, Richard Gaskins, *The Congo Trials in the International Criminal Court* (Cambridge University Press 2020) 66.

Court also used the frame of an essentially ethnic conflict, whereby it stressed the ethnicity of the offenders and victims.[814] Lubanga and Ntagande were both active in the Hema controlled *Union des Patriotes Congolais* [Union of Congolese Patriots] (UPC) and its military wing, the *Forces Patriotiques pour la Libération du Congo* [Patriotic Force for the Liberation of Congo] (FPLC), that targeted the Lendu and Ngiti population of Ituri.[815] Whereas Katanga was active in the Ngiti militia of *Walendu-Bindi collectivité* that targeted the Hema rebellions and its population.[816] However, the emphasis on the ethnical aspect of the conflict is an oversimplification of a complex conflict with a long history. Even though, 'the implication of the governments of the DRC, Rwanda and Uganda was motivated by the desire to control political space and natural resources',[817] the economic and (geo-)political factors that fuel the conflict are mostly ignored.[818]

Even though the prosecuted crimes were committed during armed conflicts, the Court is restricted to the suspects and the charges brought against him or her by the Prosecutor. These charges are bound by a specific time period and location, notwithstanding the total length and places where the armed conflict took place. As such, Katanga was only prosecuted for the crimes committed during an attack on one village that took place in one day.[819] Al Mahdi was indicted for the attack on several religious buildings in Timbuktu that took place between 30 June 2011 and 11 July 2011.[820] Lubanga and Ntaganda were both prosecuted for crimes that were committed in the region of Ituri between 6 August 2002 and 31 December 2003. A longer period

[814] Ethnicity is indeed one of the factors of the conflict in Ituri, yet this one-dimensional understanding of the conflict leads to the exclusion of victims, for instance those who do not belong to one of the main fighting ethnic groups, or that of offenders, for instance the political and military leaders who provided weapons for geo-political reasons. Pascal Kalume Kambale, 'A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo' 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) 184; Peter J Dixon, 'Reparations and the Politics of Recognition' 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) 342-347;

[815] *The Prosecutor v Thomas Lubanga Dylio* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, **T Ch I** (14 March 2012) para 81; *The Prosecutor v Bosco Ntaganda* (Judgement) ICC-01/04-02/06-2359, **T Ch VI** (8 July 2019) para 452-453.

[816] *The Prosecutor v Germain Katanga* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436, **T Ch II** (20 April 2015) para 716 and 1235.

[817] Pascal Kalume Kambale, 'A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo' 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) 185.

[818] Peter J Dixon, 'Reparations and the Politics of Recognition' 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) 335.

[819] *The Prosecutor v Germain Katanga* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436, **T Ch II** (20 April 2015) para 427.

[820] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171, **T Ch VIII** (27 September 2016) para 38.

than in the other two cases, yet still a rather short and limited one considering the scale of the conflict in the DRC.[821]

5.3.3 VICTIMS AND BENEFICIARIES

According to the RPE, victims are 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.[822] However, the victims that can actually claim their rights of protection, participation, and reparations are restricted to the victims of the crimes that are included in the charges against the identified accused or suspects. Hence, only a fraction of the total number of victims of crimes within the ICC's jurisdiction can actually be represented in the proceedings and request reparations. Accordingly, in the *Al Mahdi* case, only nine victims participated in the proceedings.[823] More victims participated in the other cases; 146 in the case against *Lubanga*,[824] 366 in the *Katanga* case,[825] and 2,121 in the case against *Ntaganda*.[826] The number of victims that requested to participate in the reparation proceedings and to receive reparations is often higher than the number of victims in the trial proceedings up to the conviction.

The Court is inconsistent in its approaches to identify the beneficiaries. In the *Katanga* case, the identification of beneficiaries was made solely by the Trial Chamber. Victims' applications received after the Court had ruled on the beneficiaries were not reviewed and additional victims were not included in the implementation stage.[827] Out of 341 applications for reparations,[828] the Trial Chamber identified 297 victims that were eligible for reparations as they could demonstrate that they were harmed due to the crimes of which Katanga was convicted.[829] In the three other cases, the Court verified the eligibility of the victims that applied during the juridical phase, however the TFV was tasked to continue this verification process during the

[821] *The Prosecutor v Thomas Lubanga Dylio* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, **T Ch I** (14 March 2012) para 1355; *The Prosecutor v. Bosco Ntaganda* (Judgement) ICC-01/04-02/06-2359, **T Ch VI** (8 July 2019) para 33.
[822] RPE, rule 85 (a).
[823] 'Case Information Sheet - Ahmad Al Faqi Al Mahdi' (*ICC*, 20 March 2018) <https://www.icc-cpi.int/CaseInformationSheets/al-mahdiEng.pdf> accessed 4 June 2021.
[824] 'Case Information Sheet – Thomas Lubanga Dyilo' (*ICC*, March 2018) <https://www.icc-cpi.int/CaseInformationSheets/lubangaEng.pdf> accessed 4 June 2021.
[825] 'Case Information Sheet – Germain Katanga' (*ICC*, 20 March 2018) <https://www.icc-cpi.int/CaseInformationSheets/katangaEng.pdf> accessed 4 June 2021.
[826] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 234.
[827] Miriam Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (Cambridge University Press 2020) 107.
[828] That a lower number of victims requested (341) and received reparations (297) than that participated in the trial proceedings (366) may be explained by the fact that Katanga was acquitted from the charges of rape, sexual slavery and the use of children to participate actively in a conflict. Victims of these crimes could participate during the trial proceedings, but not in the reparation proceedings.
[829] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017), para 168.

implementation stage.[830] Consequently, out of 473 applications, 425 eligible victims were identified by the Court in the case against *Lubanga*,[831] yet in December 2020, 933 beneficiaries were registered.[832] According to the TFV, this number rose to over a thousand in the spring of 2021.[833] In the *Al Mahdi* case, 137 victims filed applications to request reparations,[834] though the TFV is still identifying eligible victims. The *Ntaganda* case saw the highest number of victims participating during the proceedings, which was reflected in the number of potential beneficiaries. It was estimated by the Registry that of the 2,121 victims that participated during the proceedings, roughly 1,460 victims would be eligible for reparations.[835] Based on this estimation, amongst others, the Trial Chamber considered the total number of potential eligible victims in the case against *Ntaganda* in the range of thousands.[836] For clarity, the number of victims who participated in the Court proceedings, the applications for reparations, and the identified beneficiaries as described above are included in table 5.1.

[830] See for instance, *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 144.
[831] *The Prosecutor v Thomas Lubanga Dylio* (Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, **A Ch** (18 July 2019) para 207 and 221.
[832] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 235.
[833] 'Factsheet (4 March 2021)."Collective reparations in the form of services to victims of the crimes for which Thomas Lubanga Dyilo was convicted"' (*TFV* 4 March 2021) <https://www.trustfundforvictims.org/en/news/factsheet-4-march-2021-collective-reparations-form-services-victims-crimes-which-thomas> accessed 7 June 2021.
[834] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 159.
[835] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 234.
[836] Additionally, when using a very conservative approach, the TFV estimated that the number of beneficiaries that should receive reparations addressing their material, psychological and physical harm will reach over 7,500. Whereas indirect victims who should benefit from psychological care ranges beyond 14,000. *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 88-89; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 246.

Table 5.1: Number of victims before the International Criminal Court

	Victims participated during trial	Applications for reparations received	Beneficiaries identified by the ICC	Beneficiaries identified by the TFV
Lubanga	146	473	425	Over 1000
Katanga	366	341	297	-
Al Mahdi	9	137		In process
Ntaganda	2121		Estimation of thousands	

Some of the analyzed cases in this chapter concern crimes that specifically targeted vulnerable groups, consisting of groups that are especially vulnerable to abuses of human rights and humanitarian law because of, amongst others, their age (children and elderly people), gender, or disability. In several cases, children and women were specifically targeted. Two of the four cases contained convictions for the conscription and use of child soldiers,[837] a crime that targets children under the age of fifteen directly. Both boys and girls were conscripted as child soldier, yet the life as a child soldier might have had a different impact on boys and girls.[838] In addition, Ntaganda was convicted for crimes of sexual violence, namely sexual slavery and rape. Even though men and boys are also victims of sexual violence, these crimes are primarily committed against girls and women.[839]

5.4 Reparations before the ICC

In its first ruling on reparations, the ICC recognized that 'the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties'.[840] Furthermore, the Court acknowledged in the same decision that the need for reparations is increasingly recognized in international criminal law.[841]

[837] *The Prosecutor v Thomas Lubanga Dylio* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, **T Ch VI** (14 March 2012) para 916; *The Prosecutor v Bosco Ntaganda* (Judgement) ICC-01/04-02/06-2359, **T Ch VI** (8 July 2019) para 1199.

[838] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 23.

[839] *The Prosecutor v Bosco Ntaganda* (Judgement) ICC-01/04-02/06-2359, **T Ch VI** (8 July 2019) para 940, 954 and 974; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 64.

[840] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 185.

[841] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 177.

In later rulings, the Court claimed that 'the right to prompt reparations is of paramount importance'.[842]

This importance stemmed from different objectives that the Court entrusted to reparations. First, the Court-ordered reparations aimed to remedy the harm that was inflicted on the victims.[843] This is in line with 'the general principle of public international law that reparations should, where possible, attempt to restore the *status quo ante'*.[844] A concept that is incongruous in case the reparations address harm caused by international crimes such as murder, the use of child soldiers, and sexual slavery. Addressing the harm suffered by victims is also a way to deliver justice to them.[845] Second, the Court ordered the reparations against the offenders and they were held liable for the costs involved in implementing the ordered reparations.[846] Consequently, the reparations aimed to 'ensure that offenders account for their acts'.[847] This was not meant to be an additional punishment for the offender, instead the ordered reparations merely aimed to be of a remedial nature.[848] Third, reparations aim to provide a public acknowledgement of the harm and suffering of the victims of the crimes committed by the offenders.[849] The last aim of the court-ordered reparations revolved around prevention of future violations,[850] including more

[842] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 6.

[843] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 267; *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **TR Ch VIII** (17 August 2017) para 28.

[844] The Court made references to case law of the Permanent Court of International Justice (the *Chorzow* case) and the Inter-American Court of Human Rights (the case of *Velásquez Rodríguez v Venezuela*). *The Prosecutor v Germain Katanga* (Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations Pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, **A Ch** (8 March 2018) para 178.

[845] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 71; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 15.

[846] Rome statute, article 75 (2); *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 20.

[847] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 58. See furthermore, *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 15.

[848] *The Prosecutor v Germain Katanga* (Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, **A Ch** (8 March 2018) para 185; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 100.

[849] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 71; *Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 15.

[850] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 71; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 28.

unambiguous goals as reconciliation within the community and family,[851] the reintegration of former child soldiers,[852] and the prevention of future victimization of victims, particularly former child soldiers.[853]

According to the Court, 'reparations should be appropriate, adequate and prompt',[854] and they should be reflective of the local culture and customs, as long as they are not of a discriminatory nature which leads to the exclusion of some victims from participating.[855] In the same light, the ICC deemed it necessary that the ordered reparations, the reparations process, and the implementation procedure were designed in a manner that avoided 'replicating discriminatory practices or structures that predated the commission of the crimes'.[856] For instance, the Court should employ a gender inclusive and sensitive approach that takes account of the needs and views of people from both genders, as well as the gender imbalances that existed prior to the violations and that may still be in place.[857] Additionally, victims should be actively consulted during the design and implementation phase.[858]

5.4.1 CLASSIFYING THE ORDERED REPARATIONS

As discussed before, the Court's order for reparations has to include the appropriate reparative modalities for the case at hand.[859] The specificity of these modalities varies

[851] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T CH I** (7 August 2012) para 179 and 193; *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 46 and 72.
[852] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 179, 216 and 244; *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 67 (vii) and 71.
[853] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 67 (vii).
[854] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 242.
[855] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 47. See furthermore, *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 105.
[856] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 192; *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 17.
[857] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 60-61.
[858] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 282; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 250.
[859] In its first ruling, the Trial Chamber did not directly order modalities of reparations. Instead, it gave examples of possible reparations, but left the decision regarding the reparations that were appropriate to the TFV. The Appeal Chamber stated that this did not contain of an order for reparations, and amended the ruling so that it was an order for reparations. It relabeled the examples of reparations as awarded modalities. *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-

in the analyzed cases. In the cases against *Lubanga* and *Ntaganda*, the ordered modalities consisted of four broad categories of reparations: restitution, compensation, rehabilitation and 'other forms of reparations' or satisfaction.[860] Several examples of more specific appropriate reparations within these categories were given, yet these were not directly ordered. Instead, the TFV was tasked to decide which of the broader modalities were appropriate to be included in the DRIP, as well as on the form these recommended modalities should take.[861] For instance, in the *Lubanga* case, the TFV decided to include the broader modality of rehabilitation, and chose, amongst others, the form of vocational training and medical treatment.[862] However, the Court was more specific in the cases against *Katanga* and *Al Mahdi*. Instead of simply listing the four categories of reparations, the ICC ordered a limited number of detailed modalities of reparations. For example, the appropriate reparations, both individual and collective, were restricted to two categories of reparations,[863] or the specific amount of compensation was included in the order.[864]

The UN Reparation Principles was one of the sources that the Court relied on when establishing the principles on reparations.[865] Nevertheless, my analysis shows that the reparations ordered were not automatically classified according to the categories as used by the UN Reparation Principles. Material reparations were categorized following the UN Reparation Principles; these were classified as restitution, compensation and rehabilitation.[866] A categorization that was also reflected in the Rome Statute, where article 75 listed restitution, compensation and rehabilitation as possible reparations. Notwithstanding the absence of symbolic reparations in article 75 of the Statute, the Court decided in its first ruling that reparations with a symbolic, preventive or transformative value could also be a suitable

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01/06-2904, **T Ch I** (7 August 2012) para 266; *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 30, 60 and 201-202.

[860] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 201-211.

[861] The consultation with victims and their communities is essential in determining which modalities and reparation projects should be included in the DRIP. See *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 70; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 212.

[862] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 68-69.

[863] The individual reparations should be awarded in the form of compensation, and rehabilitation measures were regarded to be appropriate forms of collective reparations. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 83.

[864] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T CH II** (24 March 2017) para 300.

[865] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 24; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659 , **T Ch VI**(8 March 2021) para 29.

[866] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 35-42.

option.[867] Nevertheless, these were not labelled in line with the UN Reparation Principles, nor were the terms satisfaction and guarantees of non-repetition used. Instead, the Court referred to 'other modalities of reparations' or symbolic reparations.[868] In its fourth case, the *Ntaganda* case, the ICC used the label of satisfaction for the first time.[869] The category of guarantees of non-repetition was not used as a label for reparations in the analyzed cases, and the Court barely discussed this type of reparations.[870]

5.4.2 CATEGORIES OF REPARATIONS

This section examines the ICC's understanding of the different categories of reparations.

RESTITUTION

According to the ICC, 'the overall purpose of reparations, […] is to repair the harm caused and to achieve, to the extent possible, *restitutio in integrum*',[871] meaning that the victims should be brought back to the situation they were in before the violations took place.[872] In the case against *Lubanga*, the Court restricted restitution to a form of individual reparations; its aim was to restore an individual's life.[873] This is surprising as the Court only ordered collective reparations in the *Lubanga* case.

The Court regarded restitution as a form of reparations that is often unachievable given the 'multiple, diverse, and multi-faceted nature of the harms suffered by the victims'.[874] Restitution is especially deemed to be impossible in cases

[867] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 222.
[868] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 43; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 49.
[869] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 88, 199 and 207.
[870] Instead, guaranteeing the non-repetition is regarded as an aim of rehabilitation. See for instance, *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 67.
[871] *The Prosecutor v. Thomas Lubanga Dylio* (Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, **A Ch** (18 July 2019) para 107.
[872] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 223; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 201.
[873] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para224; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 35.
[874] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 198. See furthermore, *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the

relating to the conscription and use of child soldiers, yet the Court still ordered restitution as one of the appropriate modalities in the two cases involving this particular group of victims.[875] It seems that restitution was only included in the list of ordered modalities as a matter of form, since the Court in the *Ntaganda* case requested that the TFV should substantiate its reasons in case it would decide that restitution was indeed appropriate in the case at hand.[876]

COMPENSATION

According to the Court, compensation is the awarding of monetary funds in order to acknowledge and address the harm that was suffered by the victims.[877] Compensation may be appropriate in case there is quantifiable economic harm and when there is sufficient funding to make compensation a feasible option.[878] Even though the Court marked compensation as an appropriate measure to address quantifiable harm, it also stated that compensation should be applied on a broad basis, including to repair essentially unquantifiable damages such as psychological harm and moral and non-material damage.[879] In the *Ntaganda* case, the Court stated that compensation is 'a substitute remedy provided as a means of redress when there is no way to undo the effects of the violation through other measures'. [880] This might explain why compensation may also be awarded for unquantifiable harm; it is a remedy of last resort. Furthermore, in order to address these types of harm, compensation alone

"Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67.

[875] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 200-201.

[876] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 204.

[877] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 40; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 47.

[878] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 37; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 85.

[879] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 229 -230; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 39; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 86.

[880] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 84.

might not be suitable, instead it should be combined with other modalities of reparations.[881]

Monetary compensation was included in all analyzed cases. In the cases against *Lubanga* and *Ntaganda*, compensation was included in a general list of appropriate modalities of reparations, primarily based on article 75 of the Rome Statute.[882] The modality of compensation is not specified nor calculated, instead the TFV was tasked to develop a scheme with the specific reparation projects, possibly including compensation, that would be implemented.[883] In contrast, in the *Katanga* case, the Court awarded every victim with *locus standi* individual compensation amounting to US$ 250.[884] The compensation is of a symbolic nature, and was not intended to redress the suffered harm in its entirety.[885] Instead, it was designed to be meaningful for the victims, to acknowledge the harm suffered by them, and to offer them an opportunity to become financially independent.[886] In addition, victims living abroad, who, as such, cannot participate in the collective reparation projects that are enrolled in the DRC and Uganda,[887] will receive additional symbolic compensation to counterbalance the unavailability of collective reparations.[888]

In the case against *Al Mahdi*, the Court ordered individual compensation to the victims who depended exclusively on the demolished mausoleums for their income.[889] The compensation was not intended to be of a symbolic nature,[890] and its objective was to remedy the (quantifiable) financial damages suffered by them.[891] Furthermore,

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[881] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 85.

[882] See *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 34 and 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 82 and 199.

[883] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 70; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 202 and 212.

[884] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 300.

[885] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 300.

[886] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 298-300.

[887] The TFV proposed two distinct platforms for collective reparations: one for the victims living in the DRC and one for the victims receding in refugee camps in Uganda. See *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 66.

[888] *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 61.

[889] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red, **T Ch VIII** (4 March 2019) para 83.

[890] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red, **T Ch VIII** (4 March 2019) para 26.

[891] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 83.

descendants from the persons buried in the mausoleums were compensated for their emotional suffering.[892] Even though this damage is unquantifiable, the modality was ordered in order to make a distinction between the non-material suffering of the community of Timbuktu, who were awarded collective reparations, and the descendants of the buried persons.[893] In this case, the Court did not specify the amount of compensation, instead the TFV was tasked to decide on the sum.[894]

REHABILITATION

According to the ICC, '[i]t is crucial to provide victims with opportunities for rehabilitation'.[895] The Court defined rehabilitation in line with the UN Reparation Principles: rehabilitation should include medical and psychological care, and social and legal services.[896] Yet the Court went further and also included measures for the reintegration of child soldiers in their families and communities,[897] a process that involves the respective communities,[898] as well as measures to improve the economic situation.[899] These rehabilitative measures should be designed in a holistic fashion.[900] Rehabilitation is often directed at individual victims with the aim to 'restore, as far as possible, their independence, physical, mental, social, and vocational ability, and full

[892] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 90.
[893] *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 89.
[894] The two DRIPs of the TFV and the decision of the ICC regarding these plans were made available in highly redacted versions. Consequently, at the time of writing, information regarding the compensation and its amount is not publicly available.
[895] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 87.
[896] Reparation Principles, principle 21; *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 233. See furthermore, *The Prosecutor v. Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 42; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 87.
[897] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 234; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.
[898] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 236; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 205.
[899] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 48; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI**(8 March 2021) para 203.
[900] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 87.

inclusion and participation in society'.[901] Moreover, rehabilitative measures also aim to address the shame felt by individual victims, especially child soldiers and victims of sexual violence, and to avoid further victimization and stigmatization of these victims.[902] However, rehabilitation may also be ordered in order to restore victimized communities, for instance by preventing future conflicts.[903]

The Court ordered rehabilitation as an appropriate modality in all four analyzed cases. These rehabilitation measures were ordered as collective reparations,[904] therefore, these are further discussed in section 5.5.

SATISFACTION

The label 'satisfaction' was used for the first time in the fourth case of the ICC, the *Ntaganda* case.[905] Nevertheless, this category of reparations was discussed in other cases under the heading of 'other modalities of reparations',[906] or as 'symbolic reparations'.[907] Satisfaction measures aim to increase the awareness of the committed crimes in the broader society,[908] and prevent the crimes from happening

[901] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203. See furthermore, *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67.

[902] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 206.

[903] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 236; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 48; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 206.

[904] The ICC exclusively ordered collective reparations in the cases against *Lubanga* and *Ntaganda*, while the rehabilitation measures in the cases against *Katanga* and *Al Mahdi* were ordered as collective reparations that were explicitly distinguished from individual reparations. *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 152; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 304-305; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 83; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 7.

[905] Even though the Court used the term satisfaction in this reparation decision, it also included a separate category of symbolic reparations consisting of satisfaction measures. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 88 and 208.

[906] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 237; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 297.

[907] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 49. In the *Ntaganda* case, the Court discusses satisfaction separately from symbolic reparations without discussing the difference between these two forms of reparations. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 207-208.

[908] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 239; *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied

again.[909] Furthermore, satisfaction intents to protect the dignity of the victims and to diminish the stigmatization of victims,[910] as such these measures may assist the recovery and reintegration of the victims in their communities.[911] Moreover, satisfaction measures 'may contribute to the process of rehabilitation'.[912] In the *Al Mahdi* case, the Court deemed satisfaction measures to be 'particularly appropriate to repair harm caused to a community',[913] while in the *Ntaganda* case, these were primarily considered as relevant for addressing non-material damages.[914]

Measures of satisfaction were ordered in three out of the four analyzed cases. The Court did not order satisfaction in the case against *Katanga*, since victims expressed that they did not want satisfaction measures such as commemorations, broadcasting of the trial or the search for missing persons. They regarded these measures as inappropriate or pointless with a risk of revictimization and social unrest.[915] The measures of satisfaction that were ordered in the other cases were labelled as collective reparations, and are consequently examined in section 5.5.

GUARANTEES OF NON-REPETITION

The category of guarantees of non-repetition as set forth in the UN Reparation Principles was not defined nor clarified in any of the analyzed cases. Nevertheless, the Court did order guarantees of non-repetition in the case against *Al Mahdi* that dealt with crimes against cultural heritage.[916] The ICC ordered 'measures to guarantee non-

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to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 43; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 88 and 207.

[909] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 43.

[910] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 239; *The Prosecutor v. Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 88 and 207.

[911] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 207.

[912] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 236; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 208.

[913] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 49.

[914] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 88.

[915] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 301.

[916] See for instance, 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,* 25 August 2017) <http://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 8 July 2021; Francesca Capone, 'An Appraisal of the *Al Mahdi* Order on Reparations and Its Innovative Elements. Redress for Victims of Crimes against Cultural Heritage' (2018) 16 Journal of International Criminal Justice 645, 656.

repetition of the attacks directed against them [the mausoleums]'.[917] The Court did not clarify how these modalities should materialize and let the design of the measures of guarantees of non-repetition to the TFV. Since this modality of reparations is inherently collective, this order for guarantees of non-repetition will be discussed in section 5.5.

5.5 COLLECTIVE REPARATIONS

The Rome Statute nor the RPE defined the concept of collective reparations, instead the Court had to give meaning to the regulation that reparations may be ordered 'on an individualized basis, or, where it deems it appropriate, on a collective basis or both'.[918] In the reparation principles as first established in the *Lubanga* case, neither the Trial Chamber nor the Appeals Chamber clearly clarified the notion of collective reparations. The explanation of collective reparations was limited to the statement that '[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently',[919] and the requirement that collective reparations should address the individual as well as the collective harm that victims suffered.[920] In the subsequent cases against *Katanga* and *Al Mahdi*, the Court did not amend nor complement the principles regarding (collective) reparations.[921] Nevertheless, the Court did include clarifications of the concept of collective reparations in its reparations order instead of in its reparation principles. In the *Ntaganda* case, the Court accepted the principles as set in the *Lubanga* case and complemented them with some new principles.[922] Additionally, some of the already existing principles were further elaborated, including the principle on the types and modalities of reparations.[923] This

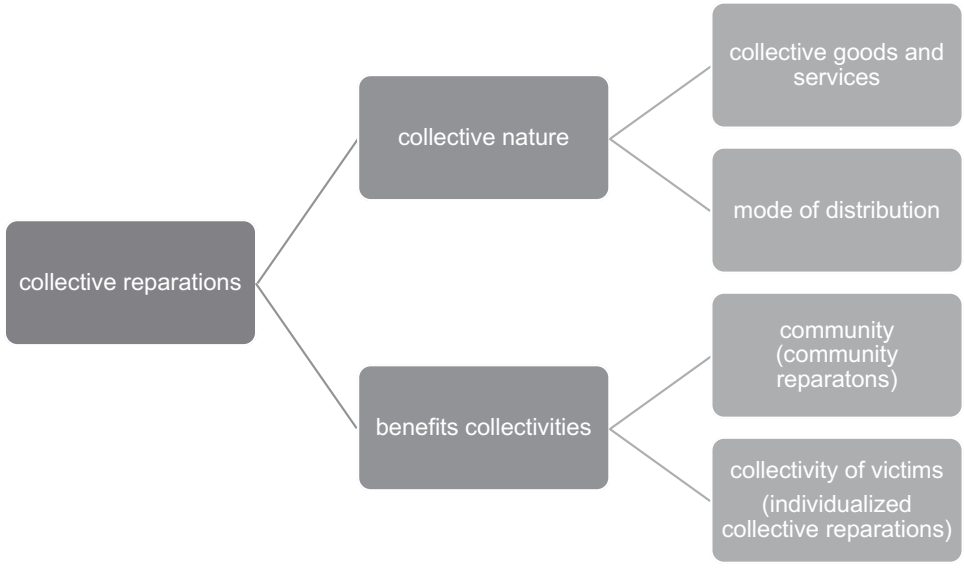
[917] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 67.
[918] RPE, Rule 97(1).
[919] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 220; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 33. This statement was endorsed by the Court in the three subsequent cases: *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 265; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 45; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 78.
[920] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 221; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 33.
[921] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 30; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 26.
[922] Examples of principles that were added by the ICC in the case against *Ntaganda* are: the 'do no harm' principle, the principle to use a gender-inclusive and sensitive approach, and the principle of transformative reparations. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 29, 50, 60 and 94.
[923] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 78-88.

supplemented information was based on decisions of the Court in previous cases, primarily the reparations orders.

5.5.1 Defining collective reparations

In its first case, the Court exclusively ordered collective reparations, yet a description of this category of reparations was lacking. The ICC's first comprehensive definition of the concept of collective reparations was given in the case against *Katanga*, a definition that was duplicated in the subsequent cases. According to the Court, collective reparations is an 'open concept',[924] meaning that collective reparations can have different forms, depending on the facts of the particular case, such as the harm that needs to be addressed and the number of victims.[925] In its case law, the Court identified four different forms of collective reparations, as can be seen in diagram 5.1.

Diagram 5.1: Forms of collective reparations



[924] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 278.
[925] *The Prosecutor v Thomas Lubanga Dylio* (Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, **A Ch** (18 July 2019) para 40.

Hence, the Court differentiated two distinctive types of collective reparations. Those of a collective nature, either the distributed goods and services, or the dissemination approach is of a collective nature, and those that benefit collectivities.[926] The latter type consists of two categories. First, collective reparations can be awarded to a group or community that existed as such before the violations took place, these are bound by pre-existing conditions, such as ethnicity, culture, religion and location, and a shared identity.[927] This group does not require a preceding legal personality, nor the violation of their collective rights.[928] Second, collective reparations may also be awarded to a group that is bound by a shared experience of victimization and the collective suffering of the members of the group.[929] The shared suffering is decisive in determining whether or not the group could receive collective reparations. That the members of the group have been victim of the same crime is insufficient on its own.[930]

Furthermore, the Court distinguished two different categories of collective reparations based on the specific needs that are addressed by the reparations. As such, a division is made between collective reparations that benefit the community as a whole and those that benefit the individual members of a group.[931] The first group of reparations, also referred to as community-reparations, are awarded to the community without making a distinction between its different members.[932] The reparative modalities from this category primarily include non-excludable goods and services; it is difficult to keep others from benefitting from this reparative project.[933] For instance, it is difficult and undesirable to deny access to a hospital simply because community members lack a victim's status. Symbolic measures are also an example of collective reparations that benefit the community as a whole and that are non-excludable. These measures intend, amongst others, to promote reconciliation, the sharing of memory among community members, and to increase the awareness of the committed crimes

[926] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 80.
[927] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 274.
[928] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 276; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 80.
[929] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 274; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 80.
[930] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 275.
[931] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 278; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 81.
[932] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 278.
[933] UNGA 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (14 October 2014) UN Doc A/69/518, para 40.

in the broader society. Hence these measures provide benefits for the community as a whole.[934]

The second group of collective reparations is of a more individual nature. These reparations target the individual harm of the group members and focus on 'the needs and current situation of the individual victims in the group'.[935] Health care measures awarded in this category of reparation are awarded to all members of the group. Yet, the specific treatment and facilities are tailored to the particular needs of the individual members of that group. In other words, these collective reparations are 'provided to a group of victims, but allow for the benefit to be adjusted to the particular need of each victim'.[936] The collective reparations that are customized to address the needs of individual group members are also referred to as individualized collective reparations.[937] It is the only category of collective reparations that was ordered in the case against *Ntaganda*.

The difference between individualized collective reparations and individual reparations seems to be minor. According to the Court, the distinction between collective and individual reparations can be drawn based on the beneficiaries: collective reparations address the group as a whole, and individual reparations benefit the individual members of the group.[938] Another contrast between the two forms of reparations concentrates on the harm that is addressed, since collective reparations are awarded to victims who have experienced shared harm.[939] Indeed, the distinction between individual and collective reparations is based on similar criteria as the division between community reparations and individualized collective reparations. Collective reparations, primarily the community reparations, address the shared harm of a group as a whole, whereas both individual reparations and individualized collective reparations address the harm of individual members of a group. In other words, the distinction between individual and collective reparations, especially in the form of individualized collective reparations, is not clear-cut. The Court acknowledged this by referring to the following statement of the TFV: 'In fact, in practice the difference between an 'individual' and 'collective' form of reparation may be quite subtle and manifest itself primarily in the role that the beneficiaries are to play in the design,

[934] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 43; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 88 and 207; UNGA 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (14 October 2014) UN Doc A/69/518, para 33.
[935] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 280.
[936] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 280.
[937] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 280.
[938] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 277.
[939] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 80.

implementation and oversight of their assistance.[940] Some modalities of reparations benefit group members individually, yet they can still be qualified as collective reparations since they were designed or managed by a collective.[941] For instance, even though individual victims benefit from medical treatment, this reparative modality can be considered to be of a collective nature when the group of beneficiaries collectively design, realize and/or manage the medical program.

The ICC cited several reasons for the ordering of collective reparations. As such, collective reparations were ordered because the crimes resulted in group victimization, shared harm and had an effect on the community as a whole.[942] Additionally, several pragmatic reasons relating to the implementation were given, including the high and/or uncertain number of victims, the scope and complexity of the suffered harm, the limited available resources, and the reluctance of some victims to come forward due to shame and stigmatization.[943] In the case against *Ntaganda*, where the Court explicitly ordered individualized collective reparations, further reasons were stated, for instance this type of collective reparations would serve an approach to reparations that would be holistic, more practical and efficient, and that would be able to address the long-term needs of the victims.[944]

5.5.2 AWARDED COLLECTIVE REPARATIONS

After the analysis of the ICC's understanding of collective reparations in general, this section examines the ordered collective modalities in more detail.

COLLECTIVE RESTITUTION

Even though the ICC acknowledged that restitution was unlikely to be appropriate in the cases before it, the Court did include this modality in the cases against *Lubanga*

[940] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 277 (footnote 391); *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 24.
[941] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 25.
[942] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 212; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 289; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 59; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 188 and 194.
[943] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 289 and 292; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 82; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 8, 190, 194 and 195.
[944] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 194.

and *Ntaganda*.[945] In both cases, the reparations ordered were solely of a collective nature, making the recommended restitution of a collective kind as well. Yet the Court did not explain what they regarded as collective restitution, instead the TFV was tasked with the identification of the appropriate reparations based on the Court's ordered modalities. Nonetheless, in the *Lubanga* case, the DRIP of the TFV did not mention restitution, nor was it included in the proposed reparation programs. In its decisions regarding the DRIP, the Court did not come back to the status of restitution. Even though the TFV was only required to present its reasons for including restitution in its DRIP, the TFV still incorporated its arguments against the provision of restitution and argued that restitution is a form of reparations that is unachievable due to the severity of the crimes and the time passed.[946]

COLLECTIVE COMPENSATION

Compensation was ordered in all four cases, though in two cases these were explicitly ordered as an individual reparation.[947] In the cases against *Lubanga* and *Ntaganda*, the ICC restricted the reparations it ordered to (individualized) collective reparations and listed compensation as an appropriate modality of reparations.[948] In the *Lubanga* case, the concept of collective compensation was not further explained by the Court in the reparations order nor in the subsequent appeal's decision. In fact, the 2019 appeals decision regarding the size of the ordered reparations for which Lubanga is liable marked the first time the Court scarcely discussed collective compensation.[949] The Appeals Chamber only stated that: 'collective reparations can include the payment of sums of money to individuals to repair harm suffered'.[950] However, the Court did not identify what distinguishes this form of collective compensation from individual compensation as awarded in the cases against *Katanga* and *Al Mahdi*.

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[945] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 200-201.

[946] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 114.

[947] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 300; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red, **T Ch VIII** (4 March 2019) para 83.

[948] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 202 and 212-213; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 200 and 202.

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

[950] *The Prosecutor v Thomas Lubanga Dylio* (Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, **A Ch** (18 July 2019) para 40.

Especially considering that the sum is awarded to individual victims in both modes of compensation.

In the case against *Ntaganda*, the Court reiterated this statement, and furthermore referred to the TFV's claim that compensation might be of a collective nature.[951] According to the TFV, compensation that is awarded in a standardized scheme can be identified as a form of collective reparations.[952] Hence, the deciding factor that contributes to the distinction between compensation as an individual or collective form of reparations consists of the harm that is addressed. The benefits of individual compensation are specific to the individual victim and address the harm they suffered, whereas the collective compensation is standardized and consequently not particular to the harm each individual victim has suffered. Instead, the shared harm of each group of victims is taken into consideration during the setting of the standardized amount.[953]

Nevertheless, the compensation that was labelled as an individual form of reparation in the case against *Katanga* also consisted of a standardized amount of money.[954] In the *Al Mahdi* case, the compensation for moral harm was standardized as well, while it seems that the setting of the compensation for material harm was based on an individual assessment of the economic damages.[955] In other words, the ICC has modified its interpretation of collective reparations, and specifically collective compensation, so that compensation to individual victims could still be distinguished as a form of collective reparations.

COLLECTIVE REHABILITATION

In all four cases, the ICC ordered rehabilitation as a collective form of reparations. In the cases against *Lubanga*, *Al Mahdi* and *Ntaganda*, the Court ordered the modality of rehabilitation, whereby it gave several requirements for, and examples of the rehabilitation measures, yet the final selection and design of these projects was up to

[951] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 193.
[952] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the Reparations Proceedings) ICC-01/04-02/06-2635-Red, **TFV** (18 December 2020) para 83.
[953] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the Reparations Proceedings) ICC-01/04-02/06-2635-Red, **TFV** (18 December 2020) para 83.
[954] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 300.
[955] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 104 ('compensation to address the individual financial losses suffered'); *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red, **T Ch VIII** (4 March 2019) para 31 ('the TFV arrives at individual awards ranging from').

the TFV.[956] In contrast, the Court ordered specific rehabilitation measures in the case against *Katanga*.[957]

The rehabilitative measures that were ordered or recommended can roughly be divided into seven categories: education, income-generating activities, health care, housing, 'general rehabilitation', reconciliation projects, and assurances of a safe return. Education and measures to assist victims to become financially independent were deemed to be appropriate measures of rehabilitation in all four cases. The Court hardly elaborated on the category of education.[958] The only exception is the *Al Mahdi* case where the court specified that the education programs should 'promote Timbuktu's important and unique cultural heritage'.[959] Hence, this measure was not directed to general (primary, secondary and/or tertiary) education, but to educating the community on their culture. The measures that were meant to support victims in becoming self-sufficient took several forms: vocational training,[960] sustainable work opportunities,[961] income-generating activities,[962] and the establishment of a micro-credit system.[963]

Another two categories were mentioned in three cases; medical and psychological care, and housing projects. The first category, consisting of psychological care, was proposed in the cases against *Lubanga*, *Katanga*, and

[956] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67-70; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 83 ('collective measures in this regard may include'); *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203 ('Measures of rehabilitation may include a wide range of inter-disciplinary activities') and 212.

[957] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 304.

[958] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 83; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 302; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

[959] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 83.

[960] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

[961] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

[962] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 302; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

[963] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 83; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

Ntaganda.[964] Medical care was only included in the *Lubanga* and *Ntaganda* cases.[965] A possible explanation for disregarding medical care in the *Katanga* case is that the Court could only establish physical harm for two victims.[966] These two victims were awarded compensation, which they could spend according to their own needs, including medical care.[967] The category of support for housing was not further detailed in any of the three reparation orders of the ICC.[968]

In two cases, the Court recommended 'general rehabilitation' in addition to measures as education, medical care, housing and economic projects.[969] The concept of 'general rehabilitation' was not explained, and it is unclear what the distinction is between general and specific rehabilitative measures. Lastly, two approaches to rehabilitation were only recommended in one case. In the case against *Al Mahdi*, the Court recommended the creation of programs for the return and resettlement of inhabitants who fled Timbuktu during the violations.[970] While projects that assisted the reintegration of victims in their communities and families, for instance through mediation, were suggested in the *Ntaganda* case.[971]

SATISFACTION

As discussed in section 5.4.2, the ICC ordered satisfaction, or symbolic reparations, in three of the four analyzed cases. Nevertheless, the satisfaction measure consisting

[964] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 69; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 302; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

[965] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 69; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203. In the case against *Al Mahdi*, the Court could not establish a causal connection between physical harm and the demolition of the protected buildings. Consequently, it did not order reparations for bodily harm. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 97-99.

[966] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 173.

[967] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 300.

[968] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 69; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 302; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

[969] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 69; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

[970] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 83.

[971] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 203.

of an apology by the offender was considered to be valuable in all four cases.[972] In the *Katanga* case this measure was not ordered under the heading of reparations, instead the Court acknowledged that a voluntary apology might strengthen the reparations process.[973] In the case against *Ntaganda*, the Court also claimed that an apology could contribute to the reparations process, yet this time it did so in the section of the reparations order that included the appropriate modalities of reparations.[974] However, this reparative measure could only be ordered after consultation with the victims.[975] Hence, it seems that the Court regarded an apology as an appropriate measure of reparations, as long as the victims agreed that it would be valuable to them. The offender should apologize voluntarily, he cannot be forced to do so.[976] Al Mahdi had already apologized during his trial, an apology that the Court in the reparations phase deemed to be genuine.[977] The Trial Chamber did acknowledge that several victims regarded the apology to be unsatisfactory to them, though it did not order an additional apology. Instead, it ordered that Al Mahdi's apology enclosing translations in the local languages of Timbuktu was made publicly available.[978] Less than two years later, the same Trial Chamber decided that the apology should not be used as a reparations measure when a sufficiently high number of victims rejected this apology, and consequently, the approved reparations plan for the Al Mahdi case did not include an apology.[979]

In addition to the official apology, other forms of satisfaction were ordered by the ICC. In the cases against *Lubanga* and *Al Mahdi*, commemorations, ceremonies and memorials were suggested. These should publicly recognize the harm of the community and could as such contribute to the process of rehabilitation, yet the TFV had to decide on how these ceremonies should take place.[980] The Court also ordered three very specific measures of satisfaction in the cases against *Al Mahdi* and

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[972] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67.

[973] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 315.

[974] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 210.

[975] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 210.

[976] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 67; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 315; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 210.

[977] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 70.

[978] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 69-71.

[979] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red, **T Ch VIII** (4 March 2019) para 99.

[980] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 90.

Ntaganda: the payment of a highly symbolic € 1 to the international community,[981] the opening of a community center that will be named after one of the victims,[982] and a sign on a hospital stating that the building falls under special protection of international humanitarian law.[983] In the two cases involving child soldiers, a group of victims that is often stigmatized, the Court ordered programs that aimed to reduce the stigma, uphold the dignity of the victims, and safeguard an active role of the victims in their communities by increasing the communities' awareness of the crimes and consequent suffering.[984] These programs consist of education campaigns directed at disseminating information regarding the court case, diminishing the stigma, and improving the victims' situation. In addition, the issuing of an official certificate of the harm that was suffered was also deemed to be an adequate program in this category.

Lastly, similar to the Extraordinary Chambers in the Courts of Cambodia (hereinafter ECCC) and the IACtHR, and by referring to the case law of the latter court,[985] the ICC regarded the conviction, sentencing and the reparations order a measure of reparations in itself. According to the Court, these decisions were 'likely to have significance for the victims, their families and communities'.[986] Since they 'may also serve to raise awareness about the extent of the damage caused and result in a recognition thereof', and show that the offender was held accountable for the crimes he committed.[987] In the *Ntaganda* case, the Court labeled its decisions as satisfaction.[988] In addition, in the same case, the Court claimed that a particular decision it had made could embody a measure of satisfaction: its recognition of children born out of rape and sexual slavery as direct victims.[989] By giving these children the status of direct victims instead of indirect victims, the Court acknowledged the harm that was specific to these children. Despite the significance of this decision, especially the implications for their status as beneficiaries for the ordered reparations,

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[981] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 107.
[982] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 208.
[983] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 207.
[984] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 207.
[985] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 237; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 211.
[986] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 237.
[987] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 88 and 211.
[988] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 211. In the *Lubanga* case, the ICC placed this modality in the category of 'other modalities'.
[989] According to the Court, children born out of rape and sexual slavery suffered as a direct result from the crimes, whereas children whose mothers were victims of rape or sexual violence, but who were not born out of these acts suffered indirectly and can consequently be considered indirect victims. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 123.

it is questionable whether it can be considered to be a measure of reparations. The Court did not make this statement in the section containing the adequate modalities of reparations, rather in the section focusing on the victims eligible for reparations, therefore it seems the Court did not intend this measure of satisfaction to be a form of reparations.

GUARANTEES OF NON-REPETITION

As discussed before, the Court ordered guarantees of non-repetition for crimes against cultural heritage in the case against *Al Mahdi*.[990] Since UNESCO had renovated the mausoleums before the reparations order was issued, the Court ordered 'measures aimed at rehabilitating the Protected Sites with effective measures to guarantee non-repetition of the attacks directed against them'.[991] Hence, it seems that the modalities of rehabilitation and guarantees of non-repetition are closely connected in this case. Except for the requirements to consult the local authorities and to design the reparations based on the needs for each mausoleum, the reparations order did not provide instructions for the TFV with regard to the design and implementation of this modality.[992] As we will see in section 5.7.2, the correlation between rehabilitation and guarantees of non-repetition is also reflected in the proposed projects in this category by the TFV.

5.6 BENEFICIARIES OF COLLECTIVE REPARATIONS

The beneficiaries of the collective reparations ordered by the ICC can be divided into four categories: the individual victims, communities, society at large, and vulnerable victims. This section discusses these four categories.

5.6.1 DIRECT AND INDIRECT VICTIMS

First and foremost, the beneficiaries of the collective reparations ordered by the ICC are the direct and indirect victims of the crimes of the conviction.[993] Indirect victims consist of the close relatives of the direct victims and those who were harmed when

[990] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 67.
[991] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 67.
[992] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII**(17 August 2017) para 67.
[993] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 194; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 36-37.

they tried to intervene in support of the direct victims.[994] That individual victims are the primary beneficiaries of collective reparations is reflected in the ICC's application of individualized collective reparations, which consists of collective reparations that are directed and adapted to the needs of individual victims.[995]

5.6.2 COMMUNITIES

The ICC ordered collective material reparations, primarily consisting of rehabilitation, to communities. These were sometimes referred to as community-based or community reparations.[996] According to the Court, a community is a 'group of people sharing a certain characteristic'.[997] As such, a community can consist of people who live in the same locality or who share another distinctive characteristic such as a religion or ethnicity. However, the ICC can only order reparations for victims who suffered harm as a result of the crimes for which the offender was convicted. Consequently, in connection to the centrality of individual victims (direct and indirect) as beneficiaries before the ICC, the Court ruled that 'where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible'.[998] The community-based reparations are thus not available to the entire community, instead only certain members of the community have access to these reparations.[999] Hence, the community reparations are directed at a group bound by one characteristic; their shared status as beneficiary. In the case of *Al Mahdi*, due to the nature of the crimes, the characteristics of locality and victimhood overlap. According to the ICC, the direct victims of the destruction of the mausoleums were the people who resided in Timbuktu during the attacks.[1000] Hence,

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[994] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 195-196.
[995] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 280; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 81.
[996] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 274; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 81.
[997] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 210.
[998] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 211.
[999] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 214; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 54.
[1000] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171, **T Ch VIII** (27 September 2016) para 80; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 56.

the Court ordered 'collective reparations for the community of Timbuktu as a whole'.[1001]

Reparations in the form of satisfaction were designed to address the harm of the eligible victims, as well as that of the broader local community. In the two cases involving child victims, the *Lubanga* and *Ntaganda* cases, the eligible victims were, prior to their enlistment, part of a local community. In order to repair their harm, these former child soldiers should be reintegrated in their community. This process naturally involves both the former child soldiers and the other community members. Hence, the Court ordered and recommended satisfaction measures that should be designed to support the reintegration of the eligible victims, including programs to limit stigmatization, and that increase the knowledge about the conflict and subsequent victimization.[1002] Furthermore, in the cases against *Lubanga* and *Al Mahdi*, the ICC ordered and recommended that commemoration, memorials and remembrance ceremonies should be organized. These should be designed foremost to redress the harm of the eligible victims by recognizing their suffering, yet this acknowledgment should be done publicly, which will also influence the awareness of the broader community.[1003]

5.6.3 SOCIETY

The ICC deals with specific crimes that took place in a particular location and time period, while these crimes were part of a broader conflict. The scope of victims and affected communities is larger than those who are included in the reparation proceedings of the Court and TFV. Nevertheless, the Court hardly ordered reparative measures that targeted the suffering of the broader groups of victims and affected communities. Measures that were designed to have an effect on society as a whole were not included. The only exception is the case of *Al Mahdi* where the ICC held that the victims of the attacks on the mausoleums were not restricted to the people who inhabited Timbuktu at the time of the violations, instead also other people living in Mali and the international community were considered to be harmed.[1004] In order to redress the harm of the international community, the Court ordered that a highly symbolic amount of compensation, namely € 1, should be paid to the international community

[1001] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 83.
[1002] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 207.
[1003] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 90.
[1004] *The Prosecutor v Ahmad Al Faqi Al* Mahdi (Judgement and Sentence) ICC-01/12-01/15-171, **T Ch VIII** (27 September 2016) para 80; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 51.

as represented by UNESCO.[1005] The ICC further regarded the collective reparations for the Timbuktu community to have an additional effect on the members of the broader community of Mali as well as the international community who suffered due to the destruction of the mausoleums.[1006]

5.6.4 VULNERABLE VICTIMS

Even though the Court-ordered reparations should be available to all victims that meet the eligibility criteria, the ICC stressed on numerous occasions that priority should be given to vulnerable victims. These victims are in a 'particularly vulnerable situation or require urgent assistance'.[1007] The vulnerability of the victims may be a result of the crimes (victims of a specific crime such as sexual violence and victims who need immediate medical treatment after their victimization) or the vulnerability may be a pre-existing characteristic (age and gender).[1008]

The Court has given priority to vulnerable victims in two different manners. In most cases, the priority of reparations for these groups of victims is reflected in the special attention they receive. The Court and TFV have to make a considerable effort in order to make sure that the vulnerable victims have 'equal, effective and safe access to reparations'.[1009] For instance, the Court urged the TFV to adopt a gender-sensitive and inclusive approach.[1010] In addition, in its last case, the ICC adopted a different method to prioritize vulnerable victims (also referred to as priority victims) by requesting the TFV to draft an 'initial draft implementation plan with focus on priority victims' within three months.[1011] Hence, this initial plan had to be submitted prior to the 'customary' DRIP. The initial plan had to include reparations that addressed the urgent needs of three groups of vulnerable victims. Namely, former child soldiers, including

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[1005] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 107.
[1006] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 54 and 91.
[1007] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 200; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 92.
[1008] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 19; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations) ICC-01/12-01/15-237-Red, **T Ch VIII** (12 July 2018) para 105.
[1009] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 200; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 92.
[1010] Consequently, the Court and TFV have to consider the different ways in which the committed crimes impacted victims based on their sex and/or gender. The reparations projects must address these specific harms without discrimination. Additionally, the gender and power imbalances in place should be considered when designing and implementing reparations. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 60-61.
[1011] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 252.

those who suffered from sexual violence during their conscription, and victims who are in a vulnerable situation due to the attacks, such as homeless people, and persons who are in urgent need for medical care.[1012] The projects proposed in the 'initial draft implementation plan with focus on priority victims' should be designed to address the most urgent needs of priority victims during the time they wait for the reparations as proposed in the DRIP.[1013] The Court ordered that the proposed reparations in the initial plan should primarily be based on existing programs, so that the implementation could commence quicker.[1014] Consequently, vulnerable victims received priority access to assistance projects.[1015]

5.7 The Trust Fund for victims

The TFV has had an influential role in the development of collective reparations within the ICC. This authority is primarily based on its reparations mandate, yet the general assistance provided under its other mandate has had an indirect influence as well. Under its reparations mandate, the TFV has three different roles: it is an independent expert body that advises the ICC during the (pre-) reparation proceedings, it is the implementing body that designs and implements the reparation projects, and it is the funding agency in case the convicted person is indigent.[1016] The TFV has regarded the implementation as its primary responsibility.[1017] Nevertheless, when it comes to the development of collective reparations within the ICC, its advisory role is most significant. At this stage of the proceedings, the TFV advises the Court on the principles on reparations, the reparations procedure, and the modalities it finds appropriate and feasible, including collective reparations.[1018] These instructions are based on the experience of the TFV in implementing prior reparation orders, as well as in the provision of general assistance projects.[1019] Since the TFV is not a party

[1012] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 92-93.
[1013] *The Prosecutor v Bosco Ntaganda* (Decision on the TFV's Initial Draft Implementation Plan with Focus on Priority Victims) ICC-01/04-02/06-2696, **T Ch VI** (23 July 2021) para 9.
[1014] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 252.
[1015] In addition to the priority access to assistance projects, the TFV also proposed priority access to reparation projects that were already in place in the Lubanga case. The Court rejected this proposal. *The Prosecutor v Bosco Ntaganda* (Decision on the TFV's Initial Draft Implementation Plan with Focus on Priority Victims) ICC-01/04-02/06-2696, **T Ch VI** (23 July 2021) para 22.
[1016] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Submissions on the Reparations Proceedings) ICC-01/12-01/15-187, **T Ch VIII** (2 December 2016) para 7; *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 11.
[1017] The TFV did not elaborate on this statement. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Submissions on the Reparations Proceedings) ICC-01/12-01/15-187, **T Ch VIII** (2 December 2016) para 8.
[1018] *The Prosecutor v Jean-Pierre Bemba Gombo* (Observations Relevant to Reparations) ICC-01/05-01/08-3357, **TFV** (31 October 2016) para 13.
[1019] The TFVs programs under its general assistance mandate are often already running before the reparation proceedings start. Consequently, the TFV has in-depth knowledge of the situation of the victims and the affected communities, and it has already established contacts with local NGOs and government officials. This is primarily exemplified in the cases focusing on crimes committed in the DRC Ituri region; the cases against *Lubanga*,

during the proceedings, it does not 'advocate for one of the different judicial outcomes solicited in the present case'.[1020] This advisory function of the TFV is complemented by its function to design the reparation projects. After the Court has issued its order for reparations, the TFV has to develop a DRIP.[1021] This plan should cover 'the objectives, outcomes and necessary activities that comprehensively respond to all of the reparations modalities that can realistically be implemented'.[1022] It should include the modalities that the Court identified in the reparations order that the TFV deemed suitable in the particular case. Furthermore, the proposed reparation projects have to be further clarified in the DRIP, including its details, a roadmap of the implementation phase, the expected timeline, and the available resources.[1023]

This section will discuss the TFV's understanding of collective reparations as brought forward during the (pre-) reparations proceedings and the implementation phase, as well as the specific forms of collective reparations that are recommended by the TFV in the DRIPs.

5.7.1 TFV ON COLLECTIVE REPARATIONS

According to the TFV, the concept of collective reparations receives increasing attention in scholarly literature,[1024] though there is no set definition of the concept of collective reparations in international law.[1025] A definition is also missing in the Rome Statute and the RPE, which the TFV believed to be a deliberate decision of the drafters so that the Court could be flexible in its approach to (collective) reparations.[1026]

The TFV acknowledged that different interpretations of the concept of collective reparations exist in international law, which were also adopted by the TFV itself. As such, the TFV distinguished five different features of reparations that set them apart as collective reparations.

Katanga and *Ntaganda*. See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 79-80.

[1020] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the Reparations Proceedings) ICC-01/04-02/06-2635-Red, **TFV** (18 December 2020) para 76.

[1021] International Criminal Court Assembly of State Parties, 'Regulations of the Trust Fund for Victims' (3 December 2005) ICC-ASP/4/Res.3, rule 54.

[1022] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 136.

[1023] *The Prosecutor v Bosco Ntaganda* (Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) para 22.

[1024] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 21.

[1025] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 173; *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 108.

[1026] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 167.

1. Reparations that address collective harm or the violation of a collective right can be qualified as collective reparations.[1027] In a more recent filing, the TFV went even further and claimed that addressing collective harm required collective reparations.[1028]
2. A reparations measure can be said to be of a collective nature when it was awarded to a group.[1029]
3. The collective nature of the benefits is another feature of collective reparations,[1030] which is not to say that collective reparations cannot have individual benefits.[1031] In fact, the TFV differentiates two types of collective benefits that are used interchangeably.[1032] On the one hand, the benefits may be 'inherently collective and exclusive', meaning that the benefits meet the needs of individual victims within in a collective context. For example, an education program for former child soldiers. On the other hand, benefits may be 'community-oriented and not exclusive', implying that these benefits 'may not be conceived in individual terms'.[1033] For instance, the opening of a school that is open to all children in the village.
4. The mode of distributing the reparations can characterize the reparations as collective.[1034] Hence, when 'the benefit is given to a 'group' or certain 'groups' of victims who jointly manage and, as appropriate, internally distribute the benefit', [1035] instead of directly handing it to each victim individually, these benefits may be classified as collective reparations. Hence, when the TFV would hand out money for the repair of damaged houses directly to each victim, this would be qualified as individual reparations. Yet when the money would be paid to a community project that

[1027] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 21; *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 173.
[1028] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 112.
[1029] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 173; *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 173.
[1030] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 173.
[1031] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 169.
[1032] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 174; *The Prosecutor v. Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 175; *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 113.
[1033] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 175.
[1034] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 174.
[1035] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 175.

was set up for the restoration of the damaged houses in that community, it would be collective reparations.

5. The victim's role during the reparation procedure, including the design, implementation and supervision, may distinguish collective reparations from individual forms.[1036] For instance, a reparative project may be qualified as a collective reparation when the community members manage that project and as such can make decisions regarding the execution of the project.

The aforementioned features of collective reparations may result in subtle differences between individual and collective forms of repair. According to the TFV, these subtle differences may result in a distinction that might not even matter for the beneficiary.[1037] A good example of this is compensation, a form of reparations that is often perceived as an individual form of reparations as it consists of individual benefits that aim to remedy the violations of individual rights.[1038] However, the TFV qualified the payment of compensation to individuals, as was proposed in the Expert Reports, as collective reparations. It had two reasons for this qualification: the amount was standardized and consequently not tailored to the individual needs, and the shared harm of the victims was taken into account.[1039] In other words, identical reparation measures may be perceived as individual as well as collective, depending on the used definition of collective reparations and on the aspect of that measure that was highlighted, for instance the harm that was addressed, the beneficiary, or the mode of distribution.

