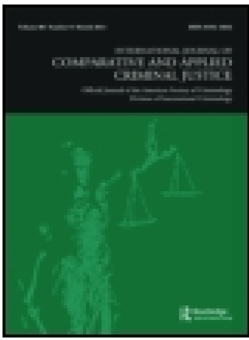

Routledge
Taylor & Francis Group

International Journal of Comparative and Applied Criminal Justice

ISSN: 0192-4036 (Print) 2157-6475 (Online) Journal homepage: https://www.tandfonline.com/loi/rcac20

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

Alina Balta, Manon Bax & Rianne Letschert

To cite this article: Alina Balta, Manon Bax & Rianne Letschert (2019): 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, International Journal of Comparative and Applied Criminal Justice, DOI: 10.1080/01924036.2019.1695640

To link to this article: https://doi.org/10.1080/01924036.2019.1695640

© 2019 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group.

Published online: 27 Nov 2019.

Submit your article to this journal

Article views: 826

View related articles

View Crossmark data

Full Terms & Conditions of access and use can be found at
https://www.tandfonline.com/action/journalInformation?journalCode=rcac20

المنارة للاستشارات

www.manaraa.com

INTERNATIONAL JOURNAL OF COMPARATIVE AND APPLIED CRIMINAL JUSTICE
https://doi.org/10.1080/01924036.2019.1695640

Routledge
Taylor & Francis Group

ARTICLE

OPEN ACCESS Check for updates

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

Alina Balta[a], Manon Bax[a] and Rianne Letschert[b]

[a]International Victimology Institute (INTERVICT), Tilburg University, Tilburg, The Netherlands; [b]International law and victimology, Maastricht University, Maastricht, The Netherlands

ABSTRACT
This article investigates the approach to reparations of the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), using a comparative law perspective, complemented by socio-legal insights. We trace back the development of the reparative frameworks of the ICC and ECCC, and identify the normative bases and political climate underlying the establishment of both courts. Moreover, we scrutinize their case law and implementation practice on reparations, and posit that the initial context of development will not predict how well the courts will fare in practice. Instead, we argue that the openness and flexibility of the courts, to acknowledge when change is needed and adapt to challenges arising during the process of designing and implementing reparations appear to be moreimportant than the initial context. We conclude that in order to make the victims' right to reparation real, the courts' reparative mandates require a deeper reflection on the feasibility of the underlying goals of international criminal justice and a realistic assessment of their performance in practice.

ARTICLE HISTORY
Received 12 April 2019
Accepted 5 November 2019

KEYWORDS
Reparations; international criminal court; extraordinary chambers in the courts of Cambodia; restorative justice; retributive justice; international criminal justice; justice for victims

1. Introduction

It is the perennial worry of victimised populations that the massive injury of carnage and destruction is followed by the insult of forgetting and silence. In the immediate aftermath of the Second World War, Hannah Arendt wrote that the problem of extreme evil would be the defining problem of the post-war era (Arendt & Kohn, 2005; Neiman, 2015). After the horrors of Auschwitz, looking away was no longer an option. The development of the institutions of international criminal law (ICL), from the Nuremberg Military Tribunal to the International Criminal Court, can be seen as an attempt to offer a legal reaction to this problem. This attempt, however, should always reckon with another insight Arendt had to offer concerning international crimes, which are ICL's remit; that the enormity of evil 'explodes the limits of the law' (Arendt, Jaspers, Köhler, & Saner, 1993, p. 54). The dilemma of ICL is thus, that something must be done, while any action is doomed to fall short. Where criminal justice in the national sphere has great difficulty in convincingly showing that it reaches its main goals, such as retribution and general/ special prevention (Tonry, 2011), the additional complexities of the situation of international crimes – the collective nature of the crimes committed, the difficulties in establishing and proving individual guilt, the uncertain line between culpable and inculpable parties and the difficulty in

CONTACT Alina Balta a.d.balta@uvt.nl

This article has been republished with minor changes. These changes do not impact the academic content of the article.

© 2019 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group.
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (http://creativecommons.org/licenses/by-nc-nd/4.0/), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

finding a punishment that can conceivably suit the crime – make this an even harder sell at the international level (Drumbl, 2005, 2007).

A superficial view of the functioning of ICL might suggest otherwise. The rhetoric accompanying ICL is one of "ending impunity', 'delivering safety and justice on a global scale', and 'advancing the rule of law' (Rome Statute of the International Criminal Court (Rome Statute), (1998), preamble; Drumbl, 2005). Lofty ideals, with which it is difficult to disagree, but which cannot as yet be substantiated with empirical evidence. This is also, perhaps particularly, true of the contribution of ICL to the experience of those bearing the brunt of the enormity of evil; the victims of crimes against humanity, war crimes, genocide and other serious violations of human rights (Letschert & Groenhuijsen, 2011). In the past decade, international legal institutions have implemented mechanisms and procedures stipulating a right to reparation, which consists of material and/or immaterial or symbolic measures to acknowledge victims" individual or collective victimhood, and, as far as possible, to make amends for the suffering victims went through (De Greiff, 2006). Norms and procedures relating to reparations are, however, not unique to the ICJ framework. On the contrary, within the international human rights framework, the individual right to reparation is anchored in international human rights procedures such as before the European Court of Human Rights and the Inter-American Court of Human Rights (*de Wilde, Ooms, and Versyp ("Vagrancy) v. Belgium*, 1972; Velásquez-Rodríguez v. Honduras, 1988). Where international lawyers traditionally sought to regulate the dealings of States with each other, the rights of man were a powerful constituting factor of self-determination of peoples and nation-building. The 1970s, however, saw a double crossover; human rights went global, projecting itself as an ethical, supranational standard to which nation States could and should be held, while international law went personal, no longer halting at the borders of nation States, but moving beyond and within them, seeking to deliver justice at the level of individual people (Moyn, 2010). Obligations therefore assumed by a State under international human rights and humanitarian law entail legal consequences not only vis-à-vis other States but also with respect to individuals and groups of persons who are under the jurisdiction of the State.

Back to international criminal justice institutions, which is the focus of this contribution, namely the International Criminal Court (ICC) and the Extraordinary Chambers of Cambodia (ECCC); two international criminal tribunals that both acknowledge the right to reparation and subsequently have a procedure in place to award reparations to victims. Nevertheless, these two ICL-based courts differ in the way they were set up; i.e. the ICC is a permanent international court, with more than 120 States Parties and with a jurisdiction covering various (future) conflicts, whereas the ECCC is a hybrid court established by the United Nations (UN) and the State of Cambodia that only deals with crimes committed during the Khmer Rouge regime (1975–1979).

Both courts are complex institutions; however, this paper solely focuses on the courts' normative bases, case-law and implementation relating to the right to reparation that victims have before these two tribunals. Using a doctrinal comparative law perspective, the goal is to track down the parallel developments of their reparation mandates, in order to understand their consequent jurisprudence on reparations as well as their implementation. Since law and its institutions, such as courts, are interconnected with society and consequently influence each other, they cannot be separated from each other when one wants to gain a deeper understanding of law and its institutions,[1] or in the words of Calavita (2010, p. 3), of the "real law"; the "law as it is lived in society". Consequently, in this paper, the doctrinal comparison is complemented by socio-legal insights gained by means of interviews with staff of both Courts (Menkel-Meadow, 2019).

Furthermore, before pursuing with the analysis, it is important to qualify the nature and definition of several terms used throughout this paper. As mentioned above, the right under investigation in the current contribution is the right to reparation of victims before two specific tribunals, namely the ICC and ECCC. The right to reparation before these two Courts does not appear to be a right per se, as for instance, the right to life as included in human rights instruments, but rather an entitlement of victims (Wemmers, 2012). Neither the legal basis of ICC nor that of ECCC refer to a victims' right to reparation but rather to the fact that "the Court

المنارة للاستشارات

www.

shall establish principles relating to reparations to, or in respect of, victims" (Rome Statute, 1998, article 75) and that "the purpose of Civil Party action before the ECCC is to seek collective and moral reparations" (Extraordinary Chambers in the Court of Cambodia (ECCC) Internal Rules, 2015, Rule 23(1)). Nevertheless, the victims can actively claim reparations before both tribunals by submitting applications. Consequently, the evaluation of these applications by the tribunals, and consideration of victims' requests for reparations throughout the case-law indicates that, in their turn, the tribunals recognise the existence of a right to reparation. Moreover, as ICL is based on individual responsibility, the reparations before the ICC and the ECCC are borne by the convicted person. As will be further discussed in section 3.2, the convicted persons are often indigent, which makes it extremely difficult to get reparations ordered against them. Consequently, the Courts used "reparations against the convicted person" as a starting point, and additionally designed a "safety net" to make sure that victims could still get reparations even in the case when the convicted person is found indigent.[2]

Although the right to reparation might have different meanings, referring to either its substantive or procedural dimensions (Shelton, 2006; van Boven, 2009), in the current research we refer to the right to reparation as defined in the mandates of both courts, elaborated at large in section 3.1.B below.[3] In addition, the term "implementation" refers to the enforcement of reparations, in other words, whether victims actually get that what was instructed by the courts through the reparation orders (van Genugten, van Gestel, Groenhuijsen, & Letschert, 2009). As will be seen, implementation is dependent on both endogenous and exogenous factors to the reparations system. Examples of endogenous factors include lengthy procedural debates amongst organs within the ICC system or court finances, whereas examples of exogenous factors include the role of NGOs or security issues on the ground.