According to the TFV, collective reparations have several benefits, including those relating to the community and those seeing to practical reasons. Collective reparations do not only address collective harm suffered in the respective community,[1040] the label of collective reparations in itself demonstrates that the harm suffered 'goes beyond the sum of individual experiences of victimisation [sic] and includes group and/or communal features of harm'.[1041] Furthermore, collective reparations may have a positive effect on the affected community, because when they are designed together with the victims and their community, the collective reparations may strengthen the

[1036] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 24.
[1037] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 24-25.
[1038] This is different for the collective compensation as awarded by the IACtHR that consisted of a sum of money that was awarded to the community as a whole in order to address the collective harm they had suffered when their collective rights were violated. See for instance, *Yakye Axe Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 125 (17 June 2005) para 195; *Xákmok Kásek Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 214 (24 August 2010) para 323.
[1039] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the Reparations Proceedings) ICC-01/04-02/06-2635-Red, **TFV** (18 December 2020) para 83.
[1040] See for instance, *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 238.
[1041] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 112.

community acceptance, healing and integration of victims,[1042] which may as a result diminish the stigmatization of victims.[1043] Additionally, these reparations may facilitate the rebuilding of social solidarity,[1044] and attribute to reconciliation between different groups in the community.[1045] The TFV distinguishes four different practical advantages of collective reparations.

1. The TFV stressed repeatedly that collective reparations were more cost-efficient than individual reparations, since they would 'maximise the use of minimal resources available to fund reparations'.[1046] Contrary to individual reparations, collective measures do not need an individual application process that is costly, resource-intensive, time-consuming, stressful for victims, and sometimes even impossible.[1047] Collective reparations are not only more cost-efficient, the TFV added that it received more voluntary contributions when the ordered reparations were labelled as collective reparations.[1048]
2. The provision of collective reparations accommodates victims with another phase of participation during both the consultation and designing stage. This participatory element of collective reparations is believed to add 'additional meaning to the reparations proceedings and be of symbolic importance to them',[1049] as well as a 'stronger reconciliatory component'.[1050]
3. When reparations are awarded in a collective form, it may prevent the 'drawing [of] a too stark line between classes of victims or between victims and non-victim groups'.[1051]

[1042] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 68.
[1043] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012); *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 167.
[1044] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 22.
[1045] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 168.
[1046] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 22.
[1047] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 20 and 291; *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 147-148; *The Prosecutor v Bosco Ntaganda* (Observations on the Responses and Observations Submitted on the Initial Draft Implementation Plan) ICC-01/04-02/06-2687-Red, **TFV** (28 June 2021) para 21.
[1048] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 127.
[1049] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 290.
[1050] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 169.
[1051] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 22. See furthermore, Lisa Magarrell, 'Reparations in Theory and Practice' (ICTJ, 9 January 2007).

4. The TFV claimed that collective reparations may be helpful in reaching vulnerable and stigmatized victims, such as victims of sexual and gender-based violence and female child soldiers.[1052] The TFV argued that this is especially the case when the collective reparations are branded in general terms, ie reparations for the victims in the case against *Ntaganda* instead of victims of sexual and gender-based violence. In this way, the specific victimization of victims does not have to be out in the open, which may enhance the chances that vulnerable and stigmatized victims will participate in the reparations process and the actual reparation programs.[1053]

These perceived benefits of collective reparations resulted in the TFV's recommendation to order collective reparations in the cases before the ICC. In its early advisory documents, the TFV even explicitly advised against individual reparations.[1054]

The TFV stressed multiple times that the reparative effect of reparations was not limited to the implemented reparative measure, instead the preceding reparations procedure is of an 'inherent reparative value'.[1055] Active participation of victims during the design and implementation of collective reparations emphasizes the central role of victims in the reparation proceedings.[1056] Moreover, (collective) reparations can only reap their potential benefits when the procedure prior to the implementation incorporates an active role for the victims. Accordingly, '[r]edress can only be achieved when beneficiaries understand the measures proposed, develop ownership and take agency of the measures'.[1057] In the *Ntaganda* case, the TFV refers to the active involvement of victims in the reparations process as agency of beneficiaries to own their own change from victimhood and suffering harm to resilience and empowerment. This is 'an essential reparative value' that is linked to the transformative element of reparations.[1058]

[1052] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 167.
[1053] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 119.
[1054] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 152.
[1055] *The Prosecutor v Germain Katanga* (Observations on Reparations Procedure) ICC-01/04-01/07-3548, **TFV** (13 May 2015) para 112. See furthermore, *The Prosecutor v Jean-Pierre Bemba Gombo* (Observations Relevant to Reparations) ICC-01/05-01/08-3357, **TFV** (31 October 2016) para 22; *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 35.
[1056] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) Annex A, para 23.
[1057] *The Prosecutor v Bosco Ntaganda* (Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) para 30.
[1058] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 8.

Additionally, some forms of collective reparations may be similar to humanitarian and developmental projects, especially when they consist of activities that also fall within the state's general obligations, such as education and health care. According to the TFV, the consultation, information provision, and participation of the victims during the reparations procedure are important to make sure that the reparation programs are indeed perceived as such.[1059] It is important that this reparations process should not be limited to the victims who participated during the reparation proceedings before the Court, or who could seek eligibility as a victim of the crimes of the conviction.[1060] Instead, it is essential that the effect on the community is taken into account before reparation programs are implemented.[1061] Accordingly, in addition to the victims eligible for reparations in the specific case, the affected communities have to be consulted, informed and involved in the operational level of the reparations procedure.[1062] The TFV claimed that this will increase the understanding of the ordered reparations and the eligibility criteria,[1063] promote reconciliation and the prevention of re-occurrence of the violations,[1064] and 'strengthen the meaningfulness and appropriateness of collective awards'.[1065]

5.7.2 THE RECOMMENDED REPARATIONS

The Court's reparations order offers a guideline for the development of a DRIP, because the TFV is bound by the principles and ordered reparations when drafting such a plan. As such, the reparation projects that are proposed by the TFV in its reparations plan have to be based on all or some of the Court's ordered reparative modalities.[1066] As discussed in section 5.4.1, the specificity of the modalities that were ordered by the ICC differed between the analyzed cases; four general categories of reparations were included in the order in the cases against *Lubanga* and *Ntaganda*,

[1059] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 70.
[1060] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 44 and 143.
[1061] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 67.
[1062] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 177; *The Prosecutor v Jean-Pierre Bemba Gombo* (Observations Relevant to Reparations) ICC-01/05-01/08-3357, **TFV** (31 October 2016) para 127; *The Prosecutor v Thomas Lubanga Dylio* (Information Regarding Collective Reparations) ICC-01/04-01/06-3273, **TFV** (13 February 2017) para 90.
[1063] *The Prosecutor v Germain Katanga* (Observations on Reparations Procedure) ICC-01/04-01/07-3548, **TFV** (13 May 2015) para 112; *The Prosecutor v Jean-Pierre Bemba Gombo* (Observations Relevant to Reparations) ICC-01/05-01/08-3357, **TFV** (31 October 2016) para 128; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public redacted version of "Corrected version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 243.
[1064] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 177.
[1065] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 155.
[1066] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 200.

while the cases against *Katanga* and *Al Mahdi* consisted of a limited number of (detailed) modalities of reparations. Consequently, the TFV had more latitude in developing its DRIP in some cases than in others. The DRIPs were the result of a process that included consultation with eligible victims, either through their representatives[1067] or directly,[1068] several organs of the Court such as the Registry and the VPRS,[1069] the government of the state where the reparations have to be implemented,[1070] and experts.[1071]

The TFV's DRIPs consist of different forms of reparations that have to be 'holistically integrated'.[1072] The reparation measures should be implemented in a unified manner, because this allows 'for referral of the victim-beneficiary to those benefits most appropriate in light of the harm he/she has experienced'.[1073] The TFV proposed a wide range of reparation projects in its reparation plans, these are discussed per category.

RESTITUTION AND COMPENSATION

Restitution was included as an appropriate modality in the reparation orders of the *Lubanga* and *Ntaganda* cases, yet the TFV did not include this category of reparations

[1067] The TFV collaborated with the LRV and OPCV 'regarding the victims current situation, needs, and desires with respect to how best to remedy the harms that they suffered'. *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 3 and 25. See furthermore, *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 21.

[1068] During the drafting of the DRIP in the *Lubanga* case, the TFV held wider consultations with 1,125 victims and 128 victims participated in focus groups. Due to the security context in the DRC, the TFV consulted with 33 victims during the development of the DRIP in the *Ntaganda* case. *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 53; *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 60.

[1069] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 33; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 23.

[1070] See for instance, *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 22; *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Submission of Draft Implementation Plan) ICC-01/04-02/06-2732, **TFV** (17 December 2021) para 11.

[1071] According to regulation 70 of the Regulations of the Trust Fund for Victims, the TFV may consult experts and expert organizations when developing and implementing collective reparation projects. These consist of experts from different backgrounds, including law, gender studies, psychology, and from both academia and practice, including persons working for ICC actors as the TFV and the VPRS, and NGOs. See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 46; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) TFV, para 30.

[1072] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 129.

[1073] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 212.

in its DRIPs. Compensation was ordered in all four cases, though it was only explicitly incorporated in the TFV's DRIPs after the Court explicitly ordered this modality in the cases against *Katanga* and *Al Mahdi*. In the case against *Katanga*, the Court set the amount of compensation at US$ 250, which was interpreted by the TFV as an 'option to choose to put the US$ 250 towards one of the collective modalities of reparations'.[1074] As such, the beneficiary could use the compensation to extend his/her home or to buy livestock, both contain projects that were proposed as collective reparations. Nevertheless, the beneficiary could also choose to receive the compensation in cash, making it possible to spend the money on objects or activities unrelated to the collective reparation projects.[1075] In case the victims had resettled in Europe or the USA, they did not have access to the collective reparation programs.[1076] Even though compensation is not a form of collective reparations, these victims should receive additional compensation to balance the missed opportunity to access these collective reparation programs.[1077] In contrast, in the case against *Al Mahdi*, the Court did not decide on the sum of compensation and left it to the TFV. Accordingly, the TFV did include compensation in its DRIP.[1078] However, the different versions of this plan are only available in a highly redacted version, making it impossible to say more about the form and sum of the compensation proposed for Al Mahdi's victims.

In the *Ntaganda* case, the TFV unambiguously renounced the inclusion of individualized compensation as a form of collective reparations.[1079] Nevertheless, the TFV did include three different forms of a financial award in its DRIP without labelling them as compensation. First, victims of sexual violence could receive 'a symbolic form of financial assistance (symbolic compensation)'.[1080] This assistance is not proportional and adequate to the harm that was suffered, and as such is only an

[1074] The Court's decision regarding the proposed reparations plan was not made publicly available at the time of writing, making it uncertain whether the Court agrees with this interpretation. *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 102.

[1075] *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 103.

[1076] The TFV proposed that a separate project for collective reparations would be established for the victims who fled to Uganda. Hence, victims that remained in the DRC (Ituri region) and Uganda could potentially make use of the collective reparation programs. See *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 66.

[1077] *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 61.

[1078] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 110; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 50.

[1079] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 119.

[1080] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 120.

acknowledgement of the general harm and not the specific individual harm.[1081] The TFV categorizes the financial assistance as symbolic reparations.[1082] This is an interesting premise as it is debatable whether compensation for international crimes (either individual or collective) can ever be adequate and proportional, or that it is even possible to put a price on the loss of a loved one, the loss of one's childhood, or the suffered trauma. Second, after their admission to the reparation projects, the beneficiaries will receive a 'modest cash transfer' to cover their basic needs so that they can fully benefit from the other reparations.[1083] Third, the TFV included the option for beneficiaries who are unable or unwilling to participate in the reparation projects to opt for the disbursement of a lump sum.[1084]

REHABILITATION

The ICC ordered rehabilitation measures in all cases, and the TFV included rehabilitation in all its DRIPs. In its development of these plans, the TFV primarily built on the specific forms of reparations that were included in the Court's reparation orders.[1085] The examples of rehabilitation given by the Court were mostly included in the TFV's DRIPs, and the TFV only seldom incorporated forms of rehabilitation that were not recommended by the Court.

In line with the reparation orders of the ICC, the TFV proposed projects containing socio-economic support in all cases. These suggested socio-economic programs encompass community savings and loan mechanisms that enable victims to acquire assets,[1086] livelihood support that include the provision of seeds, agricultural

[1081] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 115.
[1082] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 203.
[1083] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 175.
[1084] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 144 and 188.
[1085] As discussed in section 5.4.2, the ICC ordered specific rehabilitation measures in the cases against *Katanga* and *Al Mahdi*. The Court ordered rehabilitation as a general category in the *Lubanga* and *Ntaganda* cases, while recommending some specific forms of rehabilitation.
[1086] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Information Regarding Collective Reparations) ICC-01/04-01/06-3273, **TFV**(13 February 2017) para 162; *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 124.

materials and livestock,[1087] vocational training,[1088] and the development of an economic resilience facility that encourages local economic initiatives.[1089] Education was also included in all reparation orders. The TFV only proposed general (primary, secondary and/or tertiary) education in the *Katanga* and *Ntaganda* cases in the form of a budget to cover school fees and school kits.[1090] Whereas, the education projects in the *Lubanga* and *Al Mahdi* case were aimed at the victims and their communities to promote conflict resolution, and the reintegration of former child soldiers and victims of gender-based violence.[1091]

Even though psychological treatment was only ordered in three cases, the TFV did include individual and group therapy sessions for eligible victims in its DRIPs for all four cases.[1092] In order to prevent further stigmatization of the victims and a limited participation in the psychotherapeutic programs, these therapy sessions should not be framed as such.[1093] Furthermore, the TFV recommended group therapy for the families of the direct victims,[1094] and trauma healing initiatives for the affected community with separate healing groups for women and girls.[1095] Additionally, the TFV

[1087] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 161; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 251.

[1088] See for instance, *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 128; *The Prosecutor v Bosco Ntaganda* (Annex A to Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) para 69.

[1089] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 120.

[1090] *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 99; *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 182.

[1091] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 69 and 125; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 247.

[1092] *The Prosecutor v Thomas Lubanga Dylio* (Information Regarding Collective Reparations) ICC-01/04-01/06-3273, **TFV** (13 February 2017) para 92; *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 130; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 142; *The Prosecutor v Bosco Ntaganda* (Annex A to Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) para 69 and 91; *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 153.

[1093] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 148.

[1094] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 68; *The Prosecutor v Bosco Ntaganda* (Annex A to Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) para 91.

[1095] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18

considered the recruitment and training of the counselors for the psychotherapeutic program in itself 'an important form of collective reparations', since these counsellors will remain in the communities after the TFV's reparation programs have concluded.[1096] Both the ICC and the TFV included medical care, in the form of access to medical and surgical treatment, in its reparation order and DRIP in the cases against *Lubanga* and *Ntaganda*.[1097]

Even though the Court ordered/recommended housing assistance in three cases, only the TFV DRIP in the *Katanga* case included assistance in the form of construction or renovation of the victim's home, support when the victim plans to buy a building plot or home, and assistance with the rent payments.[1098] In the case against *Al Mahdi*, the ICC ordered assistance for the return of displaced victims who wanted to return to Timbuktu and the TFV incorporated this in its DRIP by proposing to cover the transportation costs of those victims.[1099] In agreement with the recommendations of the Court, the TFV included assistance with the social reintegration of victims in the *Ntaganda* case.[1100]

Lastly, the TFV proposed two rehabilitation projects that were not explicitly ordered or recommended by the ICC: life skills training for victims 'to redress some of the lost (or distorted) developmental opportunities that these young people would have had, had they grown up within the context of a family',[1101] and the rebuilding of a demolished tomb that was not previously rebuild by UNESCO.[1102]

SATISFACTION

The ICC included satisfaction in all of its reparation orders, though in the *Katanga* case this was restricted to a statement of the Court that a voluntary apology, which was

May 2018) para 259; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 150.

[1096] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 120.

[1097] *The Prosecutor v Thomas Lubanga Dylio* (Information Regarding Collective Reparations) ICC-01/04-01/06-3273, **TFV** (13 February 2017) para 108; *The Prosecutor v Bosco Ntaganda* (Annex A to Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) para 69 and 91; *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 164.

[1098] *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 124.

[1099] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 118.

[1100] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 187.

[1101] The TFV stressed that this life skills program was not part of the psychotherapeutic projects. *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 136.

[1102] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 113.

provided by Katanga during the sentencing hearing,[1103] might support the reparations process.[1104] Other satisfaction measures were not ordered in this case, since the victims had voiced that they did not want such symbolic reparations.[1105] Hence, the TFV declared that a written or video-taped apology would be part of its DRIP under condition that victims desired such a statement.[1106] Other measures of satisfaction were proposed by the TFV in the cases against *Lubanga*, *Al Mahdi* and *Ntaganda*. In the three cases, several memorialization projects were included in the DRIPs, which took different forms, for instance, in written of audio form, as an event, a religious ceremony, or a symbolic structure such as the building of a community center.[1107] In the *Lubanga* case, the TFV held that the different forms of memorialization should be combined with other satisfaction measures such as community dialogue initiatives and cultural activities that include music, art, dance and drama.[1108] Furthermore, in the *Al Mahdi* case, the TFV proposed that it would not decide on the specific nature of the memorialization projects, instead the affected community would 'steer the process of memorialisation [sic] and decide for themselves whether, what and how should be memorialised'.[1109]

In addition to the variety of memorialization projects, the TFV proposed several other satisfaction projects. In the case against *Lubanga*, the TFV incorporated one other project whereby the narratives of victims that were collected during the reparations projects, including the psychosocial programs, would be archived in order to build a depository of collective memory.[1110] Furthermore, in the *Ntaganda* case, several satisfaction projects were included in the DRIP: outreach activities to educate

[1103] *The Prosecutor v Germain Katanga* (Decision on the Review Concerning Reduction of Sentence of Mr Germain Katanga) ICC-01/04-01/07-3615, **TFV** (13 November 2015) para 14.
[1104] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **TFV** (24 March 2017) para 315.
[1105] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **TFV** (24 March 2017) para 301.
[1106] *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 135.
[1107] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 145; *The Prosecutor v Thomas Lubanga Dylio* (Filing Regarding Symbolic Collective Reparations Projects) ICC-01/04-01/06-3223-Red, **TFV** (19 September 2016) para 30; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 256 and 266; *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 210 and 217.
[1108] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 145; *The Prosecutor v Thomas Lubanga Dylio* (Filing Regarding Symbolic Collective Reparations Projects) ICC-01/04-01/06-3223-Red, **TFV** (19 September 2016) para 41; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 261 and 268.
[1109] This is based on the principle of 'restorative agency'. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 162.
[1110] *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) **TFV**, para 90.

people on the crimes that were committed and subsequent harm and suffering, a mission to encourage the local authorities to alleviate the procedure for the issuance of IDs for children born out of rape, and the appointment of a consultant tasked to search for the whereabouts of missing persons.[1111] Additionally, the TFV proposed to discuss the option of a voluntary apology with Ntaganda after it had consulted with the victims first, though this consultation cannot take place before the security situation in Ituri improves.[1112]

GUARANTEES OF NON-REPETITION

The reparations order in the *Al Mahdi* case is the only order that encompassed guarantees of non-repetition, which consisted of measures to prevent a future attack of the mausoleums.[1113] Accordingly, the TFV only incorporated measures of guarantees of non-repetition in the case against *Al Mahdi*. These consisted of the rebuilding of the cemetery walls in order to create a protecting barrier surrounding the buildings, improved lighting and increased surveillance.[1114] Yet, the other projects that were proposed by the TFV, and subsequently approved by the Court,[1115] were also directed at the preservation of the buildings, though they were aimed at the protection against natural damages by wind or desertification, and by regular deterioration. These projects did not aim to prevent the destruction by people, and thus consisted of projects that are closer to rehabilitation.[1116]

5.8 FINAL REMARKS: THE DEVELOPMENT OF COLLECTIVE REPARATIONS

As was shown in the previous paragraphs, the ICC has ordered collective reparations (sometimes in combination with individual reparations) in four cases since 2012. This concluding section discusses the results of my analysis of these ordered collective

[1111] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 206, 223, and 225.
[1112] *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para 229.
[1113] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 67.
[1114] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 89 and 102-104.
[1115] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15-324-Red, **TFV** (4 March 2019) para 78.
[1116] These projects consisted of the planting of trees to minimize the risk of desertification, strong winds and the movement of sand, the training of masons to improve their skills to preserve the buildings, as well as a fund to support the annual maintenance of the mausoleums. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Lesser Public Redacted Version of "Updated Implementation Plan") ICC-01/12-01/15-219-Red, **TFV** (14 October 2019) para 97, 106 and 108.

reparations in order to gain a deeper insight in the Court's understanding of collective reparations and how this changed over time. In addition, this development of collective reparations within the ICC system is examined in light of the relation between the Court and the TFV. The subsequent section discusses the changing understanding and application of the concept of collective reparations in light of Aristotle's theory on particular justice. Lastly, this section dives deeper into the relation between the Court-ordered and TFV-implemented collective reparations and the TFV's projects created under its assistance mandate.

5.8.1 THE DEVELOPMENT OF COLLECTIVE REPARATIONS

The different reparation orders showed a changing understanding and application of collective reparations. In the *Lubanga* case, the ICC followed the recommendations of the TFV to exclusively order a 'community-based approach'.[1117] The Appeals Chamber ruled that this meant that the Trial Chamber had ordered collective reparations. It furthermore held that the Trial Chamber's decision that 'it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards'.[1118] In the subsequent two cases, the Court no longer accepted the TFV's proposals regarding the exclusivity of collective reparations. Instead, it combined both individual and collective reparations,[1119] whereby the implementation of individual reparations was prioritized in the case against *Al Mahdi*.[1120] The ICC argued that 'the 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 commited by Mr Katanga − were it to disregard their almost unanimous preference, by awarding only collective reparations'.[1121] In the last analyzed case, the ICC again restricted its reparations order to collective reparations, though these incorporated individualized elements; the so-called individualized collective reparations.[1122]

[1117] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 274.
[1118] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 152.
[1119] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 306; *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 104.
[1120] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 140.
[1121] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 339.
[1122] This category of reparations was previously, in 2019, discussed by the Appeals Chamber which emphasized in a decision on Lubanga's liability that collective reparations could also include reparations that were individualized. See, *The Prosecutor v Thomas Lubanga Dylio* (Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, **A Ch** (18 July 2019) para 40. See furthermore, *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 186.

The two cases that combined individual and collective reparations were distinct from the two that limited its order to collective reparations; the crimes that were investigated and the subsequent number of direct victims. The *Lubanga* and *Ntaganda* cases both dealt with systematic violations during the same conflict that took place over a longer time,[1123] while the cases against *Katanga* and *Al Mahdi* were restricted to single attacks that took place during a day or a couple of days, and in one specific place.[1124] As a consequence, the number of direct victims in the analyzed cases varied considerably: the number of victims awarded with individual reparations was limited to 297 in the case against *Katanga*,[1125] and approximately 193 in the *Al Mahdi* case,[1126] while in the other cases the number of victims was uncertain, though estimated to be a high number.[1127] In the case against *Lubanga* the TFV has admitted over 1000 victims as beneficiaries,[1128] and 1837 victims participated in the court proceedings against *Ntaganda*, while the total number of victims was perceived to be significantly higher.[1129] The number of victims is an important reason for the Court to decide whether it will combine individual and collective reparations, or exclusively order collective reparations.[1130] Hence, it appears to be a pragmatic consideration to exclude individual reparations from the reparations order.[1131]

1123 The crime that Lubanga was convicted for took place over a period of almost a year, and in Ntaganda this period was slightly longer (1,5 years). See *The Prosecutor v Thomas Lubanga Dylio* (Judgement Pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, **T Ch I** (14 March 2012) para 1355; *The Prosecutor v Bosco Ntaganda* (Judgement) ICC-01/04-02/06-2359, **T Ch VI** (8 July 2019) para 32.

1124 The attack of the mausoleums in the case of *Al Mahdi* took place over a period of almost two weeks. See *The Prosecutor v Ahmad Al Faqi Al* Mahdi (Judgement and Sentence) ICC-01/12-01/15-171, **T Ch VIII** (27 September 2016) para 63.

1125 In the case against *Katanga*, five victims of transgenerational harm appealed the decision that denied their status as beneficiaries, this appeal was rejected by Trial Chamber II because the causal link between the crimes of Katanga's conviction and the suffered harm was not established. *The Prosecutor v Germain Katanga* (Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018) ICC-01/04-01/07-3751-Red, **T Ch II** (19 July 2018) para 141-142. See furthermore, *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 168.

1126 The Court received 139 victim applications for reparations, though it did not rule on the status of these applications. The TFV was tasked with the verification of the beneficiaries. The DRIPs of the TFV are highly redacted, making it impossible to establish the total number of beneficiaries. See, *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, **T Ch VIII** (17 August 2017) para 5 and 143.

1127 See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 219.

1128 'Factsheet (4 March 2021)."Collective reparations in the form of services to victims of the crimes for which Thomas Lubanga Dyilo was convicted"' (*TFV*, 4 March 2021) <https://www.trustfundforvictims.org/en/news/factsheet-4-march-2021-collective-reparations-form-services-victims-crimes-which-thomas> accessed 7 June 2021.

1129 *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 8 and 22.

1130 See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 219; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 153.

1131 Laurel E Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court' in Christian De Vos, Sara Kendall & Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 323.

There was not only a change in the application of collective reparations, especially whether or not they could and should be combined with individual reparations, the understanding of what the notion of collective reparations entailed also changed over time. In the case against *Katanga*, the Court gave its first definition of collective reparations: reparations could be regarded as collective reparations when they benefitted a collective, consisting of either a community that existed before the crimes took place, for instance a village (community reparations), or a group of victims that suffered similar harm.[1132] In practice, the Court-ordered collective reparations primarily consisted of the latter category, as only the individual victims who had suffered harm as a result of the crimes that the offender was convicted for were eligible for reparations.[1133] Consequently, only the members of the community who met this stringent definition of victims could benefit from the collective reparations. In other words, most Court-ordered collective reparations were directed to individual members of the community, instead of to the community itself, except for some symbolic reparations.

Even though the community may benefit from the symbolic reparations, these were primarily targeted at the individual victims, since the projects predominantly aimed to address the individual harm specific to the beneficiaries. Either, the community benefitted as a side effect, for instance, the primary aim of memorials was the acknowledgement of the harm of the victims, while the creation of awareness in the community came second. Or the community was needed to address the harm of the individual victims; for instance, reconciliation between former child soldiers and the community cannot be achieved without involvement of the community. Thus, the causal connection that was needed between the individual harm and the conviction was the decisive element for the status of beneficiary. Hence, the collective was diminished to a group of individuals who were tied together due to their victimization. Owiso Owiso claimed that this 'intra-community distinction' made the ordered collective reparations a restricted form of collective reparations,[1134] which my research underlines.

In the *Ntaganda* case the Court made the individual nature of collective reparations more explicit by referring to the collective reparations as individualized. This made the distinction between individual and collective reparations even more ambiguous. The Trial Chamber furthermore added another element to determine whether reparations could be qualified as collective reparations. The collective beneficiary was no longer the only differentiating characteristic of collective reparations, instead reparations that were of a collective nature (these consisted of

[1132] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 274-276.
[1133] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 211.
[1134] Owiso Owiso, 'The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process' (2019) 19 International Criminal Law Review 505, 524.

collective goods and services or their distribution was organized in a collective mode) were also qualified as collective reparations.[1135] The distinction between individual and (individualized) collective reparations shifted from the beneficiary to the procedural aspects of reparations. Consequently, the mode of distribution and the role of victims in the design and implementation became decisive in the qualification of reparations as collective. This shift was especially noticeable in the awarding of compensation. In the cases against *Katanga* and *Al Mahdi*, the Court ordered compensation as an individual reparation as it was distributed to individual beneficiaries. In its more recent decision, the Court stated that compensation handed to individual beneficiaries may still be of a collective nature when the amount was standardized and distributed through a collective procedure. However, the compensation ordered in the *Katanga* case amounted to a standardized sum of US$ 250, while in the *Al Mahdi* case the compensation for moral harm was standardized. Thus, the same reparation modality (a standardized sum of compensation given to individual beneficiaries) was first qualified as individual reparations, and two years later it was defined as a form of collective reparations.

Both the initial 'intra-community distinction' as well as the more recent focus on procedural aspects when defining collective reparations blurred the distinction between collective and individual reparations.[1136] The same reparative modality can be labelled as individual or collective depending on the used definition of collective reparations. In other words, the development of collective reparations before the ICC primarily took place on a semantic level; the ordered reparations were more or less the same, while the labels of these reparations sometimes changed from individual to collective. This is curious since it seemed that pragmatic reasons such as the feasibility of the ordered reparations in relation to the number of (potential) beneficiaries was a factor for the Court in determining whether or not collective reparations should be combined with individual reparations. Yet, the perceived advantages of collective reparations regarding feasibility were diminished when the reparations were only collective in name. Furthermore, other advantages of collective reparations identified by the Court (for instance that this modality could address shared harm of the community as a whole) were at odds with this change on a semantic level. When only the label of the reparative modalities changed from individual to collective, the perceived benefits of collective reparations regarding the practicability and collective and/or shared harm were negligible. However, according to Marina Lostal, an expert of both the ICC and the TFV, the label of collective reparations brought the

[1135] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 80. The Court did mention the nature of reparations as a factor to qualify them as collective reparations in the reparations order in the case against *Katanga*, yet this was only in the description of the input of other parties (TFV, LRV and Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Repetition) which was not mimicked in its own findings. *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 273.

[1136] See for instance, *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 277 (footnote 391); *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 24.

benefit that, when the TFV indeed prioritized collective reparations over the individual form,[1137] the individual harm of priority victims in the *Ntaganda* case could still be addressed immediately.[1138] In other words, the label of collective reparations for reparations that were primarily of an individual nature was used to ensure that the TFV could implement them.

The Court is walking a tight rope between the perceived benefits of collective reparations and its obligation as a criminal court to protect the rights of the suspect, including a required causal link between the crimes of the conviction and the individual harm when setting the offender's liability.[1139] Thus, the Court listed several (pragmatic) reasons, most notably the feasibility of reparations for a high number of beneficiaries with limited available funds, yet at the same time stretched the definition of collective reparations so that it also included individual reparations and thereby withdrawing the perceived benefits of collective reparations. The TFV's prioritizing of collective reparations may have given the Court a different pragmatic reason for the ordering of individualized collective reparations, namely to boost the chances that the ordered reparations would be implemented by the TFV.

5.8.2 Collective reparations: the interplay between the ICC and TFV

In its capacity as an expert body that advises the Court on reparations, the TFV influenced the development of collective reparations before the ICC. This became apparent in the ICC's first reparations order when the Trial Chamber followed the recommendations of the TFV and consequently only ordered collective reparations. Nevertheless, this does not mean that the ICC and the TFV had the same understanding of collective reparations and its application. My analysis shows that even though the ICC and TFV started the reparation proceedings with two opposing views of collective reparations, both institutions made some changes to their approach to collective reparations that brought them more in line with each other. The conflicting views on (collective) reparations can be traced back to the distinctive nature of the two actors, including their differing mandates, objectives and working fields. As a criminal court, the ICC is active in a 'legal reality' that is dictated by law and rules created by a political body. Moreover, the Court has to strike a fair balance between the rights of the accused and the rights of victims, including the right to reparations, whereas both

[1137] The Board of Directors of the TFV claimed that when the TFV's resources are allocated its collective reparations and assistance mandate take priority. *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 124.

[1138] Marina Lostal, 'The Ntaganda Reparations Order: a marked step towards a victim-centred reparations legal framework at the ICC' (*EJIL: Talk!,* 24 May 2021) <https://www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc/> accessed 28 February 2022.

[1139] Moffett and Sandoval described this as: '[i]t seems the Court in perpetuating the individual/collective division of reparations is tying itself in semantic knots to meet victims' expectations against the limitations of the Court's capacity and liability of the convicted person'. Luke Moffett and Clara Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) Leiden Journal of International Law 1, 13

mandates of the TFV (a reparation and an assistance mandate) are victim-focused. In addition, the TFV operates in the affected areas that suffered from a long and continues conflict, which resulted in a high number of victims and perpetrators, tension within the communities, limited resources,[1140] deficient infrastructure, and conflicting needs and interests.[1141] As such, the TFV is well-suited to determine the appropriate nature of the reparations.[1142]

The ICC has to comply with the requirement to safeguard the rights of the offender during the criminal process, including the reparations proceedings where the offender's liability for reparations is set. The offender can only be held liable for the crimes that he was convicted for, and thus only for the harm that resulted from these crimes.[1143] Consequently, the ICC-ordered collective reparations were provided to a community that was limited to the community members who met the eligibility criteria. Thus, the beneficiaries were the community members who could prove that they suffered harm from the crimes for which the offender was convicted. Therefore, the victims had to go through a screening process where the eligibility of the individual victim was assessed.[1144]

However, the TFV emphasized that the detailed scrutiny of the individual victim eligibility process negatively impacted the design and implementation of the reparations. The individual eligibility process consumed extensive funds, resources, and time.[1145] The implementation of the actual reparations made use of the same funds and resources, resulting in even more limited resources for the actual reparations.[1146] In addition, the TFV claimed that victims were fearful to participate in

[1140] Due to the COVID-19 pandemic, the yearly revenue of the TFV is even lower than it was in the years before the pandemic hit. *The Prosecutor v Bosco Ntaganda* (Public Redacted Version of the Annex A to "Trust Fund for Victims' Submission of Draft Implementation Plan") ICC-01/04-02/06-2732-AnxA-Red, **TFV** (17 December 2021) para, 31.

[1141] Alina Balta, Manon Bax and Rianne Letschert, 'Trial and (Potential) Error: Confliction Visions on Reparations Within the ICC System' (2019) 29 International Criminal Justice Review 221, 225.

[1142] Owiso Owiso, 'The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process' (2019) 19 International Criminal Law Review 505, 521.

[1143] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 99.

[1144] The Court used different approaches to assess the liability of the convicted person. In the *Lubanga* case, the liability was set in a separate decision which was issued five years after the first reparations order. The Trial Chamber required a list of the identified beneficiaries and the extent of their harm in order to be able to rule on Lubanga's liability. In the subsequent cases, the Court ruled on the liability of the convicted person in the reparations decision and calculated the liability on its estimation of the costs to repair the harm. In the cases against *Al Mahdi* and *Ntaganda*, the Court estimated the number of potential beneficiaries and tasked the TFV with the identification of the beneficiaries. See, Miriam Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (Cambridge University Press 2020) 107 and 109-111; *The Prosecutor v Thomas Lubanga Dylio* (Order Instructing the Trust Fund for Victims to Supplement the Draft Implementation Plan) ICC-01/04-01/06-3198, **T Ch I** (9 February 2016) para 14; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 215-247.

[1145] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red (1 September 2011) **TFV**, para 291.

[1146] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 148.

the eligibility process, which could lead to a select group of beneficiaries, particularly in comparison to the actual number of victims.[1147] Consequently, the TFV recommended collective reparations that made use of a community-based approach; the collective reparations had to be awarded to the local community, notwithstanding their victim status before the ICC.[1148] Thus, making the individual eligibility procedure redundant. The TFV went even further and challenged whether the collective reparations ordered by the ICC were not merely individual reparations and questioned whether the ICC's approach to collective reparations left any room for reparative projects that were inherently collective, such as symbolic reparations and reconciliation activities.[1149] The Court in its turn stressed that it had previously ruled that the projects as included in the DRIP were in agreement with the Court's reparations order.[1150]

In other words, the Court and TFV both defined collective reparations as reparations that were awarded to a collective, yet their understanding of a collective differed fundamentally. In the case against *Ntaganda*, the Court changed tack and no longer used the beneficiary of the reparations as the distinctive feature of collective reparations. Instead, the ordered collective reparations focused on individual beneficiaries and individual benefits.[1151] Even though the TFV already listed the nature of the reparations as an element that could qualify reparations as collective in the *Lubanga* case, the ICC only adopted this approach in the *Ntaganda* case.[1152] At the same time, the TFV also included the nature of reparations (such as the mode of distribution) as the distinctive factor for collective reparations, for instance compensation paid to individuals could still be seen as a collective reparations when the sum was standardized and symbolic.[1153] It appears that both institutions shifted from an element of collective reparations with two conflicting interpretations to an element with a shared reading, consequently the ICC and TFV came closer to a shared understanding of collective reparations.

[1147] Victims were scared to reveal their identity to Lubanga, to conduct a harm assessment outside of a safe counseling setting, and/or for the disruption of their lives during the process. *The Prosecutor v Thomas Lubanga Dylio* (Additional Programme Information Filing) ICC-01/04-01/06-3209, **TFV** (7 June 2016) para 25.

[1148] The TFV stressed that the conscription of child soldiers did not only harm these children, but also the affected communities. Collective reparations could address this collective harm of the communities. *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 154-155.

[1149] *The Prosecutor v Thomas Lubanga Dylio* (Additional Programme Information Filing) ICC-01/04-01/06-3209, **TFV** (7 June 2016) para 66 ('Because the Trial Chamber's current procedural approach appears to be limited to reparation awards that result in individual benefits, the Trust Fund respectfully invites the Trial Chamber to consider whether and to what extent it considers that such inherently collective activities [symbolic programs ie for reconciliation] should form part of the overall reparations program').

[1150] *The Prosecutor v Thomas Lubanga Dylio* (Request Concerning the Feasibility of Applying Symbolic Collective Reparations) ICC-01/04-01/06-3219, **T Ch II** (15 July 2016) para 10-11.

[1151] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 189.

[1152] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021), para 189.

[1153] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the reparations proceedings) ICC-01/04-02/06-2635-Red, **TFV** (18 December 2020) para 83.

At first, the TFV and the ICC disagreed on the relation between collective and individual reparations, and thereafter their understandings of this relation were brought together. The TFV not only recommended collective reparations, it also explicitly advised against individual reparations.[1154] As the funding partner of the Court-ordered reparations (due to the indigency of the convicted persons), the TFV initially claimed that it could only use its resources for collective reparations.[1155] In the *Lubanga* case, the Court acted on this advice and solely awarded collective reparations. After the Court ignored this instruction and included individual reparations in its reparations order in the *Katanga* case, the TFV put a different interpretation on Regulation 56 of the Regulations of the Trust Fund for Victims and no longer restricted its funds to collective reparations.[1156] Hence, accommodating the Court that ordered a combination of collective and individual reparations. Moreover, in the last analyzed case, the *Ntaganda* case, the TFV recommended both collective and individual reparations. Yet, the collective reparations were still prioritized, and the individual reparations were only recommended as an exception.[1157] As discussed in section 5.8.1, this prioritization may be the reason the Court labelled reparations that were primarily individual as (individualized) collective reparations. In that case, the Court followed the recommendations in wording only.

Hence, the TFV influenced the development of collective reparations within the ICC system by recommending collective reparations as the only or primary form of reparations. However, my analysis indicates that the ICC's understanding of collective reparations was not significantly influenced by the TFV. Even though the ICC and TFV both made changes in their approach to collective reparations, it was primarily the TFV who adapted its approach to meet the ICC, for instance by making its funds available for individual reparations and by recommending both collective and individual reparations. However, the Court primarily changed its terminology, without adjusting its approach to reparations, and consequently stretched the definition of collective reparations so that it also included reparations that are essentially individual.

[1154] *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 152.

[1155] The TFV based this claim on the second sentence of Regulation 56 of the Regulations of the Trust Fund for Victims: 'the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards'. See *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 125; *The Prosecutor v Thomas Lubanga Dylio* (Observations on Reparations in Response to the Scheduling Order of 14 March 2012) ICC-01/04-01/06-2872, **TFV** (25 April 2012) para 16; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 269.

[1156] *The Prosecutor v Germain Katanga* (Notification Pursuant to Regulation 56 of the TFV Regulations Regarding the Trust Fund Board of Director's Decision Relevant to Complementing the Payment of the Individual and Collective Reparations Awards as Requested by Trial Chamber II in Its 24 March 2017 Order for Reparations) ICC-01/04-01/07-3740, **TFV** (17 May 2017) para 27 and 28.

[1157] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 128 ('collective reparations seem the primary suitable form of reparations') and para 116 ('the existence of individual types of harm closely linked to Mr Ntaganda's personal action may warrant conferring individual reparations on an exceptional basis').

5.8.3 EVALUATING THE COLLECTIVE REPARATIONS

This section is set to evaluate the collective reparations ordered by the ICC. First, Aristotle's theory on particular justice is used to assess how notions of corrective and distributive justice are reflected in the reparations. Notwithstanding the corrective or distributive nature of the reparations, the role of the TFV in the reparation regime of the Court may blur the line between reparations and assistance. Therefore, the court-ordered reparations are evaluated in relation to the assistance as provided by the TFV. The five elements distinguishing reparations from assistance as introduced by Peter Dixon are used as the tools for this evaluation.

CORRECTIVE VS. DISTRIBUTIVE JUSTICE

In essence, the reparations before the ICC were of a corrective nature. According to the ICC, in concurrence with the international law principle that reparations should aim for restitution *status quo ante,* reparations aim to repair the harm suffered by victims.[1158] Even though the Court ordered the reparations against the convicted persons in order to 'ensure that offenders account for their acts',[1159] the ordered reparations were not intended to punish the offender.[1160] Instead, the offenders were held liable for the costs involved in repairing the harm of the victims,[1161] whereby the liability was set based on the harm that was caused by the criminal acts for which he was convicted.[1162] Another aspect of the reparations before the ICC that reflected their corrective nature was the principle of no over-compensation: the ordered reparations were not allowed to enrich the victims. Hence, the reparations were designed to restore the unequal division that resulted from the crimes and nothing more.

The specific forms of reparations that were ordered by the ICC were mostly on the left side of the scale of particular justice. Most Court-ordered reparations were backward-looking, because they focused on the violations and aimed to repair the unequal division that was caused by the violations. This was especially clear for the restitution that was ordered by the Court in the *Lubanga* and *Ntaganda* cases, though

[1158] *The Prosecutor v Germain Katanga* (Judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, **A Ch** (8 March 2018) para 178.
[1159] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 58 ('must be proportionate to the harm caused'). See furthermore, *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 15.
[1160] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 314; *The Prosecutor v Germain Katanga* (Judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute") ICC-01/04-01/07-3778-Red, **A Ch** (8 March 2018) para 184.
[1161] See for instance, Rome statute, article 75 (2); *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 20.
[1162] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 6.

these were not followed up in the DRIPs and subsequent Court decisions. In addition, compensation was ordered in all cases, including individual reparations in the *Katanga* and *Al Mahdi* cases. This form of reparation was ordered to undo the effects of the committed crimes in case there were no other measures available that could reach this goal.[1163] Even though rehabilitation is a category of reparations that is ideally suited for the improvement of the future of the victims, the rehabilitative measures ordered by the Court were primarily focused on repairing the past as they aimed to redress the harm suffered and restore the situation of the victim. For instance, medical and psychological care directly address the harm of the victims, while education and socio-economic projects repair the harm done due to the loss of schooling or ability to do their job. According to the Court, one of the aims of satisfaction was forward-looking, namely the prevention of future crimes.[1164] However, the ordered satisfaction measures were principally designed to address the harm that resulted from the violations, including the stigma caused by the victimization and the damaged relations in families and communities.[1165] The category of reparations that was focused on the future, guarantees of non-repetition, was only ordered in the case against *Al Mahdi*.

Nevertheless, there was a slight shift to the right side of the scale of particular justice. In the *Ntaganda* case, the Court added the principle of transformative reparations to its principles. These aim 'at producing both a restorative and a corrective effect and to promote structural changes, dismantling discriminations, stereotypes, and practices that may have contributed to create the conditions for the crime to occur'.[1166] These reparations were not only designed to restore the suffered harm, but also to distribute goods, such as power, in a fair way.[1167] However, the distributive nature of reparations was primarily linked to the reparation process, instead of the reparations themselves. When ordering transformative reparations, the Court 'should focus on confronting social exclusion by prioritsing a participatory process over outcomes'.[1168] In addition, the reparations process should 'in itself be

[1163] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 84.
[1164] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 43.
[1165] *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, **T Ch I** (7 August 2012) para 239; *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 67; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 88 and 207.
[1166] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 94.
[1167] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 95 (The transformative nature should confront social exclusion by, amongst others, 'challenging unequal power relations').
[1168] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 95.

empowering and transformative and give victims the opportunity to assume an active role in obtaining reparations'.[1169]

Thus, the reparations ordered by the ICC were primarily based on corrective justice, while the subsequent administrative and programmatic implementation process was more and more focused on distributive justice.

COLLECTIVE REPARATIONS VS. ASSISTANCE

The ICC requested the TFV to include victims who did not fit the eligibility criteria for reparations in its programs under the assistance mandate.[1170] In other words, the ICC wanted to use the assistance mandate 'to fill in the holes of a legally restricted reparations process'.[1171] Some scholars went even further and claimed that 'the ICC uses [sic] the general assistance mandate of the Trust Fund to promote the Court as having brought relief to the victims'.[1172] However, the TFV denounced the Court's idea to use the assistance mandate as a safety net when reparations were not possible.[1173] According to the TFV, each mandate had its own 'intrinsic value',[1174] and did 'possess distinctive and intrinsic qualities and independent dynamics'.[1175] Furthermore, the procedural framework of each of the mandates was different and designed to be functional for the particular mandate, making it impractical 'for victim beneficiaries to simply be "moved" from one mandate to another'.[1176] Furthermore, the Court cautioned that blurring the two mandates could undermine the suspect's rights.[1177] Nevertheless, the TFV referred non-eligible victims to other organizations for relief of

[1169] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 95.
[1170] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 199 and 215; *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 343-344.
[1171] Peter Dixon labelled this the 'Swiss cheese' model. Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 102.
[1172] Regina E Rauxloh, 'Good Intentions and Bad Consequences: The General Assistance Mandate of the Trust Fund for Victims of the ICC' (2021) 34 Leiden Journal of International Law 203, 219.
[1173] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 157.
[1174] *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 156; *The Prosecutor v Thomas Lubanga Dylio* (Additional Programme Information Filing) ICC-01/04-01/06-3209, **TFV** (7 June 2016) para 82.
[1175] *The Prosecutor v Thomas Lubanga Dylio* (Trust Fund for Victims' First Report on Reparations) ICC-01/04-01/06-2803-Red, **TFV** (1 September 2011) para 130.
[1176] *The Prosecutor v Thomas Lubanga Dylio* (Additional Programme Information Filing) ICC-01/04-01/06-3209, **TFV** (7 June 2016) para 76. See furthermore, *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Version of "Corrected Version of Draft Implementation Plan for Reparations, 20 April 2018, ICC-01/12-01/1) ICC-01/12-01/15-265-Corr-Red, **TFV** (18 May 2018) para 277.
[1177] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, **A Ch** (3 March 2015) para 182.

their harm.[1178] For instance, after Bemba was acquitted and reparations were off the table, the TFV decided to step up the realization of its assistance program for the victims in the Central African Republic.[1179]

This illustrated the ambiguous distinction between collective reparations and assistance. Moreover, these two mandates were implemented simultaneously, and partly in the same locations. At this moment, the TFV is active under both its mandates in the district of Ituri in the DRC,[1180] the region where the crimes of Lubanga, Katanga and Ntaganda were committed. This section will discuss to what extent the Court-ordered reparations can be distinguished from the TFV's assistance by using the five elements as identified by Peter Dixon: responsibility, recognition, process, form, and impact.[1181]

1. Contrary to assistance, reparations are based on the legal responsibility to repair the harm that resulted from a wrongful act and are consequently ordered against the party that committed the wrongful act.[1182] The ICC ordered reparations against the convicted person, making them liable for the reparations.[1183] The assistance provided by the TFV was not tied to a guilty verdict, nor was the wrongful party responsible for financing the assistance. According to the TFV, the Court-ordered reparations implicated a public acknowledgement that the victims had been wronged by the convicted person as well as an acknowledgement of their official status as right holders. Consequently, the moral value of the benefits received under the reparations mandate was believed to be more important to victims than that of the assistance mandate.[1184] An opinion that was also expressed in scholarly literature with scholars arguing that the element of

[1178] In case the current projects under its assistance mandate did address the particular harm, the victims would be referred to these programs, otherwise they would be directed to other aid organizations active in the community. *The Prosecutor v Germain Katanga* (Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728)) ICC-01/04-01/07-3751-Red, **TFV** (25 July 2017) para 79.

[1179] *The Prosecutor v Jean-Pierre Bemba Gombo* (Final Observations on Reparations Following the Acquittal of Mr Jean-Pierre Bemba) ICC-01/05-01/08-3648, **TFV** (6 July 2018) para 7.

[1180] Under its assistance mandate, the TFV is currently active in the DRC, including the Ituri region, the Central African Republic, Uganda, and the Côte d'Ivoire. The assistance programs in Mali, Kenya and Georgia will start as soon as the implementing partners are selected. See, 'TFV Management Brief Q1/2021' (*TFV*) <https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Management%20Brief%20Q1%202021_1.pdf> accessed 26 August 2021, p. 2-3.

[1181] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 95-102.

[1182] 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* (Social Science Research Council 2009) 172; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 147.

[1183] Rome statute, article 75 (2); *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 20.

[1184] *The Prosecutor v. Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 155; *The Prosecutor v Thomas Lubanga Dylio* (Additional Programme Information Filing) ICC-01/04-01/06-3209, **TFV** (7 June 2016) para 82.

responsibility incorporates a strong symbolic component of condemnation of the wrongful acts.[1185] However, the persons thus far convicted before the ICC were declared indigent and were only held liable for the reparations in theory, while in practice the reparations were paid from the same funds as the assistance.[1186]

Another difference between reparations and assistance relating to the element of responsibility is their objective: reparations aim to repair the harm suffered by the victims, while assistance intends to address the needs of victims.[1187] However, the TFV did not agree and regarded this to be an element to distinguish the assistance mandate from developmental aid, and stated that 'unlike projects ran for humanitarian purposes, assistance mandate programmes are conducted with a view to vindicating rights of victims in relation to harm suffered from crimes falling within the Court's jurisdiction, and to provide them with reparative measures in relation to that harm'.[1188]

2. The second element is closely linked to the first one relating to responsibility. Reparations are not only an acknowledgement of the responsibility for a wrongful act, they also serve as a public ***recognition*** of victimhood and the harm the victims suffered.[1189] The Court emphasized the importance of recognition in the *Ntaganda* case when it claimed that recognizing the children born out of rape as victims was a form of reparations.[1190] Additionally, Pablo De Greiff argued that reparations are exclusively targeting victims, instead of all the members of a community or region including those who are not a victim.[1191] In the ICC system, the reparations were only available to victims of the crimes for which the offender was

[1185] Brandon Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 566; Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 97; Kirsten J Fisher, 'Messages from the Expressive Nature of ICC Reparations: Complex-victims in Complex Contexts and the Trust Fund for Victims' (2020) 20 International Criminal Law Review 318, 342.

[1186] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 96.

[1187] Kirsten J Fisher, 'Messages from the Expressive Nature of ICC Reparations: Complex-victims in Complex Contexts and the Trust Fund for Victims' (2020) 20 International Criminal Law Review 318, 325.

[1188] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the Reparations Proceedings) ICC-01/04-02/06-2635-Red, **TFV** (18 December 2020) para 59. See furthermore, *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 154; *The Prosecutor v Bosco Ntaganda* (Annex A to Public Lesser Redacted Version of "Initial Draft Implementation Plan with Focus on Priority Victims" ("Initial Implementation Plan" or "IIP")) ICC-01/04-02/06-2676-AnxA-Corr-Red2, **TFV** (8 June 2021) para 27.

[1189] *Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, **T Ch II** (24 March 2017) para 15. See furthermore, 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* (Social Science Research Council 2009) 172.

[1190] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 123.

[1191] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

convicted, while the assistance mandate was open to victims of a situation before the Court. Indeed, in the *Ongwen* case, the TFV even rejected victims who participated in the Court proceedings from the assistance projects and let them wait for the Court to order reparations and subsequently approve the DRIP.[1192] As acknowledged by the TFV, the recognition of suffering may be counterproductive in case the victimhood caused stigmatization, as is the case for, amongst others, former child soldiers and victims of sexual violence.[1193]

3. The **process** of designing and implementing the reparations is another factor that differentiates reparations from assistance. Reparations are not limited to the reparative modalities itself, instead the process through which they are received is also essential when repairing victims.[1194] According to both the ICC and TFV, the victims should be involved during the reparations process in order to make them meaningful, as such they should be consulted in designing and implementing the reparations.[1195] As discussed in section 5.1.3 and 5.1.6, the victims can only participate indirectly during the reparation proceedings before the Court and they were represented by a (common) LRV. The TFV did consult with victims directly during the development of the DRIP. Nevertheless, the victims' involvement in the reparations process was not a distinctive factor, because the TFV's procedure for the construction of assistance projects also involved 'extensive consultation with victims'.[1196] In addition, the implementation process of reparations and of assistance took place in a similar manner and were implemented by the same NGO's.[1197]

[1192] At this moment, the ICC's order for reparations is still forthcoming. Anushka Sehmi, 'Emphasising Socio-Economic Narratives of Truth, Justice and Reparations in *The Prosecutor v Dominic Ongwen*' (2021) 26 The International Journal of Human Rights 1083, 1098.

[1193] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Observations Relevant to Reparations) ICC-01/04-02/06-2476, **TFV** (28 February 2020) para 119. See furthermore, Peter J Dixon, 'Reparations and the Politics of Recognition' in Christian De Vos, Sara Kendall & Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press 2015) 339-342.

[1194] See for instance, Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 42 Stanford Journal of International Law 279, 283; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 37; Jo-Anne Wemmers, 'The Healing Role of Reparation' in Jo-Anne Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014) 226; Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 36-41.

[1195] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, **A Ch** (3 March 2015) para 70; *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 45; *The Prosecutor v Thomas Lubanga Dylio* (Annex A to Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, **TFV** (3 November 2015) para 70.

[1196] Trust Fund for Victims, 'Trust Fund for Victims 2020 Annual Report' (September 2021) 37.

[1197] See for instance, Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward' (2017) 21 The International Journal of Human Rights 1204, 1208; Alina Balta, Manon Bax and Rianne Letschert, 'Trial and (Potential) Error: Confliction Visions on Reparations Within the ICC System' (2019) 29 International Criminal Justice Review 221, 234.

4. Reparations address the harm the victims have suffered, while assistance is based on the needs of victims. Peter Dixon argues that this should result in a different **form** of reparations that is 'more symbolically or materially significant'.[1198] Nevertheless, the TFV's reparation projects were rather similar to those operational under the assistance mandate.[1199] Most reparative and assistance projects consisted of rehabilitation measures such as medical and psychological care, material support to increase the victims' ability to earn their livelihood, and reconciliation initiatives.[1200] Moreover, in the *Ntaganda* case, the Court ordered the TFV to develop a plan, based on existing programs, for reparations for 'priority victims'.[1201] The TFV agreed with the ICC and stated that '[t]here is no conceptual barrier to resort to assistance services as interim relief for reparation beneficiaries'.[1202] The reparations received by these priority victims consisted of priority access to projects that were already operatable under the reparative mandate in the *Lubanga* case or under the general assistance mandate.[1203] Hence, the reparations were often identical to the assistance received by victims who did not meet the ICC's eligibility criteria. The TFV consequently stressed that the reparations that were provided through an assistance project should be clearly labelled as reparations.[1204]
5. The last distinct element of reparations is linked to the alleged benefits of reparations that result from the other four elements. Since reparations are connected to the responsibility of the wrongdoer and the recognition of victimhood and suffered harm, these are believed to have an exclusive symbolic component.[1205] As a result, the **impact** of reparations is assumed

[1198] Peter J. Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 100.
[1199] Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward' (2017) 21 The International Journal of Human Rights 1204, 1208; Alina Balta, Manon Bax and Rianne Letschert, 'Trial and (Potential) Error: Confliction Visions on Reparations Within the ICC System' (2019) 29 International Criminal Justice Review 221, 234.
[1200] The only exception is the reparative measure of individual compensation as ordered in the cases against *Katanga* and *Al Mahdi*. Trust Fund for Victims, 'Trust Fund for Victims 2020 Annual Report' (September 2021).
[1201] In its Reparations Order, the Court listed several criteria for priority victims, including elderly victims and victims of sexual violence. The LRV Child Soldiers and the LRV Victims of the Attacks identified victims that met these criteria and subsequently required urgent reparations. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, **T Ch VI** (8 March 2021) para 93 and 252; *The Prosecutor v Bosco Ntaganda* (Annex A to Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) para 13.
[1202] *The Prosecutor v Bosco Ntaganda* (Annex A to Report on Trust Fund's Preparation for Draft Implementation Plan) ICC-01/04-02/06-2676-Red, **TFV** (8 June 2021) **TFV**, para 27.
[1203] *The Prosecutor v Bosco Ntaganda* (Annex A to Public Lesser Redacted Version of "Initial Draft Implementation Plan with Focus on Priority Victims" ("Initial Implementation Plan" or "IIP")) ICC-01/04-02/06-2676-AnxA-Corr-Red2, **TFV** (8 June 2021) para 39.
[1204] *The Prosecutor v Bosco Ntaganda* (Annex A to Public Lesser Redacted Version of "Initial Draft Implementation Plan with Focus on Priority Victims" ("Initial Implementation Plan" or "IIP")) ICC-01/04-02/06-2676-AnxA-Corr-Red2, **TFV** (8 June 2021) para 28.
[1205] See for instance, Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114; 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:*

to be stronger than that of assistance.[1206] In theory the impact of reparations may be more significant than that of assistance, yet it remains to be seen whether this difference is existent in practice.

These five features primarily distinguished reparations from assistance on a theoretical level, while in practice reparation and assistance projects were similar, because both were financed and developed by the TFV, and realized by the same implementing partners. The main difference was the reparation's connection to a Court case and a guilty verdict.

Systems in Place and Systems in the Making (Martinus Nijhoff 2009) 91; Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

[1206] At this moment, empirical evidence that distinguishes the impact of reparations from assistance is lacking. Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 101.

CHAPTER 6: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

6.1 INTRODUCTION

From 17 April 1975 to 6 January 1979, Cambodia was ruled by the Khmer Rouge that aimed to transform Cambodia into a communist state (Democratic Kampuchea) that was based on agriculture.[1207] Therefore, the urban population was forcefully relocated to agricultural working camps with poor living conditions, where many people starved to death or died from deceases.[1208] Moreover, the persons who were believed to be the 'enemies of the State' were rounded up, tortured and executed.[1209] This repression was even extremer against several religious and ethnic minorities, such as the Islamic Cham, ethnic Chinese and ethnic Vietnamese.[1210] It is estimated that approximately 20% of the Cambodian population (1,7 million out of a total of 8 million) perished through starvation, deceases, and executions during the Khmer Rouge rule.[1211]

Almost three decades after the Khmer Rouge regime fell, the Extraordinary Chambers in the Courts of Cambodia (hereinafter ECCC) was set up to prosecute the crimes committed during this regime.[1212] The ECCC has a reparations mandate and aims to remedy the victims through collective and moral reparations,[1213] whereas individual reparative measures, such as compensation are excluded.[1214] The ECCC's interpretation of 'collective and moral reparations', as well as its understanding of its mandate are discussed in this chapter. By analyzing the judgements of the Court, this chapter's objective is to describe the evolution of collective reparations, the reasons for awarding specific collective modalities, and developments relating to the nature

[1207] See for instance, Rachel Killean, *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia* (Routledge 2018) ch 3.
[1208] See for instance, Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law: with a Case Study on the Khmer Rouge's Destruction of Cambodian Heritage* (Martinus Nijhoff 2013) 177; Ben Kiernan, 'Introduction: Conflict in Cambodia, 1945-2002', (2002) 34 Critical Asian Studies 483, 486.
[1209] See for instance, John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 2.
[1210] Ben Kiernan, *Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (3rd edn, Yale University Press 2008) 460-463; Ben Kiernan, 'Introduction: Conflict in Cambodia, 1945-2002', (2002) 34 Critical Asian Studies 483, 486.
[1211] Ben Kiernan, *Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (3rd edn, Yale University Press 2008) 456.
[1212] Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (signed on 10 August 2001, amended on 27 October 2004) NS/RKM/1004/006 (ECCC Law) article 4-6.
[1213] ECCC Internal Rules (adopted 12 June 2007, entered into force on 19 June 2007) (ECCC IR) rule 23 (1) (b).
[1214] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 659 ('In the ECCC context it excludes individual awards, whether or not of a financial nature').

and scope of the beneficiaries. In other words, the ECCC's changing perception and application of collective reparations will be examined.

This chapter first introduces the ECCC, its reparations regime, its jurisdiction, and the procedural role of victims. Thereafter, the methodology specific to this chapter is explained and the analyzed cases are introduced. This is followed by the results of the qualitative content analysis relating to the definition of collective reparations, their application, and beneficiaries. Finally, the chapter concludes with a discussion of the development of collective reparations within the Court. The results of the analysis of the primary sources, the Court documents, will be enriched with secondary sources including scholarly literature. In the conclusion, special attention is paid to the relation between collective reparations and Aristotle's theory on particular justice, and between collective reparations and assistance.

6.1.1 THE ECCC

The government of Cambodia asked the United Nations (hereinafter UN) for assistance in the prosecution of the top leaders of the Khmer Rouge on 21 June 1997. In March 2003, after six years of tense negotiations, the government of Cambodia and the UN reached an agreement to establish a Court to prosecute the crimes of the Khmer Rouge regime.[1215] Thereafter, it took another three years before the judges were sworn in,[1216] which marked the formal establishment of the ECCC.[1217] An additional year was needed before the Internal Rules of the Court were adopted and the ECCC could start its proceedings.[1218] The sticky issues of the negotiations and the follow-up after the agreement was signed, revolved around the balancing of national and international influence. On the one hand, Cambodia insisted on a national-oriented court with a majority position for the national judges, while on the other hand the UN aimed at an international tribunal with a majority of international judges and key personnel.[1219] There were several disagreements about, amongst others, the rights of the accused and the victims and who would appoint the key functions.[1220] The Cambodian government turned out to be most successful in the negotiations; the

[1215] Rupert Skilbeck, 'Defending the Khmer Rouge' (2008) 8 International Criminal Law Review 423, 424 and 427.
[1216] Helen Jarvis, 'Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 14.
[1217] Nina Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar Publishing 2018) 26.
[1218] John Ciorciari and Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2014) 35 Michigan Journal of International Law 369, 372.
[1219] See for an overview of the negotiations, Rupert Skilbeck, '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; John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 21-36.
[1220] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 31.

ECCC is a hybrid court that combines national and international features with a prominent role for the Cambodian legal system. The Co-Investigating Judge described the ECCC as a 'special internationalized court'.[1221]

The ECCC was the fourth hybrid international criminal tribunal that was established after the turn of the millennium.[1222] The ECCC varies significantly from its predecessors, especially in its influence of national law and the limited international features. Indeed, the ECCC is the first hybrid tribunal that was created by national law, and that was placed within the existing national court structure.[1223] Nevertheless, the Court regarded itself to be an 'independent entity'.[1224] The procedure of the ECCC is primarily based on the national law, while international procedural rules are only consulted when the Cambodian law does not consider the specific matter, when there is an uncertainty about a rule, or when the consistency with international safeguards is questioned.[1225] As the Cambodian legal system is based on the system of its previous colonial ruler (France) it is strongly influenced by civil law.[1226] Subsequently, this influence is visible in the ECCC, most notably in the inclusion of Civil Parties.[1227] Another difference between the ECCC and other hybrid international tribunals is the practice of two Prosecutors and Investigating Judges; one international and one national.[1228] The two Co-Prosecutors, as well as the Co-Investigating Judges, have to cooperate and aim to work unanimously.[1229]

[1221] *Prosecutor v Kaing Guek Eav (Duch)* (Order of Provisional Detention) 001/18-07-2007-ECCC, Office of the Co-Investigating Judge (31 July 2007) para 20.
[1222] International hybrid tribunals were established in East Timor, Kosovo, and Sierra Leone before the establishment of the ECCC. The UN Security Council was reluctant to create another international tribunal such as the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994). Daphna Shraga, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions' in Cesare Romano, André Nollkaemper, Jan K Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004) 15; Jörg Menzel, 'Justice Delayed or too Late for Justice? The Khmer Rouge Tribunal and the Cambodian "Genocide" 1975-79' (2007) 9 Journal of Genocide Research 215, 218.
[1223] ECCC Law, article 2.
[1224] *Prosecutor v Kaing Guek Eav (Duch)* (Decision on Appeal Against Provisional Detention of Kaing Guek Eav Alias "Duch") 001/18-07-2007-ECCC-OCIJ (PTC01)-C5/45, P T Ch (3 December 2007) para 19.
[1225] ECCC Law, article 33; Chea Leang and William Smith, 'The Early Experience of the Extraordinary Chambers in the Courts of Cambodia' in Roberto Bellelli (ed), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Ashgate 2010) 146.
[1226] John Ciorciari and Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2014) 35 Michigan Journal of International Law 369, 372.
[1227] See section 6.1.5 for a further discussion of Civil Parties.
[1228] John Ciorciari and Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2014) 35 Michigan Journal of International Law 369, 372.
[1229] It turns out that this is difficult to achieve; see for instance, Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination* (Springer 2015) 78 (arguing that '[co-investigating judges] have often worked at cross-purposes and have been accused of undermining each other's efforts.').

6.1.2 JUDICIARY

The Court is the first hybrid tribunal to be ruled by a majority of national judges.[1230] Consequently, both the Pre-Trial Chamber and the Trial Chamber are each led by three Cambodian and two international judges, while the Supreme Court Chamber includes four national and three international judges.[1231] In order to make sure that decisions cannot be reached without international judges, a super majority is needed,[1232] meaning that decisions are made by a majority plus one.[1233]

The Judges, Co-Investigating Judges, and Co-Prosecutors are elected by the Cambodian Supreme Council of the Magistracy, and the international Judges and Prosecutor are appointed on the basis of a list with nominees from the UN Secretary-General.[1234] The Supreme Council of the Magistracy is formed by the King of Cambodia, who is also the chair, the Minister of Justice, the Chiefs of the Supreme Court and the Appeal Court, the General Prosecutors of the Supreme Court and the Appeal Court, and three judges who are elected by the other members.[1235] Hence, the procedures for the election of judges and other key functions gives the Cambodian government unprecedented influence over the ECCC.[1236]

Consequently, the ECCC faced fierce criticism regarding its independence from the Cambodian government. Even though it is difficult to establish the extent of the interference, there are strong indications that the Cambodian government influenced the ECCC's procedures. First, due to the persecution of educated persons during the ruling of the Khmer Rouge, there is a lack of legally trained personnel, including judges.[1237] This increases the risk that national senior judicial personnel is elected on the basis of personal connections, instead of qualifications and work experience.[1238] Second, the Prime-Minister of Cambodia, Hun Sen, expressed his disapproval of further investigations and indictments.[1239] It is believed that this is reflected in the

[1230] John Ciorciari and Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2014) 35 Michigan Journal of International Law 369, 372.
[1231] ECCC Law, article 9.
[1232] Jörg Menzel, 'Justice Delayed or too Late for Justice? The Khmer Rouge Tribunal and the Cambodian "Genocide" 1975-79' (2007) 9 Journal of Genocide Research 215, 217.
[1233] ECCC Law, article 14.
[1234] ECCC Law, article 11, 18 and 26.
[1235] Law on the Organization and Function of the Supreme Council of Magistracy (adopted on 22 December 1994 by the National Assembly) 941222, article 2.
[1236] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 36; Elizabeth Nielsen, 'Hybrid International Criminal Tribunals: Political Interference and Judicial Independence' (2010) 15 UCLA Journal of International Law and Foreign Affairs 289, 308.
[1237] 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, 370.
[1238] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 37 and 84.
[1239] See for instance, Elizabeth Nielsen, 'Hybrid International Criminal Tribunals: Political Interference and Judicial Independence' (2010) 15 UCLA Journal of International Law and Foreign Affairs 289, 308; 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, 373; Shannon Torrens, 'Allegations of Political Interference, Bias Corruption at the ECCC' in Simon Meisenberg and

hindering of new judicial investigations and the premature closing of the *Cases 003* and *004*.[1240] When the international Co-Prosecutor and Judges tried to bring *Cases 003* and *004* forward, the national Co-Prosecutor and Judges halted this.[1241] Third, several allegations were made about corruption in the ECCC.[1242]

6.1.3 THE ECCC FRAMEWORK ON REPARATIONS

Even though the Law on the establishment of Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereinafter ECCC Law) does not mention reparations,[1243] the ECCC can nevertheless award reparations. After the ECCC was established, its Judges drafted the Internal Rules of the Court to determine the procedural issues.[1244] Rule 23 (12) of the first version of the Internal Rules held that 'the Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons'.[1245] Hence, the only source for the financing of reparations was the convicted person. However, the convicted persons before the Court are all declared indigent,[1246] making the mandate to provide reparations too stringent. Following the first reparations decision, the Internal Rules were amended to broaden the reparations mandate.[1247] In addition to the reparations borne by the convicted person, the ECCC could also order projects that were (co-)designed by the

Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contributions to International Criminal Law* (Asser Press 2016) 49.

[1240] See for instance, John Ciorciari and Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2014) 35 Michigan Journal of International Law 369, 396; Shannon Torrens, 'Allegations of Political Interference, Bias Corruption at the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contributions to International Criminal Law* (Asser Press 2016) 48; Stuart Ford, 'Senior Leaders and Those Most Responsible at the Extraordinary Chambers in the Courts of Cambodia' (2021) 15 FIU Law Review 31, 32; Juan-Pablo Pérez-Léon-Acevedo, 'UN-Backed Hybrid Criminal Tribunals (HCTS): Viable Options in International Criminal Justice?' (2022) International Criminal Law Review 1, 29-30.

[1241] A majority vote to stop the investigations was not obtained, and the investigation lingered on. In the end, *Cases 003* and *004* were prematurely terminated. This will be further discussed in section 6.2.1.

[1242] For example, several Cambodian employees had to do 'kick-back payments'. See for instance, Elizabeth Nielsen, 'Hybrid International Criminal Tribunals: Political Interference and Judicial Independence' (2010) 15 UCLA Journal of International Law and Foreign Affairs 289, 306; 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, 374; John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 88; Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination* (Springer 2015) 79.

[1243] The ECCC Law does include a provision regarding restitution, yet the confiscated goods should be returned to the state, hence excluding restitution to victims. ECCC Law, article 39.

[1244] The first Internal Rules were adopted during the plenary session of ECCC on 12 June 2007 and thereafter these were revised nine times. See John Ciorciari and Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2014) 35 Michigan Journal of International Law 369, 372.

[1245] ECCC IR, rule 23 (12).

[1246] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 666; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1124.

[1247] Christoph Sperfeldt, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia' (2012) 12 International Criminal Law Review 457, 462.

Victims Support Section (hereinafter VSS) and that had secured full funding.[1248] Consequently, there are two distinct avenues of reparations before the ECCC.[1249]

The reparations framework of the ECCC consisted only of rule 23 (12) of the Internal Rules, which was later replaced by rule 23 *quinquies* (1) that is, in the words of the Court,[1250] a 'terse legal framework'.[1251] Consequently, the Court looked at the provisions on reparations in several international treaties, non-binding documents, and other international courts.[1252] It claimed that it is an international principle that any violation has to be remedied in full, and additionally described the regional human rights courts as a 'persuasive authority' regarding the right to reparations.[1253] Nevertheless, the Court stressed that it has a specific reparations mandate that is not compatible with the other international courts.[1254] Indeed, contrary to the Inter-American Court of Human Rights (hereinafter IACtHR), the ECCC is empowered to prosecute individuals instead of states,[1255] which influences the reparations that the ECCC can order against the convicted person.[1256] Furthermore, contrary to the International Criminal Court (hereinafter ICC), the ECCC's legal framework lacked procedural mechanisms that assisted the Court in the reparations process. The Court believed that these mechanisms, including the Trust Fund for Victims (hereinafter TFV), would 'prevent the delay of the criminal case due to a potentially burdensome and time-intensive process related to reparations'.[1257] Without these mechanisms, the ECCC had to limit the content of the admissible claim.[1258] It seems that the other

[1248] ECCC Internal Rules (Rev. 6) (as revised on 17 September 2010) (ECCC IR6) rule 23 *quinquies* (3) (b); *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1122.

[1249] When filing the requests for the reparative measures, the Lead-Co Lawyers have to specify for each modality whether the costs will be borne by the offender, or that finances are secured via third parties. They have to select one or the other, making the two avenues of reparations not only distinct, but also mutually distinctive. *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1118.

[1250] Even though the Court speaks through a Pre-Trial Chamber, a Trial Chamber and an Appeal Chamber, for readability, this chapter refers to the different Chambers together as the Court.

[1251] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 639.

[1252] These include, amongst others, the UN Human Rights treaties, regional human rights treaties, the Reparations Principles, and rulings of the International Court of Justice, The European Court of Human Rights, the Inter-American Court of Human Rigths, the International Criminal Court, and the Special Tribunal for Lebanon. *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 662; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 645-651.

[1253] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 646 and 652.

[1254] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 641.

[1255] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 652.

[1256] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 663; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1116.

[1257] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 657.

[1258] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 657.

international courts, treaties and non-binding documents were merely acknowledged and did not really influence the Court's interpretation of its reparations mandate.

6.1.4 JURISDICTION OF THE ECCC

According to the ECCC Law, the Court's objective is

> to bring to trial 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 conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.[1259]

Hence, the ECCC's jurisdiction *ratione temporis* is the exact period that the Khmer Rouge ruled in Cambodia. The violence in the years prior to and after the ruling of the Khmer Rouge are thus outside the jurisdiction.[1260] The jurisdiction *ratione personae* is restricted to the leaders of the Khmer Rouge and the persons who were most responsible. However, the ECCC Law does not clarify the terms 'the most responsible', nor 'senior leaders'. The lack of jurisdiction *ratione personae* was one of the main defenses of Kaing Guek Eav, alias Duch (hereinafter Duch) in his appeal. Consequently, in its first ruling, the Supreme Court Chamber elaborated extensively on the requirements of the jurisdiction *ratione peronae*. 'The most responsible' and 'senior leaders' were both not defined and both lacked sharp-contoured criteria, hence, the interpretation of these criteria required discretion.[1261] The Supreme Court Chamber held that both criteria did not form part of the jurisdiction *ratione personae* of the ECCC.[1262] Instead, these fell within the investigatorial and prosecutorial policy, leaving it to the Co-Investigative Judges and Co-Prosecutors to determine whether a Khmer Rouge official is indeed 'most responsible' and/or a 'senior leader'.[1263] This reflects the only requirement of the ECCC's jurisdiction *ratione personae*: a Khmer Rouge official.[1264] The jurisdiction *ratione materiae* of the ECCC covers both national and international crimes. The national crimes are limited to homicide, torture, and

[1259] ECCC Law, article 1 and 2.
[1260] For an overview of the early rule of the Khmer Rouge in several regions of Cambodia and the accompanying violence, see *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 79-167.
[1261] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 62.
[1262] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 63 and 78.
[1263] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 64.
[1264] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 61.

religious persecution as set forth in the Cambodian Penal Code.[1265] The international crimes consist of genocide, crimes against humanity, and war crimes, including 'the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict'.[1266] Furthermore, 'crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations' fall within the ECCC's jurisdiction.[1267]

6.1.5 THE ROLE OF VICTIMS

The ECCC is the first international criminal court that allows victims to participate in the proceedings as Civil Parties.[1268] Victims who suffered physical, material, or psychological harm as a direct consequence of one of the crimes allegedly committed by the suspect can apply to participate as Civil Parties.[1269] As such, they can '[p]articipate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution', and request 'collective and moral reparations' after the conviction.[1270] At the early stages of the ECCC operations, Civil Parties were even seen as 'a party to the criminal proceedings'.[1271] This provision was deleted in later versions of the Internal Rules. Nevertheless, the ninth and most recent revision referred to the Co-Prosecutors and 'other parties', signifying that the Civil Parties are still regarded as a party in the proceedings.[1272]

The Internal Rules gave Civil Parties several participatory rights, such as, the right to appeal the orders of the Co-Investigating Judge, to access the case files, to call for witnesses, to question the accused, the witnesses and the experts, to make written submissions, and to make a final statement.[1273] Due to the high number of Civil Parties and the equality of arms in relation to the suspect, the ECCC restricted the scope of individual Civil Party participation, especially through obligatory representation.[1274] Initially, Civil Parties could enforce some of their participatory rights

[1265] ECCC Law, article 3.
[1266] ECCC Law, article 4 - 7.
[1267] ECCC Law, article 8.
[1268] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 53. See furthermore, John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 202; Ignaz Stegmiller, 'Legal Developments of Civil Party Participation at the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 535.
[1269] ECCC Internal Rules (rev. 9) (as revised on 16 January 2015) (ECCC IR9) rule 23 *bis* (1) (b).
[1270] ECCC IR9, rule 23 (1).
[1271] ECCC Internal Rules (rev. 4) (as revised on 11 September 2009) (ECCC IR4) rule 23 (6) (a).
[1272] See for instance, ECCC IR9, rule 33 (2), 55 (11), 72 (4) (b) (iii). See furthermore, Binxin Zhang, 'Recognizing the Limits of Victims Participation: A Comparative Examination of the Victim Participation Schemes at the ECCC and ICC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 518.
[1273] ECCC IR9, rule 74 (4), 80 (2), 90 (2), 91, 92, 94 (1)(a).
[1274] See for instance, John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 216; Binxin Zhang, 'Recognizing the Limits of Victims Participation: A Comparative Examination of the Victim Participation Schemes at the ECCC and ICC' in Simon

individually, yet this was restricted by the provision that these rights had to be exercised through their lawyer.[1275] This was further reduced in the fifth version of the Internal Rules, after which the Civil Parties formed 'a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers'.[1276] Even though the Civil Parties still have their own lawyers, in Court they are collectively represented by a national and an international Civil Party Lead Co-Lawyer who are responsible for the overall advocacy and strategy.[1277] Consequently, the participation of individual victims before the ECCC has vanished, instead they merely participate as a collective group of victims represented by two Lead Lawyers who they did not appoint, nor can they directly deliberate with them.[1278]

For the assistance of victims and Civil Parties, the Victims Unit, later renamed the VSS, was established.[1279] The VSS supports victims by assisting them by lodging complaints, filing civil party applications, finding legal representation,[1280] providing information, and the facilitation of victims and civil parties participation.[1281] In addition, the VSS is tasked with the organization of outreach activities related to victims. The revision of the ECCC's reparations mandate in 2010 gave the VSS two more tasks: the opening of the second avenue of reparations made (in cooperation with the Lead Co-Lawyers and NGOs) the VSS responsible for the identification, design and future implementation of reparations that are financed by third parties,[1282] and the VSS received the mandate to develop and implement non-judiciary measures.[1283]

Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 523.

[1275] This provision was added to the Internal Rules after the third revision; Internal Rules (rev. 3) (as revised on 6 March 2009) (ECCC IR3) rule 23 (7) (i).

[1276] This provision was added to the Internal Rules after the fifth revision; Internal Rules (rev. 5) (as revised on 9 February 2010) (ECCC IR5) rule 23 (5).

[1277] ECCC IR9, rule 12 *ter* (3), (4) and (5).

[1278] See for instance, John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 222-225; Ignaz Stegmiller, 'Legal Developments of Civil Party Participation at the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 542-543.

[1279] The first version of the Internal Rules obliges the Office of Administration to establish a Victims Unit. ECCC IR, rule 12 (1).

[1280] Even though the consolidated group of Civil Parties were represented by the Civil Party Lead Co-Lawyers in Court, the Civil Parties could still have their own lawyers. The Lead Co-Lawyers had to seek the views of the Civil Party lawyers in order to present a unified view of all Civil Parties before the ECCC. ECCC IR9, rule 12 *ter* (3). See furthermore, Binxin Zhang, 'Recognizing the Limits of Victims Participation: A Comparative Examination of the Victim Participation Schemes at the ECCC and ICC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 523-525.

[1281] ECCC IR9, rule 12 *bis* (1).

[1282] ECCC IR9, rule 12 *bis* (4).

[1283] See section 6.6. ECCC IR9, rule 12 *bis* (4).

6.2 METHODOLOGY

The qualitative content analysis of the jurisprudence of the ECCC was conducted in line with the general methodology as described in chapter 3. As there are only three cases before the ECCC that resulted in a guilty verdict and reparations order, the added value of a qualitative content analysis in combination with MAXQDA, the computer software used for the analysis, is not as significant as it is for the analysis of the other Courts.[1284] This methodology is nevertheless used for the consistency of the analyses of the different institutions. Furthermore, in chapter 8 the development of collective reparations throughout the three Courts and several truth commissions will be analyzed. This will be enhanced by the use of one methodology throughout the entire research.

Similar to the analysis of the case law of the other Courts, the coding and systematic analysis was limited to the argumentation of the Court. The argumentation of the other parties, especially the Civil Parties, were only used as illustration and not as sources for the qualitative content analysis.[1285] This section will elaborate on the selection of cases and of decisions that were included in the qualitative content analysis.

6.2.1 CASE AND MATERIAL SELECTION

The narrow jurisdiction of the ECCC, especially the *ratione personae* in combination with the ages of the suspects, and the political unwillingness to prosecute resulted in a low number of cases.[1286] Investigations have started into the conducts of ten persons, of which, at the time of writing, only three resulted in a trial.

The initial investigations resulted in three trial cases. The Co-Prosecutors opened investigations against Duch, Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith. These were divided into two cases; the case against Duch (*Case 001*)

[1284] The MAXQDA tools to (statistically) analyze the data, such as cross tabs and code frequencies, were not as advantageous as in the IACtHR and TRC chapters.

[1285] The submissions of the Civil Parties and their representatives may include valuable information regarding the views and concerns of victims relating to reparations, yet this thesis focuses on the development of collective reparations before the ECCC and not on the reparations requested by the victims. Even though the views and concerns of victims are important, they are beyond the scope of the systematic analysis of this thesis. For an overview of the victims' submissions on reparations in relation to the awarded reparations. See Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 155-163 and 173-185.

[1286] See for instance, John Ciorciari and Anne Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal' (2014) 35 Michigan Journal of International Law 369, 396; Shannon Torrens, 'Allegations of Political Interference, Bias Corruption at the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contributions to International Criminal Law* (Asser Press 2016) 48; Stuart Ford, 'Senior Leaders and Those Most Responsible at the Extraordinary Chambers in the Courts of Cambodia' (2021) 15 FIU Law Review 31, 32; Juan-Pablo Pérez-Léon-Acevedo, 'UN-Backed Hybrid Criminal Tribunals (HCTS): Viable Options in International Criminal Justice?' (2022) International Criminal Law Review 1, 29-30.

was separated from the case against the four other suspects (*Case 002*). The latter case was later divided into two separate trials (*Case 002/01* and *Case 002/02*), each covering distinct charges. The first case dealt with forced movement and the targeting of former officials of the Khmer Republic, the second case focused on the situation in the Tram Kak cooperatives, several worksites and security centres, the targeting of people on religious, ethnic and political grounds, and forced marriages. Ieng Sary passed away before the trial commenced and Ieng Thirith was declared unfit to stand trial due to dementia.[1287] Consequently, only two persons were prosecuted in *Case 002/01* and *Case 002/02*.[1288] Nuon Chea passed away after he was convicted in *Case 002/01* (first instance and appeal), yet before his appeal of his conviction in *Case 002/02* was decided.

After the first investigations were opened by the two Co-Prosecutors together, the international Co-Prosecutor started further investigations into five additional suspects. The national Co-Prosecutor disagreed, and the dispute was submitted to the Pre-Trial Chamber. However, they did not reach a majority vote and could therefore not stop the investigation.[1289] The investigations were divided into two cases: the case against Meas Muth and Sou Met (*Case 003*) and the case against Im Chaem, Ao An and Yim Tith (*Case 004*). The latter was thereafter divided into three separate cases. Yim Tith remained in *Case 004,* Im Chaem was investigated in *Case 004/01*, and Ao An in *Case 004/02*. However, none of these cases have made it to trial. *Case 003* fell through after Sou Met had died,[1290] and the case against Meas Muth was terminated because a definitive and enforceable indictment was absent.[1291] *Case 004* fell flat after the cases against Yim Tith and Ao An were also terminated due to the absence of such an indictment, [1292] whereas the case against Im Chaem was dismissed because the ECCC lacked jurisdiction.[1293]

The discontinuation of *Cases 004* and *003* can be brought back to conflicting views regarding the jurisdiction *ratione personae* between the national and the international key staff. On the one hand, the national Co-Prosecutor, Co-Investigation

[1287] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 6.
[1288] Nina Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 141-142.
[1289] Nina Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018) 154.
[1290] Subsequently, the proceedings against him were extinguished. See, 'Dismissal of allegations against Sou Met' (*ECCC*) <https://www.eccc.gov.kh/en/node/32787> accessed 29 October 2019.
[1291] *Prosecutor v Meas Muth* (Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework) 003/08-12-2021-ECCC/SC (05), S C Ch (17 December 2021) para 44.
[1292] *Prosecutor v Ao An* (Decision on International Co-Prosecutor's Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/02) 004/2/07-09-2009-ECCC/TC/SC, S C Ch (10 August 2020) para 71; *Prosecutor v Yim Tith* (Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC legal framework) 004/23-09-2021-ECCC/SC (06), S C Ch (28 December 2021) para 32.
[1293] *Prosecutor v Im Chaem* (Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons)) 004/1/07-09-2009-ECCC/OCIJ (PTC50), P T Ch (28 June 2018) VI disposition.

Judge, and pre-Trial Judges argued that there was no jurisdiction, while on the other hand, the international counterparts maintained that there was indeed jurisdiction.[1294] As a result, the Pre-Trial Chamber could not reach the required super majority, paralyzing the proceedings, and ultimately resulting in the termination or dismissal of the cases.

Consequently, the qualitative content analysis only dealt with three cases: *Case 001*, *Case 002/01*, and *Case 002/02*. In addition to the selection of the cases, the court documents that would be systematically analyzed had to be chosen. The first selection criterium related to the sole inclusion of Court's decisions, and consequently the filings of the Co-Prosecutors, the Co-Investigating Judges, the defense, and the Civil Parties were excluded. The second criterium referred to the restriction to Court's decisions that were relevant in light of this research; they had to involve collective reparations. Hence, the judgements both in first instance and in appeal were included in case they included an order of reparations. The other decisions of the ECCC did not refer to reparations and were consequently excluded.

6.3 THE SELECTED CASES

The qualitative content analysis regarding the collective reparations in the ECCC included four decisions of the Court; the judgement and appeal in *Case 001*, the judgement in *Case 002/01*, and the judgement in *Case 002/02*.[1295] These three cases are shortly introduced based on the crimes, the context, and the victims and beneficiaries.

CRIMES

The ECCC has convicted, at least once, persons for genocide (article 4 of the ECCC Law), crimes against humanity (article 5 of the ECCC Law), and war crimes (article 6 of the ECCC Law). Even though the three cases before the ECCC were distinct in the charges, locations, and suspects, there is some overlap in the proven crimes. The three cases were all concluded with a conviction for crimes against humanity, specifically those consisting of persecution on political grounds, extermination, murder, and attacks against human dignity.[1296] Other crimes against humanity,

[1294] For an overview of the conflicting views between the international and national key staff and their repercussions, see the procedural history in *Prosecutor v Meas Muth* (Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 003 to Trial as Required by the ECCC Legal Framework) 003/08-12-2021-ECCC/SC (05), S C Ch (17 December 2021) para 2-20.

[1295] The appeal in *Case 002/01* does not consider reparations, consequently, this judgement will not be included in the qualitative content analysis.

[1296] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 568; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 877 and 996; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4198 and 4326.

consisting of torture, imprisonment, enslavement, were dealt with in both *Case 001* and *Case 002/02*.[1297] In the latter case, Nuon Chea and Khieu Samphan were also found guilty for the crimes against humanity of persecution on grounds of race and ethnicity, deportation, forced marriage, and rape in the context of forced marriage.[1298] Furthermore, convictions for war crimes, consisting of the unlawful confinement of civilians, violation of the right to a fair trial, inflicting suffering and serious injuries, torture, inhumane treatment, and wilful killing were present in *Case 001* and *Case 002/02*.[1299] In other words, Duch, Nuon Chea and Khieu Samphan have been convicted for war crimes and crimes against humanity. However, the conviction against Duch is restricted to the S-21 Security Centre, while Nuon Chea and Khieu Samphan were found guilty for these crimes in multiple locations, including work sites, cooperations, and detention centres. Additionally, the suspects in *Case 002* were found guilty for the crime of genocide; Nuon Chea for the killing of the Vietnamese (a national, racial and ethnic group) and the Cham (a religious and ethnic minority), while Khieu Samphan was only convicted for genocide of the Vietnamese.[1300]

Context

As the jurisdiction *ratione temporis* already signifies, the ECCC only deals with crimes that were committed during the Khmer Rouge regime in Cambodia. As a criminal court, the ECCC is restricted to the suspect and the charges against him or her. Hence, the Court deals with specific crimes that were committed during an exact time and in particular places. For instance, *Case 001* against Duch is limited to the crimes committed in the S-21 Security Centre, while *Case 002/01* only dealt with crimes committed during the exodus of Phnom Penh and the following forced movements of people. *Case 002/02* covered more locations, yet the case is still reduced to the crimes committed in the Tram Kak cooperatives, three work sites and three detention centres, even when the Court acknowledged the presence of at least 200 of these detention centres and execution sites.[1301] Despite Nuon Chea's conviction for the violations of the Khmer Rouge regime (on the basis of his superior leadership and assigned responsibilities) these were nevertheless confined to the violations that fell 'within the scope of *Case 002/02* and were thus restricted to the crimes that took place in the

[1297] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 568; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4198 and 4326.
[1298] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4198 and 4326.
[1299] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 568; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T C Ch (16 November 2018) para 4198 and 4326.
[1300] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4200 and 4329.
[1301] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 294.

above mentioned locations.[1302] The other violations of the Khmer Rouge regime and the concurrent international conflict between the Democratic Kampuchea and Vietnam were taken into account by the ECCC to illustrate the context of the charges under investigation, yet the regime's policies and the international conflict were not examined in its entirety for the decision on the criminal responsibility of the suspects.

VICTIMS AND BENEFICIARIES (CIVIL PARTIES)

The ECCC was established to prosecute the crimes committed during the rule of the Khmer Rouge, a regime that is notorious for its ruthless policies and high number of victims. Since the cases before the ECCC are restricted to the charges against the suspected persons, the Court deals with a lower number of victims and consequently an even lower number of beneficiaries. Nevertheless, the number of direct victims in the three cases before the ECCC remains high. For instance, it was proven that 12,273 prisoners were held in the S-21 Security Centre, of whom at least 11,742 were executed.[1303] In addition, an estimated 2 million people was forcibly displaced from Phnom Penh,[1304] and at least 20,000 people were forced to work under miserable conditions in the 1st January Dam Worksite.[1305] These victims or their relatives can apply to participate as Civil Party. In *Case 001*, 93 victims were permitted to take part in the Court's proceedings,[1306] yet only 64 were accepted as Civil Parties.[1307] This number grew in appeal to 74 Civil Parties.[1308] The procedure of Civil Party admission changed before *Case 002* started, so that the Trial Chamber no longer had to consider Civil Party submissions and appeals.[1309]

In *Case 002*, the number of Civil Parties rose to 3,867.[1310] This was caused by the broader scope of the second case as it was not limited to a specific crime location. Instead, the suffering of harm due to crimes under investigating was decisive; victims could participate as Civil Party even when the crime location was not part of the

[1302] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4200.
[1303] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 141; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 2562.
[1304] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 547.
[1305] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 1684.
[1306] They could participate because their Civil Party requests were deemed admissible. *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 637.
[1307] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 650.
[1308] The Appeals Chamber granted the appeal of ten victims whose Civil Party requests were rejected by the Trial Chamber. *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) disposition.
[1309] The Co-Investigating Judge and Pre-Trial Chamber decide on the admission of Civil Parties, and this decision can be appealed before the Pre-Trial Chamber. The Trial Chamber only decides on the reparations requested by the Civil Parties. ECCC IR, rule 23*bis* (2) and (3).
[1310] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 3.

Trial.[1311] In addition, the VSS was by that time better funded so that it could organize outreach activities.[1312]

Even though *Case 002* was divided in separate cases, each considering specific locations and/or crimes, all Civil Parties were allowed to participate in both cases, even when the causal link between the charges and the harm was absent in one of the two cases.[1313] This was done because, on the one hand, the Civil Party Lead Co-Lawyers were afraid that the severance of *Case 002* and the age of the suspects could lead to the denial of the right to effective remedy of more than 3,000 Civil Parties.[1314] On the other hand, the Trial Chamber regarded the Civil Party claims as one collective claim, making the link between individual Civil Parties, the harm they suffered, and the crimes the suspect is prosecuted for less relevant. Consequently, the severance of *Case 002* did not have an impact on the Civil Party participation and reparations.[1315]

The Khmer Rouge regime was for a part indiscriminative in its policies, and the wider population suffered greatly, regardless of their background. Especially vulnerable people, such as children, elderly people, and pregnant women perished because of a lack of food, medical care, and overwork. In addition, thousands of children were executed in order to foreclose revenge.[1316] *Case 002/02* dealt with forced marriages and rape in the context of these marriages,[1317] a crime that affected both men and women. Nevertheless, the Court's understanding of rape excluded men as victims from rape in the context of forced marriages.[1318] The regime also targeted

[1311] *Prosecutor v Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) D404/2/4, P T Ch (24 June 2011) para 77.
[1312] See for instance, Elisa Hoven and Saskia Scheibel, "Justice for Victims' in Trials of Mass Crimes: Symbolism or Substance?' (2015) 21 International Review of Victimology 161, 164.
[1313] Ignaz Stegmiller, 'Legal Developments of Civil Party Participation at the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 543. Due to deaths and subsequent successions for some civil parties, the composition of the group changed somewhat and slightly lowered the total number of civil parties to 3865. *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4407.
[1314] *Case 002* (Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek – Hearing of 19 October 2011) 002/19-09-2007-ECCC/TC E125/2, T Ch (12 March 2012), para 31.
[1315] *Prosecutor v Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Severance Order Pursuant to Internal Rule 89*ter*) 002/19-09-2007-ECCC/TC E124, T Ch (22 September 2011) para 8.
[1316] See for instance, David Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prison* (University of California Press 1999) 38 and 198; *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 214 and 215.
[1317] Even though rape also occurred outside of forced marriages, the indictment against Chea and Samphan was limited to rape in the context of forced marriages. *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 3535. See furthermore, Valerie Oosterveld and Patricia Viseur Sellers, 'Issues of Sexual and Gender-Based Violence at the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 342-343.
[1318] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 3701 ('men could not be the victims of rape in the context of forced marriage').

and persecuted specific groups, such as the political opponents (particularly the soldiers and officials of the previous government).[1319]

Additionally, *Case 002/02* dealt with the maltreatment and executions specifically directed at several religious or ethnic minorities, namely the Buddhists, Islamic Cham, and the Vietnamese.[1320] Moreover, the killing of Cham and Vietnamese people was qualified as genocide by the Court.[1321] Even though the ECCC acknowledged the victimization of indigenous minorities, the specific targeting, discrimination and persecution of these groups on the basis of their race or ethnicity was not proven nor charged. The executions of Jarai people were proven, yet the Court did not establish that the people were killed because they belonged to this group.[1322] Moreover, the specific targeting and killing of Ratanakiri and Mondulkiri people were not charged before the ECCC.[1323]

6.4 Reparations in the ECCC

In its first case, the ECCC acknowledged 'the principles expressing the right of victims of gross violations of international human rights law to redress' by making references to international treaties, case law of regional human rights courts, and UN declarations.[1324] Additionally, it accepted that the victims' right to a proportionate remedy is recognized in international criminal law.[1325] Nevertheless, the Court stressed that it did not have the same leniency as human rights courts in relation to reparations; making the sources of international human rights law less relevant. As a criminal court, the ECCC dealt with individual responsibility instead of state responsibility. The Court argued that this influenced the forms of reparations that it could award.[1326] The ECCC is furthermore bound by the requests for reparations before it, and by its narrow reparative mandate as determined in the Internal Rules, limiting the available reparations to moral and collective measures.[1327] This limited

[1319] Persecution on political grounds as described here was proven in all cases before the ECCC. *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 392; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 574; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 1179 and 3148.
[1320] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 1187, 1697 and 2609.
[1321] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 3348 and 3519.
[1322] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 3002.
[1323] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4466.
[1324] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 662.
[1325] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 648.
[1326] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 652.
[1327] ECCC IR9, rule 23 *quinquies* (1); *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 662.

mandate cannot be side-stepped through the Court's case law, instead amendments of the Internal Rules are required.[1328]

According to the Appeals Chamber, its criminal proceedings were 'to be considered as a contribution to the process of national reconciliation, possibly a starting point for the reparation scheme, and not the ultimate remedy for nation-wide consequences of the tragedies' under the Khmer Rouge rule.[1329] Hence, the ECCC's competence to award reparations had to be interpreted 'in view of a narrow mandate and purpose'.[1330] Accordingly, the reparations were limited to the specific Court case, and could only address the harm resulting from the crimes for which the offender was convicted.[1331] Furthermore, the ECCC could only award reparations against the (indigent) convicted person;[1332] a constraint that was further aggravated by the Court's lack of power to impose obligations on Cambodia, or on any other national or international authority that is not part of the proceedings.[1333] Since the Court did not deem itself competent to award reparations that will not be implemented,[1334] the offenders' indigence limited the scope and number of provided reparation modalities. In order to address this problem, the Judges amended the Internal Rules and created the second avenue of reparations, which made external funded reparation projects possible.[1335] Nevertheless, the Court continued to restrict the available reparations through the requirement of feasibility: reparations could only be awarded when the funding was secured, as well as the consent and co-operation of the involved third-parties.[1336] This was reflected in the Court's request to the Lead Co-Lawyers 'to prioritise reparations projects which appeared to have the likelihood of being realised in order to ensure that proceedings resulted in meaningful reparation for victims'.[1337] Furthermore, the Court urged the Co-Lawyers to select only a small number of

[1328] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 662.
[1329] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 655.
[1330] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 655.
[1331] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4414.
[1332] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 664; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 668.
[1333] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 663; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 656; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1116; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4410.
[1334] This would undermine the ECCC's authority and frustrate the victims. *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 680.
[1335] See for instance, Christoph Sperfeldt, 'Internationalized Criminal Justice: Lessons learned at the Extraordinary Chambers in the Courts of Cambodia' (2013) 11 Journal of International Criminal Justice 1111, 1121.
[1336] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1122.
[1337] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4415.

reparative measures, so that these projects could actually be implemented with the available funds.[1338]

The ECCC mentioned several objectives of reparations; they should foremost acknowledge and address the harm that was suffered due to the crimes of which the offender was convicted.[1339] The required link between the harm and the conviction was especially relevant for *Case 001*, since *Case 002* used a more flexible approach.[1340] Even though the Court acknowledged that the intense suffering of the victims made the repairing of the harm challenging,[1341] it claimed that the reparations should remove 'the consequences of the criminal wrongdoing, as well as restoring, to the extent possible, the prior lawful status'.[1342] The ordered reparations should support the rehabilitation, reintegration and restoration of dignity of the Civil Parties.[1343] According to the Court, this restorative process of victims also benefitted from the criminal proceedings, for instance, through the public disclosure of truth, victim participation, and the recognition of victimhood in the judgements.[1344]

These are highly ambitious goals, especially in the light of the ECCC's narrow mandate that restricted the available reparations to collective and moral forms. Due to this limited mandate, the Court limited the restoration of the victim's situation to the 'psychological, moral and symbolic elements of the violation'.[1345] Hence, the Court had high aims for the reparations, yet at the same time acknowledged that these could not never be reached. This is remarkable, since the restriction of reparations to collective and moral forms of repair was issued in the Internal Rules, which can be amended by the Co-investigating Judges and Judges of the Chambers.[1346] Instead, the Court emphasised that the victims who had obtained reparations as a Civil Party could still seek and receive other reparative measures that might fully address their harm in other (future) procedures, or from other parties, such as NGOs.[1347] Consequently, the

[1338] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1121.
[1339] ECCC IR9, rule 23 *quinquies* (1); *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4436.
[1340] *Prosecutor v Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) D404/2/4, P T Ch (24 June 2011) para 42; Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 172 and 244.
[1341] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 666.
[1342] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 699.
[1343] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1116; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4410.
[1344] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 661.
[1345] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 661.
[1346] Even though the amendment of the Internal Rules involved a consultative process with the main organs of the ECCC, only the Judges can vote on changes of the reparations provision. Amendments can only be made by a super majority, whereby 14 out of 19 Judges have to agree. ECCC IR9, rule 18(3)(b).
[1347] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 668.

ECCC ended each of its sections on reparations with an appeal to donors to support the requested reparative measures that were outside of the Court's reparative mandate, or any other reparative project that addressed the victims' harm.[1348]

6.4.1 CLASSIFYING THE ORDERED REPARATIONS

This section examines the Court's interpretation of collective and moral reparations.

COLLECTIVE

The ECCC claimed that the notion of collective reparations is unambiguous and that it was previously established in other international courts, particularly in the case law of the IACtHR and in the Rules of Procedure and Evidence of the ICC.[1349] The Court did not give an in-depth explanation of collective reparations. Nevertheless, there are three components of collective reparations that can be distilled from the rulings. First, in line with the explicit rejection of compensation in the reparation provisions,[1350] the term collective reparations is a confirmation of this absence of individual financial awards.[1351] Second, the Court exemplified collective reparations to be benefitting 'as many victims as possible'.[1352] Furthermore, the reparations may address the harm of individuals, provided that these are accessible to 'victims as a collective'.[1353] This is especially relevant due to the high number of victims, and the disparity between the number of victims and Civil Parties. In addition, it is impossible to identify all individual victims of the crimes that Duch, Chea and Samphan were convicted for.[1354] Third, the Court held that collective harm has to be redressed in a collective manner.[1355] The term collective harm 'expresses the idea that the targeting of a collective can cause harm that differs from the harm caused by targeting the same number of individuals

[1348] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4467. See also, *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 717; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1164.
[1349] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 659.
[1350] 'These benefits shall not take the form of monetary payments to the Civil Parties'; ECCC IR9, rule 23 *quinquies* (1).
[1351] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1115; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4409.
[1352] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 659.
[1353] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 658.
[1354] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 659.
[1355] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 660.

who are not part of a collective'.[1356] This is primarily evident in cases of genocide. In addition, large-scale political conflicts, like the Khmer Rouge regime, often result in the displacement and destruction of communities, which causes collective harm.[1357] In addition, the 'societal and cultural context' of the violations had to be taken into account, specifically the Khmer Rouge's pursued 'policies that affected whole groups and communities, even the whole Cambodian society'.[1358] The crimes that were dealt with by the ECCC have resulted in both individual and collective harm.[1359] Yet, in the Court's description of the harm suffered by Civil Parties, it mainly depicted forms of individual harm, such as physical and psychological trauma, the loss of family members, and even material harm such as monetary and material losses.[1360]

MORAL

According to the ECCC, moral reparations are unprecedented in international law.[1361] Nevertheless, the Court did not elaborate at length on its meaning. The clarification was limited to the objective of moral reparations, which is to redress moral damages instead of material damages.[1362] Again, the notion of moral damages was not explained. The Court merely referred to the IACtHR, and consequently repeated that 'reparations are intended to wipe out the effects of the violation. Their quality and amount will depend upon the damage caused at both the material and moral levels'.[1363] Consequently, the meaning of moral damages remains vague after my analysis of the judgements.

[1356] Friedrich Rosenfeld, 'Collective Reparations for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731, 734.

[1357] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 181.

[1358] *Prosecutor v Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) D404/2/4, P T Ch (24 June 2011) para 86.

[1359] 'Collective reparations also stem from collective injury which has an individual effect as well. It would be unrealistic to see the injury caused from alleged mass atrocities only on individual basis because it encompasses individual parameters'; *Prosecutor v Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) D404/2/4, P T Ch (24 June 2011) para 70.

[1360] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1144-1150; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4440 - 4453.

[1361] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 658.

[1362] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 658; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1115; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4409.

[1363] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) footnote 1321; *Castillo-Páez v Peru* (Judgement on Reparations and Costs) IACtHR Series C No 43 (27 November 1998) para 53.

6.4.2 LABELLING OF REPARATIONS IN CATEGORIES

Due to its restriction to moral and collective reparations, it is impossible for the ECCC to award reparations from all the five categories of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (hereinafter UN Reparation Principles): restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[1364] Contrary to the ICC and the IACtHR, the ECCC only occasionally referred to these categories.[1365] The Court only labelled awarded reparations as satisfaction in *Case 001* and *Case 002/02*,[1366] and rehabilitation and guarantees of non-repetition were only used in *Case 002/02*.[1367] It is remarkable that the Court awarded similar reparative modalities in *Case 002/01*, yet did not refer to these as measures of satisfaction, rehabilitation or guarantees of non-repetition. For instance, in *Case 002/01*, the Court referred to 'projects concerning therapy and psychological assistance to victims', while similar projects were called 'projects serving rehabilitation' in *Case 002/02*.[1368]

6.4.3 CATEGORIES OF REPARATIONS

In this section, the ECCC's interpretation of the five categories of reparations as formed in the Reparations Principles is discussed. This includes the discussion for both measures that were awarded and rejected.[1369]

RESTITUTION

The ECCC stated that reparative modalities should remove 'the consequences of the criminal wrongdoing, as well as restoring, to the extent possible, the prior lawful status'.[1370] In other words, restitution should be one of the aims of the awarded reparations. Yet, it also acknowledged that its mandate limited the restorative effects of the reparations, since the measures that can be ordered by the ECCC cannot

[1364] UNGA 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (16 December 2005) UN Doc. A/RES/60/147.
[1365] For instance, when the Court mentioned its inability to award compensation, it did not use this term and instead used financial awards or monetary payment. See *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 658; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1115; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4408.
[1366] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 675; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461.
[1367] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454, 4457 and 4463.
[1368] The ECCC remained silent on this shift in wording.
[1369] The analysis of the awarded reparations will be discussed in depth in chapter 6.5.
[1370] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 699.

reinstate the victims economically or physically.[1371] Consequently, (full) restitution was not possible within the ECCC reparations system.

COMPENSATION

Even though the Court agreed that monetary payments may be important,[1372] it is simply beyond its reparative mandate. The reparations in the ECCC are restricted to moral and collective reparations, and the monetary payments to victims, both individually and collectively are explicitly excluded.[1373] The Court argued that this restriction was needed for the feasibility of the reparation process, especially due to 'the inevitable difficulties of quantifying the full extent of losses suffered by an indeterminate class of victims'.[1374]

REHABILITATION

The ECCC acknowledged that medical and psychological treatment are appropriate reparations.[1375] The statement in *Case 001* was made in light of the case law of the IACtHR,[1376] while *Case 002/02* referred to the rehabilitation section of the UN Reparation Principles.[1377] Due to the lacking competence of the ECCC to issue binding orders against the Cambodian government or third parties, these measures were unattainable in *Case 001*.[1378] After the amendment of the Internal Rules, reparations funded by third parties were allowed, thus opening the way to the provision of rehabilitation measures, consisting of psychological and medical treatment, and legal and civic training of Civil Parties. The Court categorized the latter rehabilitation project as guarantees of non-repetition. Nevertheless, for the consistency throughout this thesis, this research used the categorization of the UN Reparation Principles in

[1371] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 643 and 661.
[1372] The Court explicitly recognized the importance of compensation for the income security for elderly victims. *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4464.
[1373] ECCC IR9, rule 23 *quinquies* (1); *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 670.
[1374] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) footnote 1144.
[1375] See *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 701; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4463.
[1376] The Court discussed the IACtHR's order to establish a health center in the affected communities in the Case of *Plan de Sánchez Massacre v Guatemala* (Judgement on Merits) IACtHR Series C No 105 (29 April 2004); *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 700.
[1377] The Court referred to article 21 of the Reparation Principles. *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4463.
[1378] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 704.

case there are conflicting labels used for the reparative measures.[1379] Since these rehabilitation measures were awarded in a collective fashion, the discussion of these measures will be continued in section 6.5.

SATISFACTION

The ECCC recognized measures of satisfaction as reparations in the three analyzed cases.[1380] Moreover, out of the five categories, satisfaction is the only one that is discussed and ordered in all analyzed cases. The few measures that have been awarded in *Case 001* are all measures of satisfaction. Even though *Case 002/01* and *002/02* also included other forms of reparations, most measures in these rulings can be qualified as satisfaction. According to the Court, satisfaction measures may consist of an official declaration or a judicial decision, truth finding and telling, a public apology, commemorations and tributes to the victims, and the enclosure of an accurate description of the facts of the crimes under the Khmer Rouge regime in educational materials.[1381] In other words, measures that the UN Reparation Principles included in the satisfaction category.[1382] The Court furthermore referred to the UN Reparation Principles in its endorsement of the satisfaction modalities.[1383]

The Court ordered several satisfaction measures, consisting of the publication of facts, memorialization, documentation, and education. They aimed, amongst others, to acknowledge the harm of the Civil Parties and other victims, to restore the dignity of the victims, to promote public awareness of the crimes and subsequently contribute to national reconciliation.[1384] As these satisfaction measures intended to have repercussions for the Cambodian society at large, they are considered to be of a collective nature and will subsequently be discussed in section 6.5.

[1379] According to article 21 of the Reparation Principles, legal and social services are considered to be rehabilitation measures.
[1380] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) Trial Chamber, para 4461.
[1381] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 675.
[1382] Reparation Principles, article 22.
[1383] The Court referred to article 22 of the Reparation Principles. *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) footnote 1153; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 675; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461.
[1384] See for instance, *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1152, 1154 and 1158; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461.

Case 002/02 is the only case in which measures of guarantees of non-repetition were endorsed. Yet, in light of the UN Reparations Principles, these measures should be categorized as satisfaction. According to article 23 of the UN Reparation Principles, guarantees of non-repetition consist of forward-looking measures that go further than the case at hand and that are taken at the governmental level, including the judiciary, military, police and legislator.[1385] The ECCC was unable to order these measures as it could not impose obligations upon the State of Cambodia.[1386] The measures that were labelled as guarantees of non-repetition by the ECCC mainly consisted of satisfaction measures,[1387] such as art performances and exhibitions that aim to create awareness in the general public, especially the youth, in order to prevent the recurrence of the crimes.[1388] The measures that the Court did label as satisfaction were instead aimed at the acknowledgement of the harm and experiences of the Civil Parties.[1389] Hence, in line with the UN Reparation Principles and other institutions that were analyzed in this thesis, the measures awarded as guarantees of non-repetition will both be further discussed under the heading of satisfaction or rehabilitation.

6.5 AWARDED COLLECTIVE AND MORAL REPARATIONS IN THE ECCC

The reparations ordered by the ECCC had to address the harm as caused by the crimes for which the offender was convicted. Furthermore, the reparations had to be 'modest but tailored to what is in practical terms attainable' in relation to the reparations framework of the ECCC.[1390] Evidently, the latter narrowed down the available reparative measures tremendously. In addition, in *Case 001*, the reparations

[1385] Illias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 631.

[1386] Juan-Pablo Pérez-Léon-Acevedo argued that the ECCC did order reparative measures that consisted of guarantees of non-repetition, namely the projects that aimed to educate the society on the Khmer Rouge history. The Reparation Principles included 'human rights and international humanitarian law education to all sectors of society' as guarantees of non-repetition. In my opinion, education as guarantee of non-repetition relates to education on rights and obligations people have under human rights and international humanitarian law, while the education on the history falls within the category of satisfaction. Since the Reparation Principles included the 'inclusion of an accurate account of the violations (…) in education material at all levels'. Juan-Pablo Pérez-Léon-Acevedo, 'Reparation Modalities at the Extraordinary Chambers in the Court of Cambodia (ECCC)' (2020) 19 The Law and Practice of International Courts and Tribunals 451, 467; Reparation Principles, rule 22(h) and 23 (e).

[1387] In addition, the rehabilitative measure of legal and civic training was also labelled as guarantees of non-repetition.

[1388] See for instance, *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454.

[1389] See for instance, *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1152; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461.

[1390] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 699 and 668.

had to be borne by an indigent Duch. Consequently, in *Case 001*, the Court qualified several measures that were requested by the Civil Parties as appropriate forms of reparations in relation to the harm suffered (for instance, psychological and medical aid, and commemoration projects), yet these could not be granted as Duch was not in the position to pay for these measures.[1391] Accordingly, the reparations in *Case 001* were limited to only two reparative measures, while after the amendment of the Internal Rules, *Case 002/01* and *Case 002/02* endorsed respectively 11 and 13 reparation projects. Furthermore, some of these projects consisted of more than one reparative measure, for instance one project combined psychological aid with commemoration.[1392]

The projects in the latter two cases were all ordered on the basis of art. 23 *quinquies* (3) (b) of the Internal Rules, meaning that they were financed by third parties.[1393] Moreover, with the funding and cooperation of third parties already arranged, some of these reparative projects started before the ECCC's judgement was delivered. In *Case 002/01*, only one of the ordered measures had previously commenced,[1394] while all of the reparations in *Case 002/02* had already been implemented at the time the Court endorsed them.[1395] Moreover, ten out of the 13 projects had already finished at the time of the judgement. The Court justified this practice by its concern as shared by the Lead-Co Lawyers that it was difficult to obtain external funding, especially for projects that were in a developing phase.[1396] In the interest of 'meaningful reparations within a reasonable time', the Court allowed the implementation of reparations prior to the issuing of a guilty verdict.[1397] Despite the third-party donors, the resources and subsequent reparations remained limited. Consequently, the Court concluded its sections on the endorsed reparation projects with a reminder to third parties that they can support similar initiatives outside the Court's proceedings.[1398]

[1391] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 671; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 717.

[1392] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1131.

[1393] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1124; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4416.

[1394] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1133.

[1395] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4418.