Against this background, the paper is structured as follows. Following the introductory section, the second section focuses on the broader context in which the ICC and ECCC were established. Drawing on the context, the third section puts forward two observations in a comparative perspective. First, by focusing on the victims' rights, the content of the right to reparation, and the goals and functions of the courts, it posits that the normative bases of these two courts, including their goal to deliver rights for victims (*in casu*, the right to reparation) are influenced and moulded by the context in which the courts emerged. Second, it highlights that when it comes to transposing their normative bases into case-law, their jurisprudence is ultimately influenced by factual/empirical considerations emerging out of the complexity of the situation at hand, while at the same time the initial context has limited influence. The findings of the paper suggest that a court's normative basis must necessarily be backed up by rigorous scientific evidence supporting the feasibility of the goals it pursues or at least acknowledge from the beginning the constraints under which it will inevitably operate. We argue that, in order to make the victims' right to reparation a reality for the victims, it is time that these courts reassess their goals and pursue a more modest rhetoric, tailored to what is actually feasible for them to achieve. It is our hope that this contribution will contribute to the existing body of knowledge regarding the development and enforcement of the rights of victims of international crimes in general and the right to reparation in particular.

2. The context in which the ICC and ECCC emerged

In order to understand the development and inclusion of the right to reparation within the mandates of ICL-based courts, this section aims to provide the initial context in which the ICC and ECCC were set up. As such, it introduces the background which led to the establishment of both courts, focusing on the preparatory work as well as the theoretical groundwork underlying their establishment.

المنارة للاستشارات
www.

2.1. ICC

17 July 1998 marked a historical moment when 120 States adopted the Rome Statute, the legal basis for establishing the first permanent international criminal court. The ICC started its operations after the entry into force of the Rome Statute on 1 July 2002 (International Criminal Court (ICC), 2018). The coming into existence of the ICC is considered to be the pinnacle of international criminal justice development, and it developed building on the lessons learnt from the Nuremberg and Tokyo Military Tribunals, as well as the International Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) (Hirsch Ballin, 2018). Although the idea of an international criminal court had frequently been on the international agenda (Washburn, 1999), it was the end of the Cold War in the 1990s that created the appropriate climate to resurrect this ambition. Faced with the Balkan wars and the massive crimes committed in that context, and later on, with the genocide in Rwanda, the UN Security Council established the ICTY and ICTR in the first half of the 1990s, amid enormous political pressure to tackle the situation in those countries (Deitelhoff, 2009). These developments spurred the UN General Assembly to support initiatives to draft the founding document and set up an international criminal court. The ICC project emerged from preparatory work of the International Law Commission (ILC) in 1994, consolidated by the UN Preparatory Committee on the Establishment of an International Criminal Court (PrepCom), and concluded by negotiations carried out in Rome in 1998, under the auspices of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Washburn, 1999). Against this background, scholars contend that the ICC was established during a period characterised by relative political consensus regarding an international criminal court (Deitelhoff, 2009), as well as perceived optimism over the future of international criminal justice.[4] To be precise, the setting up has gained momentum amid what Teitel (2011) has called a normative shift in international law, referring to a gradual movement away from States towards protecting individuals. Arguably, the increasing concern for international human rights protection, including the development of victims' rights instruments, the advent of the ad-hoc tribunals, as well as the groundwork of the ILC[5] have all greatly contributed to the establishment of the ICC and its normative basis (Sperfeldt, 2017).

The ICC operates under its founding document, the Rome Statute, and the Rules of Procedure and Evidence (RPE), all negotiated by States Delegations during the 1998 Rome Conference. As explained in the commentary to the Rome Statute, the founding documents of the court do not reflect the victory of a model of law over another, instead they draw on different systems of law (Triffterer & Ambos, 2016). Thus, it creates a new system of rules permitting the effective functioning of the machinery of international criminal justice. It may be considered a "melting-pot" of some of the most adequate tendencies of criminal procedures stemming from all families of legal systems, positioning itself as the "highest common denominator" attainable by all legal models (Triffterer & Ambos, 2016).

2.2. ECCC

The ECCC has come into existence in 2007, as a result of protracted UN-Cambodian Government negotiations. Due to its structure, a national court with international elements, it is considered to be a hybrid court (Hoven & Scheibel, 2015). The establishment of the ECCC, contrary to that of the ICC – which appeared to be a rather natural step in the evolution of ICL – has at its core a specific conflict. The court was established as a reaction to the 1975–1979 conflict in Cambodia under the Khmer Rouge Regime (hereinafter referred to as the Cambodian conflict), which claimed the lives of approximately 1.7 million people, consisting in 21% of the population of Cambodia (Chandler, 2000). In 1997, the Prime Ministers of Cambodia requested help from the UN Secretary General in bringing the persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge to justice. The entire negotiations process between the UN and the Cambodian

المنارة للاستشارات
www.

Government spanned from 1997 to 2005 and included difficulties in reaching consensus between the two parties' different visions (United Nations General Assembly (UNGA), 2003; UNGA, 2005). On the one hand, the UN representatives advocated for enhanced international involvement over Cambodian involvement, in order to ensure that minimum international standards of justice would be upheld. On the other hand, the Cambodian Government militated for trials according to their own national rules, with a majority of national key personnel (including judges), and with due respect for State sovereignty (Bassiouni, 2008; Jørgensen, 2018; Skillbeck, 2008). The Cambodian counterpart also warned of the impact of a justice mechanism on Cambodia's need for peace and national reconciliation (UNGA, 1999). In addition, national politics played a role in the establishment of ECCC (Ciorciari & Heindel, 2014b); from the beginning, the Cambodian leaders expressed that if trials would be improperly conducted, they could create panic amongst former Khmer Rouge officers and potentially lead to a renewed war.[6] Distrust between the two negotiating parties and different interests stalled the process until 2005,[7] when the UN-Cambodia Agreement was eventually adopted by the two parties, laying the rules for the establishment of the court. This agreement constitutes the legal basis for the Law on the Establishment of the ECCC for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC Law) (2004), the legal instrument that regulates the functioning of the court. The law clarifies that the court has a hybrid structure within the national court system. Hence, the ECCC has a Cambodian character with, in a lower degree, international features. Furthermore, the court operates on the basis of its Internal Rules, which are a reflection of the Cambodian Criminal Procedure Law, complemented by international law in case of a lacunae in the Cambodian law, lack of clarity about a rule, or inconsistency with international standards of justice (ECCC Law, 2004, article 33). Consequently, the ECCC particularly mirrors Cambodian criminal proceedings, which are modelled after the French civil-law, inquisitorial framework (McGonigle, 2009; ECCC, 2017b). As such, the ECCC includes a judicial investigative function and an option for victims to participate as civil parties (Vasiliev, 2016). Furthermore, the prevailing Cambodian nature is also reflected in its judiciary; the ECCC rules with a majority of national judges, a national and international Co-Investigating Judge, and a national and international Co-prosecutor (Ciorciari & Heindel, 2014a). Moreover, the ECCC investigates and prosecutes both international and national crimes committed by the most responsible or senior members of the Khmer Rouge regime.[8]

3. Two observations in a comparative perspective

3.1. The context in which the courts emerged influenced the courts' normative bases

Drawing on the initial context of establishment of the ICC and ECCC, this section highlights how the context has influenced the normative bases of these courts in at least three aspects relevant to our discussion on reparations. As such, this account will focus on victims and their rights, the content of the right to reparation, as well as the courts' underlying functions and goals.

3.1.1. Victims and their rights

As pointed out above, the ICC was established in a period of time when the position of individuals in international law became stronger, due to the increased focus on universal human rights principles and norms,[9] as well as the transitional justice movement (Schiff, 2008). Consequently, the need to protect individuals from human rights or humanitarian law violations started to become an important concern of the international legal order (de Hoon, 2017). As Teitel (2011) explained, the period leading up to the adoption of the Rome Statute was marked by concerns for individuals and humanity, fostered by an apparent erosion of State sovereignty. In parallel, the transitional justice movement, spurred by the decline in polarisation between the East and the West, which started in the 1980s, placed emphasis on the condition of victims and their rights (Schiff, 2008). As such, the inclusion of victims as well as their rights in the ICC Statute appears to have been

www.

influenced by these previous developments in the international legal realm,[10] which crystalized into the Rome Statute. Not only did the Rome Statute take into account and respond to previous criticism against the ad-hoc ICTY and ICTR of failing to provide a role for victims in the proceedings, it also further consolidated the position of the individual, this time in ICL (McCarthy, 2012a; Triffterer & Ambos, 2016).

Against this background, the ICC Statute was established at the crossroads of international law and transitional justice; it has been hailed as being one of the most important recognitions of the victim as a subject of international criminal law (Bassiouni, 2006). It bestows several significant rights upon victims, namely, the right to participation and protection during court proceedings, as well as the right to reparation or compensation (Rome Statute, articles 68 and 75). As Conor McCarthy (2012b) argued, the creation of a regime of victims' rights in international criminal law to deal with the harm suffered by individual victims is not an obvious extension of international criminal law, but illustrates a potentially significant shift in international criminal justice. As Teitel (2014) demonstrated, the ICC and its victims' rights regime constitute an important phase in the transitional justice movement, entrenching on the one hand the Nuremberg model based on the prosecution of international crimes, and on the other hand enabling victims to access legal institutions. Indeed, this approach has been perceived as a progressive legal development; as Sara Kendall (2015) put it, it marks a shift of incorporating victims' needs within a field that has historically relegated them to its margins. As the history of the drafting of the Rome Statute shows, the breakthrough of the ICC, to provide a role for victims through a set of rights including a right to reparation, is the result of concerted efforts by States Delegations and international NGOs, strongly devoted to the cause of victims' rights (Donat-Cattin, 2016).[11] However, as shown above, the role played by the context leading up to the Rome conference – the growing concern for the role and protection of individuals at the international level as well as the transitional justice movement – appears to be equally important.

On the other hand, the general context in which the ECCC emerged was marked by completely different dynamics, even though the negotiations process took place in parallel to that of the ICC. As already mentioned, the establishment of the ECCC came as a response to a violent conflict and involved only two negotiating parties.[12] The process spanned over 20 years, and was riddled with political interference, compromises, and scepticism (Ciorciari & Heindel, 2014b). However, as with the ICC, the normative basis governing the ECCC and its reparations regime was influenced by the context in which the court developed.[13] As Hanna Bertelman (2010) asserted, the ECCC emerged as a hybrid court integrated within the Cambodian judicial system; this way, ECCC was ideally placed to take into account the local considerations, including the need for national reconciliation, while at the same time fulfiling international standards of justice. Consequently, the strong national ownership, complemented by UN involvement, was reflected in the choice of documents that provided the initial legal foundations of the court; the UN-Cambodian Agreement, Cambodian legislation on the ECCC, and the existing domestic criminal procedural law code (McGonigle, 2009).

Drawing on these documents, the Law on the Establishment of the Extraordinary Chambers was adopted. However, as it can be observed, the ECCC founding document only mentioned *en passant* the need for victims' protection during proceedings, and did not clarify a role and rights of victims before the ECCC (ECCC Law, 2004, article 33 new). Thereafter, the newly elected judges, both Cambodian (majority) and international (minority) were requested to draft the Internal Rules of the court building on national law and, in case of inconsistency, on international law. Building on the reference to victims in the Law on the Establishment of the Extraordinary Chambers, the judges had to carve out the victims' rights regime at the ECCC (personal interview with a ECCC Judge, Phnom Penh, June 2018). In the process, challenges shortly started to surface, resulting from the intricacies of the Cambodian conflict, the large number of victims, as well as the complexities inherent to the crimes under the ECCC jurisdiction (Pemberton & Letschert, 2017). Furthermore, the Cambodian Criminal Procedural Law Code provided a role for victims during proceedings as civil parties, and this constituted one of the initial bases for a larger role that victims were to play in the ECCC's

المنارة للاستشارات
www.

system. However, as it became apparent, the Cambodian law allowed the participation of victims in the proceedings on an individual and not a collective basis, which would not be feasible at the ECCC, considering the number of victims caused by the atrocities in Cambodia (Acquaviva, 2008). This was even further reinforced with the participatory rights of the civil parties under the national law and in the Internal Rules; they can, for instance, bring cases, call for witnesses, question the witnesses, the accused and the experts, and make written submissions. While maintaining the initial legal basis rooted in the national law, the ECCC Internal Rules (2015, Rules 74 (4), 80 (2), 90 (2), 91, 92, 94 (1)(a)) state that the judges designed aimed to respond as far as possible to the complexities posed by the Cambodian conflict.[14] Taking into account the challenges they had to grapple with, we assert that the judges ended up creating a unique victim-oriented system based on domestic practice and international trends, which at the same time was reflective of the unique context of the court (McGonigle Leyh, 2012). The ECCC was hailed as one of the few ICL courts whose legal framework relating to victims made it stand out amongst international criminal courts (McGonigle Leyh, 2012), and which provided victims with the right to participation, protection, and reparation (ECCC Internal Rules, 2015, Rule 23(1)) However, the content of these rights and their future enforceability was affected from the very beginning by the initial uncertainty permeating the negotiations and the ECCC set-up phase.[15]

As can be inferred, one main difference between the contexts in which these two courts emerged consists in the influence exerted during negotiations. While the ICC came about as an international court reflective of the highest aspirations of international criminal justice to date, the ECCC emerged as a hybrid court taking into account the context. The inclusion of victims and their rights before the ICC is the consequence of concerted work by States and international NGOs, against a background of progressive developing ideas regarding the position of the individual in international law. Contrarily, the ECCC witnessed a more modest development, mainly grounded in national law, which expanded to take the characteristics of the Cambodian conflict into account.[16] This is the merit of the judges at the ECCC, which developed the Internal Rules wherein the role of civil parties became more prominent.[17] As such, both courts achieved one important feat in the history of ICL: affording victims a significant role within international criminal the trials, as well as bestowing upon them an extensive set of rights – one important feat in the history of ICL.

3.1.2. The content of the right to reparation

In addition to influencing the status of victims and their rights, the context in which both courts developed appears to have further influenced the content of the right to reparation, as provided before the ICC and ECCC.

Article 75(1) of the Rome Statute lays down the components of the right to reparation before the ICC, which include, but are not limited to, restitution, rehabilitation, and compensation. The RPEs (2013, Rule 97) further state that reparations might be provided on an individual or collective basis, or as a combination thereof (International Criminal Court, 2013). Arguably, the broad scope of the right to reparation at the ICC draws on an important victims' rights instrument under the UN auspices, namely, the Basic Principles on Reparations (also known as the Van Boven/Bassiouni Principles).[18] This instrument sets forth the various elements relating to the right to reparation for victims of gross human rights violations and violations of international humanitarian law. It represented one important source of inspiration and impetus for the French, British and Japanese delegations, as well as international NGOs such as REDRESS during the Rome negotiations. The influence of the Van Boven/Bassiouni Principles on the Rome Statute negotiations was two-fold. On the one hand, it provided a strong legal basis for these interested parties to constantly expand the scope of the right to reparation, while on the other hand it was a tool to weak resistance against the inclusion of reparative measures for victims within the ICC Statute (Sperfeldt, 2017). The process of including reparations within the ICC Statute has not been smooth,[19] however, the context of its development provided fertile ground for it to become the state-of-the-art instrument in terms of reparations for victims of international crimes. A review of the preparatory work for the

المنارة للاستشارات
www.

Rome Statute, at its very beginning, reveals that the 1993 Draft by the ILC, on which the ICC Statute developed, did not even provide reference to reparations (United Nations International Law Commission, 1993, article 53(3)). The main opposition for the inclusion of reparations was rooted in certain State delegations' fears that the inclusion of reparations may activate the responsibility of States and may eventually be used to make reparations orders against them (McCarthy, 2015). As explained above, the involvement of key State delegations and international NGOs created momentum to spin the situation as to include the current article 75 within the Rome Statute. As a result of all these efforts, the ICC Statute became the first embodiment of the victims' right to reparation in international criminal proceedings (Zegveld, 2018), covering a broad set of reparatory measures to be awarded via its case-law.