[1396] Lead Co-Lawyer Élisabeth Simonneau-Fort stressed that 'donors are only, often, willing to advance funds when the deadlines, modalities, and other project details are clearly defined'. *Prosecutor v Nuon Chea and Khieu Samphan* (Transcript of Proceedings Trial Management Meeting) 002/19-09-2007-ECCC/TC, T Ch (27 August 2012) Trial Chamber, p 8.

[1397] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4418.

[1398] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1164; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4467.

These reparative measures ordered by the ECCC will be further discussed below in line with the Reparation Principles' categorization, which were restricted to rehabilitation and satisfaction.[1399]

COLLECTIVE REHABILITATION

The rehabilitation measures that were awarded by the ECCC comprised two forms of rehabilitation; health care and education. Since these measures required funding as well as cooperation from third parties, they were only ordered after the amendment of the Internal Rules, thus in *Case 002/01* and *Case 002/02*. Health care projects were more often ordered; twice in *Case 002/01* and twice in *Case 002/02*. While only one education project was endorsed in *Case 002/02*.

The health care projects focused primarily on psychological treatment, only one of the four awarded measures included physical health care in the form of basic health care and check-ups in mobile medical health camps, and the training of medical personnel. [1400] This provision of medical treatment was accompanied with psychological health care through community education on mental health care.[1401] The other three awarded psychological care programs consisted of a broad range of activities; such as the writing down of testimonies with the assistance of trained psychologists, truth-telling community dialogues, group therapy sessions, consultations with a professional therapist, memory initiatives, and youth outreach activities.[1402] These awarded rehabilitation reparations acknowledged the harm as suffered by the Civil Parties and subsequently addressed this harm. Moreover, the Court held that these projects might even be able to aid the healing process.[1403] In addition to addressing the harm of the Civil Parties directly, two of the psychological care projects also had an outreach component, which aimed at creating public awareness and subsequently national reconciliation.[1404]

In *Case 002*, the ECCC awarded several measures that included an education aspect. However, most of these education projects aimed at educating the public, especially the younger generations, about the crimes of the Khmer Rouge regime, instead of providing the Civil Parties or other direct victims with opportunities of

[1399] Even though the ECCC referred to several measures as guarantees of non-repetition, these were categorized as satisfaction in order to maintain the consistency throughout this thesis.
[1400] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4432.
[1401] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4432.
[1402] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1131 and 1133; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4463.
[1403] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4463 and 4465.
[1404] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1154; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4463.

schooling. Consequently, I consider these education projects aiming to create awareness to be moral reparations in the form of satisfaction, and these will be discussed in the next section. Nevertheless, the Court awarded one education measure that was aimed at Civil Parties, namely those who directly suffered from the treatment of the ethnic Vietnamese. As a result of this discriminatory treatment during the Khmer Rouge regime, many ethnic Vietnamese lost their identification papers and subsequently their legal status.[1405] In order to address this harm, the ECCC ordered the provision of legal and civic education so that the ethnic Vietnamese could learn more about their legal status under Cambodian law through a community consultation event, workshops and educative material.[1406]

SATISFACTION

Satisfaction is the category of reparations that was awarded the most by the Court, and in all three cases. Of the 26 reparative projects that had been authorized by the ECCC, 23 consisted of satisfaction measures or included satisfaction elements. Some of these projects consisted of different forms of satisfaction, [1407] or combined rehabilitation and satisfaction measures.[1408] The awarded satisfaction measures can be divided in four categories: school education, national education, Civil Party remembrance, and collective remembrance.[1409]

Similar to the ICC and IACtHR, the ECCC claimed that the acknowledgement of a reparative modality as an adequate form of reparations is 'in and of itself a form of reparation irrespective of its future implementation'.[1410] The Court argued that such an acknowledgement 'has a potential of being per se a form of satisfaction and redress, possibly capable of attracting attention, efforts, and resources toward its actual realisation'.[1411]

The Court ordered several educative projects that aimed to raise awareness among the younger generation about the crimes of the Khmer Rouge and the subsequent suffering. The ECCC was of the opinion that by teaching the youth about

[1405] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4459.
[1406] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4431 and 4459.
[1407] For instance, the project *Phka Sla Kraom Angkar* consisted of the performance of a classical dance performance and an exhibition covering the forced marriages. *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4424.
[1408] For instance, the project Testimonial Therapy combined psychological care with public commemoration**.** *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1131.
[1409] This division is not in line with categorization the Court made in its judgements.
[1410] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 691.
[1411] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 661.

these crimes, it might prevent them from happening again.[1412] Several education projects were aimed at schoolchildren and therefore incorporated in the regular educational program: a chapter on the forced evacuation was included in the history books for secondary schools,[1413] and teachers received a training on the crimes and suffering of the Khmer Rouge regime.[1414] Since these education projects were based on the statements of Civil Parties and witnesses, they had to be supplemented with a disclaimer stating that the accuracy of the material was linked to the credibility of the witnesses and the Civil Parties.[1415]

Further educative projects were not restricted to educational institutions, instead they aimed to educate society at large on the Khmer Rouge history, the harm of the Civil Parties and other victims, and the ECCC. These public educative projects often targeted the younger generations, especially high school and university students.[1416] The opportunity of intergenerational dialogue was an important aspect of these reparations.[1417] Some measures created spaces for interaction between the different generations, others opened the dialogue indirectly through art projects and digital media.[1418] By educating the general public, especially the generations born after the Khmer Rouge regime had ended, the projects aimed to improve the acknowledgement, awareness, and remembrance of the crimes committed in Democratic Kampuchea, and to promote non-discrimination of the victimized minorities.[1419] As such, these reparations were designed to not only address the harm of the Civil Parties, but also from the victims who did not participate in the trial proceedings.[1420] Moreover, the Court was of the opinion that these public education projects were likely 'to generally contribute to national reconciliation'.[1421] Several of these projects made use of art productions, such as theatre and dance performances, a song writing competition, or a graphic novel.[1422] Other projects consisted of the

[1412] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454.
[1413] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1157.
[1414] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4456.
[1415] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4455.
[1416] See for instance, *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4422.
[1417] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454, 4457.
[1418] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454, 4457
[1419] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1156; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4457.
[1420] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1156.
[1421] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1156; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454.
[1422] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4456, 4460, and 4462.

creation of exhibitions, both permanent and mobile, excursions for teenagers to the execution sides, seminars and training, the creation of a library, and the development of an app designed to learn users about the Khmer Rouge history.[1423] Some of these were specifically designed to raise awareness of the suffering of specific groups of victims; the Cham and ethnic Vietnamese, or the victims of forced marriages.[1424] These latter reparations were only endorsed in *Case 002* as it marked the only case that dealt with genocide and forced marriage.

In all three cases, the Court awarded reparative measures that commemorated the experiences of the Civil Parties. This category was most prevalent as it was part of 11 out of 23 satisfaction projects. These projects ensured that the Civil Parties' suffering would not be forgotten by making their accounts public.[1425] The Court expected that this would create public awareness and could even contribute to national reconciliation.[1426] Almost half of the national commemoration projects (40%) created opportunities for the Civil Parties to share their stories with other people through the publication of a book consisting of Civil Party accounts, community dialogues, a public ceremony where the Civil Parties' testimonies were read out loud, or an art project where students made sketches on the basis of the Civil Party's memories.[1427] On the other hand, the majority (60%) of the national commemoration projects were directly linked to the ECCC proceedings, consisting of the publication, either online or offline, of the judgement, the judicial records, the names of the Civil Parties, the procedures of the ECCC, and a compilation of the statements of apology as made by Duch.[1428]

In *Case 001*, the Court ordered the publication of these statements of apology, as well as the disclosure of the names of the Civil Parties and their deceased relatives, even though both were outside of the ECCC's reparations mandate as these did not consist of orders against Duch.[1429] The Court did still order these reparations because of 'the widespread recognition of similar measures as reparations,[1430] and because

[1423] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1160; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4456 and 4460.
[1424] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4457.
[1425] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461.
[1426] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1154 and 1158.
[1427] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1155; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4462 and 4463.
[1428] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 667 and 668; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1160; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4462.
[1429] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 667; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 675.
[1430] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 675.

the Court was the only actor that could honour these requests.[1431] Interestingly, the publication of the judgement on the official website of the ECCC is not qualified as a reparation measure in this case. Whereas the online publication of the ECCC judicial records was endorsed as a reparation measure in *Case 002/02*.[1432]

In *Case 002/01*, the Court endorsed two projects of national commemoration; a national remembrance day and a public monument in Phnom Penh.[1433] These public memorials consisted of a 'nationwide and official acknowledgement of the harm suffered by the victims', and were thus not limited to the suffering of the Civil Parties.[1434] Furthermore, these reparations aimed to restore the dignity of victims, create awareness and acknowledgement of the crimes, and to reduce the effects of their harm; consequently they aimed to contribute to the healing of their suffering.[1435] In addition, the Court believed that national remembrance is likely 'to promote a culture of peace and to contribute to national reconciliation'.[1436]

The majority of the satisfaction measures were endorsed in *Case 002/01* and *Case 002/02*, while *Case 001* was limited to two satisfaction measures. Additionally, the Court marked the trial proceedings, as well as the acknowledgement that a requested reparation measure was indeed an appropriate reparation, as forms of satisfaction.[1437]

6.6 NON-JUDICIAL MEASURES

At first, the VSS only had the capacity to assist Civil Parties in their pursuit of collective and moral reparations: the so-called judicial measures. Yet, the revision of the Internal Rules in 2010 expanded the competence of the VSS by introducing non-judicial measures, which took place 'outside of formalized court proceedings'.[1438] Consequently, the VSS is tasked with the identification, design and implementation of both the collective and moral reparations that are based on article 23 *quinquies* (3) (b) of the Internal Rules and of the non-judicial measures.[1439] The main difference between these two is that non-judicial measures transpire outside of the Court

[1431] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 667.
[1432] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4462.
[1433] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1153.
[1434] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1152.
[1435] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1152.
[1436] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1152.
[1437] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 661.
[1438] '7th Plenary Session of ECCC concludes' (*ECCC*, 9 February 2010) <https://www.eccc.gov.kh/en/articles/7th-plenary-session-eccc-concludes> accessed 12 April 2022.
[1439] ECCC IR9, rule 12 *bis* (3) and (4).

proceedings and consequently lacked a stamp of approval by the Court. In addition, these non-judicial measures are directed at all victims and not only Civil Parties.[1440] Since most victims of the Khmer Rouge regime did not become a Civil Party, the non-judicial measures were believed to become 'a major legacy of this Tribunal'.[1441] However, the VSS has little funding and limited human resources, which makes it hard to fulfil their tasks.[1442]

Almost ten years after the option of non-judicial measures was introduced, only three non-judicial measures were implemented. The UN Trust Fund to End Violence Against Women funded two consecutive projects on 'Promoting Gender Equality and Improving Access to Justice for Female Survivors and Victims of Gender-Based Violence under the Khmer Rouge Regime'.[1443] The two projects were primarily directed at victims of forced marriages.[1444] The projects focused on the creation of awareness,[1445] the strengthening of the position of female victims in the ECCC proceedings,[1446] and psychological assistance.[1447] Additionally, the second project

[1440] Nevertheless, as will be discussed in section 6.7.1, in *Case 002/01* the Court endorsed several projects that benefited the victims, and not only Civil Parties. See for instance, *Prosecutor v Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) D404/2/4, P T Ch (24 June 2011) para 42.

[1441] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014) 228 (citing Judge Silvia Cartwright at the opening of the 7th plenary session on 2 February 2010).

[1442] Jeudy Oeung, 'Expectations, Challenges and Opportunities of the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 111; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4415.

[1443] These projects ran from 2011 to 2014 and from 2016 to 2018. 'Victims Support Section of the ECCC Secures Funds from UN Trust Fund to End Violence Against Women' (*ECCC,* 21 January 2016) <https://www.eccc.gov.kh/en/node/36426> accessed 3 December 2019.

[1444] UN Human Rights Council, 'Report of the United Nations Entity for Gender Equality and the Empowerment of Women on the activities of the United Nations Trust Fund in Support of Actions to Eliminate Violence against Women: Note by the Secretary-General' (12 December 2013) UN Doc A/HRC/26/17, para 30.

[1445] Awareness was created through, amongst others, a website, radio programs, theatre programs, and community forums. UN Human Rights Council, 'Report of the United Nations Entity for Gender Equality and the Empowerment of Women on the activities of the United Nations Trust Fund in Support of Actions to Eliminate Violence against Women: Note by the Secretary-General' (12 December 2013) UN Doc A/HRC/26/17, para 30 and 31. For the website, see www.gbvkr.org.

[1446] For instance, Court officials and other stakeholders received training, victims who did not have the means and who lived in remote areas were assisted in their transportation and lodging, and victims were assisted with the registration as Civil Party. UN Human Rights Council, 'Report of the United Nations Entity for Gender Equality and the Empowerment of Women on the activities of the United Nations Trust Fund in Support of Actions to Eliminate Violence against Women: Note by the Secretary-General' (15 December 2015) UN Doc A/HRC/32/3, para 47; UN Human Rights Council, 'Report of the United Nations Entity for Gender Equality and the Empowerment of Women on the activities of the United Nations Trust Fund in Support of Actions to Eliminate Violence against Women: Note by the Secretary-General' (15 December 2017) UN Doc A/HRC/38/3, para 47.

[1447] Victims who testified in Court received psychological support, furthermore, testimonial therapy and self-help groups were provided. 'Victims Support Section of the ECCC Secures Funds from UN Trust Fund to End Violence Against Women' (*ECCC,* 21 January 2016) <https://www.eccc.gov.kh/en/node/36426> accessed 3 December 2019; 'Survivors of Sexual Violence During the Khmer Rouge Regime in Cambodia Speak Out' (*UN Trust Fund to End Violence Against Women,* 20 November 2019) <https://untf.unwomen.org/en/news-and-events/stories/2019/11/feature-survivors-of-sexual-violence-in-cambodia-speak-out> accessed 3 December 2019.

further included vocational training to enhance the ability to earn money.[1448] A third project was financed by the German Ministry of Economic Cooperation and Development and consisted of the establishment of a monument at the Tuol Sleng Genocide Museum in Phnom Penh;[1449] a reparation that was requested and denied in *Case 001*.[1450]

6.7 BENEFICIARIES OF COLLECTIVE REPARATIONS

According to Internal Rule 23 *quinquies* (1), reparations had to acknowledge and subsequently address the harm of the Civil Parties. The Civil Parties were thus the main beneficiaries of reparations. *Case 002/02* included crimes against minorities, the Islamic Cham and the ethnic Vietnamese. Consequently, this case also endorsed reparations that were primarily targeted against the Civil Parties belonging to these minorities. In addition, not all reparations were limited to the Civil Parties, instead several of the reparative projects aimed to benefit the Cambodian society. This section will discuss these three groups of beneficiaries; Civil Parties, defined harmed minorities, and society at large.

6.7.1 CIVIL PARTIES AS BENEFICIARIES

In *Case 001*, the Court decided on the Civil Party applications after the conviction, and consequently considered whether the harm of the applicant was causally connected to the wrongdoings of the offender.[1451] Of the 93 victims who participated as Civil Parties in the Court proceedings, 74 were accepted as Civil Parties for the reparations phase, and thus as beneficiaries.[1452] Before *Case 002* commenced, the Internal Rules were amended so that all the Civil Parties submissions were concluded before the actual trial started.[1453] Since this case dealt with more crimes and locations, including those that were not included in the Court's investigation,[1454] the number of direct victims was higher than in *Case 001*. This number further increased as victims no longer had to prove that they directly suffered from the specific crimes the accused

[1448] 'UN Trust Fund Grantees – 19th Cycle (2015)' (*UN Trust Fund to End Violence Against Women*) <https://untf.unwomen.org/en/grant-giving/untf-grantees/2015#_Asia_and_the> accessed 3 December 2019.
[1449] 'Inauguration of the Memorial to Victims of the Democratic Kampuchea Regime at Tuol Sleng Genocide Museum' (*ECCC,* 24 March 2015) <https://www.eccc.gov.kh/en/node/32138> accessed 3 December 2019.
[1450] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 681 and 684.
[1451] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 639.
[1452] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 637 and 650; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) disposition.
[1453] ECCC IR, rule 23*bis* (2) and (3).
[1454] In case applicants 'have suffered from the implementation of policies but in areas other than those chosen to be investigated, they shall be considered for admission as Civil Parties'. *Prosecutor v Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) D404/2/4, P T Ch (24 June 2011) para 77.

were indicted of. Instead, a link between the suffering and the charged crimes in the closing order was sufficient.[1455] As a result, in *Case 002*, the number of Civil Parties, and thus beneficiaries, rose to 3,867.[1456]

The material collective reparations, namely the rehabilitation measures, were directly attributing substantial benefits to the Civil Parties. The Civil Parties received psychological and medical treatment, and civic and legal training.[1457] In all analyzed cases, several satisfaction measures, though not all, were believed to benefit the Civil Parties through acknowledging their suffering and commemorating their experiences.[1458]

In *Case 002/01*, the ECCC stressed that the endorsed reparations could also benefit victims of the crimes the accused were convicted for, but who did not participate in the proceedings as Civil Parties.[1459] Moreover, none of the reparations were solely directed at the Civil Parties. Rather, the measures were either directed at all the victims of the crimes for which the accused were convicted, or simultaneously at both the Civil Parties and the national society.[1460] Contrarily, in *Case 002/02*, the Court claimed that all the endorsed reparation projects addressed the harm of the Civil Parties, including the measures that were in tandem directed at the society at large.[1461] Moreover, the rehabilitation projects in *Case 002/02* addressed the harm of the Civil Parties, and benefited them specifically.[1462]

[1455] *Prosecutor v Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications) D404/2/4, P T Ch (24 June 2011) para 42.

[1456] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 3.

[1457] For instance, at least 144 Civil Parties received psychological treatment through testimonial therapy. Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 291. See furthermore, *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1155; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4460, 4463 and 4465.

[1458] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 667; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1156; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461.

[1459] The Court argued that because the Civil Parties are represented as a consolidated group, the collective and moral reparations may also address the harm of other victims. *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1114, footnote 3210.

[1460] For instance, the publication of a booklet regarding *Case 002/01* would benefit both the Civil Parties as well as the society. *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1158.

[1461] See for instance the training of teachers on the history of the Khmer Rouge and its crimes, which aims at public education and only indirectly benefits the Civil Parties. According to the Court, this measure 'provide[s] benefits to the Civil Parties which address their harm'. *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454.

[1462] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4459, 4463 and 4465.

6.7.2 MINORITIES AS BENEFICIARY

As discussed before, *Case 002/02* dealt with the treatment of minorities, including the genocide against the ethnic Vietnamese and the Islamic Cham. Two endorsed satisfaction measures were specifically tailored to benefit the victimized members of these minorities.[1463] The projects consisted of different instruments to educate the general public, especially the younger generations, on the Khmer Rouge treatment of the Islamic Cham and the ethnic Vietnamese. Additionally, these aimed 'to enhance public awareness of the causes and consequences of ethnic violence and discrimination, address stereotypes, [and] promote anti-discrimination'. [1464] The Civil Parties belonging to these minorities benefitted directly by the documentation of their stories and the formal acknowledgement of their suffering. Yet, other members of these minorities may someday profit from these projects in case discrimination of these minorities is actually banned as a result of these measures.

Furthermore, one endorsed rehabilitation measure was designed to restore the legal situation of the ethnic Vietnamese; legal and civic training.[1465] Since the legal status of many ethnic Vietnamese was not recovered after the fall of the Democratic Kampuchea, the continuing statelessness also causes poor and insecure living conditions for the younger generations.[1466] Therefore, the project might have benefited the wider Vietnamese community.[1467]

6.7.3 THE SOCIETY AS BENEFICIARY

Most reparations that were endorsed by the ECCC consisted of moral reparations in the form of satisfaction. These reparations aimed to educate the public and subsequently create awareness about the crimes of the Khmer Rouge regime and the succeeding suffering. Hence, these measures had a public scope and sought to impact people who were not a Civil Party in the proceedings. Instead, many satisfaction projects were directed at the Cambodian youth who were born after the Khmer Rouge rule had ended. Several reparations stressed the importance of an intergenerational dialogue to educate the younger generation.[1468] The education of

[1463] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4457.
[1464] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4425.
[1465] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4459.
[1466] See for more information, Christoph Sperfeldt, 'Minorities and Statelessness: Social Exclusion and Citizenship in Cambodia' (2019) 27 International Journal on Minority and Group Rights 94.
[1467] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4431.
[1468] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4454 and 4461.

the public, including the youth, was deemed necessary for national reconciliation.[1469] As such, the education measures intended to benefit the Civil Parties by acknowledging their suffering, but also the society at large by preventing the crimes from happening again.

The satisfaction measures consisting of remembrance primarily aimed to benefit the Civil Parties; it honored their experiences and guaranteed that their suffering is never forgotten.[1470] The commemoration projects were often linked to the ECCC proceedings, and consequently interconnected to the Civil Parties participation at Court.[1471] Nevertheless, these measures were often endorsed because they 'provide public acknowledgement of the crimes committed and harm suffered, and assist in healing the wounds of all victims by diffusing their effects far beyond the individuals who were admitted as Civil Parties'.[1472] Moreover, they were expected to contribute to national reconciliation as they create public awareness on the crimes and suffering.[1473] Hence, these reparations were directed at the Civil Parties and the society at large.

6.8 Final remarks: The development of collective reparations within the ECCC

The ECCC case law was limited to four judgements that included a decision on reparations; three decisions in first instance and one appeal.[1474] Accordingly, the evolution of collective reparations in the ECCC was modest, yet present. This section examines this evolution by highlighting the changes in the provision of collective reparations and how this relates to the pragmatic approach as used by the Court. Furthermore, this section discusses the ECCC's reparations in light of corrective and distributive justice. This chapter lastly assesses the relation between the reparations recognized by the ECCC and assistance.

[1469] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1156.
[1470] *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461.
[1471] For instance, the publication of the names of the Civil Parties and the Court documents. *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 667; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1159; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4461.
[1472] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1152.
[1473] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1158.
[1474] The appeal of *Case 002/01* did not consider reparations.

6.8.1 THE DEVELOPMENT OF COLLECTIVE REPARATIONS

The ECCC's narrow reparations mandate was restricted to collective and moral reparations.[1475] According to the Internal Rules, reparations had to be borne by the convicted person. These reparative measures had to acknowledge and address the harm that the Civil Parties suffered through the crimes the offender was convicted for.[1476] The Court used a 'restrictive interpretation approach' when considering reparations and consequently only awarded reparations that could be implemented.[1477] It argued that 'it is of primary importance to limit reparations to such awards that can realistically be implemented so as to avoid the issuance of orders that, in all probability, will never be enforced and would be confusing and frustrating for the victim'.[1478] This limited the reparative options of the ECCC even further, especially after Duch was declared indigent. Consequently, most reparation requests of Civil Parties were rejected and only two meagre reparation measures were awarded.[1479]

The Court revised the Internal Rules in 2010, which caused the biggest shift in the collective reparations before the ECCC. This amendment introduced a second avenue of reparations: in addition to reparations ordered against the convicted person, it was now possible to award externally funded reparations. These two options were mutually exclusive, and externally funded reparations could not simultaneously be ordered against the offender. In *Case 002/01* and *002/02*, all reparations were externally financed, and the number of projects rose to 11 and 13 in these respective cases. The Court sustained its 'restrictive interpretation approach' where the feasibility of the reparations remained the decisive factor in granting these,[1480] and consequently the proposed projects without adequate funding were rejected by the ECCC.[1481]

[1475] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 644 ('[A]s necessitated by the need to fulfil its mandate of adjudicating international crimes the prosecution of which has been unviable for many years, reparations before the ECCC are intended to be essentially symbolic rather than compensatory, with eligibility decided on an equitable basis rather than according to civil compensation formulae').

[1476] ECCC IR, rule 23 (12); ECCC IR9 rule 23 *quinquies* (1).

[1477] The Court based its order for reparations on feasibility concerns, instead of on the harm suffered by the Civil Parties. Even though the latter is an 'underlying principle of reparations'. See, Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 175.

[1478] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 668.

[1479] According to one of the Civil Party Co-Lawyers, the reparations measure consisting of the inclusion of the names of the Civil Parties in the judgement was a regular obligation of the Court. See Renée Jeffery, 'Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal' (2014) 13 Journal of Human Rights 103, 114.

[1480] Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 245.

[1481] The two projects that were not recognized in *Case 002/01* were mainly denied because they did not secure sufficient funding. *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1161.

The opening of the second avenue for reparations did not only result in a higher number of projects that were recognized as reparations by the ECCC, these projects constituted a wider variety. Where *Case 001* was restricted to two highly symbolic forms of reparations, *Case 002* included 24 reparative projects that consisted of rehabilitation and satisfaction. Even though, rehabilitative measures such as medical and psychological care were identified as 'collective and moral reparations' in *Case 001*, these had to be dismissed because they could not be enforced.[1482] After sufficient funding was secured, the Court could endorse such rehabilitation measures in *Case 002*. Furthermore, the satisfaction measures that received a 'stamp of approval' from the Court ranged from the education of the youth to several memorialization projects. Notwithstanding the wider range of approved reparations, the understanding of 'collective and moral reparations' remained the same. In *Case 002/01* and *002/02*, the Court referred to the definition as given by the Appeals Chamber in *Case 001*, which 'interpreted the term "moral" to mean repairing moral damages rather than material ones, and "collective" as confirming the unavailability of individual financial award'.[1483] Furthermore, despite their rejection, the ECCC characterized several rehabilitation and satisfaction projects as appropriate forms of reparations in *Case 001*.[1484] Similar projects were indeed recognized as reparations in *Case 002/01* and *002/02* after sufficient funding was secured.

Contrary to the ICC where the convicted person was held liable for the reparations notwithstanding their indigency and funding by the TFV, the ECCC no longer required a link between the reparations and the offender's responsibility. As a result, the Court did not require a conviction for the externally funded reparation projects and these could be realized in parallel to the trial. Indeed, one project in *Case 002/01* and all projects in *Case 002/02* already started or were even concluded at the time the conviction was issued. Instead, after the conviction was rendered, the Court retrospectively recognized the requested projects as reparations. As a result, 'the Court was able to take credit for a dozen reparation projects it could never have implemented on its own'.[1485] The Court justified this approach by claiming that 'such official and solemn acknowledgement by the ECCC of the adequacy of the present reparation request constitutes in and of itself a form of reparation irrespective of its future implementation'.[1486] Hence, the Court claimed that its 'stamp of approval' addressed the harm of the victims, even when the reparation project will never be

[1482] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 701-703.
[1483] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1115; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 658; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) para 4409.
[1484] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 683, 701, 713 and 717.
[1485] Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 263.
[1486] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 692.

realized or when the project had already finished. This is a bold statement that can be questioned, especially since research showed that 80 to 90% of the Civil Parties had little knowledge or were even unaware of the reparative projects endorsed in *Case 002/01*.[1487]

By following a less strict legal perception of reparations, the Court could order and endorse more projects than it would have if it had stuck to the original understanding of reparations. Furthermore, it is likely that donor money was made available for the reparative projects because they were part of the ECCC system.[1488] However, it is questionable whether the Court stretched the concept of reparations too far. Several scholars argued that the disconnection between the reparations and the responsibility of the convicted person blurred the line between reparations and assistance.[1489] It seems that the only distinguishing factors of reparations consisted of the 'stamp of approval' of the ECCC and that they occurred inside formalized court proceedings.[1490] The next section will assess to what extent the ECCC reparations can indeed be distinguished from assistance.

6.8.2 Evaluating the collective reparations

The amendment of the Internal Rules that opened the possibility of externally funded measures changed the reparations in the ECCC. This section is set to evaluate this adjustment and how it reflected in the reparation orders of the Court. First, Aristotle's theory on particular justice is used to assess how notions of corrective and distributive justice are reflected in the reparations, both funded by the offender and by external parties. Thereafter, Peter Dixon's framework is applied to evaluate the reparations in relation to assistance.

[1487] See, Christoph Sperfeldt, Melanie Hyde and Mychelle Balthazard, *Voices for Reconciliation: Assessing Media Outreach and Survivor Engagement for Case 002 at the Khmer RougeTrials* (East West Center and Handa Center for Human Rights and International Justice 2016) 57; Timothy Williams and others, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process* (Centre for Conflict Studies (Marburg) and Centre for the Study of Humanitarian Law (Phnom Penh) 2018) 116.

[1488] This was also believed by Cambodian NGO's who requested that their project would be endorsed by the ECCC; Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 293.

[1489] In addition to assistance, scholars use terms as development aid, developmental sectors, and non-judicial measures. In line with the ICC chapter, I use the term assistance. See, Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (PhD thesis, Australian National University 2018) 246; Miriam Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (Cambridge University Press 2020) 73; Christoph Sperfeldt and Rachel Hughes, 'The Projectification of Reparation' (2020) 12 Journal of Human Rights Practice 545, 559; Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 192. See furthermore, Rachel Killean and Luke Moffett, 'What's in a Name? 'Reparations' at the Extraordinary Chambers in the Court of Cambodia' (2020) Queen's University Belfast Law Research Paper No 2022-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603179#> accessed 22 August 2022, 10.

[1490] See for instance, Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 237.

CORRECTIVE VS DISTRIBUTIVE JUSTICE

As described in chapter 2, Aristotle made a distinction between corrective and redistributive justice. In essence, the reparations before the ECCC aimed to be corrective, as they had to remove 'the consequences of the criminal wrongdoing, as well as restoring, to the extent possible, the prior lawful status'.[1491] However, since the Court's mandate was limited to moral reparations, the ECCC was restricted to an immaterial correction, for instance the restoration of civic trust.

The amendment of the Internal Rules and subsequent opening of the second avenue for reparations had effect on the position of the ordered reparations on the scale of particular justice. Where the limited reparations in *Case 001* leaned towards corrective justice, the reparations in *Case 002/01* and *002/02* incorporated elements of corrective and distributive justice. In *Case 001*, the Court ordered two measures that were backward-looking with the main objective of acknowledgement of the suffering of the Civil Parties. In addition, the reparations in *Case 001* were linked to the conviction of Duch and his responsibility for the harm; reparations could only be ordered against the offender.[1492] The reparative projects that were endorsed in the *Cases 002/01* and *002/02* included elements of corrective as well as distributive justice. On the one hand, several projects were primarily backward-looking and aimed to repair the harm of the victims, for instance through medical and psychological care, and legal and civil training for the ethnic Vietnamese. On the other hand, most projects that received a stamp of approval included distributive elements. Even though most satisfaction measures included the recognition of the violent past and the suffering of Civil Parties and other victims, they were generally designed with more forward-looking objectives in mind; such as raising awareness, reconciliation and the prevention of future conflicts. In other words, the reparations before the ECCC shifted from mostly corrective forms, to a combination of corrective and distributive elements.

However, it is questionable whether the reparations that were approved in *Case 002/01* and *002/02* indeed included elements of corrective justice. The first, and in *Case 001* the only, avenue of reparations was connected to the responsibility of the convicted person, as the reparations were ordered against him/her. Yet, the second avenue opened the possibility for externally funded projects that were no longer ordered against the offender. Furthermore, these reparation projects could commence and even finish before the guilty verdict was issued. This is an indication of 'how far the trial judges viewed the new avenue being removed from a notion of reparations associated with a criminal trial'.[1493] All reparations that were recognized in *Case 002/01* and *002/02* made use of this second option, and were mostly implemented by

[1491] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 699.
[1492] *Prosecutor v Kaing Guek Eav (Duch)* (Judgement) 001/18-07-2007-ECCC/TC, T Ch (26 July 2010) para 667.
[1493] Christoph Sperfeldt, 'Reparations at the Extraordinary Chambers in the Courts of Cambodia' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (2nd edn, Brill 2020) 494.

NGO's who were funded by third party donors such as foreign governments.[1494] Consequently the reparations in *Case 002/01* and *002/02* had 'a very weak link with the accused persons' responsibility'.[1495] This undermined the corrective nature of the reparations, because the reparations did no longer aim to rectify the 'transaction' between the offender and the victim.[1496] It is up for debate whether the projects that received a stamp of approval from the ECCC still include elements of corrective justice and consequently still fit the scale of particular justice. The findings of my research indicate that the projects that were later labelled as reparations in *Case 002* indeed lacked elements of corrective justice, instead these primarily consisted of elements of distributive justice. This resulted in a blurring of reparations and assistance.

COLLECTIVE REPARATIONS VS ASSISTANCE

This section will discuss to what extent the reparations before the ECCC can be distinguished from assistance. The reparative projects will be discussed along the lines of the five elements that differentiate reparations from assistance as established by Peter Dixon: namely, responsibility, recognition, process, form, and impact.[1497]

1. Contrary to assistance, reparations are based on the legal ***responsibility*** to repair the harm that resulted from a wrongful act. The party that committed the wrongful act is responsible for the reparations and these are consequently ordered against him/her.[1498] In *Case 001*, the reparations were indeed ordered against Duch. Yet, the amendment of the Internal Rules opened the option for externally funded reparations. Since the two options for reparations were mutually exclusive, externally funded reparations could not be ordered against the convicted person. Since all reparative projects in *Case 002/01* and *002/02* made use of this second avenue, no reparations were ordered against Nuon Chea and Khieu Samphan. Nevertheless, these projects were labelled as reparations after they received the ECCC's stamp of approval. According to Rachel Killean and Luke Moffett, referring to these projects as reparations when they are not linked to the offenders' responsibility 'arguably stretches the

[1494] Rachel Killean and Luke Moffett, 'What's in a Name? 'Reparations' at the Extraordinary Chambers in the Court of Cambodia' (2020) Queen's University Belfast Law Research Paper No 2022-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603179#> accessed 22 August 2022, 9.
[1495] Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 181.
[1496] As explained in chapter 2, the notion of rectifying 'transactions' in cases of international crimes and mass victimization is a difficult one, yet the analyzed international courts, including the ECCC, use it as its starting point. Furthermore, in theory, the reparations are borne by the wrongful party, even in case of an indigent offender, as is the case in the ICC.
[1497] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 95-102.
[1498] 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* (Social Science Research Council 2009) 172; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 147.

principle of responsibility beyond dominant conceptualisations of reparations in the context of international trials'.[1499] The link between reparations and the responsibility of the wrongful party is important since it is understood that the element of responsibility incorporates a strong symbolic component of condemnation of the wrongful acts.[1500] However, the possibility of obtaining 'the symbolic value of ordering reparations against a convicted person, regardless of indigence' was considerably reduced with the introduction of externally funded reparations.[1501]

2. In addition to the acknowledgement of the offenders' responsibility for a wrongful act, reparations also serve as a public ***recognition*** of victimhood and the harm the victims suffered.[1502] As such, Pablo De Greiff argued that reparations should exclusively target victims, instead of all the members of a community or region including those who were not a victim.[1503] The projects that were endorsed in *Case 002/01* and *002/02* had to benefit the victims of the crimes for which the offenders were found guilty, notwithstanding their Civil Party status.[1504] Additionally, several projects also aimed to benefit other groups within the Cambodian society who did not necessarily consist of direct victims, such as children and youth born after the Khmer Rouge regime had ended. Still, these projects simultaneously intended to benefit the Civil Parties by acknowledging their suffering. In other words, the collective and moral reparations before the ECCC were designed to address a consolidated group of victims, or even the Cambodian society at large, making the link between the specific wrongdoing and individual suffering moot. Consequently, Rachel Killean and Luke Moffett argued that the ECCC reparations entailed a 'more general acknowledgement of suffering offered to the consolidated group, and

[1499] Rachel Killean and Luke Moffett, 'What's in a Name? 'Reparations' at the Extraordinary Chambers in the Court of Cambodia' (2020) Queen's University Belfast Law Research Paper No 2022-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603179#> accessed 22 August 2022, 10.

[1500] See for instance, Brandon Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 566; Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 97;Kirsten J Fisher, 'Messages from the Expressive Nature of ICC Reparations: Complex-victims in Complex Contexts and the Trust Fund for Victims' (2020) 20 International Criminal Law Review 318, 342. This is also claimed by the TFV. See *The Prosecutor v Thomas Lubanga Dylio* (Filing on Reparations and Draft Implementation Plan) ICC-01/04-01/06-3177-Red, TFV (3 November 2015) para 155.

[1501] Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 238, footnote 47.

[1502] 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* (Social Science Research Council 2009) 172; Ernesto Verdeja, 'Reparations in Democratic Transitions' (2006) 12 Res Publica 115, 126 ('Reparations indicate a moral acknowledgement of wrongful suffering').

[1503] Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

[1504] In *Case 002/01*, the reparations could benefit Civil Parties as well as victims who did not participate in the proceedings, whereas in *Case 002/02* the reparations foremost addressed the harm of the Civil Parties. *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1114, footnote 3210; *Prosecutor v Nuon Chea and Khieu Samphan* (Case 002/02 Judgement) 002/19-09-2007-ECCC/TC, T Ch (16 November 2018) Trial Chamber, para 4436.

in some cases the wider community of victims', instead of recognizing the specific wrongdoing and subsequent individual suffering.[1505] This was further reinforced when several projects received the label of reparations, while they 'had little relation to the specific crimes' of *Case 002/01* or *002/02*.[1506]

Hence, in theory, the ECCC reparations included a recognition of the crimes committed during the Khmer Rouge and the subsequent suffering, albeit a general and collective acknowledgement. However, it is debatable whether the reparations included this recognition in practice. In *Case 002/01* and *002/02* the status of reparations was attached to the projects retrospectively; most projects had already started and sometimes even finished at that time. Hence, victims participated in projects that were not necessarily perceived as reparations that included the symbolic value of recognition.[1507]

3. The approach to the development and implementation of the reparations is also of fundamental importance to reparations.[1508] This ***process*** of designing and implementing reparations, especially the role of victims within this process, is another factor that differentiates reparations from assistance. This was affirmed by the International Civil Party Lead Co-Lawyer, who indicated in an interview that the consultation with Civil Parties differentiated reparations from international assistance.[1509] However, the increase in the number of Civil Parties hampered the consultation process.[1510] Where *Case 001* incorporated regular consultation meetings with Civil Parties,[1511] the Civil Party Lead Co-Lawyers depended on NGOs for the consultation with victims in *Case 002*.[1512] In a 2018 survey that was conducted among Civil Parties of the different

[1505] Rachel Killean and Luke Moffett, 'What's in a Name? 'Reparations' at the Extraordinary Chambers in the Court of Cambodia' (2020) Queen's University Belfast Law Research Paper No 2022-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603179#> accessed 22 August 2022, 12.

[1506] For instance, the National Day of Remembrance and other more general memorial and education projects. See, Rachel Killean, 'Pursuing Retributive and Reparative Justice within Cambodia' in Luke Moffett and Cheryl Lawther (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 484-485.

[1507] Rachel Killean and Luke Moffett, 'What's in a Name? 'Reparations' at the Extraordinary Chambers in the Court of Cambodia' (2020) Queen's University Belfast Law Research Paper No 2022-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603179#> accessed 22 August 2022, 14.

[1508] See for instance, Thomas M Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 42 Stanford Journal of International Law 279, 283; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 37; Jo-Anne Wemmers, 'The Healing Role of Reparation' in Jo-Anne Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014) 226; Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 36-41.

[1509] Christoph Sperfeldt and Rachel Hughes, 'The Projectification of Reparation' (2020) 12 Journal of Human Rights Practice 545, 560.

[1510] Where *Case 001* only included 74 Civil Parties, the complete *Case 002* encompassed a total of 3,867 Civil Parties. See, *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) disposition; *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 3.

[1511] Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 278.

[1512] Rachel Killean and Luke Moffett, 'What's in a Name? 'Reparations' at the Extraordinary Chambers in the Court of Cambodia' (2020) Queen's University Belfast Law Research Paper No 2022-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603179#> accessed 22 August 2022, 17.

cases,[1513] two-thirds of Civil Parties experienced consultation and had the feeling that their views had been taken into consideration.[1514] Yet, when the Civil Parties were questioned further during in-depth interviews, many expressed discontentment with the consultation process.[1515] First, the reparation projects that were requested by Civil Parties were mostly rejected by the Court in *Case 001* or not put forward in *Case 002*, thereby limiting the influence of these consultations upon the development of reparations.[1516] Second, the role of NGOs in the design and implementation of reparations increased, and the reparative projects before the ECCC in *Case 002/01* and *002/02* were guided 'by what projects NGO's could offer or what donors wanted to fund, rather than by civil parties' needs and preferences'.[1517]

4. Reparations address the harm the victims have suffered as a result of the crimes, whereas assistance is needs-driven.[1518] Accordingly, Peter Dixon argued that reparations should take a 'more symbolically or materially significant' ***form***.[1519] However, the difference between reparations and assistance is negligible at the ECCC.[1520] The amendment of the Internal Rules did not only open the option for externally funded reparations, it also gave the VSS the possibility to develop non-judicial measures.[1521] Even though the Internal Rules dealt with reparations and non-judicial measures separately, Johanna Herman observed that 'there is little clarity regarding the manner in which these initiatives are to be finally distinguished'.[1522] In fact, the VSS has

[1513] 255 Civil Parties from *Case 001, 002, 003* and *004* were included in the sample, including victims whose Civil Party status was rejected in *Cases 001* and *002*. Timothy Williams and others, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process* (Centre for Conflict Studies (Marburg) and Centre for the Study of Humanitarian Law (Phnom Penh) 2018) 21-22.

[1514] Timothy Williams and others, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process* (Centre for Conflict Studies (Marburg) and Centre for the Study of Humanitarian Law (Phnom Penh) 2018) 117.

[1515] Timothy Williams and others, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process* (Centre for Conflict Studies (Marburg) and Centre for the Study of Humanitarian Law (Phnom Penh) 2018) 117.

[1516] See for instance, Rachel Killean and Luke Moffett, 'What's in a Name? 'Reparations' at the Extraordinary Chambers in the Court of Cambodia' (2020) Queen's University Belfast Law Research Paper No 2022-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603179#> accessed 22 August 2022, 17.

[1517] Christoph Sperfeldt, 'Reparations at the Extraordinary Chambers in the Courts of Cambodia' in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (2nd edn, Brill 2020) 504. This development is referred to as '"NGOisation" of remedial measures supported by the ECCC'**.** Timothy Williams and others, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process* (Centre for Conflict Studies (Marburg) and Centre for the Study of Humanitarian Law (Phnom Penh) 2018) 118.

[1518] Kirsten J Fisher, 'Messages from the Expressive Nature of ICC Reparations: Complex-victims in Complex Contexts and the Trust Fund for Victims' (2020) 20 International Criminal Law Review 318, 325.

[1519] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 100.

[1520] See for instance, Nina Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar Publishing 2018) 393.

[1521] ECCC IR9, rule 12 *bis* (4).

[1522] Johanna Herman, 'Realities of Victim Participation: The Civil Party System in Practice at the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (2013) 16 Contemporary Justice Review 461, 471.

one team that dealt with reparations as well as non-judicial measures,[1523] since 'there is [sic] a lot of overlap between the two'.[1524]

The underlying reason was that the VSS had limited funding and that it lacked an institutional infrastructure for the implementation of reparations and non-judicial measures. Even though its function was similar to the TFV, the VSS lacked a comparable organization.[1525] Accordingly, the ECCC was highly dependent on the support from NGOs for the outreach to victims (especially those living in rural areas), the development, financing, and implementation of both reparations and non-judicial measures.[1526] Hence, both reparations and non-judicial measures were realized through NGOs. Additionally, the non-judicial projects consisted mainly of activities that were also endorsed as reparations. These were, sometimes concurrently, implemented by the same NGOs and financed by third parties. For instance, in *Case 002/01*, the Court endorsed testimonial therapy and self-help groups as a reparation. These reparations were externally funded and implemented by Transcultural Psychosocial Organization (TPO).[1527] At the same time, TPO was organizing testimonial therapy and self-help groups via the non-judicial project financed by the UN Trust Fund to End Violence Against Women.[1528]

The distinction between reparations and assistance was additionally blurred in *Case 002/01* and *002/02*. In these cases, the projects were recognized as reparations retrospectively. Some projects had already finished at the time they received the reparations label. In the event that Chea and Samphan had been acquitted or had died before the verdict had been delivered, these projects would not have been recognized as reparations. Instead, these projects would have consisted of assistance funded by donors and implemented by NGOs. Hence, the form of the reparative projects before the ECCC are identical to that of assistance projects, since they have the same substance, donors and implementation partners.

[1523] 'VSS Structure' (*ECCC*) <https://www.eccc.gov.kh/en/vss-structure> accessed 29 April 2022.

[1524] Johanna Herman, 'Realities of Victim Participation: The Civil Party System in Practice at the Extraordinary Chambers in the Courts of Cambodia (ECCC)' (2013) 16 Contemporary Justice Review 461, 469.

[1525] The ICC Trust Fund has this institutional infrastructure incorporated in its trust fund. Christoph Sperfeldt, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia' (2012) 12 International Criminal Law Review 457, 467.

[1526] See for instance, Ignaz Stegmiller, 'Legal Developments of Civil Party Participation at the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 545; Helen Jarvis, 'Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 32.

[1527] *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement) 002/19-09-2007-ECCC/TC, T Ch (7 August 2014) para 1132 and 1133.

[1528] Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 292; 'Victims Support Section of the ECCC Secures Funds from UN Trust Fund to End Violence Against Women' (*ECCC,* 21 January 2016) <https://www.eccc.gov.kh/en/node/36426> accessed 3 December 2019.

Core operations of the ECCC were primarily funded by the foreign ministries of external governments, while reparations in *Case 002* were primarily financed by foreign ministries that included development assistance.[1529]

5. Peter Dixon held that the 'principle of **impact** suggests that because of their potent symbolic value, reparations have a greater, or at least different, impact vis-à-vis assistance measures'.[1530] The impact of the minimal reparations in *Case 001* was limited, because the inclusion of names of Civil Parties in the verdict is a standard procedure,[1531] and several Civil Parties perceived the apologies to be insincere.[1532] *Case 002/01* and *002/02* saw a larger variety of reparative projects that may have had more impact.[1533] Yet, many Civil Parties who had participated in a reparative project did not know it was indeed a reparations project,[1534] making the impact of reparations label questionable. Thus, in theory, reparations may have a more significant impact than assistance, however more research is needed to analyze whether this difference is actually existent in practice.

Based on these five elements, the distinction between reparations and assistance became more subtle in *Case 002*. Despite their marginal nature, the reparations in *Case 001* were linked to the responsibility of Duch, included a recognition of the suffering of victims, and involved a consultation process. Whereas the reparations in *Case 002* were not ordered against Nuon Chea and Khieu Samphan, Civil Parties were consulted through NGOs, and the projects were funded and implemented by donors and NGOs that were also involved in similar assistance projects. Most notably, many Civil Parties who did benefit from reparation projects were unaware of the reparations status, making the difference in practice insignificant.

[1529] Christoph Sperfeldt and Rachel Hughes, 'The Projectification of Reparation' (2020) 12 Journal of Human Rights Practice 545, 557.
[1530] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 101.
[1531] Renée Jeffery, 'Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal' (2014) 13 Journal of Human Rights 103, 114.
[1532] Eric Stover, Mychelle Balthazard and Alexa Koenig, 'Confronting Duch: Civil Party Participation at the Extraordinary Chambers in the Court of Cambodia' (2011) 93 International Review of the Red Cross 503, 528.
[1533] Civil Parties who had knowingly participated in a reparations project were often positive about its impact for their own life and their community. See, Timothy Williams and others, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process* (Centre for Conflict Studies (Marburg) and Centre for the Study of Humanitarian Law (Phnom Penh) 2018) 117.
[1534] Timothy Williams and others, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process* (Centre for Conflict Studies (Marburg) and Centre for the Study of Humanitarian Law (Phnom Penh) 2018) 117 ('Of those who are known to have participated in reparation projects from the participation lists, 56.4% indicated themselves that they had participated in reparation projects, while about a quarter of these participants indicated that they had not (25.6%) and a further fifth could not remember (17.9%)').

CHAPTER 7: TRUTH COMMISSIONS

7.1 INTRODUCTION

In general, truth commissions have two main objectives:[1535] they investigate and document past human rights violations and their underlying causes, and they aim to prevent similar violations from happening again.[1536] The latter goal is partly instigated through the recommendations made in the final reports, which aim to redress the violations and to prevent future abuses.[1537] These recommendations may include reparations that are both of an individual and collective nature, as well as a material and symbolic nature.

Considering the scope and research question of this research, this chapter will focus in particular on how truth commissions defined and recommended collective reparations, and what the arguments were for their different approaches. The analyzed truth commissions made recommendations in their reports, which often included reparations. Several commissions used reparations and recommendations as interchangeable concepts, while others did not. Some truth commissions specifically recommended reparations, while others did not explicitly include reparations in their recommendations. For instance, several commission reports included a chapter or section on recommendations and a separate chapter or section on reparations, hence demonstrating a distinction between the two. In addition, some truth commissions were not transparent in their approach to reparations and recommendations and whether these were distinct or interchangeable.

The reports and the terminology used in these reports by the truth commissions was leading in the analysis. Hence, the classification of the recommendations as reparations by the commission itself was considered leading in the analysis. In other words, only measures that were labelled as reparations by the truth commissions, for instance when they were listed under the heading of 'reparatory measures' or included in a chapter titled 'reparation framework', were included in the analysis of the development of collective reparations within these institutions. That means that

[1535] Several truth commissions were set up to reach more objectives, such as the identification of perpetrators and victims, the determination whether the violations were part of state practice, addressing impunity, and assistance to the victims. These goals fall within the broader objectives of truth finding, even when the findings are used in criminal proceedings, and prevention. See for instance, Human Rights Violations Investigation Commission (Oputa Panel, Nigeria) 'The Human Rights Violations Investigation Commission Report. Volume 1' (May 2002) 29; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 1' (5 October 2004) 24-25; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 2' (31 October 2005) 1.

[1536] Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 33.

[1537] Elin Skaar, 'Transitional Justice for Human Rights: The Legacy and Future of Truth and Reconciliation Commissions' in Gerd Oberleitner (ed.), *International Human Rights Institutions, Tribunals and Courts* (Springer 2018) 407.

measures that were not labelled as reparations by the truth commissions were managed as 'general recommendations', even when these measures fell in the categories of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (hereinafter UN Reparation Principles).[1538]

This chapter starts with a short introduction of the definition of truth commissions and the victims' role within these institutions. The methodological considerations relevant for this chapter are discussed, along with selection of the truth commissions, followed by an overview of the characteristics of the selected truth commissions, including the objectives of the analyzed commissions, the geographic spread of the commissions, and the crimes that were part of the inquiry. Subsequently the results of the qualitative content analysis are discussed. The differing notions of reparations, and especially collective reparations, of the truth commissions will be examined. First, the truth commissions' definitions of reparations and its categories as derived from the UN Basic Principles consisting of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition are discussed. Second, the reparations that were actually recommended by the commissions are examined. Finally, this chapter concludes with an overview of the development of collective reparations in the truth commissions, which will be linked to Aristotle's theory on particular justice consisting of corrective and distributive justice.

7.1.1 Defining truth commissions

A wide variety among truth commissions can be inferred, for instance in their mandates, context, international influence and, available resources.[1539] Nevertheless, based on scholarly work of Priscilla Hayner, an overarching definition has evolved.[1540]

[1538] UNGA 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (16 December 2005) UN Doc. A/RES/60/147.
[1539] For instance, the Nigerian Oputa Panel had a limited budget of US$ 450,000, while the South African Truth and Reconciliation Commission had an annual budget of US$ 18 million for its first two and a half years of operation, which was still perceived as too stringent. Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commisions* (2nd edn, Routledge 2011) 28 and 250; Truth and Reconciliation Commission (South Africa), *Truth and Reconciliation Commission of South Africa Report. Volume 6* (March 2003) 741.
[1540] Other scholars use slightly different definitions, which vary primarily on whether the commission can only be authorized by the state, the extent the commissions have to be victim centered, whether they can examine ongoing violations, and whether the commission has to deliver an official report when the work is concluded**.** Elin Skaar, 'Transitional Justice for Human Rights: The Legacy and Future of Truth and Reconciliation Commissions' in Gerd Oberleitner (ed.), *International Human Rights Institutions, Tribunals and Courts* (Springer 2018) 403-404. See furthermore, Geoff Dancy, Hunjoon Kim and Eric Wiebelhaus-Brahm, 'The Turn to Truth: Trends in Truth Commission Experimentation' (2010) 9 Journal of Human Rights 45, 48-49; Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Routledge 2010) 3-4; Jeremy Sarkin, 'Redesigning the Definition of a Truth Commission, but Also Designing a Forward-Looking Non-Prescriptive Definition to Make Them Potentially More Successful' (2018) 19 Human Rights Review 349, 354.

In 2011, she revised her first definition from 1994 as it was considered too broad.[1541] In this chapter, the 2011 definition will be used.[1542] Accordingly, for this study a truth commission:

> (1) is focused on the past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experience; (4) is a temporary body with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.[1543]

Truth commissions are set up on an *ad hoc* basis by the state and/or international community, making them quasi-official bodies. As such, they have moderately weak powers and no enforcement power.[1544] Instead, 'they rely on moral suasion, pressure from civil society and the international community, and the political will of politicians to see most of their impact realized'.[1545]

7.1.2 TRUTH COMMISSIONS AND VICTIMS

Truth commissions are often applauded for being victim centered institutions.[1546] This acclaim is primarily linked to assumptions relating to the benefits of truth telling. Several transitional justice scholars, primarily human rights lawyers, believed that victims were helped by telling their stories, by having their testimonies officially acknowledged as credible, and by the recognition that the crimes against them indeed occurred and were considered wrongful or criminal.[1547] The truth telling process was

[1541] Some of the criticism of Mark Freeman was incorporated in the revised definition; Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commisions* (2nd edn, Routledge 2011), 11; Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 12-18.

[1542] For the current study, points four and five are essential. It is important that the commission concluded its work with an official report as the recommendations, including reparations, were included in these reports. Furthermore, only official commissions that were established by the state were included because these were more authoritative in the development of concepts such as collective reparations.

[1543] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commisions* (2nd edn, Routledge 2011) 11-12.

[1544] Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Routledge 2010) 15 and 27.

[1545] Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Routledge 2010) 27.

[1546] See for instance, Laurel E Fletcher and Harvey M Weinstein, 'Transitional Justice and the 'Plight' of Victimhood' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017) 253; Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Routledge 2010) 4.

[1547] Martha Minow, 'Between Vengeance and Foregiveness: South Africa's Truth and Reconciliation Commission' (1998) 14 *Negotiation* Journal 319, 329-333; Raquel Aldana, 'A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities' (2006) 5 Journal of Human Rights 107,

believed to be empowering for the victims, a claim that was also made by the Nigerian Truth Commission.[1548] Shosanna Felman and Dori Laub, a scholar specialized in comparative literature and a psychiatrist specialized in the treatment of Holocaust survivors, held that this truth telling process may even be therapeutic.[1549]

Contrary to criminal trials, the testimonies of victims are not bound by legal procedures, hence these are not limited to the legally relevant facts needed for a conviction and the victims' testimonies are not interrupted by questions from lawyers.[1550] This makes it a surrounding that is more sympathetic towards the victims.[1551] Furthermore, truth commissions processes are often able to give more attention to the suffering of the victims.[1552]

Nevertheless, this does not mean that victims can always speak freely, instead in reality, the time victims got for their testimonies was often restricted due to budget and time constrictions of the truth commission.[1553] On occasion, the victims' opportunities to speak were curtailed because a truth commission had to follow a strict legal procedure in order to be conceived as independent and legitimate. Additionally, several scholars with a background in law, sociology, anthropology, and psychology, argued that truth telling may be re-traumatizing, re-victimizing and distressing for victims.[1554] Furthermore, the positive effects of truth telling might be counterbalanced when the recommended reparations are not implemented, instead causing 'harm since victim-survivors could feel a deeper sense of deception and neglect'.[1555]

111; Lisa J Laplante and Kimberly Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29 Human Rights Quarterly 228, 238-239.

[1548] Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Routledge 2010) 4; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 1' (May 2002) 34.

[1549] Giving testimony might be therapeutic, while keeping silent may lead to distorted memory and 'serves as a perpetuation of its tyranny'. Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History* (Routledge 1992) 78-80.

[1550] An exception is the Nigerian Human Rights Violations Commission where all parties were allowed to examine or cross-examine the witnesses who publicly testified. Hakeem O Yusuf, 'Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria' (2007) 1 *The International Journal of Transitional Justice* 268, 274.

[1551] Raquel Aldana, 'A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities' (2006) 5 Journal of Human Rights 107, 113; 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, 273.

[1552] Raquel Aldana, 'A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities' (2006) 5 Journal of Human Rights 107, 113.

[1553] 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, 273.

[1554] Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (Springer 2009) 66; Gearoid Millar, 'Performative Memory and Re-Victimization: Truth-Telling and Provocation in Sierra Leone' (2015) 8 Memory Studies 242; Cheryl Lawther, 'Transitional Justice and Truth Commissions' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017) 342, 343.

[1555] Lisa J Laplante and Kimberly Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29 Human Rights Quarterly 228, 240-241.