As far as the ECCC is concerned, Rule 23 of the ECCC Internal Rules lays down the right to reparation, which is to be provided in the form of collective and moral reparations (Jeffery, 2014). The origins and content of the right to reparation before the ECCC remained unknown and largely unclarified[20] until the Appeals Chamber in case 001 shed light on the meaning of "moral" and "collective" characteristics of reparations. The Appeals Chamber clarified that the value of the ECCC proceedings should be viewed through its contribution to the process of national reconciliation (Prosecutor v. Kaing Guek Eav, 2012). While the "moral" characteristic refers to the reparations' aim to repair moral damages rather than material ones, the "collective" feature confirms the unavailability of individual financial awards, and consequently, that these measures must benefit victims as a collective. It also emphasised that reparation awards at the ECCC must take into account the Cambodian context (Prosecutor v. Kaing Guek Eav, 2012). Indeed, the drafting history of the right to reparation before the ECCC is not very explanatory in this regard. As discussed above, the Cambodian law constituted the starting point for the inclusion of reparations, however, the existing provisions were not tailored to respond to the context of mass atrocities and the large number of victims coming out of the Cambodian conflict.[21] As such, the reparations framework of the ECCC is the result of the drafting of the Internal Rules by both national and international judges, taking into account the local context and financial limitations facing the Court (Ciorciari & Heindel, 2014b). As explained by one judge at the ECCC during an interview (personal interview with an ECCC Judge, Phnom Penh, June 2018.): "[s]ince reparations were not foreseen initially in the Law Establishing the ECCC, it was difficult for us, the judges, to decide on the content of the right. 'Moral reparations' represented a way to express that reparations would not be monetary, due to lack of funding. 'Collective reparations' aimed to acknowledge the suffering of victims as a member of a group."

Consequently, a comparison of the legal frameworks on reparations of both courts reveals that the content of the right to reparation before the ICC is much more encompassing compared to that of the ECCC. Article 75 of the Rome Statute provides for a large range of reparations measures, including but not limited to restitution, rehabilitation, and compensation, on an individual and/or collective basis. Conversely, Rule 23 of the ECCC Internal Rules is limited in its content, covering only moral and collective reparations. As contended above, the difference appears to be rooted in the context of development; the ICC Statute negotiations on article 75 drew on, *inter alia*, the UN Basic Principles on Reparations, supported by key States and international NGOs. However, Rule 23 of the ECCC Internal Rules emerged as a result of a crafting process by national and international judges, confined in their endeavour by Cambodian law as well as the restrictions existing at the local level.

3.1.3. Courts' underlying functions and goals

The final point of consideration concerns the underlying functions and goals of both courts. Interestingly, both courts feature retributive[22] and restorative[23] justice functions,[24] which are to be achieved by fulfiling the different goals set forth in the courts' founding legal instruments.

The ICC Statute illustrates ambitious and encompassing goals (Fletscher, 2015), not in the least because it is a global court with worldwide outreach.[25] As such, a close reading of the Preamble to

المنارة للاستشارات
www.

the Rome Statute reveals the court's multiple goals: to end impunity of perpetrators of international crimes, to enhance the plight of "victims of unimaginable atrocities", and to safeguard peace for future generations as well as lasting respect for and the enforcement of international justice (Rome Statute of the International Criminal Court (last amended 2010), 1998, preamble). These goals are further reflected in the functions of the ICC. The setup of the court marked for the first time a departure from a merely punitive function of international criminal trials, as observed in the practice of previous international criminal justice tribunals. Thus, the ICC was invested with two functions;[26] the first function is concerned with the punishment of the accused, which is an expression of retributive justice, while the second function is concerned with the plight of victims, by placing them at the heart of proceedings and aiming to deliver justice to them (Assembly of States Parties, 2009; International Criminal Court, 2010). As such, the latter function is reflective of what Kendall (2015, p. 362) called "the restorative justice turn" of the ICC. Indeed, the ICC is the first ICL-based court where doing justice was conceived to refer not only to the prosecution and punishment of perpetrators of international crimes, but to also cover the provision of justice to victims through participation and especially through reparations (Balta, Bax, & Letschert, 2018; Moffett, 2015; Stover, Balthazard, & Koenig, 2011). In legal scholarship, different scholars attempt to justify the inclusion of "justice for victims" as one of the goals of the ICC. Kendall (2015, p. 362) attributes the restorative justice turn within the ICC's mandate to humanitarianism, which she defines as "the manifestation of compassionate or moralising sentiments as political forces that appear through practices, such as the provision of medical care to conflict-affected communities" and which predates the expansion of ICL. Fletscher (2015) argues that the "justice for victims" rhetoric is employed as one of the primary moral justifications of the ICC enterprise, in order to mobilise external support for the actions of the ICC. She explains that this way, victims of atrocity crimes become central to the ICC project, as they provide the moral urgency to mobilise political will and resources to punish perpetrators and to provide redress to victims.[27] Against this background, as can be inferred, both accounts lend support to the idea that the goals and functions of the ICC are part of a broader protective movement geared at remedying harm and protecting the rights of victims of international crimes (Stahn, 2015). In addition, this finding further ties into account assertion that that the context of establishing the ICC influenced, amongst others, the goals and functions of the court relating to victims.

With regard to the ECCC, as can be inferred from the Preamble to the ECCC Internal Rules (2015), its goals relate to conducting trials of those persons responsible for crimes against humanity, genocide, and war crimes during the rule of the Khmer Rouge from 1975 to 1979,[28] while bearing in mind the pursuit of justice, national reconciliation, stability, peace and security at the national level. As in the case of the ICC, the ECCC is concerned with the punishment of perpetrators, an expression of its retributive justice function, while it also pursues goals that support a restorative justice function. Indeed, similar to the ICC, justice for victims is one concern of the ECCC (ECCC, 2010b). As McGonigle (2009) argued, despite the fact that the Cambodian government opted in favour of criminal trials over a purely restorative justice process, the ECCC still incorporates a number of important elements commonly associated with Truth and Reconciliation Commissions, due to its focus on national reconciliation and justice for victims. It can be recalled that the representatives of the Government of Cambodia explained during the initial stages of negotiations that any decision to bring the Khmer Rouge leaders to justice must take account of Cambodia's need for peace and national reconciliation. At the same time, they clarified that if the trials would be improperly conducted, this would destabilise the fragile peace in the country (United Nations General Assembly, 1999).[29] Within the current ECCC legal framework, civil party participation and their right to reparation are proof of the ECCC's restorative function. Interestingly, as Johanna Herman argued, the ECCC's restorative justice function has expanded even during the functioning of the court, when non-judicial reparations were included in the ECCC's mandate to respond to the limited reparations awarded in the ECCC's first case. These

المنارة للاستشارات
www.

new reparations measures have the potential to address the broader interest of victims in general, not just civil parties (Herman, 2012). Taking into account the above illustration, it becomes clear that the ECCC is making great strides in attempting to strike a balance between retributive justice and restorative justice considerations.

As highlighted in this section, both the ICC and the ECCC feature retributive and restorative justice functions. However, the difference between the two courts' functions is rooted yet again in the context of establishment. As pointed out above, the ICC's narrative of providing justice to victims, added to a traditional retributive justice discourse is entrenched in a broader movement aimed at protecting the rights of victims. On the other hand, the ECCC's functions mainly represent a response to the struggles existing at the national level; punishing the perpetrators and maintaining peace at the national level, while keeping in mind the broader goal of achieving national reconciliation.

3.2. The context in which the courts emerged is not necessarily a predictor of how practice unfolds

The previous section posited that the context in which the ICC and the ECCC emerged has had influence on the courts' normative bases and theoretical underpinnings relating to victims' rights, including the right to reparation. *In concreto*, it argued that the developments in the practice and theory of international law leading up to the establishment of the ICC spurred it to establish a broad normative basis for reparations. As far as the ECCC is concerned, the influence of the local context, informed by political and legal considerations, translated into a more limited normative basis for reparations, tailored nonetheless to the apparent needs of the country.

At the ICC, Article 75 of the Rome Statute sets out the reparation regime. In addition to establishing the content of the right, as explained above, it provides that the court is authorised to order reparations by means of a decision, only after it has issued a conviction against an accused person. Furthermore, it explains that after the court issues a decision on reparations, the award for reparations, where appropriate, may be made through the Trust Fund for Victims (TFV). The TFV's establishment is provided for in article 79 of the Rome Statute, and its aim is to benefit victims and families of victims of crimes within the jurisdiction of the court. As such, the ICC and the TFV are connected in their goal of providing justice to the victims by means of reparations. However, they are two different organisations, with significant differences in their mandates, objectives, and context of work.[30] Currently, the case law wherein the ICC provided reparations consists of three cases, namely, the cases against Thomas Lubanga Dylio, Germain Katanga, and Ahmad Al Faqi Al Mahdi.

The current ECCC's reparations regime is set forth in rule 23 *quinquies* of the Internal Rules. It establishes the content of the right to reparation, and links the provision of reparations to a conviction. In addition to clarifying the scope of reparations and the formal requirements for requesting them, rule 23 *quinquies* further puts forward the modes of implementation of the reparations awards. As such, it clarifies that the court may order reparations that are borne by the convicted person, or may recognise projects amounting to reparations designed or identified by the Civil Parties' Lead Co-Lawyers, in cooperation with the Victims Support Section of the ECCC (the non-judicial reparations as introduced above).[31] So far, the ECCC has ordered reparations in three cases; Case 001 against Kaing Guek Eav alias Duch, Case 002/01 against Nuon Chea and Khieu Samphan, and Case 002/02 also against Nuon Chea and Khieu Samphan. Cases 002/01 and case 002/02 are part of the larger case 002, which was severed into two cases due to the complexity of issues covered (Extraordinary Chambers in the Courts of Cambodia, 2010a).

The context in which the two courts were established can be seen as a starting point for the reparations available in theory, yet these provisions on reparations have to be applied in actual cases. Consequently, the following section will highlight challenges to the transposition of these norms in its case-law and practice. As will be shown, although the initial context in which the courts

المنارة للاستشارات www.

emerged has influenced their normative bases, it will not necessarily be an indicator of how the practice unfolds. The case-law on reparations as well as its implementation do not emerge in a vacuum, but are influenced by a myriad of practical considerations, including, but not limited to, victims' needs on a case-by-case basis and other dynamics that influence the implementation (Roht-Arriaza, 2004). We posit that, ultimately, providing rights to victims, *in casu*, the right to reparation, is not only about their inclusion in instruments reflective of highest ideals and aspirations in ICL, but also about their effective implementation i.e. whether the beneficiaries of a right can actually avail themselves of its protection and scope.

3.2.1. Transposing the right to reparation's content via case-law

As seen above, the right to reparation at the ICC may include but is not limited to restitution, compensation and rehabilitation, on an individual and collective basis, whereas the right to reparation at the ECCC is restricted to collective and moral reparations. These provisions leave some leeway to the courts in deciding on reparations; it is up to the respective courts to further clarify the provisions on reparations, for instance the interpretation of what collective or moral reparations are. According to the Rome Statute (1998, article 75), it falls on the Trial Chamber to establish principles underlying its explanation of the reparations mandate, including, for instance, the determination of the scope of the damages and beneficiaries. Accordingly, these principles further specify the ICC's reparations regime. At the ECCC, the reparation mandate is laid down in its Internal Rules, which can be revised by the court itself.[32] Consequently, this leeway embedded in the Courts' legal bases might enable them to adapt the reparations procedure to the situation it faces in the courtroom and in the "implementation phase". It can react to the vocalised victims needs, as well as respond to prior rulings and difficulties arising during the implementation phase the reparation orders.

Hence, as will be discussed in this section, the case-law on reparations highlights that notwithstanding the broad (ICC) or more limited (ECCC) content of the right to reparation, as set forth in the courts' normative bases, there are other considerations that influence the practical transposition of the right to reparation's content via case-law.

3.2.1.1. ICC. The three cases that are concluded with a conviction before the ICC show some differences in the reparation modalities that are ordered.[33] In its first Order on Reparations, in the Lubanga case, the ICC only awarded collective reparations (Prosecutor v. Thomas Lubanga Dylio, 2012a, para. 274, 2015b, para., p. 143) despite the fact that victims clearly wished to receive individual reparations.[34] However, this exclusion of individual reparations did not last long. In the cases that followed, namely, the cases against Katanga and Al Mahdi, a combination of individual reparations, consisting of compensation, and collective reparations were provided by the ICC through the reparations orders (Prosecutor v. Germain Katanga, 2017a, para. 300, and 304; Prosecutor v. Ahmad Al Faqi Al Mahdi, 2017, para. 67, 80, and 90). In the case against Al Mahdi, the Trial Chamber went even further and indicated that the implementation of individual reparations, in the form of compensation, should be prioritised (Prosecutor v. Ahmad Al Faqi Al Mahdi, 2017, para., p. 140). This shift of the ICC's approach and its subsequent variation in the ordered reparative modalities appear to be driven by an alteration in the weighing of the demands in the situation at hand; with, on the one hand, a high number of victims and a lack of resources, and on the other hand the requests for individual reparations echoed by the victims participating in the proceedings (Balta et al., 2018). In these cases, the balance tilted towards the latter, by emphasising the individual victims' needs and requests, or in the words of the Trial Chamber: "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 committed by Mr. Katanga – were it to disregard their almost unanimous preference, by awarding only collective reparations" (Prosecutor v. Germain Katanga, 2017a, para., p. 339).

المنارة للاستشارات
www.

3.2.1.2. ECCC. The ECCC is only mandated to provide collective and moral reparations. As the case-law elicits, the court has shifted its approach from one case to another and consequently broadened its mandate on reparations. In its first case, the ECCC had a restricted conception of its mandate and asserted that it could only award reparations against the convicted person, thus excluding measures that required action by the State of Cambodia in the implementation or financing of reparations.[35] The court stressed that it is of "primary importance to limit the remedy afforded to such awards that can realistically be implemented" (Prosecutor v. Kaing Guek Eav, 2012, p. 668). Following the indigence of Kaing Guek Eav (alias Duch), the reparations ordered in the first case were limited to the inclusion of the names of the civil parties in the judgement and the publication of Duch's expressions of regret and acknowledgement (Prosecutor v. Kaing Guek Eav, 2012, para 667–668). This decision was met with critique from victims and civil society (Williams, 2016). Consequently, the Judges' Plenary amended the Internal Rules, thereby broadening the court's mandate for reparations by including the option of externally financed reparations. Pursuant to this revision of the Internal Rules, in case of the convicted person's indigence, the Victim Support Section (VSS) can design, identify and request reparative measures of pecuniary value, as long as the financing is secured from other sources (ECCC Internal Rules, 2015, Rule 23 *quinquies* (3) (b). These new Internal Rules were applied during the trials in Case 002/01 and Case 002/02, both against Nuon Chea and Khieu Samphan. The broadened mandate resulted in a wider scope of endorsed reparation measures in Cases 002/01 and 002/02; eleven and thirteen projects, respectively, were accepted by the court. These comprised projects consisting of psychological assistance, education, documentation, remembrance, and memorialisation (Prosecutor v. Nuon Chea and Khieu Samphan, 2014, para. 1151–1160, 2018, para., p. 77).

Even though both courts have a different starting point when it comes to awarding reparations, both courts have to weigh the requests of victims against the feasibility of reparations; it should be possible to actually implement the ordered reparations. Thus, amongst others, the courts have to make sure that the existing resources suffice to cover the pecuniary value of reparations, that the reparations do not undo the fragile peace in the communities, and that ongoing violations on the ground do not hinder the implementation. In the first cases adjudicated at the ICC and the ECCC, the courts gave priority to feasibility; only reparations that could actually be implemented were ordered, or that benefited as many victims as possible, provided the limited resources. Yet, both reparation orders were met with criticism from victims, civil society and experts.[36] Consequently, the ICC and ECCC both dealt with these objections, yet in different ways. Within its existing mandate, the ICC shifted its focus to award individual reparations, especially compensation. Whereas the ECCC amended its Internal Rules in order to broaden its mandate so that it could endorse measures that did not need the accused person's resources. In other words, the courts used the leeway they have in interpreting the reparations mandate and in ordering reparative measures, to, amongst others, adjust the reparations to the reactions it received after its first rulings. This flexibility removes the courts more and more from the initial normative basis; the right to reparation was transposed via its case law to include a broader scope of reparations than what was provided for at the outset. Against this background, the initial context of the ICC and ECCC that influenced their normative bases for the reparations is less prominent an indicator for the content of the reparations as elaborated in their case-law. Instead, concrete requests by victims regarding reparations turn out to influence the reparations orders.