Considering the wide diversity of truth commissions, the roles that victims played within these commissions varied tremendously as well. For instance, the form of the testimonies differed: some consisted of the truth telling regarding the violations and harm, while others also included room for statements indicating the preferred reparations.[1556] Most commissions included victims' testimonies in the investigation stage and treated these as important sources of information.[1557] These were used for the truth finding function of the truth commission, while the statements regarding the preferred reparations were used in determining the recommendations.[1558] The number of statements given by victims ranged from hundreds,[1559] to thousands,[1560] to tens of thousands.[1561] Additionally, several commissions also incorporated the testimonies of offenders.[1562] Several truth commissions, especially the ones established after the South African commission, conducted public hearings of the individual testimonies.[1563] These were often held across the country, and sometimes aired on television or radio. Still, only a fraction of the victims who gave a testimony before the South African commission also appeared before a public hearing, while many more wanted to.[1564]

[1556] See for instance, Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 100.

[1557] 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, 264; Elin Skaar, 'Transitional Justice for Human Rights: The Legacy and Future of Truth and Reconciliation Commissions' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals and Courts* (Springer 2018) 407.

[1558] See for instance, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 246; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 100.

[1559] For instance, the Chilean National Commission on Truth and Reconciliation (Rettig Commission) took testimonies from hundreds of people. National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 21.

[1560] See for instance, the 1,750 testimonies received by the Nigerian Human Rights Violations Investigation Commission (Oputa Panel), and the Canadian Truth and Reconciliation Commission with over 6,750 recorded testimonies. Hakeem O Yusuf, 'Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria' (2007) 1 The International Journal of Transitional Justice 268, 274; The Truth and Reconciliation Commission of Canada, 'The survivors speak: a report of the Truth and Reconciliation Commission of Canada' (2015) 1.

[1561] For instance, the Liberian Truth and Reconciliation Commission with over 20,000 statements and the Kenyan Truth, Justice, and Reconciliation Commission with 42,465 statements. Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume I: Findings and Determinations' (19 December 2008) 46; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume I' (3 May 2013) 83.

[1562] For instance, in the Chadian Commission of Inquiry into the Crimes and Misappropriations Committed by the Ex-President Habré, His Accomplices and/or Accessories, 42 of the 1,726 testimonies were given by offenders and in the South African Truth and Reconciliation Commission 2,240 of the 24,265 statements were from offenders. Commission of Inquiry into the Crimes and Misappropriations Committed by the Ex-President Habré, His Accomplices and/or Accessories (Chad), 'Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by the Ex-President Habré, His Accomplices and/or Accessories' (7 May 1992) 57; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 7' (August 2002) 1.

[1563] Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 24.

[1564] '[O]nly around 2000 victims, less than 10% of the victim submissions, actually got to present oral testimonies before the Committee hearings'. See Michael Humphrey, 'From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing' (2003) 14 The Australian Journal of Anthropology 171, 177.

7.2 METHODOLOGY

The reports of the truth commissions were analyzed in line with the general methodology as described in chapter 3. The methodological considerations that are specific to this chapter are discussed in the section below.

7.2.1 CODED MATERIAL

Most reports consist of an explanation of the establishment of the commission, its mandate and methodology, an elaborate account of the crimes that were committed, its victims and the root causes, and concluded with findings and recommendations. Consequently, most of the reports were very lengthy and dense, with some of these reports consisting of over 1,000 pages.[1565] This research does not provide an in-depth analysis of the conflicts and regimes, their underlying reasons, nor their consequences. Instead, it explores the notion of collective reparations and its development over time. This does not mean that the context in which these truth commissions were prescribed was not taken into account, instead some knowledge of the conflicts and background of the commissions is needed to make final observations regarding the development of collective reparations. However, this does not require a qualitative content analysis. Therefore, only the sections consisting of recommendations and reparations were coded and systematically analyzed.

7.2.2 LIMITATIONS

In order to get a better understanding of collective reparations and its development in truth commission processes, the reports of 15 truth commissions were analyzed. Several limitations arose from the use of these reports as the main source of the analysis.

First, the analyzed truth commissions did not elaborate on the difference between the recommended reparations and the 'general recommendations', nor did a number of commissions explain how they interpreted the concept of reparations. In categorizing the recommendations as reparations or as 'general recommendations', I followed the wording of the commissions. It is possible that some of the recommendations that were intended as reparations, but that were not labelled as such in the report, were not included in the analysis. This may have influenced the results of my analysis.

[1565] For instance, the five volumes of the final report of the South African TRC consists of 2.742 pages.

Second, other concepts that were frequently used in reparation decisions, such as harm and communities, often lacked a definition or explanation. Several commissions used these without specifying them.

Third, several commissions only recommended reparation programs in general wordings, leaving it to the states to design and implement the recommended reparations. Most commissions let the construction of the procedures for the provision of the reparations to the states. Hence, information on the necessary evidence to proof victimhood, or whether collective reparations had to be requested collectively or individually, was absent in the analyzed reports. Consequently, the conclusions that could be drawn regarding the development of collective reparations and the underlying reasons were affected by the ambiguousness of several truth commissions' reparation sections.

Lastly, only the English versions of the reports were included, which included five translated versions.[1566] These translations might be incomplete or concepts might have gotten a different meaning. Consequently, a researcher using the original reports could possibly arrive at different conclusions regarding the concept of collective reparations and its development with regard to these reports.

7.3 THE SELECTED TRUTH COMMISSIONS

The 15 truth commissions that were included in the systematic analysis showed a wide variety of characteristics. In order to better understand the results of the qualitative content analysis, the selected truth commissions are presented based on, amongst others, their mandates, the level of international collaboration, the type of crimes that were under inquiry, and the victims and beneficiaries. See table 7.1. for an overview of the 15 truth commissions and some of their characteristics as outlined in this section.

7.3.1 GENERATIONS OF TRUTH COMMISSIONS

Onur Bakiner, a political science scholar, divided the truth commissions into three generations.[1567] The first-generation commissions were established in the 1980s and early 1990s within the first year of the transition after authoritarianism, primarily military regimes. The truth finding was restricted to the violations of specific human rights, such as forced disappearances, and consisted primarily of domestic projects.[1568] The commissions of Argentina, Chile and Chad fell into this category. The second-

[1566] Namely, the reports of Argentina, Chile, Chad, El Salvador, and Guatemala.
[1567] Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 34.
[1568] Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 35.

generation commissions were created in the 1990s and 2000s, and came into being within three years of the transition process. Some commissions were set up after an authoritative regime came to an end, yet most were established after a conflict had ended. Contrary to the first generation, the commissions investigated a wide range of human rights and humanitarian law violations. Furthermore, they were no longer of a purely domestic nature, instead they were often of a more international nature through the involvement of international organizations as the United Nations (hereinafter UN) or the African Union (hereinafter AU) and international NGOs as the International Center for Transitional Justice (hereinafter ICTJ), the inclusion of international commissioners, and they are heavily influenced by previous truth commissions.[1569] The commissions of El Salvador,[1570] Sri Lanka, South Africa, Guatemala, Nigeria, Sierra Leone, Timor Leste, Liberia and Kenya fell within this category. The third-generation commissions developed in the 2000s and they were established in non-transitional societies where the violations that were investigated had taken place years or decades before.[1571] The commissions of Indonesia & Timor Leste, Mauritius and Canada were included in this category.

[1569] Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 35-36.
[1570] This commission falls a bit between the two generations. On the one hand, it was a commission from the early 1990s with a restricted mandate, but on the other hand, it was a commission that was established with the assistance of the UN. The categorization of Onur Bakiner was followed; Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 36.
[1571] Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 37.

Table 7.1: Overview of the truth commissions

	Years of operation	Generation	National v. international	Mandate to make Recommendations	Context of the violations	Special attention to vulnerable victims
Argentina	1983-1984	First	Almost national	No	Oppressive rule	-
Chile	1990-1991	First	National	Yes	Oppressive rule	Age,[1572] indigenous peoples
Chad	1991-1992	First	National	No	Oppressive rule	-
El Salvador	1992-1993	Second	International	Yes	Internal conflict	-
Sri Lanka[1573]	1994-1997	Second	National	Yes	Internal conflict	Women, age
South Africa	1995-1998	Second	National	Yes	State practice	Those in urgent need
Guatemala	1997-1999	Second	International	Yes	Internal conflict	Indigenous peoples, age, women, disadvantaged people

[1572] Groups that are vulnerable due to age are children and elderly persons.

[1573] Sri Lanka's truth commission consisted of four regional Commissions. The commissions for the Northern and Eastern Provinces, the commission for the Western, Southern and Sabaragamuwa Provinces, commission of the Central, North West, North Central and Uva Provinces and the final All Island commission. The report of the fourth commission of the Central, North West, North Central and Uva Provinces was not available and is therefore not included in this study. The reports of the other three Commissions were coded and used in the analysis. In this research, the three commissions are jointly referred to as the Commission of Sri Lanka. When differences between the three reports occurred, a reference to the specific commission was included.

Nigeria	1999-2002	Second	National	Yes	Oppressive rule and conflict	Women
Sierra Leone	2002-2004	Second	International	Yes	Internal conflict	Women, age, war-wounded, victims of sexual violence
Timor Leste	2002-2005	Second	International	Yes	Foreign oppression	Women, age, disabled persons, torture victims
Indonesia & Timor Leste	2005-2008	Third	International	Yes	Foreign oppression	Age, women
Liberia	2006-2009	Second	Almost international	Yes	Internal conflict	War wounded, women, indigenous peoples, minorities, age
Mauritius	2009-2013	Third	Almost national	Yes	State practice	Age
Kenya	2009-2013	Second	National	Yes	Structural violence	Indigenous peoples, minorities, age, women
Canada	2009-2015	Third	National	Yes	State practice	Indigenous peoples

7.3.2 THE COMMISSIONS THROUGH TIME

The 1983 Argentinean National Commission on the Disappeared is often regarded as the first truth commission.[1574] This commission was included in this analysis and marked the only commission from the 1980s.[1575] Thereafter, the 1990s and 2000s saw, respectively, six and five of the included commissions. The number decreased and only three commissions of the 2010s were selected.

Additionally, the process time of the truth commissions increased over the years, from less than a year to over six years. This is primarily linked to public hearings.[1576] Hence, the earliest commissions did not have public hearings and were finished within a year. In contrast, the ones with a public hearing took usually between 2 and 3,5 years.[1577] In diagram 7.1, a timeline of the selected truth commissions can be found.

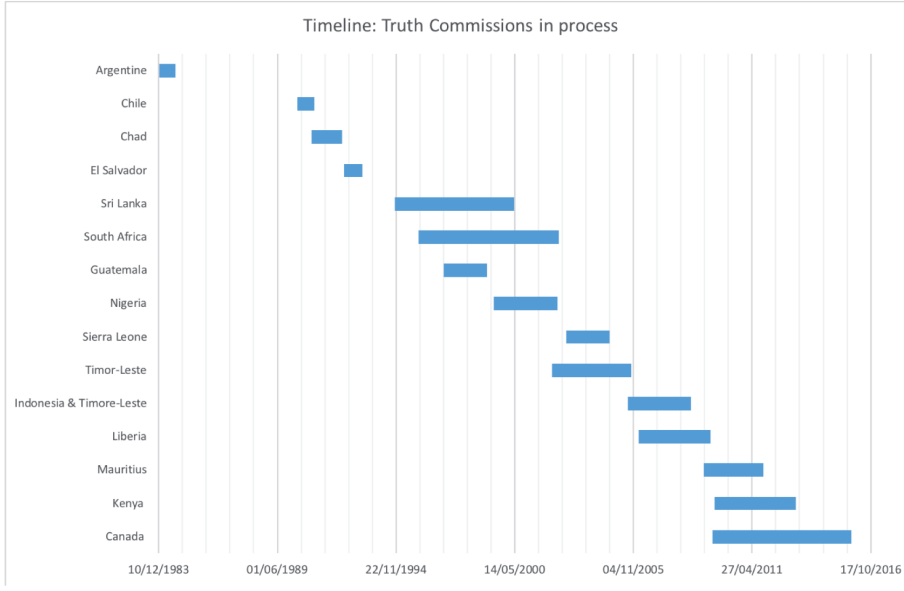
[1574] See for instance, Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 25; Anita Ferrera, *Assessing the Long-Term Impact of Truth Commissions: The Chilean Truth and Reconciliation Commission in Historical Perspective* (Routledge 2014) 4. Nevertheless, it can also be argued that the 1974 Commission of Inquiry into the Disappearances of People in Uganda was the first truth commission. Angela Nichols argues that other scholars did not include this commission as it was used by Idi Amin as a political tool to cover up his crimes. See Angela D Nichols, *Impact, Legitimacy, and Limitations of Truth Commissions* (Palgrave Macmillan 2019) 17.

[1575] National Commission on the Disappearance of Persons (Argentina), 'Nunca Mas' (1984).

[1576] Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 32.

[1577] Overall, the Sri Lanka truth commission took five and a half years. However, the separate truth commissions took each around 2 years. In addition, the South African commission finished after more than six years because the Amnesty Committee continued after the truth commission released its first report in 1998 (within three years). Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commisions* (2nd edn, Routledge 2011) 31.

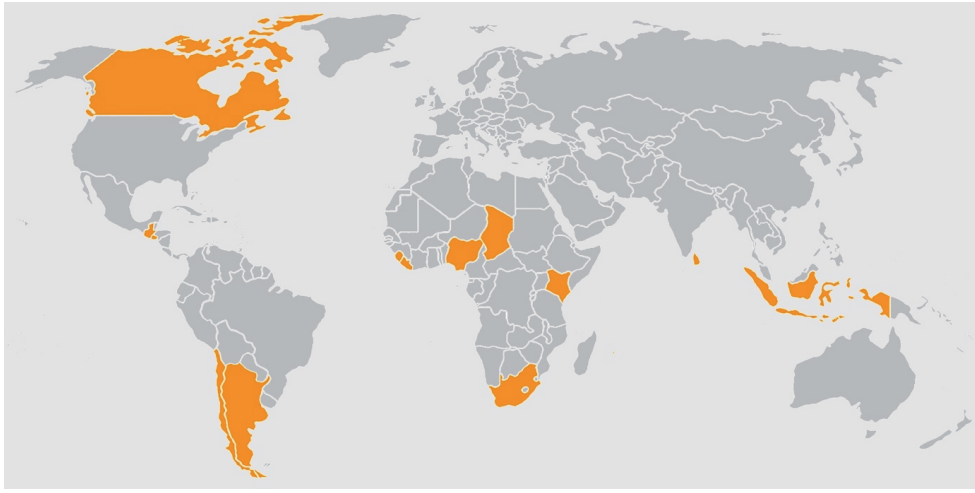
Diagram 7.1: Timeline of the truth commissions



7.3.3 COUNTRIES

The selected truth commissions covered different areas around the world. As can be seen in diagram 7.2, the commissions were situated in North America (1), Central America (2), South America (2), Africa (7), the Indian Sub-Continent (1), and South East Asia (2).

Diagram 7.2: Geographical locations of the selected truth commissions



7.3.4 CONTEXT OF THE VIOLATIONS

The truth commissions were set up to scrutinize specific violent periods. The first three of the selected commissions investigated the violations committed during the authoritative regimes of, respectively, the Argentinean military junta, Pinochet, and Hissène Habré. Furthermore, five commissions examined an internal conflict.[1578] Two of these commissions considered the same international conflict; one inquired into the entire Indonesian occupation of Timor Leste, [1579] and the other one only into the violent outburst surrounding the referendum for independence of Timor Leste from Indonesia.[1580] Two truth commissions were not linked to a specific regime or conflict, instead they were mandated to look at a time period that covered multiple authoritative

[1578] Namely the commissions of El Salvador, Sri Lanka, Guatemala, Sierra Leone and Liberia.
[1579] The Timor-Leste commission investigated particularly the 'practices and policies of Indonesia and its forces present in East Timor between 7 December 1975 and 25 October 1999'. UN Transitional Administration in East Timor, 'Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor' (13 July 2001) UN Doc UNTAET/REG/2001/10, article 13.2 (b).
[1580] The Commission for Truth and Friendship between Indonesia and Timor-Leste was limited to 'the period leading up to and immediately following the popular consultation in Timor-Leste in August 1999'. Terms of Reference for the Commission of Truth and Friendship (Indonesia & Timor-Leste) (10 March 2005) <https://www.etan.org/et2005/march/06/10tor.htm > accessed 22 August 2022, article 14 (a).

regimes, conflicts and violent episodes.[1581] Additionally, three commissions were set up to inspect a particular state practice, consisting of the apartheid regime, slavery and indentured labor, and the practice of the Indian residential school system.[1582]

7.3.5 CRIMES UNDER INQUIRY

Truth commissions generally focus on acts of excessive violence and state repression.[1583] Nevertheless, the older commissions had a rather limited investigatory authority; in Argentina and Sri Lanka these were limited to disappearances. In the Chilean Commission, this was complemented by killings by state agents through executions or torture, kidnapping, and attempts on life by civilians.[1584] In the 1990s, the scope of crimes that had to be explored by the commissions increased. As such, 2/3 of the selected truth commissions were mandated to inquire into (gross) human rights violations committed during a specific period, [1585] and three, all African, commissions were additionally looking into violations of international humanitarian law.[1586] The more recent commissions of Liberia and Kenya additionally included specific violations of human rights and international humanitarian law, consisting of economic crimes, including the subsequent economic marginalization, and explicitly mentioned sexual violence.[1587] In addition, the Kenyan commission was mandated to inquire into the causes of the political violence surrounding elections and ethnic tensions.[1588] This further broadening of the investigatory authority was also reflected in the recent commissions in Mauritius and Canada, which were not limited by specific crimes or violations, instead they had to analyze, respectively, slavery and indentured labor after 1638, and the Indian residential school system that operated between 1831 and 1996.[1589]

In addition to the broadening of the crimes and violations that had to be inquired, the time period that was under enquiry also increased. Eleven of twelve commissions that were established before 2010 were limited to a specific repressive regime, internal armed conflict or international conflict under inquiry, resulting in time

[1581] Namely the commissions of Nigeria and Kenya.
[1582] Namely the commissions of South Africa, Mauritius and Canada.
[1583] Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press 2006) 33.
[1584] Creation of the Commission on Truth and Reconciliation (Chile) (25 April 1990) Supreme Decree No 355, article 1.
[1585] Namely the commissions of Chad, El Salvador, South Africa, Guatemala, Nigeria, Sierra Leone, Timor Leste, Indonesia & Timor Leste, Liberia, and Kenya.
[1586] Namely the commissions of Sierra Leone, Liberia, and Kenya.
[1587] Act to Establish the Truth and Reconciliation Commission (Liberia) (approved on 10 June 2005) article 4 (4) (a); The Truth, Reconciliation and Justice Commission Bill (Kenya) (2008) No 6 of 2008 (revised in 2012) article 5 (c), (d), (e), (f) and (g).
[1588] The Truth, Reconciliation and Justice Commission Bill (Kenya) (2008) No 6 of 2008 (revised in 2012) article 5 (i) and (j).
[1589] JR Miller, 'Residential Schools in Canada' (*The Canadian Encyclopedia*, 10 October 2012) <https://www.thecanadianencyclopedia.ca/en/article/residential-schools> accessed 16 February 2021.

periods ranging from less than one year to several decades. The only exception is the truth commission in Nigeria that was set up to investigate the different regimes and civil war that transpired between the collapse of the First Republic in 1966 and 1999.[1590] Furthermore, as seen above, the truth commissions that operated in the 2010's were authorized to examine extensive periods consisting of more than a century or even centuries.[1591]

7.3.6 National vs. international truth commissions

Based on the parties that were involved in the establishment of the truth commissions, I made a distinction between national and international truth commissions. The majority of the selected truth commissions, nine out of fifteen, were characterized as national truth commissions, because they were established by national actors such as the president, the national parliament, or by a court settlement between the national government and victims. The national commissions predominantly consisted of national commissioners.[1592] The six commissions that were classified as international were primarily set up through an international peace accord.[1593] These peace accords were the results of negotiations under the auspices of the UN, the AU, and/or the Economic Community of West African States. These international organizations remained influential in the establishment and running of the truth commissions, as the international commissioners were elected by organs of the UN, the AU or an International Technical Advisory Committee.[1594]

In addition to the involvement of international organizations in the establishment of the truth commissions, international NGOs (primarily the ICTJ) were highly influential in the development of truth commissions.[1595] The ICTJ was established in 2001 by two commissioners of the South African commission, Alex Boraine and Paul van Zyl, and by Priscilla Hayner, author of one of the authoritative works on truth

[1590] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 1' (May 2002) 22-23.
[1591] The investigated time span of the Kenyan commission was remarkably shorter (45 years), yet this period covered the time after Kenya's independence. Sosteness Francis Materu, *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (Asser Press 2015) 145.
[1592] Exceptions were the Argentina truth commission who had one international commissioner and twelve with the Argentinean nationality, and the Mauritius truth commission had four national commissioners and an international chair.
[1593] The only exception is the Timor-Leste truth commission that was established by the UN Transitional Administration in East Timor. UN Transitional Administration in East Timor, 'Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor' (13 July 2001) UN Doc UNTAET/REG/2001/10.
[1594] All commissioners in the Liberian truth commissions were nationals elected by the Head of State, however an international advisory committee was set up to assist the commission in all its activities. The members of this committee had comparable functions as the commissioners, they only lacked the right to vote during meetings. Act to Establish the Truth and Reconciliation Commission (Liberia) (approved on 10 June 2005) article 10. See furthermore, Carla De Ycaza, 'A Search for Truth: A Critical Analysis of the Liberian Truth and Reconciliation Commission' (2013) 14 Human Rights Review 189, 195.
[1595] See for instance, Marcos Ancelovici and Jane Jenson, 'Standarization or Transnational Diffusion: The Case of Truth Commissions and Conditional Cash Transfer' (2013) 7 International Political Sociology 294, 301-302.

commissions.[1596] Furthermore, Pablo De Greiff was the research director of the ICTJ from 2001 to 2004. He was later appointed as the UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence, and edited one of the authoritative works on reparations.[1597] The ICTJ's influence stretches from truth commissions to reparations.

The aim of the ICTJ is 'to help societies find their way as they seek to address the legacy of a troubled and violent past, restore lasting peace, and build just and inclusive societies'. [1598] The ICTJ works together with civil society, national governments and the international community to reach this goal. Furthermore, it combines advocacy with operational activities and practice-oriented research. [1599] ICTJ is a 'gate-keeper' organization because of its resources and international visibility. As such, it is an NGO that can 'set the tone of the TJ [transitional justice] debate and create and recreate TJ templates or a menu of TJ options from which states may choose'.[1600] Hence, the involvement of the ICTJ during the establishment of truth commissions and the subsequent truth telling processes influenced the standardization of truth commissions and reparations.[1601] In other words, it aided the diffusion of the characteristics of the commissions.

Of the seven analyzed commissions that were established after its founding in 2001, the ICTJ was directly involved in five commissions through the provision of training to staff, technical support, assistance in the dissemination of the work of the commissions, as well as the implementation of the recommendations.[1602] However, the ICTJ played a more indirect role in the other two commissions: the commission of Indonesia & Timor Leste was required to review, amongst others, the documents of the ICTJ-assisted commission of Timor Leste, [1603] and the chair of the Mauritian commission was Alex Boraine, one of the founding fathers of the ICTJ.[1604]

[1596] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commisions* (2nd edn, Routledge 2011).

[1597] 'Pablo De Greiff' (*ICTJ*) <https://www.ictj.org/about/pablo-de-greiff-0> accessed 8 March 2021; Pablo De Greiff, *Handbook of Reparations* (Oxford University Press 2006).

[1598] '2018-2022 Strategic Plan' (*ICTJ*, 2018) <https://www.ictj.org/sites/default/files/ICTJ_2018-2022_Strategic_Plan.pdf> accessed 4 January 2021, 2.

[1599] Jelena Subotić, 'The Transformation of International Transitional Justice Advocacy' (2012) 6 The International Journal of Transitional Justice 106, 113; '2018-2022 Strategic Plan' (ICTJ 2018) <https://www.ictj.org/sites/default/files/ICTJ_2018-2022_Strategic_Plan.pdf> accessed 4 January 2021, 6-9.

[1600] Jelena Subotić, 'The Transformation of International Transitional Justice Advocacy' (2012) 6 The International Journal of Transitional Justice 106, 108. See furthermore, Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 217.

[1601] Anne K Krueger, 'The Global Diffusion of Truth Commissions: An Integrative Approach to Diffusion as a Process of Collective Learning' (2016) 45 Theory and Society: Renewal and Critique in Social Theory 143, 157.

[1602] Namely the Commissions of Sierra Leone, Timor Leste, Liberia, Kenya and Canada.

[1603] Terms of Reference for the Commission of Truth and Friendship (Indonesia & Timor-Leste) (10 March 2005) <https://www.etan.org/et2005/march/06/10tor.htm > accessed 22 August 2022, art. 14 (a) (i).

[1604] Alex Boraine was also the deputy chair of the South African Commission, yet this Commission operated prior to the establishment of the ICTJ. Richard Croucher, Mark Houssart and Didier Michel, 'The Mauritian Truth and

Prior to the establishment of the ICTJ, other organizations, such as the Ford Foundation, encouraged and financed an international network of human rights organizations.[1605] As such, the Ford Foundation financed organizations and academic centers for research, litigation and reporting on human rights.[1606] Some of these organizations were influential in the creation and operation of truth commission, for instance, organizations funded by Ford Foundation assisted the Argentinian commission,[1607] and the South African commission.[1608] Moreover, the Ford Foundation suggested the creation of an umbrella organization to strengthen the local institutions and subsequently financed the establishment of the ICTJ.[1609] Furthermore, several persons who were involved in Ford Foundation-funded organizations played key roles in the creation of the ICTJ.[1610]

Concludingly, the selected truth commissions, whether established by the national government or by international organizations, were, to some extent, influenced by their predecessors. At first, prior truth commissions were used as inspiration, while in the late 1990's, through the increasing role of international NGOs as the ICTJ and the international community, a standardized model of truth commissions emerged.[1611]

Justice Commission: Legitimacy, Political Negotiation and the Consequences of Slavery' (2017) 25 African Journal of International and Comparative Law 326, 337.

[1605] Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 206.

[1606] Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 206.

[1607] The Center for Legal and Social Studies (CELS) was funded by the Ford Foundation, and it assisted the Argentinan Commission with the gathering of information and testimonies. Emilio Crenzel, 'Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice' (2008) 2 The International Journal of Transitional Justice 173, 180; Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 206.

[1608] The Ford Foundation-funded Center for the Study of Violence and Reconciliation (CSVR) 'served as provider of expertise and recruitment pool for the South African Truth and Reconciliation Commission'. Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 208.

[1609] 'About Us' (*ICTJ*) <https://www.ictj.org/about> accessed 4 January 2021; Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 209 and 211.

[1610] For instance, Priscilla Hayner's comparison of truth commissions that resulted in her authoritative book *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* was funded by the Ford Foundation. Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 203-204.

[1611] Anne K Krueger, 'The Global Diffusion of Truth Commissions: An Integrative Approach to Diffusion as a Process of Collective Learning' (2016) 45 Theory and Society: Renewal and Critique in Social Theory 143, 152-159.

7.3.7 COMMISSIONERS

There is a wide diversity in the composition of the commissions; for instance, the number of commissioners,[1612] the division of male and female commissioners,[1613] and the division of national and international commissioners.[1614] Commissioners were often appointed by the President or by international organizations, consisting of the transitional administrator, the UN and the AU. Occasionally, the appointments were made in consultation with the legislator, the parties of the peace accord or a selection panel. The selection criteria for the commissioners varied, yet most included qualifications as impartiality, integrity, experience, and a reputed standing.[1615] Several governments and international organizations had specific requirements for the composition of the commissions; the commissioners had to be a reflection of, for instance, both sides of the conflict,[1616] of people from different walks of life,[1617] both genders,[1618] and had to include persons with an indigenous background.[1619] Sometimes, commissioners had to be prominent figures,[1620] while in other commissions, the absence of a high political profile was decisive.[1621] Most commissioners only took part in one commission, however there were exceptions; Alex Boraine was a commissioner in both the South African and the Mauritian commission, and several commissioners of the commission of Timor Leste fulfilled the same role in the commission of Indonesia & Timor Leste.[1622]

[1612] For instance, the Argentinean National Commission of inquiry into Disappearances consisted of 13 commissioners, while the Guatemalan Historical Clarification Commission comprised three members; National Commission on the Disappearance of Persons (Argentina), Nunca Mas (1984) Part IV; Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 254.

[1613] Most Commissions included both male and female members, yet no Commission had a female majority.

[1614] Nine Commissions consisted of only national commissioners, one was completely international, and five had a combination of both, with a majority of national commissioners.

[1615] See for instance, The Truth and Reconciliation Commission Act (Sierra Leone) (2000) article 3 (2); Truth and Justice Commission Act (Mauritius) (2008) Act No 28 of 2008, article 3 (4).

[1616] The Chilean truth commission included eight commissioners equally consisting of supporters and opponents of Pinochet's regime. Mark Vasallo, 'Truth and Reconciliation Commissions, General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador' (2002) 33 University of Miami Inter-American Law Review 153, 164.

[1617] National Commission on the Disappearance of Persons (Argentina), Nunca Mas (1984) Part IV.

[1618] For instance, the Regulations for Timor Leste's commission included the requirement that 'at least thirty per cent (30%) of the National Commissioners shall be women'. UN Transitional Administration in East Timor, 'Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor' (13 July 2001) UN Doc UNTAET/REG/2001/10, section 4.1. In the actual Commission, only two of the seven commissioners were female (29%).

[1619] For instance, the Canadian truth commission had to consist of at least one aboriginal commissioner. Indian Residential Schools Settlement Agreement. Schedule N (Canada) (2006) article 5 (a). Eventually, two of the three commissioners were of aboriginal descent.

[1620] See for instance, Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 1' (May 2002) 28.

[1621] See for instance, Promotion of National Unity and Reconciliation Act (South Africa) (1995) Act No 34 of 1995, article 7 (2) (b).

[1622] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011) 64.

7.3.8 MANDATED RESPONSIBILITIES OF THE TRUTH COMMISSIONS

Unsurprisingly, all truth commissions were mandated to find the truth about the crimes that were committed during the previous military regime, authoritarian ruling or armed conflict. Furthermore, five, primarily early, truth commissions were additionally tasked to search for specific truths.[1623] These commissions were explicitly authorized to investigate the whereabouts of victims, including disappeared and abducted children. In addition, the Chad truth commission was empowered to determine the total cost of the war, and to register the resources, goods and properties of the former president and its accomplices.[1624] An important tool to uncover the truth are the accounts of victims, offenders, and witnesses. All selected truth commissions included the testimonies of victims as evidence, which was also a requirement specifically included in the mandates of seven commissions.[1625] Four commissions, that all worked in the 21st century, referred to the benefits of truth telling in their mandates. Truth telling was regarded as 'psychological therapeutic',[1626] two considered that the interchange of accounts of both victims and offenders could 'facilitate genuine healing and reconciliation',[1627] and one deemed that truth telling would lead to a 'new moral vision' and a 'value-based society'.[1628] Lastly, the findings of the commission had to be published in an official report, an obligation that was explicitly included in the mandate of 2/3 of the truth commissions.

Another common task of truth commissions, in addition to truth finding, was the making of recommendations: 87% of the selected commissions were mandated to do so.[1629] These recommendations consisted of legal, administrative, political and/or other measures. Six of the commissions were authorized to define the measures that were needed to fulfill the objects of the commission, including reconciliation.[1630] Whereas other commissions were empowered to make recommendations for more specific goals. Four commissions were specifically mandated to propose measures to prevent the future occurrence of human rights violations,[1631] and an additional three were charged to make recommendations regarding the prosecution of offenders and

[1623] Four of the five commissions that were obliged to investigate the whereabouts of victims commenced in the 1980's or in the first half of the 1990's, the only exception is the Kenyan truth commission. The Truth, Reconciliation and Justice Commission Bill (Kenya) (2008) No 6 of 2008, article 5 (o).
[1624] Decree Creating the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories (Chad) (1990) Decree No 014/P.CE/CJ/90, article 2.
[1625] Namely the commissions in Chad, South Africa, Nigeria, Sierra Leone, Liberia, Kenya, and Canada.
[1626] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 1' (May 2002) 34.
[1627] Act to Establish the Truth and Reconciliation Commission 2005, article 4 (b). See furthermore, The Truth and Reconciliation Commission Act 2000 (Sierra Leone) article 6 (2) (b).
[1628] The Truth, Reconciliation and Justice Commission Bill (Kenya) (2008) No 6 of 2008, article 5(n).
[1629] Even though the commissions in Argentina and Chad were not mandated to make recommendations, they did include these in their reports.
[1630] This applies to the commissions in El Salvador, Guatemala, Nigeria, Sierra Leone, Indonesia & Timor Leste, and Canada. See for instance, Indian Residential Schools Settlement Agreement, Schedule N (Canada) (2006) article 1(f); The Truth and Reconciliation Commission Act (Sierra Leone) (2000) article 15 (2).
[1631] Namely the commissions in Chile, Sri Lanka, South Africa, and Kenya.

offences.[1632] Furthermore, five commissions were explicitly authorized to recommend reparations,[1633] of which the two most recent ones were additionally required to pay special attention to the claims of dispossession of land.[1634]

In line with the mandate to make recommendations concerning the prosecution of responsible persons, several truth commissions were closely linked with criminal law procedures. Two commissions were explicitly tasked to address impunity,[1635] four to identify the persons and organizations responsible,[1636] and two had to determine the responsibility of the state.[1637] In addition, two truth commissions were authorized to grant amnesties to offenders who came forward and gave full disclosure of the facts concerning the crimes committed.[1638] Moreover, the truth commission of Timor-Leste was mandated to strengthen the reintegration of persons who had committed minor criminal offences 'through the facilitation of community based mechanisms for reconciliation'.[1639]

Interconnected to the main objectives of truth commissions, namely truth finding and truth telling by victims and offenders, is the goal of reconciliation.[1640] The truth commissions in Timor-Leste and Canada included the promotion of reconciliation in their mandates.[1641] This was combined with orders to promote human rights, acknowledge the experiences of victims, to create awareness of the violations, and to commemorate the suffering of the victims.

7.3.9 VICTIMS

The beneficiaries of the reparations recommended by the truth commissions were often the direct victims and their relatives, as was made explicit in 12 out of 15 reports. Yet, with the broadening of the mandates, both in the scrutinized crimes as well as the time period, the number of direct victims before the truth commissions increased. For instance, the commission of Sri Lanka was restricted to the disappeared persons and

[1632] Namely the commissions of Sri Lanka, Timor-Leste, and Kenya.
[1633] Namely the commissions in Chile, South Africa, Liberia, Mauritius, and Kenya.
[1634] Namely the commissions of Mauritius and Kenya.
[1635] Namely the commissions of Sierra Leone and Liberia.
[1636] Namely the commissions of Sri Lanka, Nigeria, Liberia, and Timor-Leste.
[1637] Namely the commissions of Chad and Timor-Leste.
[1638] Namely the commissions of South Africa and Kenya.
[1639] UN Transitional Administration in East Timor, 'Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor' (13 July 2001) UN Doc UNTAET/REG/2001/10, article 3.1 (h).
[1640] See for instance, The Truth and Reconciliation Commission Act (Sierra Leone) (2000) article 6 (2) (b) ('promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered').
[1641] UN Transitional Administration in East Timor, 'Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor' (13 July 2001) UN Doc UNTAET/REG/2001/10, article 3.1 (g) and (i); Indian Residential Schools Settlement Agreement, Schedule N (Canada) (2006) article 1 (a), (c) (d) and (g).

their family,[1642] while the commission of Sierra Leone acknowledged that all Sierra Leoneans suffered during the conflict.[1643] The high number of direct victims made it impossible to address the harm of all victims. Therefore, six of these 12 truth commissions provided the measures explicitly to the most vulnerable victims.[1644] These consisted of children, those in urgent need, elderly persons, widows, the war wounded, disabled persons, victims of sexual violence, torture victims, indigenous peoples and minorities. Most truth commissions that did not include these groups specifically as direct beneficiaries, yet these still acknowledged the plight of vulnerable victims by demanding that special attention would be paid to their needs.[1645]

7.4 RECOMMENDATIONS

Most of the selected truth commissions were mandated to make recommendations, while the two commissions without a mandate thereto still included recommendations in their reports.[1646] These recommendations were non-binding and the truth commissions lacked the power to oversee the implementation of the recommendations. Nevertheless, some truth commissions claimed that their recommendations were binding,[1647] while others proposed the establishment of an independent implementing body that should either design, coordinate, implement, and/or evaluate the implementation process.[1648]

Recommendations tended to be vague and open so that the government could decide on the content and implementation of the recommended measures. For example, the Guatemalan commission recommended that the National Reparations Programme should include '[m]easures for the satisfaction and restoration of the dignity of the individual, which should include acts of moral and symbolic

[1642] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter V.
[1643] All Sierra Leoneans were beneficiaries of the recommended symbolic reparations. Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 242.
[1644] Namely the commissions of Chile, South Africa, Guatemala, Sierra Leone, Timor-Leste, and Kenya.
[1645] See for instance, Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 220-228.
[1646] Namely the commissions of Argentina and Chad.
[1647] See for instance, Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013), para 14 ('recommendation of the Commission, and as with all recommendations as set out in the TJR Act is binding as matter of law'); The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) section IIA ('under the mandate, "the Parties undertake to carry out the Commission's recommendations". The Parties thus agree to be bound by the Commission's recommendations').
[1648] See for instance, Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) para 214; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 299; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) para. 16.

reparation'.[1649] Concepts as satisfaction and 'restoration of dignity', and acts of moral and symbolic reparations were not clarified, nor did the commission elaborate on the execution of such measures. This was different from reparations ordered by a human rights court, or even more so for those provided by a criminal court.

This was primarily linked to the mandates of the truth commissions in relation to those of the human rights and criminal courts. The human rights courts investigated specific violations, usually limited to one place and period, and criminal courts were bound by the crimes of particular suspect(s). Consequently, the reparations awarded by these courts were limited to specific violations and crimes that were proven in court. However, truth commissions had a broader mandate with regard to the inquired period, violations, crimes, and persons. Therefore, the recommendations, including reparations, had to redress the harm caused during a longer period, in a larger area, and as a result of a larger range of crimes. Contrary to the legal nature of the courts, truth commissions were quasi-legal, and as such not bound by rules regarding the protection of the suspect regarding his or her liability for the awarded reparations. Additionally, the commission's recommendations were non-binding, and therefore dependent on the state and other actors for the actual implementation. Recommendations that left room to the states to translate the recommendations to official policy may have a higher chance of getting implemented. However, there were also some exceptions to this rule, and some recommendations were really specific and detailed. For instance, the truth commission of Mauritius recommended that the *Bassin Capucin*, a pool on the island of Agalega, could be used for farming, particularly the breeding of ducks.[1650]

7.4.1 MANDATE TO MAKE RECOMMENDATIONS

As discussed above, thirteen out of the fifteen selected truth commissions were required to make recommendations that had to consist of appropriate measures to prevent future conflicts and/or violations, to address the harm of the victims, and/or to contribute to reconciliation. The truth commissions of Argentina and Chad lacked a mandate to make recommendations, yet these still made recommendations in order to prevent the horrors of the past from repeating.[1651]

[1649] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.

[1650] Unfortunately, the Mauritian commission did not disclose its line of reasoning for including such detailed recommendations. The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 444.

[1651] The Chad truth commissions also made recommendations aimed at reconciliation. Commission of Inquiry into the Crimes and Misappropriations Committed by the Ex-President Habré, His Accomplices and/or Accessories (Chad), 'Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by the Ex-President Habré, His Accomplices and/or Accessories' (7 May 1992) 92; National Commission on the Disappearance of Persons (Argentina), 'Nunca Mas' (1984) recommendations.

Adam Kochanski, a transitional justice scholar, analyzed the mandates of 44 truth commissions that operated between 1974 and 2015, and found that there was an increase in the number of commissions with a mandate to recommend reparations.[1652] However, my analysis of the fifteen commissions did not show this expansion to the same extent.[1653] The trend was similar for the period between 1984 and 2005. The earliest commissions of the first generation often lacked a mandate to make recommendations or to recommend reparations; only the Chilean commission had a reparations mandate. The second-generation commissions were sometimes mandated to recommend reparations,[1654] yet they typically included an objective to recommend measures directly aimed at addressing the needs of victims. These recommendations had to 'respond to the needs of victims', [1655] afford relief to victims, [1656] 'redress injustices of the past', [1657] and 'preserve the memory of victims'.[1658] The commission of El Salvador is the only second-generation commission that lacked a mandate to recommend measures redressing the victims; yet, this commission is positioned between the first and second generation.[1659] However, none of the analyzed commissions of the third generation had a mandate to recommend reparations.[1660] Hence, the rise of the third generation of truth commissions halted the increase of reparation mandates. In addition to the non-transitional nature of the third-generation commissions, other particularities of these commissions can further explain the lack of such a mandate. Indonesia, Mauritius and Canada are democracies where there was no immediate threat to the stability in the states in case these state practices and their consequences would not be addressed.[1661] The commission of Indonesia &

[1652] Adam Kochanski, 'Mandating Truth: Patterns and Trends in Truth Commission Design' (2020) 21 Human Rights Review 113, 127-128.
[1653] This difference can be explained by the truth commissions that were included in the respective studies. Several 21st century truth commissions that included a mandate to recommend reparations and a number of early commissions, up to 1990, that lacked such a mandate, were excluded from my analysis.
[1654] Namely the commissions in South Africa, Liberia, and Kenya.
[1655] The Truth and Reconciliation Commission Act (Sierra Leone) (2000) para 15 (2); UN Transitional Administration in East Timor, 'Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor' (13 July 2001) UN Doc UNTAET/REG/2001/10, para 21.2.
[1656] Presidential Proclamation (Sri Lanka) (25 January 1995) Proclamation No. SP/6/N/191/94, para 2A.
[1657] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 1' (May 2002) 29.
[1658] UNGA, 'Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer' (23 June 1994) Annex II to UN Doc A/48/954.
[1659] Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 36.
[1660] The truth commission of Indonesia & Timor Leste was required to recommend measures to rehabilitate, yet this was restricted to the persons who were wrongly accused of human rights violations and excluded the victims of the violence during the referendum. However, the commission did not identify individuals who were wrongfully convicted, and no rehabilitation was recommended. Terms of Reference for the Commission of Truth and Friendship (Indonesia & Timor-Leste), (10 March 2005) <https://www.etan.org/et2005/march/06/10tor.htm> accessed 22 August 2022, para 14 (c) (ii); The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 291.
[1661] Franklin Oduro and Rosemary Nagy, 'What's in an Idea?: Truth Commission Policy Transfer in Ghana and Canada' (2014) 13 Journal of Human Rights 85, 88; Sheila Bunwaree, 'The Democratic Deficits of Mauritius: Development and Justice Threatened' in Said Adejumobi (ed), *National Democratic Transforms in Africa: Changes and Challenges* (Palgrave Macmillan 2015) 201-218.

Timor Leste was a bilateral commission that was primarily established to encourage foreign relations between the two states 'rather than a serious effort to pursue substantive and reparative forms of justice'.[1662] The Canadian settlement agreement that amongst others, established the truth commission, included separate provisions for compensation, rehabilitation and satisfaction.[1663] Since the commission could not recommend measures that were already included in the settlement agreement,[1664] the objective of recommending reparations lost some of its relevance, and was not included in its mandate.

7.4.2 THE RELATION BETWEEN RECOMMENDATIONS, RECOMMENDED REPARATIONS AND REPARATIONS

As will be discussed in section 7.5, the analyzed truth commissions had different views regarding the concept of reparations and its different forms. This was also reflected in the perceived relation between recommendations and reparations.

The truth commission of Indonesia & Timor Leste was the only analyzed commission that referred to all their recommendations as reparations.[1665] Seven commissions regarded reparations as part of their recommendations; the reparations were recommended as a category of the recommendations.[1666] An additional four commissions separated the recommendations from the proposed reparations regime, and discussed them in distinct parts of the truth commission Reports.[1667] These separate chapters or volumes of reports incorporated a more extensive elaboration on the concept of reparations and its different forms. The remaining three commissions, the two early commissions of Argentina and Chad, and the recent commission of Canada, did not use the word reparations in their recommendations.[1668] An overview of the truth commissions that had a mandate to recommend reparations, and how these reparations were included in their reports is included in table 7.2

[1662] Rebecca Strating, 'The Indonesia-Timor Leste Commission of Truth and Friendship: Enhancing Bilateral Relations at the Expense of Justice' (2014) 36 Contemporary Southeast Asia: A Journal of International and Strategic Affairs 232, 252.
[1663] Indian Residential Schools Settlement Agreement (Canada) (2006) article 5.02, 7.02 and 8.
[1664] Indian Residential Schools Settlement Agreement. Schedule N (Canada) (2006) article 4.
[1665] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 289.
[1666] Namely the Truth Commissions of Chile, El Salvador, Sri Lanka (only the All Island Commission), Guatemala, Timor-Leste, Liberia and Mauritius.
[1667] Namely the Truth Commissions of South Africa, Nigeria, Sierra Leone and Kenya.
[1668] Additionally, contrary to the All Island Truth Commission of Sri Lanka, two regional Truth Commission in Sri Lanka did not use the term reparations and instead recommended 'relief measures'.

Table 7.2: Reparation mandates of truth commissions

	Reparations mandate	The phrase 'reparations' used in the report
Argentina	No	-
Chile	Yes	Reparations part of recommendations
Chad	No	-
El Salvador	No	Reparations part of recommendations
Sri Lanka	Indirect[1669]	Recommendations are part of reparations package
South Africa	Yes	Reparations separate from recommendations
Guatemala	Indirect	Reparations part of recommendations
Nigeria	indirect	Reparations separate from recommendations
Sierra Leone	indirect	Reparations separate from recommendations
Timor Leste	Indirect	Reparations part of recommendations
Indonesia & Timor Leste	No	All recommendations are reparations
Liberia	Yes	Reparations part of recommendations
Mauritius	No	Reparations part of recommendations
Kenya	Yes	Reparations separate from recommendations
Canada	No	-

[1669] Several commissions had an indirect mandate to recommend reparations, their mandates included an objective to recommend measures directly aimed at addressing the needs of victims.

The truth commission of Timor-Leste was the only analyzed commission that went beyond truth finding and the provision of recommendations. Instead, it interpreted its mandate relating to the provision of assistance to the victims in restoring their human dignity as a duty to launch several initiatives addressing the most urgent needs of some vulnerable victims.[1670] These consisted of symbolic measures that aimed at public healing and understanding, and emotional and psychological support; namely, public hearings, and healing and community workshops.[1671] Furthermore, the commission reasoned that 'it did not seem enough to tell survivors to wait until the recommendations of the Commission's Final Report had been acted on for help to come'.[1672] Therefore, with support of the Trust Fund for East Timor governed by the World Bank, the Urgent Reparations Scheme was established. This consisted of an emergency grant of US$ 200, the provision of medical and psycho-social care, and commemoration projects that were provided during the time the commission was in process.[1673] Nonetheless, the commission stressed that the small emergency grant did not comprise full reparation, and consequently did 'not prejudice in any way any right of victims to full reparations as part of a long-term settlement'.[1674]

7.5 REPARATIONS

Of the 12 truth commissions that referred to reparations in their reports, 11 discussed the concept of reparations. However, three of them did not define nor clarify the concept of reparations. Instead, the commissions of El Salvador and Liberia merely referred to the rationale behind their responsibility for the recommendation of reparations, while the commission of Mauritius only referred to reparations as being part of restorative justice.[1675] The other eight commissions elaborated more extensively on the meaning of reparations.

Since the commissions differed from each other, reparations were defined in different wordings. For instance, the Sierra Leone commission defined reparations 'as

[1670] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 10: Acolhimento and victim support' (31 October 2005) 18.
[1671] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 10: Acolhimento and victim support' (31 October 2005) 18-19.
[1672] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 10: Acolhimento and victim support' (31 October 2005) 38-39.
[1673] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 10: Acolhimento and victim support' (31 October 2005) 39-40.
[1674] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 10: Acolhimento and victim support' (31 October 2005) 39.
[1675] The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424.

the provision of redress to victims', while the Nigerian commission stated that '[r]eparation is mostly about making repairs; self-made repairs on ourselves- mental repairs, psychological repairs, cultural repairs, organizational repairs, social repairs, institutional repairs, technological repairs, economic repairs, political repairs, educational repairs, repairs of every type…'.[1676] Nevertheless, the definitions were overlapping and some general observations could be made. Most commissions stated that reparations were measures that were primarily aimed at the victims; they restored the dignity of the victims,[1677] acknowledged the victims and their harm,[1678] they addressed the needs of the victims,[1679] and they empowered them.[1680] Furthermore, for the South African commission, reparations had to counterbalance the amnesties, since these precluded victims from filing civil claims against the offenders.[1681] In addition, all commissions considered reparations as broader than just victim-centered, because they went 'beyond individual satisfaction'.[1682] This was primarily linked to the goal of several truth commissions to promote reconciliation. Six commissions regarded reparations as a prerequisite for reconciliation; 'without reparation, there can be no real reconciliation'.[1683] The statement of the commission of Kenya was less bold:

[1676] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 46.

[1677] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1057; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 188 (specifically through symbolic reparations); Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 196; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 38; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 97.

[1678] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 174; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 227; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 98.

[1679] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1057 ('achieving a better quality of life for those families most directly affected'); Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 227 (address the needs of the victims'); Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 36 ('to repair damages suffered by victims'); Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 97 ('alleviate their suffering, compensate their [victims'] social, moral and material losses, and restitute their rights').

[1680] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 39.

[1681] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 170.

[1682] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 227.

[1683] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 3. See furthermore, National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1057; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 170; Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 196; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission.

reparations 'aim to contribute to a process of reconciliation and healing'.[1684] Furthermore, some commissions defined societal objectives of reparations, such as the building of 'civic trust and social solidarity',[1685] the restoration of 'damaged relationships within our society',[1686] and the prevention of future conflicts.[1687]

Most analyzed truth commissions that specifically recommended reparations regarded it as a legal obligation. For five commissions, the obligation derived from the right to reparations for victims of human rights violations as established in both national and international law,[1688] while another three regarded it as an obligation arising from the laws relating to state responsibility.[1689] In addition to a legal obligation, it was sometimes also seen as a moral obligation.[1690] Several commissions regarded the provision of reparations as 'an imperative demand of justice'.[1691] The requirements of

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Volume 2' (5 October 2004) 237; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 38. The El Salvador Commission made this claim indirectly; The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) IV.

[1684] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 102.

[1685] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 227.

[1686] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 38.

[1687] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.

[1688] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 170; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 7; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 230; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 37; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 98.

[1689] National Commission on Truth and Reconciliation, 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1057; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 289; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 276. Furthermore, the Commission of Kenya identified the acknowledgement of state responsibility as one of the objectives of reparations.

[1690] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 177; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 38; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 276.

[1691] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 25. See furthermore, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 229 ('The purpose of a reparations programme is to (…) accord a measure of social justice to victims'); Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 36 ('A reparations programme will ensure that: (…) A form of justice is delivered').

justice were twofold, accountability and reparations.[1692] This was also referred to as restorative justice.[1693]

Several truth commissions were open about the shortcomings of the reparations they could recommend. First of all, seven truth commissions acknowledged that reparations would never fully repair the loss of a loved one, nor the pain and harm suffered by the victims.[1694] Nevertheless, the recommended reparations had to be 'adequate, effective, and prompt' to make an impact on the lives of victims.[1695] Second, the high number of victims made it impossible to recommend reparations that would benefit all victims,[1696] nor could the reparations be tailored to the needs of individual victims.[1697] In addition, the recommendations were only based on the statements of a small number of victims. Hence, the Nigerian truth commission made general recommendations that could 'serve as a beginning point for the development and implementation of a substantial reparations package for victims of gross human rights violations'.[1698] Third, the recommendations of several truth commissions had to be implemented in a war-torn society where there was a lack of resources. The truth commissions of Sierra Leone and Timor-Leste took the criteria of implementability explicitly into account when developing the recommended reparations program.[1699] Lastly, the commission of Chile claimed that reparations in

[1692] The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) IV.
[1693] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1058; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 6. In addition, the Commission of Mauritius refers to reparations as a form of restorative justice. The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424.
[1694] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1057; Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces' (September 1997) chapter 10; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 174; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 49-50; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 234; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 394; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 108.
[1695] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 24; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 172.
[1696] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 229.
[1697] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 23; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 98.
[1698] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 30.
[1699] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 229 and 232; Commission for Reception, Truth and

itself 'will obviously be unable to accomplish anything by themselves', instead truth, reconciliation, and forgiveness should be achieved first.[1700]

7.5.1 CLASSIFYING THE RECOMMENDED REPARATIONS

The analyzed first-generation truth commissions often made recommendations without categorizing them, instead they merely presented a list of recommendations without further clarification.[1701] Additionally, none of these recommendations were labelled as reparations. However, the only first-generation commission that did specifically recommend reparations, the commission of Chile, elaborated, for instance, on their reasons and objectives. It furthermore categorized the recommended reparations according to the addressed areas, such as health care and social welfare.

All the analyzed second-generation commissions made recommendations that included reparations. Most of these commissions further elaborated on the reparations and the recommended measures. The truth commission of Sri Lanka was an exception, as it only stated that the 'recommendations are acted upon as part of a reparation package' without discussing this statement.[1702] Hence, of the nine second-generation truth commissions that were established since the South African commission, eight recommended reparations and subsequently specified what these reparations entailed. Seven out of them categorized the forms of reparations.[1703] The first second-generation commission, the El Salvadoran truth commission, classified the recommended reparations based on their objectives, for instance institutional reform and reconciliation. In addition, in this commission, reparations were recommended under the heading of '[s]teps towards national reconciliation' and classified as material and symbolic compensation.

Thereafter, this categorization was often linked to the UN Reparation Principles. The UN Reparation Principles were only adopted in 2005, and most reports consisting of recommendations were published previously. Yet, the preparation for the UN Reparation Principles started some fifteen years before the adaptation,[1704] and the Principles did reflect the current state of affairs.[1705] Even when it was still a work in

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Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 39.

[1700] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1057.

[1701] Namely the truth commissions of Argentina and Chad.

[1702] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) Chapter VI.

[1703] The exception was the truth commission of Liberia that did not categorize the recommended reparations at all.

[1704] 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' (United Nations Audiovisual Library of International Law 2010) 1.

[1705] 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

progress, truth commissions already used the draft of the UN Reparation Principles as a guide.[1706] Hence, six truth commissions classified the recommended reparations along the line of the categories of the UN Reparation Principles: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The truth commissions of Nigeria and Kenya followed the five categories of the UN Reparation Principles quite literally, even the definitions of the categories resembled the UN Reparation Principles.[1707] The commission of South Africa also mentioned the five categories, yet it used the term 'restoration of dignity' instead of satisfaction.[1708] The same applied to the commissions of Sierra Leone and Timor Leste; out of the five categories, satisfaction was the only one that was not mentioned. Instead, the terms 'establishing the truth' and 'the restoration of dignity' were used,[1709] which fall within the UN Reparation Principles' category of satisfaction.[1710] However, for the urgent reparations that were provided by the commission of Timor-Leste, the five categories of the UN Reparation Principles were used, including satisfaction.[1711] The truth commission of Guatemala was the only commission that named three categories (compensation, rehabilitation and satisfaction) and described restitution as a fourth category, whereas guarantees of non-repetition was not included as a category of reparations.[1712]

Two of the three third-generation commissions did recommend reparations, even though they did not possess a mandate to do so. However, the commissions of Indonesia & Timor Leste and Mauritius did so without explaining the underlying reasons or meaning of labelling recommendations as reparations.

7.5.2 CATEGORIES OF REPARATIONS

Similar to the International Criminal Court (hereinafter ICC), the Extraordinary Chambers within the Courts of Cambodia and the Inter-American Court of Human

International Humanitarian Law' (United Nations Audiovisual Library of International Law 2010) 5; Reparation Principles, preamble.

[1706] See for instance, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 232.

[1707] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 7-11; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 99.

[1708] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 177.

[1709] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 232; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 37.

[1710] Reparation Principles, rule 22.

[1711] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 10: Acolhimento and victim support' (31 October 2005) 39.

[1712] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.

Rights (hereinafter IACtHR), several truth commissions categorized the reparations according to the UN Reparation Principles. This section examines the recommended reparations along the lines of the five categories; restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. These categories are broad and the distinction between the categories is not always clear-cut. In this research, the wording of the commissions is followed. In case the commission did not refer to the categories, the UN Reparation Principles were used to classify the recommended reparations. The five categories of reparations are discussed separately following the order of the UN Reparation Principles. The discussion of the reparations starts with the explanations of a particular category, followed by the varying measures that were recommended in that category. In case these consisted of collective reparations, the discussion is included in section 7.6. Only the recommendations that were labelled by the truth commissions as reparations were included in the analysis of the development of collective reparations. Consequently, the analysis as described in this and the following sections only included the truth commissions that used the term reparations; the commissions of Argentina, Chad and Canada were excluded.