3.2.2. Dynamics that influence implementation

3.2.2.1. ICC. As indicated above, article 75 of the Rome Statute posits that the ICC may order reparations against an accused person following his conviction and at the same time, reparations may be made through the TFV. The inclusion of the TFV within the ICC system to implement the court awarded reparations stems from negotiations during the Rome Conference. The idea of the

المنارة للاستشارات
www.

TFV arose in the context of discussions regarding fines imposed on convicted persons, which however had to be adjusted to the ambitions of the reparations mandate (Assembly of States Parties, 2002). Indeed, a system solely relying on the assets of convicted persons would not match the extensive reparations mandate. Therefore, these assets were complemented by voluntary contributions by States and other donors to the fund, as a compromise that was accepted by State delegations (McCarthy, 2012a). Although the negotiators agreed on the inclusion of a TFV within the ICC system, its purpose and relationship with the court remained vague in the Statute, merely providing the possibility for the court to make reparations awards "through the Trust Fund" (Sperfeldt, 2017). The court was called upon to clarify the meaning of this provision in its very first case; however, the relationship between the TFV and the ICC remains complicated today, carrying along implications for the design and implementation of reparations (Prosecutor v. Thomas Lubanga Dylio, 2015b, para., p. 76). In theory, the ICC reparations system provides that, after the court awards reparations, they are to be implemented by the TFV; as such, the TFV is first tasked with drafting an implementation plan and only after the court approves the plan, the actual implementation by the TFV can commence.[37]

In the case against Lubanga, the Appeals Chamber directed the TFV "to prepare the draft implementation plan and submit it to the Trial Chamber within six months of the issuance of the [3 March 2015 Reparations] Order" (Prosecutor v. Thomas Lubanga Dylio, 2015b, para. 75–76). However, it was only in April 2017, 5 years after its first decision on reparations that the first step of the implementation plan for reparations was finally approved by the Trial Chamber (Prosecutor v. Thomas Lubanga Dylio, 2017). As we previously argued, the underlying reason for the clash on the implementation plan was that the Trial Chamber of the ICC and the TFV did not agree on the required level of specificity (Balta et al., 2018). On the one hand, the ICC is bound in its specificity by respect for the rights of the offender, which need to be taken into account, particularly in view of his liability for reparations (Trial Chamber, ICC 2015a).[38] On the other hand, the TFV operates under specific procedural and operational realities which make it impossible for the TFV to reveal the details requested by the ICC (Balta et al., 2018). Similarly, the Trial Chamber ordered reparations in the cases against Katanga and Al Mahdi. In the case against Katanga, the draft implementation plan has been submitted before the Trial Chamber in July 2017 and is pending approval by the Trial Chamber (Prosecutor v. Germain Katanga, 2017b). In the case against Al Mahdi, the draft implementation plan has been submitted in May 2018 (Prosecutor v. Ahmad Al Faqi Al Mahdi, 2018a). The Trial Chamber criticised the TFV for submitting a plan that was flawed and contained a multitude of corrections (Prosecutor v. Ahmad Al Faqi Al Mahdi, 2018a, para. 13–14). Nevertheless, the Chamber approved the plan pending improvements (*Prosecutor v. Ahmad Al Faqi Al Mahdi*, 2018b, para. 12–14). In November 2018, the TFV resubmitted an "Updated Implementation Plan", clarifying all aspects previously challenged by the court (*Prosecutor v. Ahmad Al Faqi Al Mahdi*, 2018c), and requested approval by the Trial Chamber of which it is waiting.

As illustrated above, the court delegated the implementation of reparations to a quasi-external body, i.e. the TFV.[39] However, it still retained judicial powers over the process, with the ability to block its actions in relation to the implementation of reparations as long as it does not abide by the rules required by the court. As the practice in the three cases illustrates, this system was crafted with the idea to support the implementation of reparations at the ICC, nevertheless it now gives rise to a convoluted process which creates further barriers to the design and enforcement of reparations on the ground.[40] One essential downside to this approach is that the victims, the very people the system was allegedly supposed to benefit, grow dissatisfied with the ICC processes. Not only do they need to wait for many years for a conviction to be rendered in order to benefit from reparations,[41] but also, when they are finally entitled to reparations, they need to wait yet again for the implementation plan to pass the tests imposed by the ICC.[42] Realistically speaking, the entire reparations process at the ICC, from adjudication to implementation, is hardly providing justice to victims (Balta et al., 2018). The once ambitious ICC, reflective of the

المنارة للاستشارات

www.

highest ideals in ICL relating to victims' rights and their protection, has not managed yet to make them a reality in practice. One explanation for this may be that the very expectations that the ICC uttered at its inception were simply not feasible, and they should be adjusted moving forward. Another way out of this impasse may be found in the example of the ECCC provided below.

3.2.2.2. ECCC. The ECCC's case law and experience with reparations illustrate a dynamic approach to its jurisprudence on reparations, which is very much influenced by the challenges on the ground. As explained above, rule 23 *quinquies* sets forth the reparation regime at the ECCC, and links the provision of reparations to a conviction. As already indicated, after Case 001 was adjudicated, the Internal Rules have been amended in order to respond to the challenges posed by the implementation of reparations at the ECCC. Equally relevant to the discussion is the role of the VSS, the unit designated to, *inter alia*, support victims in filling applications with the court and assist them in the reparations process (ECCC Internal Rules, 2015, Rule 12 *bis*). As discussed in section 2, the negotiations to the establishment of the ECCC were characterised by a lack of mutual confidence between the negotiating parties, and as such, the court struggled with reputation and financial issues since its beginnings.[43] In consequence, the functioning of the VSS was heavily impacted by these issues, with researchers reporting that the VSS started its operations with a financial and human resources deficit (Sperfeldt, 2012). This in turn impacted the quality of outreach and representation of victims (Hoven, 2014). As documented, during the trial against Duch, the effort to inform the Cambodian population about victim participation at the ECCC was led by Cambodian NGOs, acting as intermediaries, instead of by the VSS (Stover et al., 2011). In addition, legal representation of civil parties, by both national and international lawyers, took place on a *pro bono* basis, as the court did not provide for any legal aid scheme for this purpose (Sperfeldt, 2013). From 2008 through 2012, the German Foreign Office awarded the ECCC a grant totalling 1.9 million euro to strengthen the VSS, which made it possible for the court to extend its support to victims in case 002 (Stover et al., 2011). The scarcity of human and financial resources in case 001 was further reflected in the reparations awarded in case 001 against Duch. The court held that, according to the Internal Rules, reparations are directed against and borne exclusively by the accused. Due to the indigence of Duch, the court thus lacked competence to enforce extensive reparations awards (Prosecutor v. Kaing Guek Eav, 2010, p. 238). The reparations awards in case 001 were therefore limited in their scope consisting of the inclusion of the names of Civil Parties and their deceased relatives in the judgement, and the compilation and publication of all statements of apology made by Duch throughout the trial (Prosecutor v. Kaing Guek Eav, 2010, p. 240).

Amid these limitations in Case 001, the Internal Rules were amended to offer an alternative venue to the civil parties to claim reparations, i.e. the non-judicial reparations referred to above in 3.1.6. These revised Internal Rules came into force before Case 002 commenced. As an alternative to the Chamber's order that the costs of the reparations awards shall be borne by the convicted person, the Civil Parties Lead Co-Lawyers can request the Chamber to recognise that specific reparations measures, designed or identified in cooperation with the VSS are appropriate for implementation using external funding (ECCC Internal Rules, 2015, Rule 23(3) *quinquies*). Thus, in Case 002, this provision enabled the VSS and the Lead Co-Lawyers to seek funding for reparations from donors and to develop the reparations projects in collaboration with governmental and non-governmental organisations external to the ECCC (Prosecutor v. Nuon Chea and Khieu Samphan, 2014, para. 1113). In addition, the court explained that this second venue for reparations may be drawn up for the benefit of the collective; at the same time, they must respond to the harm suffered as a result of the charges and allegations which constitute the basis of Case 002 (Prosecutor v. Nuon Chea and Khieu Samphan, 2011, para., p. 2).