RESTITUTION

Restitution was described as the re-establishment, as far as possible, of the situation the victim was in prior to the violation. For the Guatemalan truth commission, restitution was limited to the return of material possessions,[1713] while the Kenyan truth commission explicitly included forms of restitution that were not material, namely the restoration of liberty, identity and citizenship.[1714] The truth commission of Nigeria described restitution as containing both forms of restitution: material, such as the return of property, and symbolic including the reinstatement of liberty, citizenship, legal rights, family life, and social status.[1715]

Only five truth commissions recommended restitution under the heading of reparations. On the one hand, the truth commissions of Sri Lanka, Guatemala, and Kenya suggested the restitution of material goods, in particular of land, as a measure that should figure in a reparations program set up by the state.[1716] In Sri Lanka, this

[1713] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.
[1714] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 99.
[1715] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 11.
[1716] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter V; Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197. In Kenya, the restitution is recommended as a reparation measure that should be awarded by the National Land Commission; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 109.

restitution of land was limited to individual owners, while the other two commissions opened the possibility for land restitution to groups. Therefore, the land restitution in Guatemala and Kenya will be further discussed in section 7.6. On the other hand, the commissions of South Africa, Indonesia & Timor Leste, and Kenya recommended the restitution of symbolic goods, namely the restoration of the good name of wrongfully accused persons or persons convicted for political activities, for instance by expunging their criminal records.[1717]

COMPENSATION

Of the 12 truth commissions that recommended reparations, ten included compensation. Several commissions considered the recommended compensation as an acknowledgement of the violations, the suffering they caused, the state responsibility, and of the community's responsibility towards helping the victims.[1718] It was furthermore aimed at the restoration of the victims' dignity and the assistance of victims in fulfilling their basic needs.[1719] Additionally, the provision of an individual grant gave beneficiaries the freedom to choose how they wanted to address their needs and which need was most pressing.[1720] The truth commissions recommended compensation despite its acknowledged limitations, such as the burden on a government with a lack of resources,[1721] the risk of further dividing the society,[1722] and the incompetence of compensation to repair the harm of gross human rights violations.[1723] According to the Kenyan truth commission, the latter restriction made

[1717] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 189; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 291 (even though the Commission labelled this measure as rehabilitation); Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114 and 121.

[1718] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 120; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 29; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 184; Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter V.

[1719] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 184; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 8; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 276.

[1720] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5'(October 1998) 179.

[1721] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter V; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 245.

[1722] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 245 and 259.

[1723] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 29.

the compensation a symbolic payment that merely acknowledged the wrongdoing as it was impossible to fully repair the harm.[1724]

The compensation was mostly provided in the form of a single payment: seven commissions recommended the provision of 'compensation',[1725] 'grants',[1726] and 'material assistance'.[1727] The other three commissions provided compensation in the form of a monthly or annual pension.[1728] Furthermore, in Sri Lanka, a compensation procedure was already in place, yet its All-Island Commission recommended that the discrimination in providing these grants was stopped, and that all victims should receive compensation.[1729]

The compensation recommended by the commissions of Guatemala and Kenya were not restricted to individual payments, these will be further discussed in section 7.6.

REHABILITATION

Rehabilitation was often defined in line with the UN Reparation Principles as social services, particularly medical and psychological care, but also legal, social and other services with the main aim to assist victims.[1730] In the words of the Sierra Leonean commission: '[c]oncentrating on rehabilitative measures would respond to the acute

[1724] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 120.
[1725] The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) IV A; Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 50; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 426.
[1726] Truth and Reconciliation Commission South Africa, 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 184; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 10: Acolhimento and Victim Support' (31 October 2005) 41.
[1727] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 181; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 276.
[1728] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1063; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 259; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 106 and 120.
[1729] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter V.
[1730] See for instance, Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 177; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 9; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 99.

needs of the victims and improve their future quality of life'.[1731] Since the main aim is the improvement of the situation of the victims, the Mauritian commission dubbed rehabilitative measures as 'social reparations'. [1732] However, the commission of Indonesia & Timor Leste gave a different definition: 'actions meant to restore the good name of those unjustly accused of human rights violations'.[1733] A measure that is better fitting in the category of restitution as it attempts to brings the situation of the wrongfully accused back to situation before the violations. Moreover, this commission did not have access to data to investigate the possible wrongful accusations and therefore made 'no recommendations for rehabilitation'.[1734] Nevertheless, as we will see, they did recommend reparative measures that are categorized as rehabilitation by the UN Reparation Principles without using the same terminology.

Out of the 12 commissions that incorporated reparations in their recommendations, the commission of El Salvador was the only one that did not include rehabilitation measures. The recommended reparations relating to rehabilitation could roughly be divided in six categories; medical and psychological health care, education, infrastructure, economic assistance, social and legal services, and a rest category.

91% of the commissions recommending rehabilitation as reparation, endorsed medical and psychological care. These comprised predominantly of suggestions consisting of individual reparations; free access to medical, psychosocial, and therapeutic care for direct victims.[1735] The commissions of Guatemala and Indonesia & Timor Leste recommended collective forms of health care, these will be discussed in section 7.6.

Education measures were also prevalent; these were recommended in 72% of the reports relating to reparations. These consisted of collective as well as individual forms of reparations, the collective variant will be further discussed in section 7.6. The individual measures aimed to improve the access to education for individual victims and their children.[1736] The provision of scholarships to the children of victim is one way

[1731] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 232.
[1732] The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1 (November 2011) 402. In addition, the Commission of Chile refers to health care and education, which fall in the category of rehabilitation, as 'social reparations': National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1067 and 1070.
[1733] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 291.
[1734] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 291.
[1735] See for instance, National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1065-1069; Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter V; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 252 and 258.
[1736] The Commission of Mauritius recommended reparation in the form of education to poor individual families. The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 402.

to make education accessible.[1737] The Sierra Leonean Commission did it differently and suggested that primary and secondary education should be free for child victims and children of victims that lost their earning capability.[1738] Many victims lost their opportunity for schooling due to the human rights violations they suffered, therefore, several commissions recommended that vocational training should be provided to victims, their children and other close relatives.[1739] Skills training of this kind may give people the opportunity to become economically independent, according to the Sierra Leonean commission, this was 'one of the stated goals of the reparations programme'.[1740]

The third category of recommended rehabilitation measures involved infrastructure, including the provision of housing for individual victims,[1741] and community development projects. The latter will be further discussed in section 7.6. Two smaller categories predominantly included individual reparative measures: access to micro credit,[1742] and the provision of social and legal services.[1743] The rest category consisted of measures that did not fit one of the other categories and that were only recommended as reparation by a single commission. The South African commission suggested the establishment of a rehabilitative system for perpetrators

[1737] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1070; Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter V; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43. Moreover, even though the commission of Indonesia & Timor Leste claimed that all their recommendations consisted of collective reparations, it recommended scholarships, an individually divisible measure. The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 297.

[1738] This recommendation was made in addition to the general recommendation of free primary education to all children in Sierra Leone. Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 261.

[1739] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1070; Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter V; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 262; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43.

[1740] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 262.

[1741] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991)1071-1072; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 193; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 402.

[1742] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009).

[1743] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43.

and their family. They should receive assistance in dealing with the past and moving forward in a peaceful and constructive manner with the intention to reintegrate them into society.[1744] A similar program was suggested to teach adolescents who were used to adopt violence to settle conflicts in a peaceful way.[1745]

SATISFACTION

All commissions that recommended reparations included measures of satisfaction under the heading of reparations. Satisfaction was defined as symbolic, non-material measures that aimed to restore the dignity of victims, to acknowledge and remember the violations and inherent suffering, and it was considered to have a deterrent effect.[1746] The commission of Kenya furthermore qualified satisfaction as collective reparations,[1747] which was in line with the impact these measures have on the community at large, and the indivisibility of the measures for individual beneficiaries. Hence, the reparative satisfaction measures that were recommended were all of a collective nature as they focused on truth finding, accountability, commemoration, and raising awareness; measures designed to have repercussions for a community or group of people. Consequently, these will be further discussed in section 7.6.

GUARANTEES OF NON-REPETITION

Since truth commissions investigated the patterns of the abuses committed during a specific period and placed these in the context in which they took place, these commissions were suited to recommend reforms of, for instance, the state's legal, administrative, and political institutions in order to prevent a repetition of similar abuses.[1748] According to Priscilla Hayner, the prevention of 'further violence and human rights abuses in the future' was the overarching aim of truth commissions.[1749] This was reflected in the number of recommendations that consisted of guarantees of non-repetition. As argued by the South African truth commission, these were structural measures, primarily of a legislative and administrative nature, that contributed 'to the maintenance of a stable society and the prevention of the re-occurrence of human

[1744] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 191-192.
[1745] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 191.
[1746] See for instance, National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1058; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 10.
[1747] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.
[1748] Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Routledge 2010) 14.
[1749] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011), 182.

rights violations'.[1750] Only a fraction of the recommendations for guarantees of non-repetition were made under the heading of reparations. Nevertheless, eight of the 12 commissions recommended them as reparations, while the other four included them in their 'general recommendations'. Guarantees of non-repetition were inherently collective as they aim to fundamentally change the state's organization, therefore these will be further discussed in section 7.6.

7.6 COLLECTIVE REPARATIONS

Of the twelve commissions that recommended reparations, only three truth commissions used the term 'collective reparations'.[1751] Others referred instead to 'collective measures of reparations',[1752] community reparations,[1753] allowed groups to 'receive reparations collectively',[1754] or stated that 'reparations can take shape as measures directed to individuals or collectively'.[1755] Four commissions did not make a distinction between individual and collective reparations, instead the recommended reparations of a collective nature were referred to as reparations without the specific classification of collective reparations. These four commissions consisted of the three earliest commissions, namely Chile, El Salvador and Sri Lanka, and the more recent commission of Mauritius. The latter did not make a clear distinction between recommendations and reparations and did therefore not elaborate on the concept of (collective) reparations. Nevertheless, whether or not the commissions used the term collective reparations, all commissions recommended collective reparations in some form, often in combination with individual reparations. Since a combination of individual and collective reparations 'will more effectively address the interconnected nature of the violations that Kenyans have experienced as well as the ripple effects

[1750] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 178; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 37. See furthermore, Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 99.
[1751] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 198; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 289; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 99.
[1752] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 38.
[1753] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 190 ('community rehabilitation); Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.
[1754] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 23.
[1755] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 36. See furthermore, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 232.

that violations may have on a family or community throughout the generations'.[1756] The only exception was the truth commission of Indonesia &Timor Leste, which explicitly excluded the option of individual reparations.[1757]

Collective reparations addressed the harm of communities and groups of victims that 'may be bound by a common identity, experience or violation',[1758] and/or who have suffered collectively.[1759] In addition, collective reparations had to 'address structural inequalities such as identity and gender-based dimensions of individual violations'.[1760] The recommended collective reparations should have a 'lasting and sustainable impact on communities'.[1761] The commission of Guatemala considered collective reparations as an instrument to bring about reconciliation between victims and offenders, especially when reparative projects were implemented without distinction between victims and offenders.[1762] Finally, the Kenyan commission presented an additional argument for collective reparations: they intended to 'maximize the efficient use of available resources' as they may address the harm of more people.[1763]

Accordingly, the twelve truth commissions recommending reparations all included collective reparations that consisted of measures that were awarded to a group, community or the society at large, and that were indivisible between the individual members. This section will further elaborate on the recommended collective reparations, which will be discussed in line with the five categories of the UN Reparation Principles.

COLLECTIVE RESTITUTION

As discussed in section 7.5.2, the commissions of Guatemala and Kenya were the only commissions that recommended restitution of collective property under the heading of reparations. Both commissions specifically dealt with crimes against

[1756] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 104-105.
[1757] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 289.
[1758] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 107.
[1759] See for instance, Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 190; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 265; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 107.
[1760] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 108.
[1761] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 180.
[1762] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.
[1763] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 107 and 99.

indigenous peoples and minorities. The Guatemalan commissions implicitly recommended collective restitution, as it recommended the inclusion of restitution of land ownership in a national reparation program, which should be open for both individual and collective claims. The nature of the violation was decisive in the choice for either individual or collective reparations in the national reparations program.[1764] According to the Guatemalan commission, 'the armed conflict created forced displacement among individuals and groups that feared attacks from the army and its related organizations'.[1765] Rural areas with a predominantly indigenous population were mostly affected by violence, including genocidal massacres and destruction of their land through scorched earth operations, and consequently experienced a high number of displacements.[1766] Thus, it is likely that restitution of collective land rights could be a relevant reparatory measure in the Guatemalan reparation program. In contrast, the Kenyan commission recommended the collective form of restitution explicitly; communities that suffered historical land injustices, including indigenous peoples and minorities,[1767] should be remedied with land restitution or otherwise be resettled or gain access to alternative plots of community land.[1768]

COLLECTIVE COMPENSATION

The compensation recommended under the heading of reparations was often of an individual nature. Nevertheless, the reparative programs recommended by the commissions of Guatemala and Kenya that also included collective restitution, opened up a possibility for collective claims for compensation. As discussed before, the Guatemalan national reparations program comprised both individual and collective reparations, depending on the nature of the violations. In addition, this program should include measures of compensation.[1769] Hence, collective compensation was a possibility for the Guatemalan commission, yet it did not elaborate on this measure. For the Kenyan commission, the recommendation of collective compensation was more direct; communities that suffered historical land injustices could potentially be remedied through compensation.[1770] Nevertheless, the commission did not clarify how the collective compensation should be realized.

[1764] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.
[1765] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 33.
[1766] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 67-78.
[1767] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 9 and 46.
[1768] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 109.
[1769] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.
[1770] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 109.

COLLECTIVE REHABILITATION

Contrary to the other two forms of collective material reparations, collective rehabilitation was suggested by eight of the twelve commissions that recommended reparations.[1771] These can roughly be divided in four categories; medical and psychological health care, education, infrastructure, and a rest category. Collective measures relating to health care were only recommended by three commissions: community mental health care in Guatemala,[1772] the opening of local treatment centers and community-based survivor support in South Africa,[1773] and cooperation between Indonesia & Timor Leste to improve the health care of both countries, including the training of medical staff, research in public health, and the advancement of hospital facilities.[1774]

Four commissions recommended collective rehabilitation in the form of education. In two cases, these consisted of the improvement of the accessibility of education for all children, including those living in rural and disadvantaged areas. The Liberian commission suggested that primary, secondary and specific tertiary education should be free for all Liberian children,[1775] while the South African commission proposed the opening of community colleges and the rebuilding of demolished schools.[1776] Furthermore, both commissions recommended skills training for specific groups; people who were semi-illiterate due to the lost opportunity for schooling during the apartheid regime or female victims of war that started their own business.[1777] The other two commissions recommended measures to advance the skills of teachers.[1778]

[1771] The exceptions are the early 20th-century commissions of Chile, El Salvador, and Sri Lanka, and the 2002 Nigerian commission. Nevertheless, the commissions of Chile and Nigeria did suggest collective rehabilitation as 'general recommendations'. National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1110; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 56-57.

[1772] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.

[1773] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 191-192.

[1774] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 297.

[1775] Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.

[1776] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 193.

[1777] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 193; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.

[1778] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 261; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 297.

The rehabilitative measure of community development was recommended by five of the most recent African commissions and one Asian commission. According to the South African commission, victims were members of communities that had been victimized, these 'communities suffer the adverse effects of post-traumatic stress disorder, (…) It is therefore recommended that rehabilitation programmes be established both at community and national levels'.[1779] Furthermore, the South African commission recommended the development of housing projects for the hardest-hit communities, and a multidisciplinary programme to assist displaced persons and communities.[1780] Another three commissions recommended community development specifically for the hardest-hit communities.[1781] According to the Sierra Leonean commission, this form of rehabilitation is a 'community reparation'.[1782] The commission of Mauritius had a different approach and recommended that agricultural land would be given jointly to the inhabitants of a region that was highly affected by the wrongful state practice, in order to make the community self-sufficient and autonomous.[1783]

The most recent commission went even further and recommended two procedures for the rehabilitation of communities. First, the Kenyan commission suggested that victims who had suffered as a group, for instance through systematic marginalization, land injustices, and massacres, should collectively receive funds to rehabilitate the community.[1784] The community was requested to decide cooperatively on the measures the money would be spend on, whereby special attention had to be paid to prevent the elite from capturing the decision process.[1785] Second, the commission appealed to the government to enforce a socio-economic policy for historical marginalized communities.[1786] Contrary to the developmental funds, the government had to decide which community facilities had to be build or improved.

The last category of collective rehabilitative reparations consisted of a rest category, including two measures that did not fit the other categories and that were

[1779] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 190.
[1780] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 191 and 193.
[1781] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 265; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 41 and 43; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.
[1782] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 265.
[1783] The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424.
[1784] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 107 and 110.
[1785] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 111.
[1786] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 113.

only recommended once. One of the measures was mostly recommended as an individual reparation; the victim's access to micro credit. However, the Sierra Leonean commission suggested that micro credit should also be available to groups of beneficiaries.[1787] The other measure was only recommended in collective form and included the 'assistance to rebuild the shrines and holy places and rehabilitate desecrated traditional, cultural and religious institutions'.[1788]

SATISFACTION

Satisfaction is the category of reparations that was most prominent, and all commissions that recommended reparations included measures of satisfaction as reparations. Because of its inherent collective nature, satisfaction was the form of collective reparations that was most in demand. The satisfaction measures can roughly be divided in four categories; truth finding, accountability, commemoration, and raising awareness. Only four recent truth commissions included all four categories.[1789] The most recommended category consisted of commemoration; eleven of the twelve commissions that included reparations in their recommendations suggested measures of commemoration.[1790] These consisted of the establishment of monuments,[1791] the launch of a national day of remembrance,[1792] public ceremonies,[1793] the renaming of streets and public buildings,[1794] the maintenance of graves,[1795] and art projects.[1796]

[1787] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 263.
[1788] Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 276.
[1789] Namely the commissions of Sierra Leone, Indonesia & Timor Leste, Mauritius and Kenya.
[1790] The only exception was the commission of Guatemala.
[1791] See for instance, The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) Part IV; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 276.
[1792] See for instance, National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1059; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 49.
[1793] See for instance, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 264; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 40 and 43.
[1794] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 189; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.
[1795] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 188; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 298.
[1796] See for instance, Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31

Nine commissions recommended satisfaction measures relating to truth finding. The truth finding shifted slightly from a principal focus on finding the truth about the whereabouts of the disappeared and abducted children,[1797] to a wider focus on the truth of these disappearances as well as the past violations in general.[1798] In this light, only early commissions recommended that procedures should be adopted to consider the situation of the relatives of the disappeared, such as the provision of death certificates, marking the only truth finding measure that was recommended by two early commissions.[1799] A similar shift is noticeable in the category of accountability, which was recommended by seven commissions. The earlier commissions focused on the obligation to investigate and prosecute the offenders or to decide outstanding legal matters promptly,[1800] while the more recent commissions concentrated on the issuance of official apologies from state officials and the correlated acceptance of responsibility.[1801]

The last category of satisfaction was only recommended by five 21st-century commissions, and aimed at the creation of awareness among the general population about the violent and/or oppressive past. As such, three commissions recommended that education material covering the past violations were included in the general curriculum for schools.[1802] Furthermore, commissions suggested the spreading of knowledge about the past through the publication and dissemination of the truth

October 2005) 43; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424.

[1797] Since the South African commission, most commissions recommended the search for the disappeared persons and abducted children. See for instance, Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 199-201; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.

[1798] The commission of Indonesia & Timor Leste recommended both the investigation into the whereabouts as well as general research into the conflict and the commission of Mauritius merely suggested the research into the past violations. The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 295 and 297; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424.

[1799] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1061; Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter VI.

[1800] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter VI; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 189; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 51.

[1801] See for instance, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 263; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424.

[1802] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.

commission's report,[1803] its proposed reparations program,[1804] the oral testimonies of victims, [1805] and additionally through the opening of an exhibition covering the violations.[1806]

GUARANTEES OF NON-REPETITION

Guarantees of non-repetitions were only scarcely recommended as reparations by the analyzed commissions. Eight commissions included this category of reparations, yet these consisted only of a few measures. [1807] The measure of guarantees of non-repetition that was most frequently recommended was the provision of human rights training. The commission of Nigeria focused on the human rights training for the police, army and security service,[1808] the commission of Timor Leste on the education of civilians, [1809] while the commission of Indonesia & Timor Leste recommended the training for both groups.[1810]

Three other measures were recommended more than once; law reform, institutional reform, and the monitoring of the implementation. First, the commissions of Indonesia & Timor Leste and Kenya recommended measures relating to the reform of the law in place. As such, laws had to be amended to improve the chances to prosecute offenders, [1811] including police and military officials, and to restrict discriminatory policies.[1812] Additionally, Indonesia and Timor Leste were urged to ratify and implement international treaties promoting human rights. [1813] Second, the commissions of Nigeria and Indonesia & Timor Leste suggested the reform of the police, military and security sector, whereby special attention was paid to the penalties

[1803] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 298.
[1804] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 264.
[1805] The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 425.
[1806] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.
[1807] The only exception is the commission of Indonesia & Timor Leste, which recommended a wide variety of guarantees of non-repetition, unsurprising for a commission that labelled all their recommendations as reparations and consequently did not have 'general recommendations'.
[1808] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 52.
[1809] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43-44.
[1810] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 291-292 and 296-297.
[1811] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 292; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.
[1812] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.
[1813] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 298.

for officials who violated the rules, including lustration and elimination from holding office.[1814] Third, the El Salvadorean and South African commissions included the monitoring of the implementation of the recommendations,[1815] or the reparations program specifically,[1816] under the heading of reparations.[1817]

The other guarantees of non-repetition were recommended by single commissions. The protection of the media and human rights organizations was recommended by the Sri Lanka commission,[1818] the Mauritian commission suggested that the decision power in local decision processes should be shared between the elite and civilians,[1819] and the Kenyan commission wanted reform of the distribution of land.[1820] As a commission considering a conflict between two states, the commission of Indonesia & Timor Leste recommended measures that contributed to bilateral cooperation, including the settlement of economic issues and efficient border security.[1821]

7.7. BENEFICIARIES OF COLLECTIVE REPARATIONS

The truth commission made recommendations to the state, which had to implement these recommendations. The commissions did not have the power to implement or oversee the recommended reparations. As such, most commissions only scarcely commented on the design and implementation of the concrete reparation projects. Instead, states had to decide on the procedural aspects of the reparation procedure, for instance, states had to lay down the criteria for victims to be considered beneficiaries, and the evidence they needed to proof that they met the criteria. The same applied to the design and implementation of collective reparations. The recommended collective reparations, especially the material measures, were directed at a community. Yet, most truth commissions did not define what constituted a

[1814] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 47-51; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 292.
[1815] The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) Part IV.
[1816] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 312.
[1817] Other commissions did often include guidelines for the implementation and monitoring instruments in their reports, yet these were not part of the recommendations on reparations. See for instance, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 117.
[1818] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) Chapter VI.
[1819] Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424-425.
[1820] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 109.
[1821] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 293-296.

community and how its members should be identified. Furthermore, it was unclear whether the collective reparations should be requested by a group or by individual members of the group. In case of the latter, the difference between individual reparations and collective reparations to groups of victims becomes more subtle, if at all existent.

Nevertheless, based on my analysis, the beneficiaries of collective reparations recommended by the truth commissions could roughly be divided in three groups: groups of victims, communities and the society at large.[1822] The first two groups were not strictly separatable, a group of victims that suffered from a specific violation may consist of a community that was victimized based on their location or ethnicity. Yet, in several cases it was possible to deduct the collective beneficiary from the recommended reparation. For instance, the recipients of the reparation measure containing skills training for women who suffered during the war were bound by their victimhood, since they were categorized as a group of victims. The beneficiaries of reparations that were recommended to the inhabitants of a village or region were classified as a community, because their location was decisive and not their victimhood. Furthermore, several recommended measures had different beneficiaries at the same time. For example, the commission of Sri Lanka claimed that reparations to the victims will help in the process of national healing and reconciliation'.[1823] Hence, a group of victims and the entire national society may simultaneously, yet on a different level, benefit from a reparations measure. These three groups will be further discussed hereafter.

7.7.1 VICTIMS AS A GROUP

Direct victims were the primary object of collective reparations as these aimed to acknowledge their suffering,[1824] to restore their dignity or their good name,[1825] and to benefit the victims.[1826] The material collective reparations consisted of tangible measures that directly benefitted groups of victims, including restitution, compensation, and rehabilitation projects as literacy teaching and the provision of micro credit. Furthermore, the commission of Timor Leste recommended that groups

[1822] This section specifically looked at the beneficiaries of collective reparations, hence individual reparations and 'general recommendations' were excluded from this analysis.
[1823] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter VI.
[1824] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 49.
[1825] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1058; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 98.
[1826] The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) part IV; Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.

of victims should be able to apply for support for the development of their communities. The commission stressed that rehabilitation of victims should occur in the context of the community, therefore, groups of victims should be able to request assistance for community rehabilitation.[1827] In addition, the Kenyan commission recommended that groups of victims should have access to funds for socio-economic projects in their community, yet these groups were restricted to geographical, indigenous and minority communities.[1828]

Several truth commissions indicated that it was impossible to address the needs of all victims who had suffered harm during a particular conflict, and consequently prioritized specific groups of victims that should receive material reparations. [1829] A practice that was primarily adopted for material individual reparations, yet it was also followed for collective reparations. The identification of eligible beneficiaries was often made on the basis of vulnerability, and vulnerable victims were the beneficiaries of all the awarded collective material reparations. These were mostly directed at victims who got into a vulnerable position due to the violations, for instance, victims of sexual violence or torture, those who were disabled due to the violations, war widows, children affected by the war, and communities with a high concentration of victims.[1830] For the inclusion in the groups of vulnerable victims and thus beneficiaries, the commission of Sierra Leone did not make a distinction between civilians and ex-combatants; 'a reparations programme is not based on a person's past actions but rather on what violations have been suffered by him or her'.[1831] The commissions of Guatemala and Kenya additionally prioritized victims that were vulnerable due to their age, elderly and children, or that were marginalized and victimized because they belonged to a minority or indigenous community.[1832]

[1827] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 40.

[1828] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 107 and 109.

[1829] See for instance, Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 198; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 39.

[1830] See for instance, Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 198; Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 193; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 243 and 250; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 41.

[1831] Yet, the commission took the assistance previously provided to the ex-combatants into account when deciding on the reparations. Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 245.

[1832] The Kenyan commission awarded material collective reparations to victims of historical land injustices. These were primarily committed against ethnic communities, indigenous peoples and minorities. Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IIB' (3 May 2013) 165-341 and 359. See furthermore, Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 198.

In addition to the inclusion of groups of vulnerable victims as beneficiaries of collective reparations, several commissions incorporated an 'vulnerability-inclusive' approach to reparations. For example, the Guatemalan commission demanded that the Mayan population, an indigenous community, would be included in the development and execution of the national reparations programme as recommended by the same commission.[1833] Furthermore, the Timor Leste commission required a gender-balance in the communities that requested community rehabilitation,[1834] and the commission of Kenya recommended that laws that preserved discriminative practices against women and indigenous peoples had to be withdrawn.[1835] This special attention for the inclusion of vulnerable or marginalized groups within a community or society, whether or not they were also victims, was even more prevalent in the 'general recommendations' of the different commissions.[1836]

Contrarily, since symbolic measures are more likely to reach a larger group of people, all victims of the violations under investigation may be beneficiaries of satisfaction measures.[1837] These measures 'honour victims',[1838] and 'address the demand and need on the part of victims for remembrance'.[1839] Consequently, the satisfaction measures had to be developed in consultation with the victims.[1840] In addition to the victims and their relatives, the satisfaction measures simultaneously target communities and the society at large.

In other words, reparative measures may be directed at a group of victims bound by their victimization or to a community that may for instance be bound by a common identity. A community bound by, for instance a common identity, location or ethnicity may include victims, yet their individual victimhood is not decisive for their status as beneficiary.

[1833] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 198.
[1834] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43.
[1835] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.
[1836] See for instance, Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) Chapter VI; The Truth and Reconciliation Commission of Canada, 'Truth and Reconciliation Commission of Canada: Calls to Action' (2015) 3.
[1837] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 242.
[1838] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 40.
[1839] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 263.
[1840] See for instance, Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 40; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 104 and 117.

7.7.2 COMMUNITIES

Six truth commissions recommended material collective reparations to communities, mostly without specifying what they understood to be a community. According to the Kenyan truth commission, the groups of beneficiaries 'may be bound by a common identity, experience or violation'.[1841] Yet, the commission did not clarify what they considered to be a common identity. Other commissions neither specified the procedural aspects of the recommended community reparations, instead the commission recommended community reparations or reparations to a community without specifying who made up this community. Based on the recommended material collective reparations, I distilled the meaning of a community that may benefit from collective reparations: a group linked to a geographical area and/or to a common identity.

The most common measure was recommended by five commissions:[1842] a community development project for the communities that were most severely impacted during the conflict or that were systematically marginalized. These projects should consist of the (re)construction of facilities in the community, including schools, health services, roads and sewage systems.[1843] The Mauritian commission did it a bit differently, and instead of recommending general community development, it suggested that agricultural land should jointly be given to inhabitants of the village Le Morne and surrounding villages, an area where escaped slaves (Maroons) hid.[1844] In addition, rehabilitation measures as housing and educations should be provided to poor families who descended from slaves and Maroons. Even though these measures were directed to individuals, these aimed to improve the community.[1845] The commission of Guatemala did not recommend community rehabilitation as such, instead it included community mental health care, an unspecified measure.[1846]

Communities, especially the geographical unit, often existed of a group of people who played different roles during the conflict; victims, offenders, helpers, those who benefitted from the violations, those who resisted the violence, and people who stayed neutral. In addition, an individual can belong to different categories,

[1841] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 107.
[1842] Namely the commissions of South Africa, Sierra Leone, Timor Leste, Liberia, Mauritius and Kenya.
[1843] See for instance, Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 113.
[1844] Anna Eichmann, 'From Slave to Maroon: The Present-Centeredness of Mauritian Slave Heritage' (2012) 9 Atlantic Studies 319, 323.
[1845] Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 402 ('so that this community and its descendants are better able to create a more stable social and economic existence going into the future').
[1846] Daniel Rothenberg(ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.

successively or simultaneously.[1847] In order to promote reconciliation in these communities, including between victims and offenders, the commissions of Guatemala and Sierra Leone required that the collective reparation projects were established for the entire population, without making a distinction between victims and offenders.[1848]

Five commissions recognized the importance of the communities where the victims lived, as a communal process of commemoration was considered to be important for the healing and closure of victims.[1849] Consequently these commissions recommended symbolic collective reparations for these communities. Commemoration projects on a communal level, a satisfaction measure, was recommended by three commissions,[1850] and a fourth one required that communities were involved in the design of the monuments.[1851] Furthermore, three more recent commissions recommended reparations in the form of guarantees of non-repetition specifically targeting (specific) communities: the commission of Indonesia and Timor Leste recommended the development of programs to solve and prevent community conflicts,[1852] the Mauritian commission suggested that the community of Le Morne had to be included in the activities of the Le Morne Heritage Fund,[1853] and the Kenyan commission recommended that specific areas had to be officially recognized as 'community lands'.[1854]

7.7.3 THE SOCIETY AS BENEFICIARY

The twelve commissions that recommended collective reparations all included measures that were, directly or indirectly, aiming at societal impact. Most commissions either recommended collective reparations to the society at large, or stressed the societal relevance of the recommended reparative measures. Even though the

[1847] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press 2004) 99-100.
[1848] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 232.
[1849] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 188; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 10: Acolhimento and Victim Support' (31 October 2005) 41.
[1850] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 190; Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43; Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 425.
[1851] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 117.
[1852] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 296.
[1853] Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 425.
[1854] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 109.

recommended reparation programmes largely consisted of individual reparations and/or reparations specifically targeting victims, ten commissions argued that reparations could lead to national healing and reconciliation.[1855] Moreover, some went even further and stressed that 'without reparations, there can be no real reconciliation'.[1856] Furthermore, reparations were deemed important for the 'transition toward a fuller democracy',[1857] the prevention of the recurrence of the violence,[1858] the restoration of civic trust,[1859] and the 'rebalancing of the society'.[1860] Hence, the society at large was a beneficiary of the recommended reparation packages, at least indirectly.

The collective reparations that were directly aimed at the society primarily consisted of symbolic reparations, yet four commissions additionally recommended material collective reparations, which consisted mainly of the improvement of general primary and/or secondary education,[1861] but also the improvement of general health care,[1862] the provision of micro-credit,[1863] and the rebuilding of sacred places.[1864] The beneficiaries of these rehabilitative measures were not determined on the basis of

[1855] See for instance, Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter VI**;** The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 394.

[1856] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 3. See for other examples, Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 174; Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 38-39.

[1857] National Commission on Truth and Reconciliation, 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1057. See furthermore, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 241.

[1858] See for instance, Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197; Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 40; Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 394.

[1859] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 241

[1860] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 98.

[1861] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 193 (rebuilding schools); Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 261 (training of teachers); The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 297 (teacher and student exchange between the two countries); Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277 (free education to all Liberian children).

[1862] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 297.

[1863] Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.

[1864] Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 276.

their victimhood or community, instead other criteria, such as age, sex,[1865] or health status, were decisive. In addition, the improvement of the accessibility of schools and the quality of teachers, was directed at all children; the future of the country. Hence, this rehabilitative measure comes close to the category of guarantees of non-repetition.

The commissions of Timor Leste and Kenya stated that symbolic reparations in general benefitted the society at large by building civic trust, preventing repetition of violence, educating people, and promoting reconciliation. [1866] However, most commissions only mentioned similar effects in relation to specific measures of satisfaction. Commemorative projects, including monuments and national remembrance days, were perceived to contribute to national reconciliation, [1867] prosecution was considered to assist in building civic trust,[1868] and research into the violent past and the consequent dissemination of the results in education material and museums was believed to strengthen the commitment to oppose repetition of the violations. [1869] Additionally, the Sierra Leone commission targeted all citizens as beneficiaries of an official apology by the government.[1870] Lastly, two commissions went even further and explicitly included future generations as the beneficiaries of symbolic reparations, such as monuments.[1871]

The reparations category of guarantees of non-repetition is exceptionally equipped to contribute to the societal goals of reparations. Yet, this category was rarely recommended under the heading of reparations, instead it was primarily

[1865] The commission of Liberia recommended the expansion of micro-credit schemes exclusively for credit for women. Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.
[1866] Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 40; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.
[1867] See for instance, National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1058-1059; The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) part IV; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 116.
[1868] Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island) (Sri Lanka), Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Certain Persons (All Island)' (May 2000) chapter VI.
[1869] Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 294-295.
[1870] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 26 ('the government acknowledge the suffering Sierra Leoneans went through during the conflict and unreservedly apologise to the people for all actions and inactions of all governments since 1961').
[1871] National Commission on Truth and Reconciliation (Chile), 'Report of the Chilean National Commission on Truth and Reconciliation' (9 February 1991) 1059 and 1073; Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in Western, Southern and Sabaragamuwa Provinces' (September 1997) chapter 14.

recommended as 'general recommendation'. The measures relating to guarantees of non-repetition that were recommended as reparation, whether they included law reform, human rights education or the reform of security services, unsurprisingly, envisioned to prevent the recurrence of the violations,[1872] which is a desired effect aimed at the society at large.

7.8 SHARED RESPONSIBILITY FOR REPARATIONS

According to eleven of the twelve truth commissions recommending reparations, the primary responsibility for the reparations rests with the state where the violations took place. The only exception is the commission of Timor Leste, which investigated the violence during the Indonesian occupation between 1975 and 1999,[1873] and found that the Indonesian government and its security forces were responsible for several human rights and humanitarian law violations.[1874] Consequently, the commission placed the primary responsibility for the reparations on the State of Indonesia.[1875] However, this did not mean that the State of Timor Leste was released from its responsibility to provide reparations to the victims.[1876] Additionally, the commission argued that other responsible parties, consisting of states and businesses that profited from the conflict and the permanent members of the United Nations Security Council that backed Indonesia, should contribute to the reparations.[1877]

Four other commissions also expanded the number of parties who were responsible for the provision of reparations. In three cases, these consisted of national

[1872] See for instance, Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 48; Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 292-293.

[1873] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 2: The Mandate of the Commission (31 October 2005) 2-3.

[1874] According to the commission, the Indonesian government and security force were responsible for the death of 100,000 to 180,00 people due to hunger and illness (more than fifteen percent of the population). Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 8: Responsibility and Accountability' (31 October 2005) 5-8.

[1875] Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 42.

[1876] Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 38. ('the state of Timor Leste has the moral and constitutional obligation to ensure that victims of past human rights violations receive measures of reparations').

[1877] Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 4, 34 and 42.

identities: the other fighting party in the civil war,[1878] the individual perpetrators, [1879] and a business that benefitted from labor exploitation. [1880] While two commissions concluded that foreign states had to contribute to the reparations because these either aided the fighting parties in the civil war, [1881] or that as former colonizers traded slaves.[1882]

Though they were not particularly considered to be responsible, six commissions requested assistance from third parties for the provision of reparations. On the one hand, the international community and NGOs were invited to facilitate the implementation of the recommended reparations by sharing their networks and knowledge, [1883] while on the other hand, foreign governments, international organizations as the UN, NGOs and civilians, including convicted offenders, were called upon for financial contributions for the reparations. [1884] This practice of demanding material and financial support from third parties was widely used for the 'general recommendations', which included many requests for donations and specific performances to, amongst others, foreign governments, international organizations, businesses, and religious communities.[1885]

7.9 THE DEVELOPMENT OF COLLECTIVE REPARATIONS

Collective reparations were recommended by 12 analyzed truth commissions. These included commissions from each generation as formulated by Onur Bakiner. Furthermore, the reports of the truth commissions that included collective reparations were presented between 1991 and 2013, a time period in which the recognition of

[1878] The civil war in El Salvador took place between the government and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN), both parties signed the peace accords ending the conflict. The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) part IV.
[1879] Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 3-4.
[1880] The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 426.
[1881] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 199.
[1882] The United Kingdom and France should fund the reparations for the rehabilitation and reconstruction of the communities of descendants of former slaves. The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 402.
[1883] See for instance, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 248 and 251; The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 300.
[1884] See for instance, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 42; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 122.
[1885] See for instance, Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 316 and 318; The Truth and Reconciliation Commission of Canada, 'Truth and Reconciliation Commission of Canada: Calls to Action' (2015) 5 and 10.

victims and the provision of reparations through (international) law increased. This section examines whether this development was also reflected in the reports of the truth commissions.

7.9.1 The different notions of collective reparations

The analysis in this chapter focused on the recommendations for collective reparations in a range of truth commissions. There is a high number of variables between the analyzed commissions that could possibly influence the outcome, especially since the commissions show such a wide variety. Section 7.3 of this chapter gave an overview of several of these variables: the three generations of truth commissions, the years the commissions operated, the countries, the context of the violations, the crimes under inquiry, the national or international nature of the commission, the commissioners, the mandate of the commissions, and lastly the role of the victims. Nonetheless, the analysis of the coded reports in relation to the abovementioned variables did scarcely result in clear links between the variables and the definition of reparations or the particular recommended measures. Only two variables seemed to influence the perception and application of collective reparations: the time period in which the commission was active, and the three generations of truth commissions. Even though this latter variable was linked to several other variables, for instance the second-generation commissions tended to be more international than those from the first and third generation, the single variable of international or national nature of the commissions did not show the same correlation with the recommended collective reparations.

The exploration of the development of collective reparations in truth commissions was complicated by the frequent absence of a clarification of the recommended reparations or the envisioned beneficiaries, and the underlying reasons for the specific recommendation. Most commissions made recommendations for reparations without going into the underlying reasoning for these recommendations, and only a few elaborated extensively on the concept of reparations. In addition, the commissions recommended the broader parameters for the reparations policy, while the states had to give substance to the recommendations and had to decide on the design and implementation of the concrete reparations. Several commissions kept the recommendations broad and vague, giving the states more freedom to develop the actual reparations. Another adversity with the analyses of the collective reparations in the different truth commissions related to the commissions' competence to make 'general recommendations' in addition to reparations. Some truth commissions did not clearly differentiate between the 'general recommendations' and reparations, instead these referred to several recommendations as reparations without giving a reason nor

did these elaborate on the implications of using the label of reparations.[1886] Nevertheless, some trends in the recommendations for collective reparations in the truth commissions can be derived, which will be discussed below.

My analysis of the reports of the truth commissions results in several observations in relation to the development of collective reparations. The first observation relates to the manifestation of collective reparations in the three generations of truth commissions. With the introduction of the second-generation commissions, the number of truth commissions that included a mandate that allowed recommendations relating to measures that addressed the harm of the victims increased. All second-generation commissions recommended reparations, including the commission of El Salvador that lacked a mandate thereto. However, my analysis of the truth commission reports indicates that the actual recommendations of reparations are not solely linked to second-generation commissions. One first-generation commission recommended reparations, and two third-generation commissions did so despite the absence of a mandate. Commissions from all three generations recommended measures of compensation, rehabilitation and satisfaction. The suggestions relating to the latter category were even made by all twelve commissions.

The second observation is primarily connected to the objective of the recommended collective reparations. My analysis indicates that reparations can be backward and forward looking. Backward looking elements of reparations relate to the redressing of past violations, and forward-looking elements focus on the prevention of future conflicts.[1887] The commission of South Africa marked a turning point for collective reparations as it was the first commission to recommend material collective reparations. Thereafter, five second-generation and two third-generation commissions followed. The two categories of reparations that were primarily backward-looking as they aimed to restore the situation of the victim to what it used to be (restitution and compensation) were only recommended in a collective form by two international, second-generation commissions. The commissions of Guatemala and Kenya both recommended reparations for crimes that mainly targeted or affected indigenous peoples.[1888] However, these were not the only commissions that investigated crimes

[1886] For instance, the introduction to the report of the commission of Mauritius referred to its 'reparations policy' and 'reparation by way of positive discrimination', while its chapter on recommendations did only include the term reparations twice; 'reparation payments' and the recommendations to a specific community consisted of reparations. The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 9, 424 and 426.

[1887] See furthermore, Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 382.

[1888] Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 67-78; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 9 and 45-46.

against indigenous peoples.[1889] Hence, a direct link between indigenous peoples and material collective reparations cannot be made.

The third category of material reparations (rehabilitation) could include both forward- and backward-looking aspects. The only measures that directly targeted the harm that resulted from the conflict were the community mental health care, the 'assistance to rebuild the shrines and holy places and rehabilitate desecrated traditional, cultural and religious institutions', and three community rehabilitation projects.[1890] These projects focused on rehabilitating the communities by repairing harm, for instance by establishing housing projects in communities that had suffered mass destruction of property.[1891] The aim was to 'make them [the communities] whole again'; a backward-looking focus.[1892]

The three more recent commissions that recommended rehabilitation for communities went beyond the mere restoration of these communities, and they intended to improve the situations of the victimized communities. The objective to empower the communities and to make them economically independent was pursued by providing access to developmental aid, agricultural land, or a socio-economic policy including the active participation of the community.[1893] Even though some of the recommended collective rehabilitation measures targeted the harm suffered by victims, they were not only designed to restore the victims, but also to advance their situations beyond their previous situations. This was especially clear for the recommendations relating to education and micro credit, because these aimed to empower the victims and to increase their chances to become economically independent.[1894] Furthermore, several rehabilitative measures were not directed to

[1889] The Liberian civil war was partly caused by the discrepancy between the Americo-Liberians (former slaves from the USA who started settling in Liberia after 1822) and the indigenous peoples. Americo-Liberians held the political and economic power, while the indigenous peoples were systematically oppressed. Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume I: Findings and Determinations' (19 December 2008) 65-70; Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 4 and 6-7. Furthermore, the Commission of Nigeria discussed the 'perceived marginalization and discriminatory practices against the indigenous peoples' in relation to unequal power relations. Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 1' (May 2002) 112.

[1890] Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009); Daniel Rothenberg (ed), *Memory of Silence: The Guatemalan Truth Commission Report* (Palgrave Macmillan 2012) 197.

[1891] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 190; Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 40.

[1892] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 265.

[1893] Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 110.

[1894] See for instance, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 262; Truth and Reconciliation

groups of victims or victimized communities, instead they were aimed at the entire society, or at least all children.[1895] Hence, the link between the violations and subsequent harm and the recommended reparative measure was tenuous, making the recommendation predominantly forward-looking.

All commissions that recommended reparations included symbolic collective reparations, particularly satisfaction measures. Similar to the material collective reparations, the recommended symbolic remedies can be backward-looking, forward-looking or both. My analysis of the truth commission reports shows that there was a slight shift from a focus on backward-looking remedies aimed at the victims to a combination of backward- and forward-looking measures that addressed the harm inflicted on victims and at the same time aimed to have a societal effect in order to prevent the recurrence of the conflict. First, two 1990s commissions recommended the prosecution of the persons responsible for the violations, whereas the more recent commission of Kenya suggested that legal barriers for prosecutions should be removed; a measure not only directed at the investigated violations, but also to future violations.

Second, a category of satisfaction measures that was forward-looking related to the education of the general public on the violent past, which aimed to facilitate a common understanding of the past, and that were considered as 'most important steps towards reconciliation, and prevention of human rights violations'.[1896] These were only recommended from the second half of the 2000s onwards, including commissions from both the second and third generation. The two second-generation commissions of Timor Leste and Kenya recommended the education of the general public, through the inclusion in curricula in schools, but also through popular literature, art exhibitions, and museums.[1897] Yet, the two third-generation commissions of Indonesia & Timor-Leste and Mauritius additionally recommended further research on the violent past, as well as the conservation of historical data, including oral history, and sites of historical importance.[1898]

Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.

[1895] See for instance, the Liberian commission recommended that all children should receive primary and secondary education free of charge. Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009).

[1896] The Commission of Truth and Friendship, The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 298. See furthermore, Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.

[1897] Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 43; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 114.

[1898] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 295; The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424-425.

Third, a category of satisfaction that had a strong link with the investigated violations involved apologies or declarations of responsibility; these were only recommended since the mid 2000s. However, according to several truth commissions, the objective of an official state apology was not restricted to acknowledging the suffering of victims, instead it was also regarded as an important step in the work towards reconciliation and a peaceful future.[1899] Hence, the recommended official apologies and acknowledgements had both a backward- and forward-looking function.

Fourth, all commissions that recommended satisfaction, including commissions from all three generations, included measures relating to commemoration. The initial aim of these recommended commemorative projects was backward-looking, and was directed at the recognition of the suffering, the remembrance of the dead, and the honoring of the victims. However, several second-generation commissions added a forward-looking objective by stating that commemoration and memorialization 'strengthen the social commitment to oppose repetition of such acts, are educative and promote reconciliation'.[1900] Moreover, the Sri Lankan Commission emphasized the significance of a national monument to 'both the living and the future generations'.[1901]

The last category of reparations, guarantees of non-repetition, were intrinsically future orientated; 'they are about changing the status quo, not returning to it'.[1902] Even though most measures relating to guarantees of non-repetition were recommended as 'general recommendations', a few measures were nevertheless recommended as reparations. The guarantees of non-repetition recommended under the heading of reparations shifted from a mere focus on the reform of the institutions that were responsible for the violations or that failed to prevent them from happening, to more attention for the role of citizens, for instance through education on human rights and peaceful conflict solving. The two most recent commissions of Mauritius and Kenya went even further and recommended measures to empower marginalized communities, primarily in relation to the access to land and the fair distribution of

[1899] The Commission of Truth and Friendship (Indonesia & Timor Leste), 'Per Memoriam Ad Spem: Final Report of the Commission of Truth and Friendship, Indonesia – Timor-Leste' (31 March 2008) 298; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 116 and 119.
[1900] Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 40. See furthermore, The Commission on the Truth for El Salvador, 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador' (2001) part IV; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 116.
[1901] Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces (Sri Lanka), 'Final Report of the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in Western, Southern and Sabaragamuwa Provinces' (September 1997) chapter 14.
[1902] Naomi Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice: The Missing Link?' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (Cambridge University Press 2019) 113.

benefits and participation. These measures come closest to the notion of transformative reparations.[1903]

7.9.2 TRUTH COMMISSIONS WITHIN THE BROADER FIELD OF TRANSITIONAL JUSTICE

The analyzed truth commissions did not operate in a vacuum, instead they operated within a broad framework of international and national transitional justice mechanisms that functioned successively or simultaneously. For instance, a truth commission and international criminal tribunal operated at the same time in Sierra Leone and Timor-Leste.[1904] After two decades, the commission of Chad was followed up by an international criminal tribunal to prosecute ex-president Habré,[1905] while other states incorporated domestic prosecutions.[1906] In addition, several commissions were mandated to identify the responsible persons who should be prosecuted.[1907] Furthermore, several states established additional reparation programs, memorialization projects, lustration processes, and other transitional mechanisms in addition to the truth commission. These different instruments sometimes operated independently from each other, while others were connected, for instance, when the reparations program was based upon the recommendations of the truth commission.[1908]

The functioning of a truth commission was at times influenced by other mechanisms, either by expanding their activities or restricting their objectives. The latter was especially clear in the case of Canada where the settlement between Canada and the victims of the Indian residential schools included several distinct measures, each developed in a separate agreement. The mandate of the truth commission explicitly excluded recommendations on matters covered in the

[1903] Naomi Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice: The Missing Link?' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (Cambridge University Press 2019) 125.
[1904] William A Schabas, 'Conjoined Twins of Transitional Justice? The Sierra Leonean Truth and Reconciliation Commission and the Special Court' (2004) 2 Journal of International Criminal Justice 1082, 1088; Alison Bisset, *Truth Commissions and Criminal Courts* (Cambridge University Press 2012) 86.
[1905] The Extraordinary African Chambers convicted Hissène Habré in 2016 for crimes against humanity and war crimes. Christoph Sperfeldt, 'The Trial against Hissène Habré: Networked Justice and Reparations at the Extraordinary African Chambers' (2017) 21 The International Journal of Human Rights 1243, 1247. The report of the Truth Commission was used by several NGOs while lobbying for the prosecution of Habré. John Perry and T Debey Syndee, *African Truth Commissions and Transitional Justice* (Lexington Books 2015) 66.
[1906] For instance, Argentina and Guatemala have seen several domestic prosecutions of crimes that were also inquired by the respective truth commissions. The results of these inquiries were used during the criminal proceedings. Emilio Crenzel, 'Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice' (2008) 2 The International Journal of Transitional Justice 173, 173; Susan Kemp, 'The Inter-Relationship Between the Guatemalan Commission for Historical Clarification and the Search for Justice in National Courts' (2004) 15 Criminal Law Forum 67, 99.
[1907] See for instance, Presidential Proclamation (Sri Lanka) (25 January 1995) Proclamation No SP/6/N/191/94; Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 1' (May 2002) 29.
[1908] See for instance, Elizabeth Lira, 'The Reparations Policy for Human Rights Violations in Chile' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 55-101.

agreement, such as compensation, rehabilitation and satisfaction projects,[1909] hence limiting the opportunity to recommend reparations. The same applied to some other truth commissions, especially those established as a result of a peace accord. Similar to the Canadian agreement, peace accords included different transitional justice instruments. Consequently, some truth commissions made narrow recommendations because the peace accords already addressed several of the underlying reasons of the conflict.[1910] It is beyond the scope of this research to delve in the relations between the different mechanisms that were established in the transitional contexts of the fifteen truth commissions. This limited the possibility to fully explain differences and similarities between the commissions' recommendations regarding (collective) reparations.

Moreover, the field of transitional justice is highly dominated by an international community of transitional justice experts. For instance, the UN and the ICTJ were involved in many of the analyzed commissions. These institutions were recognized for translating elements that form the basis of mechanisms from transitional justice processes in one state to another state. Several scholars argued that this led to the standardization of truth commissions.[1911] Kathryn Sikkink held that this was an oversimplification; 'each new truth commission was not simply a copy of what came before; rather, it was consciously crafted to try to avoid earlier problems or to fit the particular situation of a transitional country'.[1912]

The negotiations to reach a peace accord or an agreement on the establishment of a truth commission primarily took place behind closed doors, as did the negotiations between the commissioners to reach an agreement on the appropriate recommendations. It is therefore impossible to assess to what extent these international actors, previous truth commissions and other transitional justice mechanisms influenced the mandates, procedures and recommendations of the analyzed truth commissions. This was reinforced by the scarcity of argumentation, clarifications and definitions in the recommendation sections of the analyzed truth commission reports, as well as the generality of the recommended reparations.

Nevertheless, some observations can be made regarding the standardization of the recommended reparations on the basis of my analysis. The commissions that

[1909] Indian Residential Schools Settlement Agreement (Canada) (2006) article 5.02, 7.02 and 8; Indian Residential Schools Settlement Agreement: Schedule N (Canada) (2006) article 4.
[1910] Naomi Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice: The Missing Link?' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (Cambridge University Press 2019), 124.
[1911] See for instance, Marcos Ancelovici and Jane Jenson, 'Standarization or Transnational Diffusion: The Case of Truth Commissions and Conditional Cash Transfer' (2013) 7 International Political Sociology 294, 299-302; David Backer, 'Cross-national comparative analysis' in Hugo van der Merwe, Victoria Baxter and Audrey Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace Press 2009) 49; Anne K Krueger, 'The Global Diffusion of Truth Commissions: An Integrative Approach to Diffusion as a Process of Collective Learning' (2016) 45 Theory and Society: Renewal and Critique in Social Theory 143, 157-159.
[1912] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (WW Norton & Company 2011) 329.

elaborated on the concept of reparations in their reports referred to other commissions when discussing the concept of reparations in general,[1913] and their recommendations were used as a source of inspiration.[1914] Furthermore, several commissions referred to the IACtHR, [1915] the ICC, [1916] and the UN Reparation Principles. [1917] As a consequence, it appears that a standardized 'toolkit' containing the appropriate and available measures developed along the lines of the five categories of the UN Reparation Principles. However, my analysis does not unearth evidence that the recommendations of predecessors were copied and transferred to their own reports. Instead, my findings align with Kathryn Sikkink's observation; the truth commissions build upon the work of its predecessors, but also adjusted the reparations from the 'toolkit' to the situation at hand. The recommendations of the different truth commissions varied remarkably and the recommended reparations, especially of the more recent commissions, were detailed and reflective of the situation at hand.[1918] There were hardly duplicates of the detailed recommended reparations. Hence, it seems that the context of the conflict and the country, as well other transitional justice mechanisms were similarly decisive in the recommendations that were made.

[1913] The Nigerian commission gave an overview of the recommended reparations of other truth commissions**.** Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 30-42.

[1914] See for instance, Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 246; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 117-118.

[1915] See for instance, Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 174; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 244.

[1916] See for instance, Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 19; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 2-3.

[1917] See for instance, Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 26; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 232.

[1918] For instance, the Mauritian commission recommended a reparative measure consisting of a 'full historical and archaeological survey of Le Morne summit and slopes'. The results of this survey had to be made publicly available 'through books, films, drama, songs dance and curriculum materials for schools'. Under the heading of non-material reparations, the Kenyan commission recommended 'that the Nyayo House basement (which served as torture chambers) be converted into a museum and a monument in commemoration of the victims of torture by state security agencies'. The Truth and Justice Commission (Mauritius), 'Report of the Truth and Justice Commission. Volume 1' (November 2011) 424; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 120.

7.9.3 EVALUATING THE RECOMMENDED COLLECTIVE REPARATIONS

As discussed before, the collective reparations recommended by the analyzed truth commissions shifted from typically backward-looking to a combination of back- and forward-looking measures. The recommended reparations were designed to restore the victims, but some reparative measures also consisted of forward-looking objectives as reconciliation and non-repetition of the violations. The distinction between backward- and forward-looking reparations can be linked to Aristotles' theory on particular justice, which is discussed in this section.

CORRECTIVE VS DISTRIBUTIVE JUSTICE

My analysis of the reports of the twelve truth commissions that labelled some recommendations as reparations shows several parallels between the recommended reparations, Aristotle's theory on particular justice, and the scale of particular justice. Corrective justice in its purest form, restitution of material and/or immaterial goods, was only recommended by five commissions. Yet, the other measure that is primarily corrective, compensation, was recommended by eleven of the twelve commissions. Furthermore, corrective justice was also reflected in the objectives of reparations as described by different commissions: reparations foremost intended to acknowledge and restore the victims. Hence, the recommended reparations were often grounded in corrective justice.

Furthermore, my analysis indicates a shift on the scale of particular justice from essentially corrective justice towards a combination of both forms, to more and more influence of distributive justice. Reparations were not supposed to solely target the victims, they additionally aimed to contribute to reconciliation and the prevention of the reoccurrence of the conflict. This was linked to the nature of truth commissions: 'they are not solely backward looking but also distinctly future-oriented, or forward looking, encouraging public acknowledgement of past conflict in order to transform and reconcile the present and the future'.[1919] In other words, the truth commissions had both corrective and distributive goals in recommending the reparations. Consequently, most recommended reparative measures, consisting of rehabilitation, satisfaction, and guarantees of non-repetition, comprised a combination of corrective and distributive components. For instance, the recommended satisfaction measures were primarily designed to undo the wrongful 'transaction' by prosecuting the offenders, searching for and subsequently reburying disappeared persons, officially apologizing, acknowledging the suffering of victims, and remembering the violations and its victims. However, they generally aimed to go beyond correcting the wrongful 'transaction' and intended to promote reconciliation and to prevent a resurgence of the violence. Furthermore, the more recent commissions additionally recommended satisfaction

[1919] Julia Paulson and Michelle J Bellino, 'Truth Commissions, Education, and Positive Peace: An Analysis of Truth Commissions Final Reports (1980-2015)' 53 Comparative Education (2017) 351, 354.

measures that were more distributive than corrective. The general public had to be educated on the violent past through the dissemination of education material, exhibitions, the conserving of historically important sites, and further research, hence distributing knowledge with the aim to prevent future violations.