Arguably, the amendment of the Internal Rules, to provide an alternative to reparations borne by the accused enlarged the scope of reparations in both segments of case 002. Under the new system, the role of the court was limited to merely endorsing the reparations projects proposed, as long as

المنارة للاستشارات
www.

funding was secured for them and they responded to harm resulting from charges in the case. As such, in case 002/01, of the 13 reparations projects requested by Civil Parties, the Trial Chamber turned down only two of them, due to the insufficiency of funding to support these projects (Prosecutor v. Nuon Chea and Khieu Samphan, 2014, para. 1153–1163). Similarly, in case 002/02 only two of the 14 reparations projects requested by Civil Parties were not endorsed by the Trial Chamber (Prosecutor v. Nuon Chea and Khieu Samphan, 2018, para., p. 2). As mentioned before, due to efforts by Lead Co-Lawyers and the VSS, funding for most of these projects was already secured in advance, and the majority of projects were already implemented before the ECCC endorsed them (Extraordinary Chambers in the Courts of Cambodia, 2014; Extraordinary Chambers in the Courts of Cambodia, 2017a).

To conclude, as exemplified above, the implementation of reparations projects at the ICC level is currently lagging behind. The protracted process of deciding upon an implementation plan has extended the prospect of reparations' implementation unreasonably. On the other hand, the ECCC provides a more robust example of how the practice on reparations can constantly adapt to respond to challenges posed by scarce financial and human resources, as well as limitations of the initial normative basis. As such, the practice on reparations of both courts exhibits challenges which might be overcome if a flexible approach is taken. At the same time, it highlights that the initial context in which a right emerged, as well their normative basis, are not predictors of how well the implementation will fare; openness and flexibility to challenges arising during the process of designing and implementing reparations are equally important to achieving meaningful reparations.

4. Concluding observations

In the past decades, international legal institutions have adopted mechanisms and implemented procedures stipulating a right to reparation, which consists of material and/or immaterial or symbolic measures to acknowledge the victims' individual or collective victimhood, and – as far as possible – to make amends for the suffering they went through. This article has addressed the approach to reparations of two international criminal justice institutions, namely the ICC and the ECCC, using a doctrinal comparative law perspective in order to analyse the development and practice of the two reparations mandates. We argued that since law and its institutions, such as courts, are interconnected with society and consequently influence each other, they cannot be separated from each other when one wants to gain a deeper understanding of law and its institutions. Consequently, in this paper the doctrinal comparison was complemented by socio-legal insights.

The period leading up to the development of the ICC and ECCC has witnessed increased attention for universal human rights on the one hand and transitional justice on the other (Letschert & Parmentier, 2014; Teitel, 2014). Victims' interests and rights started to take centre stage, and this development has also been reflected within ICL-based institutions which made it as one of their goals to deliver rights for victims, including the right to reparation. As illustrated in the paper, the normative culmination of ideas in international law and transitional justice was incorporated in the ICC Statute. The founding document of the ICC included an extensive set of rights for victims, reflecting a progressive development in ICL-based courts. Even though its drafting took place at the same time, the ECCC's Statute is much more limited. It does provide for a set of rights of victims and a right to reparation, however, they are transplanted from the Cambodian legal system and tailored by the judges, to the extent possible, to the specifics of the Khmer Rouge conflict. Although the UN has played an important role in the establishment of the ECCC, the enthusiasm permeating the ICC negotiations was not transposed to the Cambodian case. The goals the ECCC pursues are limited to the national context and the reconciliation of the country's population.

Thus, this initial context in which these courts developed further influenced their legal bases. We highlighted this by focusing on victims and their rights, the content of the right to reparation, as well

المنارة للاستشارات
www.

as the courts' goals and functions. The ICC's Statute includes the most comprehensive set of rights for victims, a broad and encompassing right to reparation, and it pursues goals on a global scale, informed by the ICC's retributive and restorative justice functions. All these elements are reflecting developments in international law and transitional justice prior to the adoption of the Rome Statute. The ECCC is more restricted; the rights of victims, the content of the right to reparation, and the goals it pursues are shaped by the frictions between the negotiating parties as well as the challenges to adapt the Cambodian national criminal law to the situation under ECCC consideration.

Furthermore, by scrutinising the case-law of these two courts, the paper highlighted that the initial context of development might not necessarily influence their jurisprudence. By focusing particularly on reparations, this article contends that there is room for improvement in the Courts' jurisprudence as well as the actual implementation of the reparation orders. At the ICC level, three orders on reparations have been issued so far, however, the process of implementation is developing at a very slow pace. We acknowledge the challenges posed by the situations where the ICC-awarded reparations have to be implemented.[44] However, this research has also highlighted that ongoing confrontations between the court and the TFV have resulted in significant delays in the drafting of the implementation plans. In addition, according to publicly available documents, victims at the ICC have not received any court-ordered reparations since the ICC's establishment almost 20 years ago. On the other hand, the ECCC's case-law on reparations indicates that the initial reparations system in place at the ECCC translated into very limited reparations in its first case, to the dissatisfaction of victims (Nickson, 2017). Pursuant to amendments to its legal basis, the Court eventually succeeded to better respond to victims' calls for more extensive reparations in case 002.[45] In addition, by the time these reparations were endorsed by the Court through its judgements, most of the funding and implementation was already underway. The case of ECCC lends support to the idea that the openness and flexibility of courts, to acknowledge when change is needed and adapt to challenges arising during the process of designing and implementing reparations appears to be more important than the initial context. We contrast the ECCC's amendment of its Internal Rules to better respond to victims' calls for reparations to the ICC's stiff application of legal rules by judges that stalls the reparations' implementation.

Concluding, we contend that international criminal justice interventions have great trouble in transposing lofty ideals in practice. When viewing the respective mandates of the ICC and ECCC and the ensuing rights, one cannot help but wonder if thought was ever given to the actual feasibility of implementation. It appears that the drafters of the two mandates pushed all challenges and problems on future judges and practitioners' plates. We believe that pros and cons should have been considered from the beginning, and the risks strongly highlighted. The fact that the justice for victims' rhetoric is still being pursued and reiterated by courts such as the ICC, although there is actually no empirical study to support this,[46] points to recklessness from the ICC's side. We contend that justice through reparations is seen to be done when it is seen in the eyes of the victimised populations (Pemberton & Letschert, 2017). Simply put, it is the victims who determine whether reparations will have the desired impact in practice. Reparations should not merely be about provisions in legal statutes or lengthy debates between lawyers and judges. For reparation mandates to be effective, we urge for a deeper reflection on the feasibility of all the underlying goals of international criminal justice and a realistic assessment of its performance in practice.

Notes

1. According to a socio-legal approach, the analysis of law is directly linked to the analysis of the social situation to which the law applies and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation (Menkel-Meadow, 2019; Schiff, 1976). Equally, it is important to note that the interviews for the purpose of this article were carried out with the goal of contextualising the findings emerging out of the doctrinal research, which is the main research method employed in this study. As such, the interviews are not utilised in the current research as a primary research method.

المنارة للاستشارات
www.