The abovementioned reparations combined a corrective objective by recognizing the victims and a forward-looking, distributive perspective that primarily aimed at the prevention of future violations by targeting different causes of the conflict. For instance, through human rights training for the security services, institutional reform, and education programs on peaceful conflict resolutions. Several commissions additionally recommended transformative reparations and consequently shifted further towards distributive justice on the particular justice-scale. Corrective justice aims to correct a wrongful 'transaction' by restoring the situation to what it was prior to the violation took place. However, as argued by Margaret Walker, in case these violations were committed against marginalized groups, such as indigenous peoples, minorities and women, bringing them back to their 'original' situation would 'recreate or reinforce conditions of powerlessness, inequality or insecurity'.[1920] Consequently, several scholars argued that 'reparations should transform the economic, social, cultural and political dynamics that oppress women and girls [and by analogy other marginalized groups] and often cause their victimization'.[1921] Hence, transformative reparations address a problem larger than discrete injury; according to Margaret Walker, 'they recognize a problem of social and political standing that may be both a cause and a result of gross violations'.[1922]

The commission of Kenya recommended transformative reparations explicitly. The recommended collective reparations were, amongst others, designed to address structural inequalities such as identity and gender-based dimensions of individual violations'. [1923] As such, the Kenyan government was required to initiate socio-economic development in order to correct the historical marginalization of certain communities.[1924] Moreover, the commission specifically addressed historical land injustices and recommended reparations for this specific crime. Even the corrective reparations of restitution and compensation had a transformative motive, because these were not only recommended to repair the violations per se, but also because land injustices are 'one of the major contributors to marginalization and ethnic tensions'.[1925] Several other commissions also included reparations that addressed the

[1920] Margaret Urban Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking About Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 109.
[1921] Brianne McGonigle Leyh and Julie Fraser, 'Transformative Reparations: Changing the Game or More of the Same?' (2019) 8 Cambridge International Law Journal 39, 46.
[1922] Margaret Urban Walker, 'Making Reparations Possible: Theorizing Reparative Justice' in Claudio Corradetti, Nir Eisikovits and Jack Volpe Rotondi (eds), *Theorizing Transitional Justice* (Ashgate Press 2015) 217.
[1923] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 108.
[1924] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 112.
[1925] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 108-109.

harm of the victims, and additionally aimed to improve their situation. This was especially done through community rehabilitation, access to education, and the availability of micro-credit to all women in the country.[1926] In addition, the South African commission designed its reparations policy to be development-centered, and aimed to 'actively [empower] individuals and communities to take control of their own lives'.[1927]

Rodrigo Uprimny Yepes described transformative reparations often as measures consisting of access to social services, such as education, health care, and infrastructure in a broad sense, which were 'grounded on the State duty to fulfil economic, social and cultural rights and on the idea of distributive justice and the principles of non-discrimination'. [1928] Consequently, several truth commissions underlined the distinction between the recommended reparations and the general obligation of the state to provide essential services to its citizens, such as education and health care.[1929] In the words of the Kenyan commission, [w]hat will distinguish these reparative measures from other development projects is the moral and political content under which they are undertaken. They must not be implemented in isolation but will be accompanied by a symbolic dimension'.[1930] Therefore, the provision of social services or development aid, which is primarily of a distributive nature, should include some aspects of corrective justice in order to be regarded as reparations. Most recommended reparations were, to some extent, linked to corrective justice and the wrongful 'transaction'. However, this link seemed absent from a few recommended reparation measures, for instance, the Liberian commission recommended free primary and secondary education to all Liberian children, without revealing the (symbolic) reparative dimensions.

[1926] Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.
[1927] Truth and Reconciliation Commission (South Africa), 'Truth and Reconciliation Commission of South Africa Report. Volume 5' (October 1998) 180.
[1928] Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625, 635.
[1929] See for instance, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 39; Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 232.
[1930] Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 113.

CHAPTER 8: CONCLUSIONS

8.1 INTRODUCTION

This dissertation started with the example of the Guatemalan schoolchildren who visited the village of Río Negro where they walked the trail towards the 1982 massacre site. This excursion is an example of a method used by NGOs to educate the youth on the crimes that were committed against the Maya population in Guatemala during the civil war from 1960 to 1996. Similar education projects were ordered and recommended by the courts and truth commissions I analyzed in this dissertation. These measures can be qualified as collective reparations, which address individual and collective harm, and benefit individuals and groups of persons. In addition, collective reparations often aim to have impact on the broader society.

The starting point of this research was the observation that the individual right to reparations has increasingly received a collective character. Different courts and quasi-legal institutions have ordered a variety of collective reparations. These institutions have defined and applied collective reparations differently. As a result, the concept of collective reparations has developed in different directions, lacks a common understanding and a clear-cut definition. Furthermore, it is uncertain whether a right to collective reparations actually exists, or that the individual right to reparations is only applied in a collective manner.

Moreover, research into collective reparations is fragmentized and often includes studies into a specific court or legal field (for instance, international human rights law or international criminal law). Therefore, a comprehensive overview of the development of collective reparations that transcends the confines of a specific court or field is missing. Therefore, my dissertation aimed to gain a deeper understanding of collective reparations and its development, and to contribute to the crystallization of the legal framework regarding collective reparations. Additionally, this research evaluated this development in light of the perceived convergence between reparations and assistance. This dissertation examined the approach and development of collective reparations in the Inter-American Court of Human Rights (hereinafter IACtHR), the International Criminal Court (hereinafter ICC), the Extraordinary Chambers within the Courts of Cambodia (hereinafter ECCC), and 15 truth commissions.

In order to achieve the objectives of this research, I developed an approach to explore how different international courts and truth commissions define and apply collective reparations. This scheme consists of three components. First, a systematic analysis of the courts' decisions and the truth commission reports. Second, a comparative analysis between the truth commissions, between the courts, and

between the courts and truth commissions. Third, an evaluation of the different understandings and applications of collective reparations.

This chapter is divided in three sections. In the first two sections, I will integrate the results of the analyses of the different institutions in order to answer the research questions that guided this research:

> *How have international courts and truth commissions, that are mandated to provide or recommend collective reparations, perceived and applied collective reparations for victims of mass atrocities, and how can the differences and similarities between the institutions be explained?*

The first two sections include the comparative analysis of the development of collective reparations before the three international courts and the truth commissions. The first section comprises the comparative analysis of the courts. These results are juxtaposed with the findings of the analysis of the truth commission reports in the second section. The comparison reveals that the differences and similarities between the courts often manifest along the lines of the division between criminal courts (ICC and ECCC) and human rights courts (IACtHR). In addition, other factors account for the differences and similarities between the different courts, and between the courts and truth commissions. These include the mandates, the types of mass atrocities under scrutiny, and the way the judges respond to the obstacles they face in responding to a high number of victims and massive trauma. Furthermore, these two sections explore the implications arising from the findings of this dissertation. Drawing on Aristotle's theory on particular justice and Peter Dixon's five prepositions that distinguish reparations from assistance, this chapter critically assesses the development of collective reparations.

Lastly, the third section combines the findings of this research. This section contains the implications that flow from the findings of this study, including suggestions for future research, implications for the international courts, and reflections on the future of collective reparations and international courts.

8.2 COLLECTIVE REPARATIONS BEFORE INTERNATIONAL COURTS

By referring to the *Factory at Chorzów* judgement of the Permanent Court of International Justice (hereinafter PCIJ),[1931] the three analyzed courts claimed that it is a principle of international law that harm caused by a wrongful act has to be repaired. The IACtHR went a step further and recognized the obligation to repair harm as customary law.[1932] Furthermore, the courts followed the *Factory at Chorzów* judgement and reiterated that reparations should attempt to restore victims to their situation prior to the violations. In case restitution is impossible, insufficient or inappropriate, other forms of reparations should be ordered, including compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The analyzed decisions of the courts involve mass atrocities, including genocide, torture, sexual violence, and the conscription and use of child soldiers. These are wrongful acts that make *restitutio in integrum* impossible or inappropriate. In general, reparations before the courts pursue a similar principal objective; the elimination of the consequences of the wrongful acts.[1933] The reparations thus aim to address the harm inflicted on victims. This is complemented by other objectives such as the safeguarding of the violated rights, the acknowledgement of harm, the relief of suffering, the restoration of dignity, reconciliation, and the prevention of future violations.

The following sections discuss the results of the comparative analysis. These results are presented here to provide a deeper understanding of collective reparations in international courts and truth commissions, including the similarities, differences, and the underlying reasons.

8.2.1 DEFINING COLLECTIVE REPARATIONS

Prior to the actual decision on the reparations, the courts introduced their definitions of reparations. Because the underlying norms and definitions are unspecified in the statutes and treaties, the courts not only used international treaties and documents, but also jurisprudence of international courts to interpret the reparation provisions. The courts partially built upon the same sources when defining reparations. The two criminal courts referred to the case law of the PCIJ and the International Court of Justice (hereinafter ICJ). Furthermore, the ICC and ECCC included a number of international sources that provided guidance, including human rights treaties such as

[1931] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1927] PCIJ Rep Series A No 17, 29 ('it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation').
[1932] *Aloeboetoe et al v Suriname* (Judgement on Reparations and Costs) IACtHR Series C No 15 (10 September 1993) para 43.
[1933] See for instance, *"Street Children" (Villagrán-Morales et al) v Guatemala* (Judgement on Reparations and Costs) IACtHR Series C No 77 (26 May 2001) para 63; *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012) para 179; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 699.

the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (hereinafter ICCPR), and the American, European and African Conventions on Human Rights.[1934] International soft law documents, most notably the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (hereinafter UN Reparation Principles), were also used as sources.[1935] Even though both criminal courts acknowledged that the IACtHR ordered reparations against the State and not against individuals, both use the case law of the IACtHR as it could 'provide useful guidance' in the interpretation of the concept of reparation.[1936] Likewise, the ICC and ECCC made references to the IACtHR's jurisprudence when it came to collective reparations.[1937] Hence, despite their status as criminal courts, the ICC and ECCC have been guided by a range of international human rights sources that were developed in light of state responsibility.[1938]

On the contrary, the IACtHR hardly mentioned international sources that guided its decisions on reparations. In its first decision on reparations (*Velásquez-Rodríguez v. Honduras*), the Court only referred to the European Convention on Human Rights and the Human Rights Committee of the ICCPR.[1939] Thereafter, the IACtHR has based its decisions on reparations on its own case law and that of ICJ and its predecessor, the PCIJ.

Surprisingly, the ICC was the only court that gave an extensive description of collective reparations. Whereas the ICC based its understanding of reparations on the abovementioned human rights sources, the definition of collective reparations was primarily based on submissions made by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, the International Center for Transitional Justice, the Reparations Expert Consultation at the Transitional

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[1934] See for instance, *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 647; *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012) para 185.

[1935] See for instance, *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 649 and 661; *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012) para 177 and 185. In the analyzed cases, the IACtHR referred to the Reparation Principles once. *The Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 284 (14 October 2014) para 54.

[1936] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 652. See furthermore, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012) para 186.

[1937] See for instance, *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 659; *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012) para 217 and 220.

[1938] This includes the UN Basic Principles, as these 'were adopted in a IHRL [international human rights law] context and primarily address states'. Juan-Pablo Pérez-Léon-Acevedo, 'Reparation Modalities at the Extraordinary Chambers in the Court of Cambodia (ECCC)' (2020) 19 The Law and Practice of International Courts and Tribunals 451, 454.

[1939] *Velásquez-Rodríguez v Honduras* (Judgement on Reparations and Costs) IACtHR Series C No 7 (21 July 1989) para 28. This case was not included in the analysis of the IACtHR as it did not cover mass atrocities.

Justice Institute in Belfast, and the Trust Fund for Victims (hereinafter TFV).[1940] The IACtHR was only mentioned as a court that ordered a combination of individual and collective reparations under similar circumstances.[1941] The IACtHR and the ECCC did not provide a definition of collective reparations, yet I distilled the meaning of collective reparations before these courts from their decisions.

The courts have agreed that collective harm is an important component of collective reparations. For the IACtHR and the ECCC, the suffering of collective harm required a collective approach to reparations. Whereas the ICC identified the collective harm that was recognized as such by the victims as a distinctive element of collective reparations.

However, the courts do not agree on the other components of collective reparations. The ICC considered collective reparations to be an open and broad concept that consists of different forms. The ICC distinguished two main categories of collective reparations; those consisting of collective benefits, and those benefitting collectivities. The first category is collective on the basis of the goods and services that are provided, or because of a collective method of distribution. The other two courts did not specify this category of collective reparations. Instead, the IACtHR and the ECCC underwrote the second category of measures which benefit a collective consisting of a community, a group of victims, or society at large. The ICC defined a community on the basis of pre-existing conditions, including location, religion and culture. In other words, a community is a group which already existed before the violations took place. For example. the IACtHR consistently awarded collective reparations to an indigenous community, a community that shares pre-existing characteristics, such as a shared identity, culture and/or religion.

The second collective beneficiary, a group of victims, is defined by the ICC as a group that suffered from the same violations and consequently suffered collective harm. Hence, reparations can be qualified as collective when these benefit a group identified by a shared victimization experience. Even though collective harm is a prerequisite for reparations to be considered collective, collective reparations in the ICC can simultaneously address individual harm. Similarly, the ECCC argued that collective reparations have to be available to 'victims as a collective', even when these simultaneously benefit individual members.[1942] In other words, the two criminal courts categorized reparations as collective when a group of individual victims was addressed.

[1940] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, T Ch II (24 March 2017) para 273-274. These submissions seldom referred to the IACtHR and its jurisprudence on collective reparations.

[1941] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, T Ch II (24 March 2017) para 283. The IACtHR was used for guidance on the standard of proof and evidence in the reparations phase, and on the determination of psychological harm.

[1942] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 658.

The legal frameworks of the courts clarify why the ICC and ECCC included a group of victims as a defining element for beneficiaries of collective reparations, and why the IACtHR did not. Since the international criminal courts can only order reparations against the convicted person, a causal relation between the harm and the conviction is required. Therefore, the reparations can only be awarded to a collective when every member can prove that it suffered from the crimes of which the offender was convicted. In contrast, the IACtHR can order reparations that address the harm of the violations. This demands a less strict and legalistic causal relation between the suffered harm and the violations. As such, the IACtHR was able to award collective reparations to indigenous communities without identifying its individual members. These communities either suffered from massacres that targeted the community or their collective right to land was violated, and thus include victims who suffered from the same violation. Yet, this shared victimization and harm is not the main binding factor of the group. Instead, they are identified on the basis of pre-existing characteristics, such as their indigenous culture and location. It can thus be argued that the two collectivities as distinguished by the ICC coincided before the IACtHR. The pre-existing community was the victim of the violations, whereby its members suffered both individual and collective harm.

Lastly, the ECCC linked the relation between collective harm and collective reparations to the 'reconciliatory function of reparations'. The ECCC quoted the Guatemalan truth commission, which stated that this reconciliatory function of reparations means that 'the entire population without distinction between victims and perpetrators' should benefit from the collective reparations.[1943] It thus defined collective reparations as measures that could benefit the society at large. The IACtHR ordered symbolic reparations with public scope and impact without explaining who is a member of the intended public. The specific symbolic measures indicated that this group is broader than the group of victims involved in the case before the IACtHR. Moreover, several reparation orders suggested that some of the ordered measures have repercussions for the society as a whole.[1944]

8.2.2 Ordering collective reparations

The comparative analysis of the definitions as used by the three courts demonstrates that the understanding of collective reparations is comparable. The courts all recognized the relation between collective harm and collective reparations, and all three perceived measures awarded to a collective as collective reparations. Nevertheless, the courts operate in different settings with different legal frameworks, which has influenced the application of the concept of collective reparations. This

[1943] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 660;
[1944] For instance, the IACtHR often ordered the State to publish the judgement in a newspaper with national circulation.

section examines how the courts apply collective reparations in their reparation orders, and how the legal context in which they operate influences this application. This section starts with a discussion of the categories of collective reparations as proposed by the UN Reparation Principles. It concludes with some remarks on the different applications of collective reparations and the possible explanations for these differences.

RESTITUTION

Even though the courts each made references to the *Factory at Chorzów* judgement and the accompanying conclusion that reparations should aim at *restitution in integrum,* the IACtHR is the only court that provided restitution.

As acknowledged by the courts, restitution is often unachievable to redress the harm that results from the mass atrocities. The ECCC not only lacks a mandate to award measures of restitution, its judgements are also confined to crimes for which restitution is impossible, such as murder, extermination, torture and genocide. Even though the ICC can order restitution measures, the Court's judgments are primarily restricted to crimes in which full restoration to the original situation is not possible. For example, the ICC included restitution in its list with appropriate reparations in two cases that focused on the conscription and use of child soldiers, despite its acknowledgement that restitution was impossible in these cases. Indeed, restitution was only ordered on paper in these cases. The restitution measures were not included in the Draft Implementation and Reparations Plans (hereinafter DRIP), nor did the ICC respond to the absence of restitution in the DRIP and the proposed reparation programs[1945] The case against *Al Mahdi* revolved around the destruction of religious buildings, a crime that can be repaired through restitution. However, these buildings had been rebuilt and restored prior to the reparation decision. Therefore, the restitution was no longer necessary.[1946]

The IACtHR is the only Court that ordered (collective) restitution. The explanation for this is twofold: the IACtHR has a mandate to order restitution and the analyzed decisions include human rights violations that can be restituted. Collective restitution was solely ordered in the cases that focused on the violation of the right to collective property,[1947] such as ancestral lands of indigenous people. The restitution of the land to the community corresponds with the communitarian tradition among

[1945] See chapter 4, sections 4.2 and 5 on restitution in the ICC.
[1946] *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, T Ch VIII (17 August 2017) para 63.
[1947] In case the violation of the right to property was of an individual nature, such as the destruction of houses, the Court did not order restitution. Instead, this violation was mostly repaired through compensation. See for instance, *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 390 (f) and (g); *Vereda la Esperanza v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 341 (31 August 2017) para 305.

indigenous peoples regarding the ownership of their ancestral land.[1948] The state had to identify the land and its perimeters, recognize the community's right to the land, and ensure that the community could enjoy this right. Collective restitution does not only address the violation of a collective right, it also aims to repair the collective harm that resulted from the violation. For instance, the IACtHR argued that the violation of an indigenous community's right to its ancestral land results, for instance, in involuntary expulsions and threats to the traditional way of living. The ordered measures of collective restitution aimed to address this collective harm.

In other words, the measures of collective restitution that were actually ordered by the IACtHR are in line with the general definition of collective reparations. These restitution measures addressed collective harm and the recipients were collectivities. In addition, the restitution ordered by the IACtHR also falls within the second category of collective reparations as distinguished by the ICC. For example, the title of the land is a collective good as it is returned to the community as a whole and individual members cannot claim a part of the land for themselves.

COMPENSATION

Since the legal framework of the ECCC has explicitly ruled out the option of monetary payments, the court did not order compensation. In contrast, the ACHR and the ICC's Rome Statute unequivocally include compensation as a method to remedy the violations. This is reflected in the analyzed case law of the two courts, in which compensation was ordered in all the cases that are included in the analyses of the IACtHR and ICC. In the majority of the cases, this consisted of individual compensation, yet both courts also ordered collective compensation.

Corresponding to its approach to collective restitution, the IACtHR only ordered collective compensation in cases involving the violation of the right to ancestral land. Not only does this consist of a violation of a collective right, it also causes collective harm to the community. The ordered measures of collective compensation aimed to restore the collective harm of the indigenous community. In the case of the *Sawgoyomaxa Indigenous Community v. Paraguay*, the community members suffered collective and individual harm. The poor living situation in the resettlement after its land rights were violated resulted in several deaths, causing individual harm to their relatives. Whereas the collective harm was addressed by collective compensation, the individual harm was compensated in an individual manner. [1949] Collective compensation was either transferred to the leaders of the indigenous community or a community fund was created. The money had to be spent on works of interest to the community, such as the opening of a local health center or school, the construction of

[1948] See for instance, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 79 (31 August 2001) para 149.

[1949] *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 226.

a sewage system, and the provision of electricity and drinking water. Hence, the collective compensation as ordered by the IACtHR both benefitted a collective and consisted of collective goods, since the individual members could demand a part of the amount for themselves.

In the cases against *Lubanga* and *Ntaganda*, the ICC listed compensation as one of the modalities it regarded to be appropriate to address the harm of the victims. The TFV is tasked to design the reparations program, and has to determine whether compensations should indeed be included and what an adequate amount would be. The Court limited its reparations order to collective reparations in the case against *Lubanga* and to collective reparations with individualized components in the case against *Ntaganda.* Consequently, the compensation in the two cases had to be of a collective nature. Almost seven years after the first reparations order in the *Lubanga* case, the ICC stated that money paid to individuals may still fall within the scope of collective reparations.[1950] In the *Ntaganda* case the ICC furthermore referred to the TFV's clarification, which provided that the payment of a standardized amount that takes the collective harm into account is a form of collective reparations.[1951] When compensation is a set amount for each group of victims, the amount is inherently symbolic and not based on the harm specific to each individual. Accordingly, the ICC qualified compensation as collective because it addresses shared harm and not the quantified harm of each individual. The mode of distribution is the differentiating factor. The reparation orders in the cases against *Katanga* and *Al Mahdi*, which were issued prior to the decisions that included these explanations, included similar (standardized) compensation measures. However, these were specified as an individual reparation. The definition of collective reparations in relation to compensation has evolved before the ICC, and not the actual ordered modality of compensation.

Even though the IACtHR and ICC both ordered collective compensation, the ramifications of these orders diverged. The IACtHR awarded compensation to indigenous communities whose collective right to land had been violated. The ordered modality of collective compensation conformed the indigenous peoples' communitarian tradition of land ownership, the violation of a collective right and the subsequent collective harm. However, the ICC has thus far not dealt with violations of collective rights. Instead, the offenders were convicted for crimes that violated individual rights in the first place and that caused primarily individual harm.[1952] The ICC requires a causal link between the harm that was addressed by the ordered reparation modality and the crimes for which the offender was convicted. Only the

[1950] *The Prosecutor v Thomas Lubanga Dylio* (Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable') ICC-01/04-01/06-3466-Red, A Ch (18 July 2019) para 40.

[1951] *The Prosecutor v Bosco Ntaganda* (Trust Fund for Victims' Final Observations on the reparations proceedings) ICC-01/04-02/06-2635-Red, TFV (18 December 2020) para 83.

[1952] For instance, in the *Ntaganda* case the harm suffered was extensively discussed and consisted essentially of individual harm. The only exception was the damage to the local health center, which resulted in a long-term reduced capacity. *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, T CH VI (8 March 2021) para 148-183.

victims of these crimes could directly benefit from the ordered reparations. The provision of a collective sum to the community as a whole may jeopardize the liability of the offender, because he could potentially pay for reparations that benefit people who are not victimized by the crimes he is convicted for. In other words, the difference between collective compensation before the IACtHR and ICC can be explained by their differing legal frameworks, including the incorporation of collective rights.

REHABILITATION

The analyzed case law of the courts offers a variety of ordered rehabilitation measures. The IACtHR and the ICC included individual as well as collective forms of rehabilitation, while the orders of the ECCC were confined to a collective form.

As was indicated in the previous discussion concerning collective restitution and compensation, the IACtHR can order collective reparations to communities that can be identified on the basis of pre-existing characteristics, most notably indigenous communities. This is reflected in the ordered collective rehabilitation measures, which are primarily present in cases involving indigenous peoples. The IACtHR ordered modalities that aimed to rehabilitate the community as a whole, for instance, the opening of community facilities such as a health clinic or a school, and the improvement of the local infrastructure, including roads, the supply of clean water, and power supply. The members of the community benefitted from these measures exactly because they were part of the victimized community, and not as an individual victim that could prove that his/her harm was a direct result of the violations.[1953] In most cases, these communities consisted of indigenous peoples whose collective right to their ancestral lands was violated, or who had been targeted for massacres. Additionally, some non-indigenous communities who survived massacres also received collective rehabilitation measures. In the case of the *massacres of El Mozote and Nearby Places v. El Salvador,* the IACtHR had ordered a development program for the community, a measure primarily awarded to indigenous communities.[1954] The IACtHR did not specify the reason for awarding this form of collective rehabilitation in this case and not in the other cases involving massacres in non-indigenous communities. The IACtHR acknowledged the collective harm of the community,[1955] yet this was also recognized in the case of the *Ituango massacres v. Colombia* where a similar program has been absent.[1956] Furthermore, states were occasionally ordered to guarantee the safe return of former inhabitants of the attacked villages, and to

[1953] In case the individual member of the indigenous community suffered individual harm, they were additionally compensated individually.
[1954] The IACtHR did not elaborate on its decision to make an exception for this non-indigenous community.
[1955] The massacres 'profoundly affected the community's social tissue'. *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 208.
[1956] *Ituango Massacres v Colombia* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) para 258.

establish housing programs in these communities. These reparations primarily addressed the individual harm caused by the violations.

It appears that the ICC made a distinction between the cases concerning the Democratic Republic of Congo (hereinafter the DRC) and the case set in Mali. This was reflected in the ordered rehabilitation measures. The Malian case of *Al Mahdi* dealt with the destruction of religious buildings that belonged to the community.[1957] The community as such was thus a direct victim. The community of Timbuktu can be identified on the basis of pre-existing characteristics as religion, culture and location. By contrast, the crimes committed in the DRC concern crimes against individuals who were killed, wounded, raped and abducted. These crimes were carried out on a large scale and caused mass victimization, which resulted in shared harm.[1958] The distinction of the two conflicts is reflected in the ordered collective rehabilitation measures. In the case of *Al Mahdi*, the ICC ordered the rehabilitation measures to the community of Timbuktu. Including community-based education on the cultural heritage of Timbuktu, programs to guarantee a safe return of people who fled Timbuktu, as well as measures to increase the community's ability to earn money.[1959] In the DRC cases, the ICC similarly ordered measures to improve the capacity to generate an income, yet these addressed the needs of the identified individual victims.[1960] In addition, the ICC ordered medical and psychological health care in the three DRC cases and qualified them as collective reparations. The treatment was only available to the victims who could prove that they suffered harm due to the crimes for which the offender is convicted. As the health care had to be provided in shared facilities and addressed both the individual and collective harm of the victims, these measures were regarded as collective reparations.

Since rehabilitation measures require funding and cooperation from third parties, the ECCC has only ordered these measures after its Internal Rules were amended. In both cases in *Case 002*, the ECCC endorsed several health care projects that combined individual treatment, which often involved group therapy forms, with an outreach component to create public awareness. Furthermore, in *Case 002/02* the ECCC ordered an education project consisting of legal and civic training for the ethnic Vietnamese victims. Even though some of these rehabilitation projects aimed to have repercussions for the broader society, the primary beneficiaries of these projects were the Civil Parties. In other words, a causal relation between the suffered harm and the

[1957] According to the ICC, the Timbuktu community, the Malian community, and even the international community were harmed by the destruction of the mausoleums. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171, T Ch VIII (27 September 2016) para 67.
[1958] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, T Ch VI (8 March 2021) para 111.
[1959] The income-generating measures explicitly targeted the community, the ordered measurers aimed to 'assist the population to generate income' and restore some of Timbuktu's lost economic activity'. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15-236, T Ch VIII (17 August 2017) para 83.
[1960] These measures 'allow the individual needs of the victims in question to be addressed'. *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, T Ch II (24 March 2017) para 303.

crimes for which the offenders were convicted was required to benefit directly from the rehabilitation reparations before the ECCC.

Accordingly, the rehabilitation measures that were ordered by the courts consisted of different forms of collective reparations; collective goods and services that were awarded to a collective, and goods and services that were distributed in a collective manner. The decisive factor in ordering a particular form of collective reparations consisted of the type of collective harm that had a causal relation with the proven violations. The collective goods and services were ordered in cases involving indigenous peoples or when collective goods had been demolished. The IACtHR ordered indivisible collective rehabilitation to indigenous communities who suffered collective harm due to violations. For example, when the massacres and lack of access to ancestral lands had led to the destruction of the indigenous culture.[1961] On the contrary, the ICC ordered indivisible collective rehabilitation to a community that suffered collective harm after buildings belonging to the community were destroyed. Hence, the collective harm of these communities was a direct result from the proven violations. The rehabilitation measures that were distributed in a collective manner, yet that benefitted individual beneficiaries, were ordered in cases where the proven violations primarily caused individual harm. The scale of the violations caused collective harm, yet this was subsidiary to the individual harm.

SATISFACTION

Satisfaction was the most ordered category of reparations; 45 of the 48 analyzed cases, including cases of all courts, incorporated satisfaction measures.[1962] Even though satisfaction measures principally address the harm suffered by direct victims of the violations, these additionally intend to benefit the wider community. Because increasing knowledge about the violent past is considered to contribute to the prevention of recurrence of violence, the courts ordered satisfaction measures that aimed to increase the awareness of the violations and subsequent suffering among the general population. Furthermore, the ICC argued that satisfaction measures that create awareness among society may also contribute to the reintegration of the former child soldiers in their communities. The ECCC added another benefit for society at large by claiming that satisfaction measures could advance national reconciliation.

In order to raise awareness of the mass atrocities and the subsequent suffering of the victims, the courts ordered measures such as commemorations, wide publication of the decisions, apologies, and acknowledgements of responsibility by the

[1961] An exception is the case of the *massacres of El Mozote,* this non-indigenous community was awarded a community developmental program, even though the beneficiaries solely consisted of individual victims. *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 306.

[1962] Only two early cases of the IACtHR and the *Katanga* case of the ICC did not include satisfaction in their reparation decisions.

responsible states. Commemoration activities, such as monuments, plaques with the names of the victims, and public ceremonies, were prevalent in the reparation orders of the courts. The ECCC included these modalities in all its cases, the ICC in three out of the four cases, and the IACtHR in 13 of the 41 cases.

In addition, the courts marked their own decisions as 'a form of reparation and satisfaction'.[1963] In 39 of the 41 cases, the IACtHR argued that a judgement of condemnation in itself constituted a reparation measure that addressed the non-material harm of the victims. The ICC stressed in two cases that the conviction, sentence, and reparations order were reparations per se.[1964] Both courts stated that their decisions were of significance to the victims as it addressed their harm, raised awareness about the facts of the case, and even helped to prevent future crimes. The ECCC claimed that the acknowledgement of a reparative measure as an appropriate reparation was 'in and of itself a form of reparation irrespective of its future implementation.[1965] The ECCC argued that such a statement may attract attention and consequently sponsors for these reparative projects.

Similarly, the courts furthermore considered the publication and wide circulation of the judgements as a reparative modality that may inform society about the violent past and consequently prevent similar events.[1966] This modality was primarily prevalent before the IACtHR, which ordered the state to publish the judgements in local and national newspapers, broadcast them through local radio stations, and include them in the websites of government agencies. The ICC mentioned the publication of decisions as a possible modality that it could introduce,[1967] while the ECCC only ordered the inclusion of the names of the Civil Parties in the judgement. The scarcity of measures relating to the publication before the ICC and ECCC can be explained by their outreach programs. Both criminal courts have outreach programs to inform the public about the Court and the trial proceedings in order to broaden the impact of the Court,[1968] making the order for the publication of the judgement redundant.

The reparative function of apologies and/or the acknowledgement of responsibility was recognized by all courts and consequently included in at least one

[1963] *Las Palmeras v Colombia* (Judgement on Reparations and Costs) IACtHR Series C No 96 (26 November 2002) para 74.
[1964] See for more information, Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 285-297.
[1965] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 691.
[1966] See for instance, *The Prosecutor v Thomas Lubanga Dylio* (Decision establishing the Principles and Procedures to be Applied to Reparations) ICC-01/04-01/06-2904, T Ch I (7 August 2012) para 238.
[1967] *The Prosecutor v Thomas Lubanga Dylio* (Annex to Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129-AnxA, A Ch (3 March 2015) para 67.
[1968] International Criminal Court, 'Integrated Strategy for External Relations, Public Information and Outreach' (*ICC*, 18 April 2007) <https://www.icc-cpi.int/sites/default/files/ICCPIDSWBOR0307070402_IS_En.pdf> accessed 5 July 2022; Extraordinary Chambers in the Courts of Cambodia, 'Public Affairs Section' (*ECCC*) <https://www.eccc.gov.kh/en/public-affairs-section> accessed 5 July 2022.

reparation order per analyzed court. The ICC included a few requirements for an apology: it has to be offered voluntarily and most importantly, the victims have to accept the apology. Since the victims did not accept the apologies that were offered, the delivering of an apology was not included in the actual reparation plans.[1969] The ECCC based its reparation order on the requests of the victims, which only included a request for the compilation and publication of statements of apology in *Case 001*. Consequently, an apology was only ordered in *Case 001*. *Case 002* lacked such requests and thus did not include measures consisting of apologies. In contrast to the international criminal courts, the IACtHR did not discuss whether the wrongful state was willing to apologize or accept its responsibility, nor whether the victims requested an apology or would accept these statements. Nevertheless, the IACtHR ordered a public acknowledgement of the State's responsibility for the violations in 60% of the analyzed cases and an apology in 10% of the cases.[1970]

In addition to the similar satisfaction measures that were ordered by all three courts, there are also satisfaction measures that were particular to specific courts. The IACtHR frequently ordered the state to investigate and prosecute the responsible persons, and to locate, exhume, identify and rebury the disappeared persons. These two satisfaction measures demand the state's involvement, and cannot be ordered against an individual offender.[1971] This type of satisfaction measures is beyond the scope of the ICC and ECCC. Furthermore, the IACtHR ruled that the impunity and the uncertainty about the events and the whereabouts of loved ones consisted of a violation of the right to humane treatment.[1972] Impunity is a human rights violation that has to be addressed before the IACtHR, while this issue is outside the jurisdiction of the ICC and ECCC. In contrast, the ICC and ECCC are in themselves the result of the fight against impunity.

In the two cases that considered the subscription and use of child soldiers, the ICC ordered several satisfaction measures that aimed to destigmatize the former child soldiers, reconcile them with their community and reintegrate them in their families and communities. The two other courts did not order similar measures, a possible explanation is that the IACtHR and ECCC did not award reparations to this particular group of victims. Even though all courts ordered satisfaction measures to raise awareness among the general public, the ECCC endorsed projects that targeted the Cambodian youth. Through the regular educational curriculum, intergenerational dialogue, art projects, digital media, and exhibitions, the youth of Cambodia has been educated on the Khmer Rouge regime, its victims and their suffering in order to prevent

[1969] See chapter 5, section 5.2 on satisfaction.
[1970] See chapter 4, section 5 on satisfaction.
[1971] An individual offender may be valuable in locating the whereabouts of the missing persons, yet he/she cannot carry out the entire process of locating, exhuming, identifying and reburying the disappeared persons.
[1972] See for instance, *Favela Nova Brasilia v Brazil* (Judgement on Preliminary objection, Merits, Reparations, and Costs) IACtHR Series C No 333 (16 February 2017) para 269-274.

future conflicts.[1973] This explicit focus on the younger generations is particular for the ECCC; the IACtHR and ICC mostly targeted the community or society as a whole.

Satisfaction measures are inherently collective due to their symbolic nature. Even when the reparative modality is awarded to the victims identified in the court proceedings, the benefits cannot solely be appropriated to the recognized beneficiaries. Unidentified victims, victims of the same conflict and other persons may also benefit from symbolic measures such as the publication of the judgement, a public ceremony where the state acknowledges its responsibility, and truth finding. In other words, the satisfaction measures ordered by the courts amount to collective reparations, because these include collective goods that benefit collectivities. Even though the satisfaction measures are primarily ordered to a consolidated group of direct victims, the courts acknowledged the repercussions for the broader community or society; it is one of the reasons to order satisfaction.

GUARANTEES OF NON-REPETITION

Whereas the IACtHR frequently ordered the wrongful state to make systematic changes to its laws and institutions, especially the law enforcement agencies, the ICC and ECCC rarely ordered guarantees of non-repetition. The ECCC labeled some of the reparations it endorsed as guarantees of non-repetition, yet these consisted of satisfaction measures geared towards educating the general public and subsequently preventing the recurrence of crimes.[1974] In other words, the ECCC did not include guarantees of non-repetition as defined in the UN Reparation Principles.[1975] The ICC only ordered guarantees of non-repetition in the *Al Mahdi* case, which were restricted to the prevention of identical crimes as the ones of which Al Mahdi was convicted. In other words, the religious buildings that were previously demolished have to be protected against a future attack. Hence, the scope of ordered guarantees of non-repetition is broader before the IACtHR than before the ICC.

The discrepancy between the guarantees of non-repetition before the IACtHR and ICC can be attributed to the differences between the legal systems underlying both courts. As a human rights court, the IACtHR orders reparations against the wrongful state, while as a criminal court the ICC orders them against the offender. According to the UN Reparation Principles, guarantees of non-repetition primarily include improvements to the national laws and governmental institutions; changes that can only be made by the state, and not by individual persons nor third parties.[1976] The range of available guarantees of non-repetition measures is consequently wider

[1973] See chapter 6, section 5 on satisfaction.
[1974] See chapter 6, section 5 on satisfaction.
[1975] UNGA 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (16 December 2005) UN Doc A/RES/60/147 (Reparation Principles).
[1976] See for instance, Frédéric Mégret, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparations' (2009) 16 International Review of Victimology 127, 135.

before the IACtHR. Furthermore, the strict causal relation between the harm and the crimes for which the offender is convicted, as is required before the ICC and ECCC, hinders these courts' capacity to order reparations that exceed the case at hand. Since, guarantees of non-repetition 'typically go beyond the individual case at hand' and aim to prevent similar violations from happening,[1977] the requirement of a causal relation hampers the provision of such measures.

Similar to satisfaction, guarantees of non-repetition are inherently collective. These measures consist of collective services that are indivisible and that are ordered to a group. The beneficiaries of guarantees of non-repetition include the members of the society as a whole, even including future generations.

Different applications of reparations

Whereas courts have a comparable understanding of collective reparations, they apply the concept differently. The overview provided in this chapter shows the variety in the ordered collective reparations, consisting of a range of measures that involved different types of collective reparations. My analysis indicates that the scope of collective reparations before the IACtHR is much broader than before the ICC and ECCC. As can be seen in table 8.1, material collective reparations consisting of collective goods and services were primarily ordered before the IACtHR. The ICC only awarded collective goods and services to the Timbuktu community as rehabilitation measures in the *Al Mahdi* case. Furthermore, the majority of guarantees of non-repetition were ordered by the IACtHR. The only guarantee of non-repetition that was ordered by another court were the measures to protect the religious buildings in the *Al Mahdi* case; a narrow measure in comparison to the measures before the IACtHR that related to changes to the national laws and institutions. The ECCC had the narrowest application of the concept of collective reparations and only included satisfaction and several rehabilitation measures.

[1977] Illias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press, 2016) 631.

Table 8.1: Ordered collective reparations

	Material reparations						**Symbolic reparations**	
	Restitution		Compensation		Rehabilitation		Satisfaction	Guarantees of non-repetition
	Goods	Distribution	Goods	Distribution	Goods	Distribution	Collective goods	Collective goods
IACtHR								
ICC								
ECCC								

Frequently ordered	Rarely ordered

The variation in applying collective reparations primarily arose from the different contexts in which the courts operate, most notably the distinctive legal frameworks. The divergence between human rights courts and international criminal courts is most striking. As a human rights court, the IACtHR orders reparations against a state. Consequently, the IACtHR has more options of collective reparation measures at its disposal; reparative measures that require the involvement of the state can be ordered, and states have more resources than individual offenders.[1978] Furthermore, the IACtHR investigates and addresses human rights violations, which may include a wider variety of offences than the international crimes before the criminal courts. As a result, the IACtHR has to address types of harm that are additional to the harm addressed in criminal courts. Contrary to the ICC and ECCC, the IACtHR has the jurisdiction to rule on the violation of collective land rights of indigenous peoples,[1979] and consequently may address collective harm. The wide range of collective reparations ordered by the IACtHR was connected to the cases concerning indigenous lands and collective material reparations were chiefly ordered in these cases. The IACtHR was responsive to the collective harm of indigenous peoples, both in cases considering ancestral lands and massacres. Instead, the collective material reparations ordered in non-indigenous cases are rather similar to those ordered by the ICC.

Furthermore, in several analyzed cases, the IACtHR ruled that the next of kin of the murdered or disappeared victims were also direct victims whose harm needed to be addressed. Their right to humane treatment, as well as the right to a fair trial and

[1978] This is not the only clarifying characteristic. The European Court of Human Rights is also a human rights court that orders reparations against a state, yet this court has a narrow understanding of reparations.
[1979] American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) article 21.

judicial protection were violated because of the death of their loved ones, the uncertainty about the whereabouts of their family members, and the prolonged situation of impunity.[1980] In order to address this harm, the IACtHR frequently ordered the state to investigate and prosecute the responsible persons and to search and identify the whereabouts of the disappeared persons.[1981]

The model of reparations of the ICC and ECCC is rooted in the individual criminal responsibility of the convicted person. Therefore, the reparations are intrinsically linked to the conviction of an individual person.[1982] In the ICC, the convicted person is held liable for the reparations, even when he/she is declared indigent,[1983] while the offender before the ECCC is only liable for the reparations that are ordered against him (the first avenue of reparations). The second avenue of reparations, the externally funded reparations, are not ordered against the offender and these are not borne by him. [1984] Because an individual offender can only be held accountable for the harm that resulted from the crimes for which he/she was convicted, only victims that suffered harm that is causally connected to the crimes included in the guilty verdict may qualify as beneficiaries. Collective reparations can thus only be awarded to a collective that is composed of individual victims who could each prove that they suffered harm due to the crimes for which the offender was convicted.[1985] The collective reparations available to the criminal courts is therefore limited in comparison to those available to the IACtHR. The latter may order measures that are accessible to all members of the community notwithstanding their status as victim.[1986] In addition, the focus of the ICC and ECCC on the responsibility of a handful of individual perpetrators overlooks the fact that international crimes are inherently committed by a net of perpetrators. In addition, these crimes can only take place in a complicit state, either directly through active participation or indirectly through the failure to protect the citizens.[1987] The two

[1980] See for instance, *Pueblo Bello Massacre v Colombia* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 140 (31 January 2006) para 154-162 and 212.
[1981] Hence, the reason that these two measures were prevalent before the IACtHR and absent before the ICC and ECCC is twofold; these two measures address harm of violations that were only present in the IACtHR, and these consisted of measures that require the involvement of the state.
[1982] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, A Ch (3 March 2015) para 65.
[1983] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, T Ch VI (8 March 2021) para 97.
[1984] ECCC Internal Rules (rev. 9) (as revised on 16 January 2015) (ECCC IR9) rule 23 *quinquies* (3) (a).
[1985] In the case of *Al Mahdi,* the ICC ordered rehabilitation measures to the community of Timbuktu. For these reparative measures, the individual inhabitants of Timbuktu did not have to prove their harm, instead the Court concluded that the community as a whole suffered harm because the demolished 'buildings belonged to entire community of Timbuktu'. *The Prosecutor v Ahmad Al Faqi Al* Mahdi (Judgement and Sentence) ICC-01/12-01/15-171, T Ch VIII (27 September 2016) para 67.
[1986] For instance, the opening of a health center of school in a village that are open to all members of the community and not only to the victims.
[1987] See for instance, Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 186; Tapia Navarro, 'Collective Reparations and the Limitations of International Criminal Justice to Respond to Mass Atrocity' (2018) 18 International Criminal Law Review 67, 96; Owiso Owiso, 'The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process' (2019) 19 International Criminal Law Review 505, 525.

international courts can consequently only order reparations for a fraction of the crimes committed, harm suffered and number of victims.

Even though the ICC and ECCC both ordered reparations against a convicted person who was liable for these reparations, the courts responded differently to the indigency of the offenders. The ICC ordered reparations against the indigent offenders, and additionally through the TFV.[1988] Neither the indigence of the convicted person nor the limited funds of the TFV influenced the scope of the liability. Instead, the sum for which the convicted persons was liable was based on the harm that the crimes caused and the money needed to repair this harm.[1989] The ECCC lacks a mechanism comparable to the TFV that can fund the reparations.[1990] Furthermore, the ECCC used a narrow interpretation of its already restricted reparative mandate of the Court,[1991] claiming that it lacked jurisdiction to order reparations that require the involvement of the Cambodian government. Renée Jeffery dismissed this claim by arguing that the mandate limits the 'powers of enforcement, not engagement' and consequently, the ECCC may request the government to undertake actions.[1992] The alleged lack of independence of the Court from the Cambodian government may have influenced this restrictive approach of the ECCC.[1993] Additionally, the ECCC argued that it was committed to only order reparations that could realistically be implemented.[1994] Even though, the amendment of the Internal Rules and the inclusion of externally funded measures expanded the scope of reparations available to the ECCC, the indigency of the convicted person has limited the available reparations before the ECCC.

[1988] *The Prosecutor v Thomas Lubanga Dylio* (Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012) ICC-01/04-01/06-3129, A Ch (3 March 2015) para 70-76.
[1989] *The Prosecutor v Bosco Ntaganda* (Reparations Order) ICC-01/04-02/06-2659, T Ch VI (8 March 2021) para 97-98.
[1990] The amendment of the ECCC's Internal Rules in 2010 adjusted the tasks of the VSS, making it more similar to the TFV. Similar to the TFV, the VSS was made responsible for the design and implementation of externally financed reparations (the TFV's reparations mandate), and it could implement non-judiciary measures (the TFV's assistance mandate). Nevertheless, the VSS lacked sufficient funding and human resources in order to operate in the same manner as the TFV. Jeudy Oeung, 'Expectations, Challenges and Opportunities of the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016) 111.
[1991] See for instance, Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 175.
[1992] Renée Jeffery, 'Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal' (2014) 13 Journal of Human Rights 103, 115.
[1993] See chapter 6, section 1.2 on the judiciary.
[1994] *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 663-668.

8.2.3 DEVELOPING COLLECTIVE REPARATIONS

The differences in the legal backgrounds of the courts resulted in distinctive developments of collective reparations. This was reflected in the scope of ordered measures of collective reparations, as well as in the court's instructions on the design and implementation of these reparations.

The case law of the IACtHR that is included in the analysis covers almost three decades, roughly two decades more than the two criminal courts. During this time, the IACtHR has broadened the scope of awarded measures, yet the changes to the concept were relatively small.[1995] My analysis does not show a significant transformation of the ordered symbolic reparations, instead most categories of satisfaction and guarantees of non-repetition were ordered by 2007. In addition, the ordered collective material reparations did not expand considerably after the first case that deals with indigenous land rights. All cases that considered the violation of collective land rights feature comparable measures of collective restitution, rehabilitation and compensation. The IACtHR has made some adjustments to the design of the latter category. For instance, the collective compensation that was ordered before 2012 was often allocated to the leaders of the indigenous community, while after 2015 the compensation was primarily directed to a community developmental fund. Except for the case of the *Xucuru Indigenous Peoples and its Members v. Brazil*, the IACtHR determined the areas that have to be developed with the funds, and the state has to be involved in the implementation.[1996]

The IACtHR enhanced the development of the role of victims before the court, which has affected the details of the ordered collective reparations. The IACtHR changed its rules of procedure a few times to expand the role of the lawyers representing the victims at the expense of the Commission's representation tasks. This has led to a wider variety of specific measures that were ordered, such as the provision of a fully equipped ambulance or the setting up of latrines, as these were ordered after the representatives of the victims have requested them.[1997] In addition, the IACtHR changed its approach towards indigenous peoples, from an individual approach that required all members of the community to be individually identified, to a collective approach that permits the court to award reparations to the community as a whole.

In comparison to the IACtHR, the ICC and ECCC have more restrictive legal frameworks regarding reparations, which reduce their reparative potential. Nevertheless, both criminal courts try to overcome their limitations within the legal possibilities they have. The reparative mandate of the ECCC is the most restrictive;

[1995] See chapter 4, section 7.1 on the development of collective reparations.
[1996] See chapter 4, section 5 on collective compensation.
[1997] See for instance, *Río Negro Massacres v Guatemala* (Judgement on Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 250 (4 September 2012) para 281 and 284; *Sawhoyamaxa Indigenous Community v Paraguay* (Judgement on Merits, Reparations and Costs) IACtHR Series C No 146 (29 March 2006) para 201 and 230.

the Court can only order collective and moral reparations against the offender. Because Duch was declared indigent, the scope of ordered reparations in *Case 001* was seriously restricted. Therefore, the ECCC amended the Internal Rules and added the option of externally funded reparations. This new avenue of reparations has resulted in a rise in the number of endorsed reparations. However, the reparative potential of these endorsed externally funded reparations was reduced due to the disconnection between the reparations and the responsibility of the offender. Since the reparations can either be ordered against the offender or be financed by external sponsors, the offender is not held liable for the reparations that are not ordered against him/her. In fact, the causal relation between the harm addressed by the reparations and the crimes for which the offender is convicted is no longer required for externally funded reparations. The ECCC endorsed these reparative projects after the guilty verdict was issued. In *Case 002*, most projects had already commenced or even finished at the time of the endorsement. The ECCCs understanding of the concept of collective reparations has not changed with the amendment of the Internal Rules. Reparations similar to the ones that were ordered in *Case 002* had been accepted as appropriate measures in *Case 001*. Yet these had been dismissed thereafter due to Duch's indigence and the ECCC's inability to award reparations that impose obligations on the State of Cambodia or other third parties.[1998]

In contrast, the ICC has not amended the provisions underlying its reparative mandate, nor did it order markedly different reparations. Instead, the ICC's development of collective reparations has primarily taken place on a semantic level. Its understanding of collective reparations has broadened and consequently measures that were previously qualified as individual reparations have later been understood to be collective.[1999] Initially, the main distinction between collective and individual reparations related to the harm and the beneficiaries. As such, collective reparations addressed both collective and individual harm, and the measures were awarded to a collective. In its fourth case, the case against *Ntaganda*, the ICC added the collective nature of the implementation process as differentiating element. A collective mode of distribution and the role of victims in the implementation process was decisive in labelling reparations as collective. Hence, when the ICC's reparation orders developed from only collective to a combination of individual and collective, and finally to individualized collective reparations, the awarded reparative measures did not alter accordingly; only the label changed. My analysis indicates that the ICC has broadened its definition of collective reparations to bring its ordered reparations in line with the TFV's recommendations to prioritize collective reparations.[2000]

[1998] See for instance, *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 683-684.
[1999] See chapter 5, section 8.1 on the development of collective reparations.
[2000] See chapter 5, section 8.2 on the interplay between the ICC and TFV.

8.2.4 STRETCHING THE CONCEPT OF COLLECTIVE REPARATIONS TOO FAR?

Whereas the IACtHR had only made slight adjustments to its reparative framework and minimal changes in its application of collective reparations, the concept of collective reparations has undergone a more profound transformation before the criminal courts. The ECCC fundamentally altered its legal framework, while the ICC adjusted its definition of collective reparations. It is open to discussion whether the concept was not stretched too far by the international criminal courts.

Initially, the collective reparations ordered by the ICC addressed collective harm and benefitted a collective. Due to the required link between the harm suffered and the crimes for which the offender was convicted, this collective was solely made up of victims who met the stringent criteria for beneficiaries.[2001] Consequently, the collective reparations targeted only individual members of a pre-existing community, which diminished the collective nature of the reparations.[2002] The ICC reduced the collective nature of the collective reparations even further as it solely ordered individualized collective reparations in its last reparations order. In addition, the distinction between individual and collective reparations has shifted from aspects related to its content to procedural aspects. The mode of distribution of the reparations and the role of victims in the design and implementation phase has become decisive. This makes the distinction between individual and collective reparations ambiguous and fluid; measures that were characterized as individual reparations were qualified as collective reparations in a succeeding case. Thus, these material reparations are merely collective in name.

Similar to the ICC, the ECCC has outsourced the funding and implementation of reparations to third parties after it opened the second avenue of reparations. However, contrary to the ICC, the ECCC disconnected the externally funded reparations from the offender's responsibility and liability. This demonstrates a narrow understanding of reparations,[2003] and undermines the corrective nature of the reparations.[2004] It furthermore restricts 'the symbolic value of ordering reparations against a convicted person'.[2005] Instead, the ECCC used its retrospective 'stamp of approval' to differentiate the projects as reparations. This is a controversial

[2001] The case of *Al Mahdi* was an exception to this rule. The ICC ordered rehabilitation measures to the community of Timbuktu, since the community suffered as a whole. *The Prosecutor v Ahmad Al Faqi Al* Mahdi (Judgement and Sentence) ICC-01/12-01/15-171, T Ch VIII (27 September 2016) para 67.
[2002] Owiso Owiso, 'The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process' (2019) 19 International Criminal Law Review 505, 523 and 524.
[2003] See for instance, Rachel Killean, 'Pursuing Retributive and Reparative Justice within Cambodia' in Luke Moffett and Cheryl Lawther (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017) 484; Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020) 181.
[2004] See chapter 6, section 8.3 on corrective and distributive justice.
[2005] This was one of the main critiques of the Civil Party lawyers and NGOs active before the ECCC of the Court's second avenue of reparations. Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 238.

interpretation of the concept of reparations, because these endorsed projects are only reparations in name.

8.2.5 BLURRING THE LINE BETWEEN COLLECTIVE REPARATIONS AND ASSISTANCE

An ongoing scholarly debate about the relation between (collective) reparations and assistance takes place. It is argued that there are many linkages between the two fields and that these may overlap.[2006] As a consequence, the line between reparations and assistance may be blurred. From a legal perspective, this is problematic as reparations and assistance have different objectives. Victims have a legal entitlement to receive reparations for the harm suffered from the wrongful party.[2007] Reparations aim to address the harm suffered by victims, and include a declaratory function, in which the responsibility for the wrongdoing as well as victimhood are recognized.[2008] Assistance, on the other hand, often aims to satisfy basic and urgent needs of citizens, and is provided because of a general state obligation to provide basic services to all its citizens.[2009] Several scholars argue that assistance has a lower reparative capacity than reparations, because people receive goods and services as citizens, and not as victims with a right to reparation.[2010]

In order to assess how the approach and development of collective reparations relate to assistance, Aristotle's theory on particular justice and Peter Dixon's framework are used. Both schemes provide tools for the evaluation of the collective reparations. Aristotle's theory supports the identification of corrective and distributive

[2006] See for instance, Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 186-192; 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* (Social Science Research Council 2009) 171-207; Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 88-107; Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

[2007] See for instance, 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* (Social Science Research Council 2009) 172.

[2008] See for instance, Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114; Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

[2009] See for instance, Sanne Weber, 'Trapped Between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39 Bulletin of Latin American Research 5, 6.

[2010] See for instance, Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 114; 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 Nijhoff 2009) 91; Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

elements in collective reparations, considering that reparations follow corrective justice, while distributive justice comes closer to assistance. Additionally, Peter Dixon discerned five elements that distinguish reparations from assistance: responsibility, recognition, process, form and impact.[2011] These five prepositions are used to evaluate whether the collective reparations are reparations in name only.

My analysis demonstrates that each court has slightly shifted on the scale based on Aristotle's theory on particular justice: a shift from a reparative approach that is rooted in corrective justice towards the inclusion of several elements of distributive justice. The courts declared that, when possible, the starting point of reparation should be *restitution in integrum*, the materialization of corrective justice. In addition, most ordered reparations were backward-looking and aimed to address the harm that was caused by the violations. The courts additionally ordered reparations that went beyond purely corrective justice. As such, a shift towards distributive justice, as these were forward-looking and aimed to prevent the repetition of (similar) violations, has been made. Furthermore, the IACtHR and ICC included elements of transformative reparations, which addressed the harm of the victims, but also the structural inequalities that contributed to the conflict.[2012] In several cases involving indigenous peoples, the IACtHR ordered reparations that aimed to improve the marginalized position of these communities. These measures do not intend to bring the victims back to the situation as it existed before the violations took place, but to create a better situation. The ICC included transformative reparations in the reparation principles in the *Ntaganda* case, which primarily related to the transformative purpose of the reparation procedure, including the design and implementation, and not to substantive reparations.

Furthermore, my analysis shows that the concept of collective reparations was not only stretched too far by the changes the two criminal courts made to their legal frameworks and used definitions, the reparation orders blurred the line between reparations and assistance. The collective reparations before the ICC and ECCC are remarkably similar to assistance. On a theoretical level, the collective reparations can be distinguished from assistance by the elements of responsibility and recognition. The ICC and ECCC, though the latter only in its first case, ordered the reparations against the convicted person, underlining his responsibility for the crimes. In addition, the reparations have served as a public recognition of victimhood and the suffering of victims. These court-ordered reparations were consequently only provided to the victims.[2013] The amendment of the ECCC's Internal Rules has blurred the distinction

[2011] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 95-102.
[2012] See for instance, Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625, 639; Brianne McGonigle Leyh and Julie Fraser, 'Transformative Reparations: Changing the Game or More of the Same?' (2019) 8 Cambridge International Law Journal 39, 43.
[2013] According to Pablo De Greiff, reparations are awarded to the victims and assistance is available to all the members of a community, notwithstanding their victim status. Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 470.

between reparations and assistance even further, because the convicted person is no longer held responsible for the reparations. The reparations before the ECCC can thus only be distinguished from assistance on the basis of the element of recognition, albeit merely consisting of a general and collective acknowledgement of suffering. However, the projects that the ECCC endorsed were already operative or had even finished at the time of endorsement and many victims have participated in reparative projects at a time that these were not yet characterized as reparations. Consequently, these projects lacked a symbolic value of recognition at the time the victims participated.[2014]

Though a distinction can be made on a legal level, several of the ordered reparations of all courts are rather similar to assistance in practice.[2015] For example, the reparations ordered by the ICC are funded and developed by the TFV, and are similar to the projects under its assistance mandate. In addition, projects under both mandates of the TFV are realized by the same implementing partners, in the same locations, and in a similar form.[2016] The reparative projects endorsed by the ECCC in *Case 002* were also funded and implemented by donors and NGOs that were similarly involved in assistance projects. Furthermore, both courts did not directly involve the victims in the process of designing and implementing the reparations. The ICC consulted with the victims through the (common) legal representative for victims, and the ECCC used NGOs to consult the victims. The TFV directly consulted victims when developing the reparation projects, yet it did the same for assistance projects. Hence, Peter Dixon's element of process that incorporates the inclusion of victims in the reparations process does not distinguish the courts' reparations from assistance. Furthermore, Peter Dixon suggested that reparations may have a stronger impact on the victims than assistance.[2017] Several scholars argued that reparations have an exclusive symbolic component, primarily relating to its connection to the responsibility of the offender and the recognition of suffering.[2018] However, the negligible difference between reparative and assistance projects in practice is likely to diminish the difference in impact. In case victims are unaware that they participated in a reparations project and not in an assistance project, or when the associated recognition of suffering and the responsibility of the offender is not clear to the victims, it is

[2014] Rachel Killean and Luke Moffett, What's in a Name? 'Reparations' at the Extraordinary Chambers in the Court of Cambodia' (2020) Queen's University Belfast Law Research Paper No 2022-10, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603179#> accessed 22 August 2022, 14.
[2015] See chapter 5, section 8.3 and chapter 6, section 8.2 on collective reparations vs. assistance.
[2016] In the *Ntaganda case*, the ICC ordered priority access to projects that were operative under the TFV's assistance mandate. *The Prosecutor v Bosco Ntaganda* (Annex A to Public Lesser Redacted Version of "Initial Draft Implementation Plan with Focus on Priority Victims" ("Initial Implementation Plan" or "IIP") ICC-01/04-02/06-2676-AnxA-Corr-Red2, TFV (8 June 2021) para 39.
[2017] Peter Dixon acknowledges that there is a lack of empirical evidence to distinguish the impact of reparations from the impact of assistance. Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 101.
[2018] Brandon Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 565-667; 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* (Martinus Nijhoff 2009) 56-66.

reasonable that the (symbolic) impact of reparations is similar to that of assistance projects.

The collective reparations before the IACtHR that consist of community development, either through a funds or a program, are similar to the state's general obligation to fulfill the economic, social and cultural rights of citizens.[2019] Community development covers similar services to the ones that fall under the state's general obligation, such as the provision or improvement of education, health care, and infrastructure. Nevertheless, the community development ordered by the IACtHR can be distinguished from the state's general obligation as it includes an acknowledgement of the state's responsibility for the violations and a recognition of the victims' suffering. Furthermore, when the community development was ordered through the establishment of a fund, the victims were involved in the design and implementation of the development projects. Hence, on a theoretical level there is a clear difference between the community development ordered by the IACtHR and the state's obligation to assist marginalized communities. In practice, the developmental projects were similar in content and both were funded and implemented by the state. It may be difficult for victims to know the source of the benefits they received. For instance, do they know whether the state opened a school in the community because it was ordered to repair the harm of the victimized community, or because it was required to do so under its general obligation? Whether the impact of community development as reparations is more significant to the victims than community development delivered as fulfillment of the state's general obligations depends on the awareness of victims as to the basis of these measures.

8.3 Collective reparations before truth commissions

The research included in this dissertation goes beyond the development of collective reparations before three international courts, as it also includes an analysis of the reports of 15 truth commission. These consist of a wide range of truth commissions that vary, amongst others, in their mandates, the period of operation, and the violations and time periods that were under inquiry.[2020] Though both mechanisms operate in the aftermath of a violent conflict or oppressive rule, the courts and truth commissions are distinct institutions with contrasting objectives, mandates, and underlying frameworks.[2021] As quasi-legal institutions, the truth commissions have more leeway in recommending reparations. Compared to the courts, the truth commissions have a broader mandate with regard to the inquired period, violations, crimes, and persons. Consequently, the recommendations are not restricted to the harm caused by specific

[2019] See chapter 4, section 7.2 on reparations vs. general obligation of the State.
[2020] See chapter 7, section 3 for an extensive description of the 15 analyzed commissions.
[2021] According to Pablo De Greiff, the Courts and truth commissions relate to two different contexts; a juridical and a non- or quasi-juridical setting. Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *Handbook of Reparations* (Oxford University Press 2006) 452-459.

violations and crimes. Instead, the recommendations, including reparations, have to redress the harm caused during a longer period, in a larger area, and as a result of a larger range of crimes. Furthermore, the truth commissions are not bound by rules regarding the protection of the suspect regarding the liability for the awarded reparations. The causal link between the harm of the victims and the crimes for which the state or other actors are held responsible is not required. The commissions could thus order reparative measures that are not available to the courts. For instance, the Liberian Commission recommended that primary, secondary and specific tertiary education free of charge should be available to all children in Liberia.[2022] Additionally, the commission's recommendations were non-binding, and therefore dependent on the state's willingness to comply with the recommendations.

Despite their differences, the analyzed courts and truth commissions influenced each other's understanding and approach to collective reparations. The ICC and ECCC made references to the commissions of South Africa and Guatemala in relation to collective reparations, [2023] and several truth commissions mentioned the jurisprudence of the IACtHR and the ICC.[2024] In addition, several organizations that were involved in the establishment and operation of various truth commissions, were also active in at least one of the courts. [2025] Lastly, the courts and commissions occasionally based their rulings on overlapping sources, including human rights treaties, [2026] the *Factory at Chorzów* judgement, [2027] and the UN Reparation Principles.[2028]

[2022] Truth and Reconciliation Commission of Liberia, 'Final Report of the Truth and Reconciliation Commission of Liberia. Volume II: Consolidated Final Report' (29 June 2009) 277.
[2023] *The Prosecutor v Germain Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07-3728, T Ch II (24 March 2017) para 284; *Prosecutor v Kaing Guek Eav (Duch)* (Appeal Judgement) 001/18-07-2007-ECCC/SC-F28, S C Ch (3 February 2012) para 660. The IACtHR also referred to truth commissions, yet this was done in relation to the establishment of the facts of the case. See for instance, *La Cantuta v Peru* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 162 (29 November 2006) para 86-88; *Massacres of El Mozote and Nearby Places v El Salvador* (Judgement on Merits, Reparations, and Costs) IACtHR Series C No 252 (25 October 2012) para 66-87.
[2024] See for instance, Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 19-20.
[2025] For instance, the UN was involved in the establishment of a few truth commissions and of the ECCC. The ICTJ, a highly influential NGO, was active in several commissions and in the ICC. See, Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 218-219. See chapter 7.3.6 on how international actors influenced several truth commissions.
[2026] Such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See for instance, Human Rights Violations Investigation Commission (Oputa Panel, Nigeria), 'The Human Rights Violations Investigation Commission Report. Volume 6' (May 2002) 17.
[2027] Sierra Leone Truth & Reconciliation Commission, 'Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission. Volume 2' (5 October 2004) 230.
[2028] See for instance, Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor. Part 11: Recommendations' (31 October 2005) 36; Truth, Justice, and Reconciliation Commission (Kenya), 'Report of the Truth, Justice, and Reconciliation Commission. Volume IV' (3 May 2013) 99.

There is no consolidated definition nor a universal application of collective reparations before the analyzed truth commissions. In addition, not all commissions defined collective reparations or clearly distinguished reparations from general recommendations. Nevertheless, there are several parallels that can be drawn between the collective reparations before the truth commissions and the three courts.

DEFINING COLLECTIVE REPARATIONS

Similar to the courts, most truth commissions understood collective reparations as measures that address collective harm and that are bestowed upon collectivities. These collectivities include groups of victims that are bound by their victimizing experience, communities that existed prior to the violations (these are primarily linked to a specific geographic area), and society at large. Hence, the truth commissions recognized the same collectivities as beneficiaries as the courts. Whereas, the ICC added the condition of collective distribution, the truth commission did not adopt this particular definition of collective reparations.

ORDERING COLLECTIVE REPARATIONS

12 of the 15 analyzed truth commissions recommended reparations that were framed as such and that were distinguished from 'general recommendations'. Measures from each of the five categories as developed in the UN Reparation Principles were included in at least one truth commission report. The recommendations were spread across these categories in the same way as before the courts. The categories that were prevalent before the courts (collective rehabilitation and satisfaction) were also often recommended by the commissions, while the categories that were predominantly laid down by the IACtHR (collective restitution, compensation and guarantees of non-repetition) were rarely recommended by the commissions.

Collective restitution and compensation were only recommended by two truth commissions, those of Guatemala and Kenya. Similar to the IACtHR, these forms of material reparations were only recommended in relation to indigenous peoples.[2029] Contrary to the criminal Courts, the IACtHR and the truth commissions can order or request guarantees of non-repetition. The IACtHR regularly ordered guarantees of non-repetition, while the truth commissions rarely recommended this category under the heading of reparations. Instead, a wide variety of similar measures has been put forward as 'general recommendations'; measures of this category were thus mostly not framed as reparations.

[2029] The commissions of Nigeria and Liberia also included indigenous peoples, yet these commissions did not order collective restitution or compensation.

The truth commissions recommended a wider variety of measures of collective rehabilitation than the courts had. These consist of measures that benefitted the inhabitants of the areas that were most severely impacted during the conflict or oppressive rule, or to a specific group within the general population of the State, for instance, children and semi-illiterate persons. Hence, the recommended measures did not make an intra-community distinction where only the members of the community that could prove that they had been directly harmed by the crimes could be a beneficiary. In case a specific group within the community or society was targeted, the distinction was made based on the needs of that group, for instance the need for education. Like the IACtHR, several truth commissions recommended community development in the form of development programs or funds, the enforcement of socio-economic policy, and the donation of land to a community. However, these community development programs targeted the most severely impacted communities, notwithstanding their status as indigenous, minority, or non-indigenous community, whereas the IACtHR only ordered community development to indigenous communities.

Satisfaction measures were prevalent before both the courts and the truth commissions; all analyzed institutions ordered or recommended satisfaction measures. The recommended measures of the truth commissions are similar to those ordered by the courts. Resembling the orders of the courts, commemoration was common and were recommended in 11 of the 12 analyzed truth commission reports. A variety of other satisfaction measures were recommended by the truth commissions, although less frequently. Whereas all courts included apology statements in their reparation orders, only four recent truth commissions did so. The IACtHR is the only court that ordered satisfaction measures that required the involvement of the state, such as the investigation and prosecution of the crimes, the search for the whereabouts of the disappeared, and procedures for the families of these disappeared people. Most commissions recommended measures commanding the state to actively undertake these procedures. However, unlike the IACtHR, each specific measure was only recommended sporadically.[2030]

Developing collective reparations

The truth commissions' approach to collective reparations shifted towards a combination of elements of corrective and distributive justice. While most reparative measures were recommended to address and acknowledge the harm suffered by the victims, more recent commissions added forward-looking objectives, such as national reconciliation. Satisfaction measures, including the education of the general public, official apologies, and commemoration, were increasingly recommended with the objective to promote reconciliation, in addition to the backward-looking intention of acknowledgement of harm and victimhood. In addition, several commissions went

[2030] See chapter 7.6 on satisfaction.

beyond the restoration of the situation of the victims and recommended measures that empower marginalized communities and advance their position beyond the one they previously held.[2031]

8.4 Reflections on this research

This section incorporates a reflection of the overall research. The strengths of this dissertation, as well as its pitfalls are discussed. Based on these reflections, several recommendations for future research are given.

Strengths

The main strength of this dissertation lies in the approach to study the development of collective reparations in various courts and truth commissions. I developed an innovative methodological approach to explore the different definitions and applications of collective reparations. It consists of a systematic analysis of case law and truth commission reports, a comparative analysis, and an evaluation.

Since the development of collective reparations takes place in different instruments, including non- or quasi legal mechanisms, the analysis of the decisions is not restricted to one court or legal field. Therefore, in addition to human rights courts and international criminal courts, fifteen truth commissions are included in this research. The inclusion of truth commissions adds valuable insights into the development of collective reparations as it shows the application of collective reparations outside a legal context. It demonstrates that collective reparations do not develop in a vacuum. As a result, this dissertation consists of one of the most complete and detailed overviews of collective reparations to date.

While the systematic analysis reveals the definition, application and development of collective reparations in a specific institution, the comparative analysis displays the differences and similarities between the courts, between the truth commissions, and between the courts and truth commissions. Furthermore, such a comparison produces crucial insights into the underlying reasons for the similarities and differences. These observations would have remained unnoticed without the comparisons.

This research is enhanced by an assessment of collective reparations as well as its development before international courts and truth commission. Aristotle's theory on particular justice and Peter Dixon's framework on the distinction between reparations and assistance provide the tools for this evaluation. This strengthens the evaluation process, which may lead to more detailed observations regarding the distinction between (collective) reparations and assistance.

[2031] See chapter 7, section 9 on the development of collective reparations before the analyzed truth commissions.

Another strength of this research relates to the methodology that is used for the systematic analysis of the case law and reports: qualitative content analysis. [2032] This methodology is close to doctrinal research. Yet it also offers set rules and stages for the analysis, assisting the systematic nature of the analysis. The qualitative content analysis in combination with the corresponding software (MAXQDA2020) demonstrated its value for this research. First, the qualitative content analysis has assisted the selection, coding and analysis a high number of documents from different institutions. Consequently, patterns and themes relating to the development of collective reparations came to the surface. These observations would likely have remained unnoticed without this systematic approach. Hence, the qualitative content analysis has generated comprehensive and robust analyses of the development of collective reparations in different courts and truth commissions. Second, the software assisting the qualitative content analysis supports the analysis of a high number of documents. The documents, codes and variables are stored in one file, making it easy to retrieve the segments that were coded a time ago. In addition, MAXQDA provides tools to analyze the data, of which several were used in this research. These tools have assisted the uncovering of patterns, relations between codes (for instance, ordered reparative measures) and variables (for instance, the presence of indigenous peoples), and the prevalence of specific codes. Accordingly, the software has enriched this research by providing tools to systematically analyze the definitions and applications of collective reparations in different institutions.

LIMITATIONS

Even though, this dissertation consists of one of the most comprehensive overviews of the application of collective reparations in international courts and truth commissions. It is important to emphasize that this overview is limited to the courts' and commissions' approach to collective reparations. The analyses in this dissertation have primarily focused on the judgements of the courts and truth commissions. The only exception is the inclusion of the observations of the TFV in the analysis of the ICC. Since the TFV is influential in the development, design and implementation of reparations, I deemed it important to take its views into account. Moreover, even though reparations are victim-focused, victims' perspectives are not included; the input of victims and their representatives was left out of the qualitative content analysis.[2033]

Despite its undeniable importance, the actual implementation of the ordered or recommended collective reparation is not examined in this dissertation. Similarly, the effects of the implemented collective reparations (or the lack thereof) on victims

[2032] For an elaboration on the qualitative content analysis and the methodological considerations, see chapter 3, section 2.

[2033] The analysis of reparations in international courts by Alina Balta includes, amongst others, the submissions of victim representatives and victims' observations made during trials. See, Alina D Balta, 'What's Law got to Do with It? Assessing International Court's Contribution to Reparative Justice for Victims of Mass Atrocities through their Reparations Regimes' (PhD thesis, Tilburg University 2020).

(beneficiaries and non-beneficiaries) and their communities are not included in this research. This PhD research is part of a bigger research project, 'What's Law Got to Do with It'. A project aimed at understanding whether, and if so how, reparations awarded through international justice procedures contribute to a sense of justice amongst survivors. The empirical part of this research consists of four case studies, each including 60 interviews with victims (30 beneficiaries and 30 non-beneficiaries of the reparations ordered by a specific court).[2034] This empirical research investigates the impact that the reparations ordered by four international courts have on the lives of victims. Hence, the findings of the empirical part of the overarching research project will enrich the findings of this legal analysis, and shed a light on the perceptions of the victims. However, at the moment of writing, the analyses of the four empirical studies are ongoing and their results could therefore not be included in this dissertation.

The scope of this research was additionally reduced due to the number of languages I master. Sources that are only available in languages other than Dutch and English could not be included in this research. Consequently, several cases of the IACtHR and several truth commission reports are not be included in this study. It is my judgement that the number of included sources is sufficient to gain a better understanding of the development of collective reparations in international courts and truth commissions. Nevertheless, the field relating to (collective) reparations could benefit from the inclusion of sources that are not available in English.

Another limitation of this research relates to the comparative analyses in this dissertation. The courts and commissions showcase a wide variety of characteristics, and subsequently a high number of variables that might explain the development of (collective) reparations. The number of studied institutions is too small to conclude on the relation between specific characteristics of the courts and their decisions regarding collective reparations.[2035] A measure that future research can adopt to address this limitation incorporates a comparative approach that is case-sensitive,[2036] meaning that the specific contexts of the institutions have to be examined and included in the comparison.

An additional limitation is the lack of transparency in the decisions. My systematic analysis shows that the courts were not always consistent in the definitions, categories and procedures they use. For instance, the courts used the reparation categories as proposed in the UN Reparation Principles, yet these were not applied consistently. A specific measure was categorized as rehabilitation in one decision, and as satisfaction in another. The courts did not explain why a modality was labelled as

[2034] The four case studies include Cambodia (ECCC), the DRC (ICC), Guatemala (IACtHR) and Cyprus (European Court of Human Rights).
[2035] This is also known as the '"many variables, small N" problem'. See Arend Lijphart, 'Comparative Politics and the Comparative Method' (1971) 65 The American Political Science Review 682, 686.
[2036] Charles C Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (University of California Press 2014) 167.

rehabilitation or satisfaction, making it difficult to understand the reasons and implications of these changes.

One limitation of this research is specific to the analysis of the truth commissions. Most truth commission reports did not elaborate on the meaning of the terms 'reparations' and 'recommendations', making it unclear if and how these two were differentiated. I have followed the wording of the commissions during the analysis of the truth commission reports. It is possible that some of the recommendations that were intended as reparations, but that were not labelled as such in the reports, were not included in the analysis. This may have influenced the results of my analysis. Additionally, most commissions let the construction of the procedures for the provision of the reparations to the states. Information on the guidelines for the design and implementation of the recommended collective reparations were occasionally absent from the reports. Consequently, this affects the conclusions that can be reached about the development of collective reparations and the underlying reasons.

Future research

On the basis of the strengths and limitations of this research, three key recommendations for future research come up.

First, I highly recommend the qualitative content analysis for the analysis of legal sources. The methodology fits legal research and provides tools for a systematic analysis of a high number of legal documents, including case law. Patterns, developments and recurring themes are easier to detect. As such, the methodology in combination with software programs enriches doctrinal research.

Second, future research should consider the data regarding the implementation of the collective reparations. This could contribute to the understanding of the development of collective reparations as provided in this dissertation. Where this research is limited to the manifestations of collective reparations on paper, future research may contribute by including the outcome of the implementations of the reparation orders. Do the definitions and applications of collective reparations as used by the courts change or remain the same during the implementation? Are the implemented reparations identical to the ordered reparations, or are they adjusted during the implementation? Furthermore, the inclusion of implementation data in the analysis may provide valuable information regarding collective reparations. For instance, which reparative measures (collective or individual) have a higher implementation rate, and how can this be explained?

Third, empirical studies on courts exploring the needs, desires and observations of victims are desirable. Reparations are provided in order to redress victims and their suffering. This makes the input of victims regarding their harm, needs and desires essential. Additionally, the reparation orders of the courts are based on many assumptions regarding the effects of specific reparative measures on the victims

and their communities, often without reference to empirical research supporting these claims. Hence, empirical research studying the impact of reparative measures is needed in order to allow courts to base their decisions on empirical data. Lastly, more empirical research is needed regarding the distinction between reparations and assistance. Do victims know whether they are entitled to reparations when a judgement is not implemented, and do they know that they have received reparations, assistance, or that the state fulfilled its general obligations regarding the safeguarding of social and economic rights? And more importantly, does it matter to the victims?[2037]

8.5 IMPLICATIONS

This dissertation elaborates at length how international courts and truth commissions award collective reparations to enforce the individual right to reparations.[2038] The enforcement of the individual right to reparations is a complex undertaking, especially in the context of mass atrocities. The high number of victims, the often immeasurable and widespread harm, the hard-to-define exact time period in which violations took place, and a lack of resources are some of the challenges courts and truth commissions face when awarding reparations. Furthermore, mass atrocities often lead to both individual and collective harm. In order to accommodate these difficulties, a collective approach to reparations has emerged. This collective approach has translated into the legal bases of several international courts and truth commissions,[2039] of influential documents of international organizations,[2040] and in the decisions of international courts and truth commissions. Hence, the individual right to reparations is increasingly regarded and applied in a collective fashion.

The emergence of collective reparations may have repercussions for the individual right to reparations. Since the courts have developed different approaches to (collective) reparations, these repercussions differ. Even though the IACtHR ordered a wide variety of collective reparations, including material reparations as restitution and compensation, the individual right to reparations was often still recognized. Most material collective reparations were ordered to address the collective harm of indigenous peoples, who are recognized as collective legal subjects

[2037] The empirical part of the overarching research, 'What's Law Got to Do With It', already shows that it is difficult for many victims to trace the source of the reparations they are entitled to. Nevertheless, more research is needed and should cover a different cases, courts, and other institutions.

[2038] An individual right to reparations has emerged in international law, which primarily focuses on the vindication of individual rights. See for instance, Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 42; Diana Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018) 10.

[2039] For instance, the legal frameworks of the ICC and ECCC allow for the provision of collective reparations. Rule 97(2) of the RPE; ECCC IR9, rule 23 *quinquies* (1).

[2040] Article 13 of the UN Reparation Principles holds that 'States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate'. Yet, this collective approach should be complementary to the individual access to reparations.

in international law.[2041] In addition, the IACtHR restricted the reparation orders to collective reparations in the cases that exclusively considered the violation of a collective right. When individual rights were violated, which resulted in individual as well as collective harm, the IACtHR ordered individual and collective reparations. Thus, the collective reparations either addressed the collective harm of indigenous peoples, or they complemented individual reparations in order to address the individual as well as the collective harm. The collective approach to reparations enhances the right to reparations for both individual and collective subjects.

On the contrary, the collective approaches to reparations as developed in international criminal courts have considerable repercussions for the individual right to reparations. The ICC and ECCC face distinct challenges, including the restrictive reparative mandates, the declared indigency of the offenders, and the risk that rifts in communities expand when only a fraction of the community members receives reparations. Both the ICC and ECCC have developed strategies to enforce the right of reparations: the provision of collective reparations. The ECCC's legal framework restricts its reparative mandate to moral and collective reparations. Whereas the ICC can order individual and collective reparations. Nevertheless, in two of the four cases, the reparations were limited to (individualized) collective reparations. Even though beneficiaries were identified on an individual basis, including the proof of a causal relation between the harm they suffered and the crimes for which the offender was convicted, they primarily received reparations collectively. Repairing individual victims in a collective manner runs the risk that victims are treated as people that suffered harm due to the same crimes, and not as people that have a right to reparation.[2042] The collective approach to reparations as developed by the ICC and ECCC has served as a substitute of individual reparations. This inevitably leads to hollowing out the individual right to reparations, as individuals cannot exercise their individual right.

Furthermore, the analysis of the case law and truth commission reports reveals that the courts and truth commissions built on the work of predecessors when using concepts as reparations and collective reparations. Corrective justice and the consequent idea that victims have to be restored to their prior situation provide the long-established starting point for reparations. This perspective of reparations is foundational to tort law, which in turn influences the international law of state responsibility.[2043] The fundamental sources that were used by all institutions in their reparation decisions, including the *Factory at Chorzów* judgement and the UN

[2041] See for instance, Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observations' (2008) 30 Michigan Journal of International law 177, 179.
[2042] Liesbeth Zegveld, 'Victims as a Third Party: Empowerment of Victims?' (2019) 19 International Criminal Law Review 321, 340.
[2043] See for instance, Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Elgar 2019) 378; Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International & Comparative Law Review 157.

Reparation Principles, are rooted in the law of state responsibility, and consequently reflect the requirement for *restitution in integrum*.[2044] This was reiterated in the case law of the courts. For instance, all courts used *restitution in integrum* as starting point for their reparation orders, even though tort law was never designed to respond to mass atrocities, making the concept of *restitution in integrum* almost impossible to apply in case of mass atrocities.

Because collective reparations have primarily developed before human rights courts, especially the IACtHR, and in several truth commissions,[2045] criminal courts build on the laws and practices of human rights courts when deciding on reparations.[2046] In other words, the notion of reparations transferred from tort law, to international public law, human rights law, and international criminal courts. Moreover, the notion of collective reparations extended from human rights courts to international criminal courts. In addition, the same can be observed in national transitional justice projects, including truth commissions. However, these institutions operate in different contexts, have distinctive legal frameworks and mandates, and face specific challenges. As a result, similar notions of reparations and collective reparations are applied differently.

8.5.1 Implications for international courts, truth commissions and the international community

As can be inferred from above, there is not one understanding of collective reparations in international law and transitional justice. The various institutions face some identical challenges inherent to mass atrocities, such as the high number of victims and harm that is often irreparable, and some challenges that are specific to the institution, including their mandates. The courts and truth commissions have developed different approaches to respond to these challenges, resulting in different definitions and varying modalities of collective reparations. The characteristics of collective reparations, such as the beneficiaries, modalities, and objectives, differ within specific courts and between the institutions mandated to provide reparations. Several implications for international courts, truth commissions and the international community have arisen from the expansion of the individual right to reparations and of collective reparations.

[2044] Brianne McGonigle Leyh, 'Reparations for Victims' in Paul R Williams and Milena Sterio (eds), *Research Handbook on Post-Conflict State Building* (Elgar 2020) 233.
[2045] See for instance, Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731, 739-742.
[2046] Juan Pablo Perez-Leon-Acevedo, 'Reparations for Victims of Mass-Atrocities: Actual and Potential Contributions of the Inter-American Court of Human Rights to the International Criminal Court' in Giuliana Ziccardi Capaldo (ed) *The Global Community Yearbook of International Law and Jurisprudence 2018* (Oxford University Press 2019) 308-309; Annika Jones, 'Insights into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court' (2026) 16 Human Rights Law Review 701.

All institutions built on the work of predecessors, even though precedents from other legal fields and institutions cannot simply be used. Instead, appropriate consideration to the particularities of the court needs to be given first.[2047] While, the ICC and ECCC acknowledged that the IACtHR ordered reparations against states instead of individual offenders, the IACtHR was still seen as valuable guidance regarding reparations. In its reparation decisions, the two criminal courts repeated the same terminology and objectives of (collective) reparations. Consequently, the definitions of collective reparations given by the institutions were rather similar on paper, yet collective reparations were applied differently when the (individual) right to reparations was enforced. This has led to uncertainty regarding the collective reparations that can be imposed by the specific court. Victims may have false expectations about the reparations they may request or receive, which may influence how they engage with the reparation procedures of the courts.[2048]

The ordered reparations reflect the context from which they arise, including the legal field in which they operate (human rights law or international criminal law), their mandates, the circumstances of the case at hand, and available resources. Even though it is understandable that these distinct contexts influence the reparation decisions, the institutions should be transparent in relation to this. For instance, in case the ordered collective reparations hollow out the individual right to reparations, the courts should acknowledge this consequence and motivate the reasons for the collective approach over an individual one. This may lower the expectations of the victims resulting in more realistic expectations.

Since the factors that are likely to influence the outcome of the reparation judgements are known prior to the issuance of these decisions, the institutions should consider how their contexts influence the (collective) reparations they can issue, and adjust the used definitions accordingly. This is especially relevant for the ICC, a court that proposed a definition of collective reparations that fits its framework poorly. For instance, the ICC specified collective reparations as reparations that addressed collective harm and that benefitted a collective. However, as a criminal court that orders reparations against a convicted person, the ICC requires a causal relation between the crimes of the conviction and the harm of individual victims. As a result, the ICC can only order collective reparations to groups of victims who are individually

[2047] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 9.

[2048] For instance, the collective reparations as included in the reparations order in the *Lubanga* case raised false expectation by the victims on the expected collective reparations. Consequently, several victims withdrew from victim participation in the *Ruto and Sang* case before the ICC as they were extremely opposed to collective reparations. However, the implementation of the collective reparations was in line with the measures that the withdrawn victims had requested, making their withdrawal premature. In the end, this withdrawal did not have consequences as the case was terminated in 2015, without a guilty verdict or a reparations order. *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013) ICC-01/04-01/11-896, T Ch V (5 September 2013) para 12; Alina Balta, Manon Bax and Rianne Letschert, 'Trial and (Potential) Error: Confliction Visions on Reparations Within the ICC System' (2019) 29 International Criminal Justice Review 221, 232-233.

identified as beneficiary, and not to a collective as a whole. The notion of a collective beneficiary is ill-suited for the ICC, and leads to false expectations. This is avoidable by acknowledging that the context in which it operates has an impact on its reparation regime, and that this has repercussions for the definitions it can use.

The context in which the institutions operate does not only determine the reparations that can be ordered, it also affects, to some extent, the reparations that can and will be implemented. Factors such as the available resources (money, facilities as hospitals, and experienced work forces), the number of victims, the status of the conflict (ended or ongoing), the political parties in power, and cooperation of states may have an impact on the implementation of the reparations. Institutions that order or recommend (collective) reparations should acknowledge the expected obstacles in the implementation phase, and limit its reparations order to measures that offer reasonable prospect of realization. Future empirical research into (collective) reparations that includes the data on implementation may provide valuable insights in elements that determine the probability of implementation and the impact on victims. It is important to recognize here in particular the ECCC's efforts to ensure that its reparation orders could actually be implemented. Requested reparations were only ordered when funding was available and the necessary cooperation of third parties was ensured. This has resulted in a meagre set of recommended reparations, especially in *Case 001* where external funding was not allowed, yet the reparations that were ordered could indeed be implemented. Reparations that are awarded but not implemented may negatively impact victims' sense of justice, and may only lead to disappointment and frustration.

Courts and truth commissions should be transparent about the assumptions underlying their reparation orders. Many claims regarding the effects of reparations in general (reparations will do justice to victims) and of specific measures (this reparative measure will result in reconciliation in the community) were explicitly mentioned in the reparation orders. However, most claims were not substantiated with empirical data, nor did courts explain how they came to these claims. This increases the risk that the claims underlying the design of the reparation orders are false, and consequently raise false expectations for victims and the wider community in which the crimes took place. Therefore, the courts and truth commissions should be reluctant in expressing the impact of their decisions without providing or knowing the underlying evidence for their claims. In this context, it is important to reiterate the argument that the overlap between reparations and assistance could make it difficult for victims to identify the source of their rights, and this is even more plausible for reparations that are not implemented. Courts should therefore be even more reluctant to make these kinds of claims, since the symbolic value cannot be determined if this distinction is not clear to victims.

Similarly, the institutions and actors involved in the establishment of these institutions, as well as the experts who directly or indirectly influence the reparation regimes of these institutions, should be transparent about the assumed added value of reparations over assistance. Furthermore, these actors should clearly support their claims regarding the differences between reparations and assistance, preferably with empirical data. The assumption that reparations may have additional benefits to the victims in comparison to assistance, may have led to a choice for a reparations mandate over the provision of assistance. However, without empirical data to support these assumptions, it is uncertain whether reparations actually have distinct benefits for victims. Contrary to the international courts, assistance organizations are not bound by a terse legal framework, which may make them more effective in case of mass atrocities. For instance, because the causal relation between the harm and the conviction is not required, a division within a community between beneficiaries who meet the stringent legal criteria and non-beneficiaries does not need to be made. Therefore, more (empirical) research is needed so that a careful and detailed consideration can be given regarding the preference of reparations over assistance, or the other way around.

Lastly, the states and international organs that establish institutions with a reparations mandate should be realistic about the actual possibilities of these institutions to provide meaningful reparations. This is especially relevant for international criminal courts ordering reparations against individual offenders, who are often declared indigent. States and other actors that set up such a court should consider how the reparations are funded and realized. If the aspiration is to provide some form of redress to the victims, they need to provide the necessary resources. The ICC and ECCC were set up with the high ambition to provide justice to the victims, including repairing their harm, yet the underlying systems and procedures executing these goals were weak or missing. Instead, both courts were left with the daunting task of redressing victims without sufficient funding and a procedural mechanism implementing the reparations (ICC's TFV and the ECCC's Victims Support Section) that similarly lacked resources. Either states and international organizations should provide the needed resources, or they should adjust their ambitions and include a more modest reparations mandate, if one at all.

8.6 Final reflections on the future of collective reparations and the role of international criminal courts

International courts

First of all, it is important to stress that international courts are entrusted with the impossible task of providing justice in an unjust world. Courts are mandated to repair harm inflicted on victims of mass atrocities, which evidently almost always results in a high number of victims and immeasurable and sometimes irreparable harm. However, these courts have restrictive legal frameworks that only allow for the redress of victims who suffered harm due to the crimes of the case and that meet certain requirements. For instance, international criminal courts can only order reparations against individual offenders, while the total number of responsible parties, including national and sometimes international state actors, is high. Furthermore, the reparations can only be awarded to the victims of very detailed crimes, which are often restricted to a specific time and location, and consist of specific acts. Even though, human rights courts' legal frameworks are subject to less severe restrictions, the IACtHR can only order reparations for the violations that were included in the specific case. Hence, the international courts can only order reparations to a fraction of the victims that suffered harm due to mass atrocities. Lastly, the courts were set up with insufficient funding and/or without an (adequate) enforcement mechanism.

It is commendable that the international courts tried to reach as many victims as possible. The IACtHR used a wide interpretation of its mandate to 'ensure that the injured party can enjoy their right or freedom again, the consequences of the violation are remedied, and fair compensation is paid'.[2049] For instance, the IACtHR broadened the scope of beneficiaries to include the relatives of victims, and it recognized indigenous communities as the injured party. In addition, the IACtHR ordered a variety of individual or collective and material or symbolic reparations, including modalities that benefited the society at large. Even though the reparations mandates of the ICC and ECCC are narrower, these courts have amended their approach to reparations in order to reach as many victims as possible. This may be problematic legally and conceptually, yet pragmatically understandable.

My dissertation shows that the international courts have developed different approaches to fulfill the immense task to provide reparations to victims of mass atrocities, including the provision of collective reparations that might not be collective

[2049] American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR), article 63 (1).

or reparative. This raises the question whether international courts are suitable to order reparations to address the harm suffered by victims of mass atrocities.[2050]

As stressed at the beginning of this section, the courts have taken on the impossible task to repair the victims of mass atrocities. Even though the international courts will never (fully) fulfill this task, it is the best legal option that is currently available. While international courts are not suited to address the harm of all victims of a conflict, and it is questionable whether this is possible at all, the reparation regimes enable international courts to provide some form of redress to a fraction of the victims of a conflict. In addition, the international courts generate (international) attention for the crimes, the victims and their ongoing suffering. As such, the courts are an important catalyst for the attention process of states, international organizations and other actors; it confronts them with the suffering of victims as well as the urgency for action. Furthermore, this attention may increase the (earmarked) funding provided by third party donors.[2051] In other words, the reparation regimes of the international courts are an imperfect solution in the case of mass atrocities. It is therefore essential that the courts are transparent about their shortcomings in providing reparations for the victims of mass atrocities, and subsequently adapt the goals they set themselves in this regard. This may lead to more realistic expectation of the victims, which may have an actual chance of being met.

Considering the identified limitations of international courts to provide reparations to victims of mass atrocities, it is fundamental that the reparation regimes of these courts are organized in cooperation with other mechanisms set up to redress the harm of victims. One can think of national reparation programs, the assistance mandate of the TFV, and the non-judicial measures connected to the ECCC. Consequently, the state where the mass atrocities took place as well as other states that, directly or indirectly, facilitated these crimes,[2052] should be encouraged or, when possible, forced to develop reparation programs themselves.[2053] These reparations may target all citizens of that state who suffered from mass atrocities, instead of only a small fraction of the total number of victims. Furthermore, unlike the individual offender, the state is equipped to provide measures of guarantees of non-repetition,[2054] and transformative reparations that address the underlying causes of

[2050] See for instance, Tapia Navarro, 'Collective Reparations and the Limitations of International Criminal Justice to Respond to Mass Atrocity' (2018) 18 International Criminal Law Review 67, 70; Owiso Owiso, 'The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process' (2019) 19 International Criminal Law Review 505, 511.

[2051] For instance, several Cambodian NGOs who requested that their project would be endorsed by the ECCC expected that this would increase the likelihood of receiving donor money. See, Christoph Sperfeldt, 'Practices of Reparations in International Criminal Justice' (PhD thesis, Australian National University 2018) 293.

[2052] Marc Groenhuijsen and Antony Pemberton, 'Genocide, Crimes Against Humanity and War Crimes. A Victimological Perspective on International Criminal Justice' in Rianne Letschert and others (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 12-13.

[2053] Luke Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparations Regime of the International Criminal Court' (2013) 17 International Journal of Human Rights 368, 384.

[2054] The research of Gallen, Moffett and others displayed the importance victims attached to guarantees of non-repetition. James Gallen and Luke Moffett, 'The Palliative Role of Reparations in Reconciling Societies with the Past: Redressing Victims or Consolidating the State' (2022) Journal of Intervention and Statebuilding 1, 12.

the conflict. Lastly, states that participated in the establishment of an institution with a reparations mandate should allocate resources to the reparation programs of these institutions.

COLLECTIVE REPARATIONS

My dissertation reveals that there is not one understanding, definition or application of collective reparations. Instead, there are numerous manifestations of collective reparations that reflect the context of the court or truth commission and the case at hand. Based on this research, it is my assessment that the legal concept of collective reparations should not be harmonized. Instead, it should remain an open concept that can be applied to the specifics of the case at hand in order to increase the probability that victims and their harm will be addressed. Where it is important that courts and truth commissions are transparent about the decisions in relation to the manifestations, so that in other situations these insights can be taken into account in formulating new provisions. Accordingly, an open concept of collective reparations enables the international courts, truth commissions, and other institutions with a reparations mandate to develop a realistic approach in repairing victims of mass atrocities. Afterall, a right to reparations does not mean much when it is not enforced, making pragmatic considerations a key aspect in the development of reparation orders.

SUMMARY

This dissertation focuses on substantive remedies that address the harm caused by mass atrocities, these are often referred to as reparations. More specifically, the starting point of this research was the observation that the individual right to reparations has increasingly received a collective character. As this dissertation explores, there is a growing recognition of collective reparations in international law. This is reflected in the case law of several international courts and in various truth commission reports. This trend is furthermore recognized by international organizations, including the United Nations and the International Law Association,[2055] and in academic literature.[2056]

Even though collective reparations have received increasing recognition in theory and practice, neither a legal definition nor a framework of collective reparations has yet been established.[2057] Instead, the notion of collective reparations has emerged, which is based on the allocation of a variety of collective measures by a range of distinct institutions that developed different understandings of collective reparations. These institutions range from regional human rights courts, international criminal tribunals, truth commissions to reparations programs. The particular context of the relevant institutions appears to result in competing claims to dilemmas relating to collective reparations. For instance, orders for collective reparations have been established by mechanisms with differing objectives, mandates, and limitations. These mechanisms can produce different conclusions concerning, for instance, the aim, the collective measures, the elements distinguishing collective from individual reparations, and the beneficiaries of collective reparations. Thus, the mechanisms represent a diversity in standards and procedures of formulating and applying collective reparative measures. In other words, the current legal understanding of collective reparations varies among institutions with a reparation mandate, potentially resulting in conflicting applications of collective reparations. Moreover, research into collective reparations is fragmentized and often includes studies into a specific court or legal field (for instance,

[2055] Office of the UN High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States. Reparation Programmes' (2008) HR/PUB/08/1; UNGA 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Repetition' (14 October 2014) A/69/518, para 38-42; International Committee on Reparation for Victims of Armed Conflict, 'Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)' in International Law Association Report of the Seventy-Fourth Conference (The Hague 2010) (International Law Association, The Hague Conference 2010), commentary to article 6.

[2056] See for instance, Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 International Review of the Red Cross 731; Diana Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018).

[2057] See for instance, Tapia Navarro, 'Collective Reparations and the Limitations of International Criminal Justice to Respond to Mass Atrocity' (2018) 18 International Criminal Law Review 67, 72; Francesca Capone, 'Is anybody playing?: the right to reparation for child victims of armed conflict' (PhD thesis, Tilburg University 2013) 18.

international human rights law or international criminal law). Therefore, a comprehensive overview of the development of collective reparations that transcends the confines of a specific court or field is missing.

Against this background, this dissertation sets out to gain a deeper understanding of collective reparations and its development, and to contribute to the crystallization of the legal framework regarding collective reparations. Concretely, the aim of this PhD research is to explore the legal development of collective reparations in both the juridical and the quasi-juridical setting. The objective of this study is to analyze case law of the Inter-American Court of Human Rights (hereinafter IACtHR), the International Criminal Court (hereinafter ICC), the Extraordinary Chambers within the Courts of Cambodia (hereinafter ECCC) and the reports of 15 truth commissions in a systematic and comprehensive manner in order to see if it is possible to come to a thorough understanding of collective reparations and their development. The analyses scrutinize how each court and truth commission defines and applies collective reparations, and the underlying reasoning for a specific approach to collective reparations.

The research question guiding this research was:

> *How have international courts and truth commissions, that are mandated to provide or recommend collective reparations, perceived and applied collective reparations for victims of mass atrocities, and how can the differences and similarities between the institutions be explained?*

By answering these two interlinked questions, this dissertation will provide a comprehensive overview of the development of collective reparations. This overview is innovative because it is not restricted to the approach to collective reparations in a particular court or legal field, but also includes international criminal courts, human rights courts, and truth commissions. As will become clear, these different courts and legal fields interact and consider each other's decisions, resulting in synergy and cross-fertilization. This dissertation shows that this is particularly true for the conceptualization of (collective) reparations in the different courts and truth commissions. Consequently, it is argued that a deeper understanding of the development of collective reparations can only be achieved when the analyses of the case law of the international courts and truth commission reports are integrated.

In order to answer the research question and to achieve the objectives of this research, I developed an approach to explore how different international courts and truth commissions define and apply collective reparations. This scheme consists of three components. First, a systematic analysis of the case law of each of the courts and of

the truth commission reports. Second, a comparative analysis between the truth commissions, between the courts, and between the courts and truth commissions. Third, an evaluation of the development of collective reparations in light of the relation between reparations and assistance. These three components of the research are elaboratively discussed in chapters two and three.

Chapter two first places (collective) reparations in a historical context, and provides an overview of the historical development of reparations as well as the role of individuals in international law. This overview shows how reparations developed from a state-to-state practice to a practice that increasingly includes individuals. Furthermore, this chapter elaborates on the two tools for the evaluation. The first tool for this assessment consists of Aristotle's theory on particular justice,[2058] the theory that underlies most other theories relating to reparative justice. The first form of justice as distinguished by Aristotle, corrective justice, relates to the undoing of injustice. Restitution and compensation come close to corrective justice. The second form of particular justice, distributive justice, concerns the equal division of goods in a society. Distributive justice is not linked to wrongful acts, harm or victim status. Instead, this comes closer to assistance. This research shows that many reparations combine elements of corrective and distributive justice. Therefore, I propose that corrective and distributive are not two distinct forms of justice, instead these overlap and reparations can include elements of both forms of justice. The second tool consists of Peter Dixon's framework that provides guidance in the assessment of court-ordered reparations as reparations or as assistance. The framework of Peter Dixon consists of five prepositions to distinguish reparations from assistance: responsibility, recognition, process, form, and impact.[2059] These five elements are used to evaluate the reparation programs of each of the three courts.

Chapter three introduces the methodologies used in this dissertation; the comparative analysis and the qualitative content analysis. This dissertation includes three related comparisons; a comparison of the three courts, a comparison of the reports of fifteen truth commissions, and the juxtaposition of the courts and the truth commissions. Hence, the methodological considerations for each comparison are discussed separately. In order to explore the approaches, criteria, considerations, and conditions used towards collective reparations in the three courts and 15 truth commissions, a high number of primary sources from different institutions have to be analyzed. Therefore, this research includes a qualitative content analysis, a systematic approach for an analysis of this nature.

[2058] Aristotle, *Nicomachean Ethics* (CDC Reeve tr, Hackett Publishing Company 2014).
[2059] Peter J Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 International Journal of Transitional Justice 88, 95-102.

The analysis of the case law of the courts and the reports of the truth commissions are included in chapters 4-7. These chapters depict how collective reparations were defined, categorized, and ordered or recommended in each institution. Special consideration is given to the beneficiaries of the collective reparations, the objectives, and other characteristics that were used by the institutions to distinguish collective from individual reparations. Furthermore, these chapters explore how the understanding and application of collective reparations developed within each institution. Lastly, each chapter appraised the changing approach towards collective reparations in relation to Aristotle's theory on particular justice and Peter Dixon's framework relating to the distinction between reparations and assistance.

Chapter four is devoted to the IACtHR, and includes an analysis of 41 of its cases. In these 41 cases the IACtHR awarded a wide variety of collective measures, including material and symbolic reparations. My analysis of the IACtHR case law reveals that the development of material collective reparations is closely connected to the presence of indigenous peoples. Collective forms of restitution and compensation were only ordered in cases involving victimized indigenous communities, and most collective rehabilitation measures were awarded to these communities. This was different for the symbolic reparations (satisfaction and guarantees of non-repetition), these were ordered in most analyzed cases. Furthermore, the analysis shows that the development of collective reparations in the IACtHR went hand in hand with the expansion in attention for the victims in the Inter-American system. As the victims' role in the proceedings expanded and more cases involving indigenous peoples were decided, the awarded (collective) reparations became more diverse.

Chapter five covers the analysis of the case law of the ICC, consisting of the cases against *Lubanga, Katanga, Al Mahdi* and *Ntaganda.* The ICC ordered collective reparations in all its cases, either in combination with individual reparations or solely collective reparations. The analysis in this chapter includes both Court documents and documents of the TFV. My analysis shows a changing understanding and application of collective reparations. However, this change took primarily place on a semantic level; the ICC changed its terminology, without really adjusting its approach to reparations, and consequently stretched the definition of collective reparations so that it also included reparations that are essentially individual.

The analysis of the case law of the ECCC was included in chapter six, and consisted of three cases (*Case 001, Case 002/01* and *Case 02/02*). The reparative mandate of the ECCC is restrictive as it is only allowing to order collective and moral reparations against the offender. Because of indigency, the scope of ordered reparations in *Case 001* was seriously restricted. Therefore, the ECCC amended the Internal Rules and added the option of externally funded reparations. This new avenue of reparations has

resulted in a rise in the number of endorsed reparations. However, the reparative potential of these endorsed externally funded reparations has been reduced due to the disconnection between the reparations and the responsibility of the offender.

Chapter seven entailed the analysis of the reports of 15 truth commissions. Out of the 15, 12 truth commissions recommended collective reparations, consisting of a wide range including measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The most notable change in the definition and application of collective reparations by the truth commissions relates to the objective of the ordered measures. The collective reparations recommended by the analyzed truth commissions shifted from typically backward-looking to a combination of back- and forward-looking measures. The recommended reparations were designed to restore the victims, but some more recent reparative measures also consisted of forward-looking objectives as reconciliation and non-repetition of the violations.

The last chapter, chapter eight, incorporates the concluding chapter of this dissertation. The first part includes a comparison of the notion of collective reparations and its understanding and application before the IACtHR, the ICC and the ECCC. The results of this comparison are thereafter juxtaposed with the findings of the analysis of the 15 truth commissions. The differences and similarities between the three courts, and between the courts and truth commissions are explored, followed by a critical assessment of the distinct developments of collective reparations. These three comparisons result in one of most comprehensive and complete overviews of the development of collective reparations in international courts and truth commissions, through which the legal characteristics, standards and practices relating to collective reparations are highlighted. Furthermore, the comparisons are complemented with an evaluation of the used definitions and applications of collective reparations, which takes place in light of Aristotle's theory on particular justice and Peter Dixon's framework to distinguish reparations from assistance.

The second part of the concluding chapter reflects on the research and makes three recommendations for future research. First, I highly recommend the qualitative content analysis for the analysis of legal sources. Second, future research should consider the data regarding the implementation of the collective reparations, and lastly empirical studies exploring the needs, desires and observations of victims participating in reparation programs (of courts, truth commissions, or other institutions) are needed.

Lastly, the third part puts forward some implications for international courts, truth communities and the international community. The analyzed institutions face some identical challenges inherent to mass atrocities, such as the high number of victims and harm that is often irreparable, and some challenges that are specific to the institution, including their mandates. The courts and truth commissions have

developed different approaches to respond to these challenges, resulting in different definitions and varying modalities of collective reparations. Hence, the ordered reparations reflect the context from which they arise, including the legal field in which they operate (human rights law or international criminal law), their mandates, the circumstances of the case at hand, and available resources. Even though it is understandable that these distinct contexts influence the reparation decisions, the institutions should be transparent in relation to this. Furthermore, the institutions should consider how their contexts influence the (collective) reparations they can issue and that can realistically be implemented, and adjust the used definitions and orders accordingly. The institutions should not only be transparent on how its context influenced the understanding of (collective) reparations, these should also be transparent about the assumptions underlying their reparation orders. Similarly, the institutions and actors involved in the establishment of these institutions, as well as the experts who directly or indirectly influence the reparation regimes of these institutions, should be transparent about the assumed added value of reparations over assistance. Lastly, the states and international organs that establish institutions with a reparations mandate should be realistic about the actual possibilities of these institutions to provide meaningful reparations.

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Ik hâld fan dy oant de moanne en werom
en meier dan alle sterre an den himmel.

APPENDICES

ANNEX A

Code categories[2060]

Name category	explanation	Examples codes
General Codes		
Color code: red	Interesting information that does not fit one specific code	
Color code: yellow	Interesting claims made by other parties (eg victims representatives, offender)	
Color code: blue	Interesting information that is not included in the qualitative content analysis	
Color code: magenta	References made to other courts or legal documents as treaties and the Reparation Principles	
Astonished 😲	Unexpected information	
Facts of the case		
NGO	The involvement of an NGO in the case	NGO brought case before court, NGO represented victims
Offender	The responsible/liable party	Responsible party, liable party, state accepted responsibility
Victims	The victims of the case at hand	Number of victims, vulnerable victims
Damages/harm	The harm that resulted from the mass atrocities	Pecuniary harm, collective nature of harm
Crime/violation/proven facts	Information relating to the mass atrocities committed	Crimes of the conviction, articles ACHR violated, the proven facts of the

[2060] Several sections were coded with more than one code.

		case, the context of the crimes in the case (eg armed conflict)

Reparations		
beneficiaries	The beneficiaries of the ordered reparations	Direct victims, civil parties, beneficiary of collective reparations
Reparations in general	the definitions and aims of (collective) reparations in general (not specific modalities)	Aims of reparations, definitions of collective reparations, link between individual and collective reparations, moral reparations
Reparations ordered/recommended	The awarded modalities, including the aims, criteria, definitions, and reasons of the specific modalities	Rehabilitation > income-generating activities > criteria > time frame for implementation
Awarded reparations	The awarded modalities (categorized according to the Reparation Principles)	Compensation > pecuniary compensation > to community Satisfaction > apology

ICC		
ICC vs TFV	Information regarding the relation between the court-ordered reparations and the TFV	Reparations mandate v. assistance mandate, reparation plan approved
TFV	The statements of the TFV	Collective reparations > definition

Truth commissions		
Recommendations	The recommended reparations	Land restitution, publication report of the truth commission
Recommendations extended	Additional information regarding the recommended reparations	Reason, criteria, how to do it?
Recommendations in general	Information regarding recommendations in general (not specific recommendations)	Binding nature of the recommendations, underlying reasons for recommendations
To whom recommendations are directed	Parties that are requested to implement the recommendations	Responsible state, international organizations (eg UN), former colonizer, businesses, media

Facts of the case		
NGO	The involvement of an NGO in the case	NGO brought case before court, NGO represented victims
Offender	The responsible/liable party	Responsible party, liable party, state accepted responsibility
Victims	The victims of the case at hand	Number of victims, vulnerable victims
Damages/harm	The harm that resulted from the mass atrocities	Pecuniary harm, collective nature of harm
Crime/violation/proven facts	Information relating to the mass atrocities committed	Crimes of the conviction, articles ACHR violated, the proven facts of the case, the context of the crimes in the case (eg armed conflict)

ANNEX B

Table 5.1 The selected Court documents

Court document	year	Organ	redacted
Lubanga			
Trust Fund for Victims' First Report on Reparations	2011	TFV	X
Observations on Reparations in Response to the Scheduling Order of 14 March 2012	2012	TFV	
Decision establishing the Principles and Procedures to be Applied to Reparations	2012	Trial Chamber I	
Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012	2015	Appeals Chamber	
Order for reparations[2061]	2015	Appeals Chamber	
Filing on Reparations and Draft Implementation Plan	2015	TFV	X
Draft Implementation Plan for collective reparations to victims[2062]	2015	TFV	
Order instructing the Trust Fund for Victims to supplement the draft implementation plan	2016	Trial Chamber II	
Additional Programme Information Filing	2016	TFV	
Request Concerning the Feasibility of Applying Symbolic Collective Reparations	2016	Trial Chamber II	
Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals	2016	TFV	X
Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations	2016	Trial Chamber II	
Order instructing the Trust Fund for Victims to Submit Information regarding Collective Reparations	2016	Trial Chamber II	
Information regarding Collective Reparations	2017	TFV	

[2061] This is the annex to the 'Judgement on the Appeals against the "Decision establishing the Principles and Procedures to be Applied to Reparations" of August 7 2012'.
[2062] This is Annex A to the 'Filing on Reparations and Draft Reparations Plan'.

(Draft) scope of work Collective Reparations projects in relation to the conviction of Thomas Lubanga Dyilo before the International Criminal Court[2063]	2017	TFV	
Order approving the proposed programmatic framework for collective service- based reparations submitted by the Trust Fund for Victims	2017	Trial Chamber II	
Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable"	2017	Trial Chamber II	X
Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations	2019	Trial Chamber II	
Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'	2019	Appeals Chamber	X
Order Concerning the "Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations"	2019	Trial Chamber II	

Bemba			
Observations relevant to reparations	2016	TFV	
Final observations on reparations following the acquittal of Mr Jean-Pierre Bemba	2018	TFV	

Katanga			
Observations on reparations procedure	2015	TFV	
Observations in response to the Trial Chamber's order of 15 July 2016	2016	TFV	X
Order for Reparations Pursuant to Article 75 of the Statute	2017	Trial Chamber II	
Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017	2017	TFV	X
Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute"	2018	Appeals Chamber	X
Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations	2018	Trial Chamber II	X

[2063] This is Annex A (public version) to the 'Information regarding collective reparations'.

Al Mahdi			
Submissions on the reparations proceedings	2016	TFV	
Final submissions on the reparations proceedings	2017	TFV	
Reparations Order	2017	Trial Chamber VIII	
Judgment on the appeal of the victims against the "Reparations Order"	2018	Appeals Chamber	X
Corrected version of Draft Implementation Plan for Reparations	2018	TFV	X
Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations	2018	Trial Chamber VIII	X
"Updated Implementation Plan" submitted on 2 November 2018	2019	TFV	X
Decision on the Updated Implementation Plan from the Trust Fund for Victims	2019	Trial Chamber VIII	X

Ntaganda			
Trust Fund for Victims' observations relevant to reparations	2020	TFV	
Trust Fund for Victims' final observations on the reparations proceedings	2020	TFV	X
Reparations Order	2021	Trial Chamber VI	
Report on Trust Fund's preparation for draft implementation plan	2021	TFV	X
Initial Draft Implementation Plan with Focus on Priority Victims[2064]	2021	TFV	X
Observations on the responses and observations submitted on the initial draft implementation plan	2021	TFV	X
Decision on the TFV's Initial Draft Implementation Plan with Focus on Priority Victims	2021	Trial Chamber II	
Trust Fund for Victims' Submission of Draft Implementation Plan	2021	TFV	

[2064] This is Annex A to the 'Report on Trust Fund's preparation for draft implementation plan'.

Annex "Trust Fund for Victims' Submission of Draft 2021 TFV Implementation Plan"[2065]		X

[2065] This annex contains the actual DRIP.

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