2. The assistance mandate of the Trust Fund for Victims, as well as the change of the Internal Rules of the ECCC can be seen as a "safety net" in case the convicted person is indigent.
3. We acknowledge that different terms regarding reparations are used across international instruments. For instance, the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power uses the terms; redress (general term), and the more specific forms of, amongst others, restitution and compensation. However, the terminology we are using in this article is based on the wording used in the respective legal rules.
4. Luban (2013, p. 506) provides the geopolitical background for the establishment of the ICC, calling it "the honeymoon period for ICJ". He explains that the international criminal justice climate at the global level in early 1990s was rather positive. Payam Akhavan (2013), similarly, called this period as "romanticisation" over international criminal law.
5. As James Crawford (1997) explained, in 1985–1990 nobody took seriously the prospect of an international criminal court, despite several discussions. It was with the development of the ICTY/R ad-hoc tribunals, as well as the ILC draft statute for an international criminal court in September 1994 that the establishment of the ICC took off.
6. In addition, throughout the years of its functioning, a number of international judges resigned their functions citing political interference and dysfunctional climate (Killean, 2017).
7. Throughout 2002, the UN expressed that the ECCC's normative basis would not guarantee the international standards of justice required by the UN to continue discussions towards the establishment of the Court, which led the UN to withdraw from negotiations for a short period (Bassiouni, 2008).
8. The international crimes consist of genocide, war crimes, and crimes against humanity, while the national crimes are limited to homicide, torture and religious persecution (ECCC Law, 2004, articles 3–8).
9. For instance, in the 1990s, protocol 11 to the European Convention on Human Rights has been adopted, through which the right to individual petition has become compulsory for all States Parties to the Council of Europe (Council of Europe, 1990). Also, the rise of interest in the position of individuals was highlighted by the growing concerns at the UN level, with the adoption of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, as well as the 2005 UN Basic Principles on Reparations, whose drafting process started in 1989 (van Boven, 2010).
10. William Schabas (Schabas, 2001, p. 20) expressed that "without any doubt its [the ICC Statute's] creation is the result of a human rights agenda that has steadily taken centre stage within the United Nations".
11. Christoph Sperfeldt (2017) similarly details how the combined efforts of France and the United Kingdom State Delegations, as well of international NGOs were instrumental in incorporating a reparations mandate into the Rome Statute.
12. A Review of the negotiations leading to the establishment of ECCC points to the involvement of UN and Cambodian representatives, as well as US Diplomats, but not NGOs, as was the case of the ICC (Documentation Center of Cambodia, 2001).
13. One other important aspect to the establishment of the ECCC constituted the funding, to which the UN was not willing to contribute if the ECCC would not commit to international standards of justice (Documentation Center of Cambodia, 2001).
14. For instance, due to the high number of civil parties and the equality of arms in relation to the suspect, the ECCC's Internal Rules restricted the scope of individual civil party participation, especially through obligatory representation (Zhang, 2016; Sperfeldt, 2018).
15. As will be shown below in section 3.1.B, the content of the right to reparation is embedded in the local context and reflecting the limited resources on the ground. In addition, although the inclusion of victims and their rights at the ECCC is an important development, accounts demonstrate that questions about the inclusion of victims were some of the last issues addressed by judges when drafting the Internal Rules and almost no mention was made of victims in the Framework Decision or ECCC Law (McGonigle Leyh, 2011).
16. Interestingly, ECCC did not have as a starting point a strong support by NGOs and States, although the negotiations were indeed carried out by UN diplomats aware of the parallel developments at the ICC.
17. Christoph Sperfeldt (2018) asserts that the role of NGOs in advocating for extensive victims' rights at ECCC is significantly more modest compared to the role of NGOs in the negotiations to the establishment of ICC. However, they did play a role, albeit at a later stage, and more modest.
18. Christoph Sperfeldt (2017) argued that proponents for the inclusion of the right to reparation argued that because a right to reparation for victims of mass atrocities is recognised under international human rights law, it must equally be recognised under international criminal law and therefore be enshrined in the ICC Statute, with reference to the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the then draft Basic Principles and Guidelines. At the same time, he also detailed how the Basic Principles became one important source of inspiration for article 75 of the Rome Statute.
19. As Conor McCarthy (2012a) argued, the reparations regime at the ICC is not the result of some grand design but an arrangements that evolved in the later stage of the negotiations process from a number of negotiations and proposals.

المنارة للاستشارات
www.

20. The Internal Rules exemplified forms that reparations may take: a) an order to publish the judgement in any appropriate news or other media at the convicted person's expense; b) an order to fund any non-profit activity or service that is intended for the benefit of Victims; or c) other appropriate and comparable forms of reparation (ECCC Internal Rules, 2015, Rule 23 (12)).
21. Under national law, civil parties have the right to claim individual monetary compensation, while both individual as well as material measures are excluded from the reparative mandate of the ECCC (Prosecutor v. Kaing Guek Eav, 2010, para. 661, footnote 1144.)
22. Retributive justice is related to the institution of criminal punishment (Hermann, 2017) Wenzel, Okimoto, Feather, and Platow (2008) explain that retributive justice essentially refers to the repair of justice through the imposition of punishment.
23. Restorative justice aims to affirm the status of victims and their rights. It seeks to take into account and consider the interests of the victim, the offender as well as the community. As such, it questions traditional retributive criminal justice, which is, inter alia, concerned with the punishment of the offender (Clark, 2008; Evans, 2012; Zehr, 1990).
24. The challenges inherent in attempting to strike a balance between the two functions of the ICC have been discussed at large in (Balta et al., 2018) By examining the Court's practice on reparations to date, we argue that the restorative justice function of the ICC, relating to concern for victims and their rights is overshadowed by the retributive justice function.
25. At the time of writing of this article, 123 States were States Parties to the Rome Statute. Out of them 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States (International Criminal Court, 2019).
26. The argument might be made for a third function of the ICC, due to its more abstract goals that it pursues, as elicited by its concern for future generations as well as respect for international justice.
27. Fletscher (2015) also provides the example of former presidents of the ICTY who although did not provide for right for victims, including the right to reparation, it nevertheless invoked victims in the annual reports of the tribunal to the UN Security Council as a measure of the success of the institution; completed trials deliver justice to victims. Seen this way, the ICC is the first international criminal justice institution that propelled the "justice for victims" narrative to become a function of law.
28. Interestingly, the Law establishing the ECCC (2004), on the other hand, provided in article 1 that its goal was merely to conduct trials of the most responsible Khmer Rouge leaders.
29. Some scholars argued that justice in Cambodia came in the form of ECCC trials, and not a Truth and Reconciliation Commission – which was also on the table – due to the fact that the ratione temporis and personae of the ECCC was to be rather limited, excluding risks that the Government in power would also be prosecuted (as most of them were Khmer Rouge officials (Klosterman, 1998; McGonigle, 2009).
30. As is well known, the TFV has two equal, victim-focused mandates: a reparations and an assistance mandate. The reparations mandate is linked to the ICC conviction of an accused; following a conviction the Court may make awards on reparations "through" the TFV. The assistance mandate, on the other hand, is concerned with benefits to all victims of crimes under the Rome Statute, and it is not linked to any conviction (Rome Statute of the International Criminal Court (last amended 2010), 1998, article 75(2); ICC RPE, 2013, rule 98(5); Balta et al., 2018).
31. During the first case at the ECCC, the reparations awards were to be borne by the accused person, in relation to the crimes he was found guilty of. However, he turned out to be indigent, thus significantly limiting the reparations awards provided to the civil parties. In the Case 002, the Internal Rules were amended as to offer an alternative venue to the civil parties to claim reparations, and they currently reflect the reparations regime described above.
32. At the time of writing, the ninth revision of the Internal Rules is at play.
33. The ICC has at the moment of writing not agreed on a reparations programme, nevertheless, several reparative measures have been ordered by the Court.
34. In a submission of group V01, the LRV Stated that 12 of 14 victims wanted compensation (Prosecutor v. Thomas Lubanga Dyilo, 2012c, para., p. 15). Similarly, in a submission of group V02, similar wishes were echoed (Prosecutor v. Thomas Lubanga Dyilo, 2012b, para., p. 16).
35. Claims for measures containing health care, commemoration days, renaming of public buildings and State apology were rejected (*Prosecutor v Kaing Guek Eav*, 2012, para. 663–664).
36. In the case of the ICC against Ruto and Sang, victims withdrew of participation because they were extremely opposed to reparations on a community basis (Prosecutor v. William Samoei Ruto and Joshua Arap Sang, 2013, para. 12; Williams, 2016, p. 332).
37. The Draft Implementation Plan is based on consultations with the Registry, the legal representatives of victims, the defence, local authorities and experts. After hearing from the parties, the Trial Chamber may then approve, reject or modify the plan. Once approved, the Trust Fund launches an international competitive bidding process to select implementing partners on the ground (Assembly of States Parties, 2005). In addition,

المنارة للاستشارات

www.

the Trust Fund is required to submit periodic progress reports to the Chamber throughout the implementation phase (REDRESS, 2018).

38. The Trial Chamber argued that it is not able to rule on Lubanga's liability as long as it does not have a list with the identified beneficiaries and the extent of their harm, the specific details about the proposed programmes and a precise evaluation of the costs (Prosecutor v. Thomas Lubanga Dylio, 201, para. 14 and 22).
39. Even though the TFV is established in the Rome Statute and thus, is part of the ICC reparations system, its role in relation to the Court ordered reparations is limited to the implementation of the reparations.
40. For instance, in the Lubanga case, the approval of the TFV's implementation plan by the Court was stalled for almost one year due to the fact that the Court wanted clarity over all the details regarding beneficiaries of reparations, despite the TFV insisting that this was impossible given the challenges on the ground (*Prosecutor v. Thomas Lubanga Dyilo*, 2017, para. 15–17; Balta et al., 2018, p. 12).
41. For instance, the abrupt termination of proceedings in the case of Prosecutor v. Jean Pierre Bemba Gombo left all the victims deeply disappointed with the ICC process: "victims are disappointed and have lost faith in the justice process following Mr. Bemba's acquittal" (Prosecutor v. Jean Pierre Bemba Gombo, 2018).
42. As a report by REDRESS (2019, p. 10)put it, "In the Lubanga case, 15 years after the commission of the crimes in 2003, victims are yet to receive the reparations they have been waiting for, even though the first reparations decision was handed down in 2012."
43. As explained by Corciari and Heindel (2014b, p. 6), "unlike the ICTY and ICTR, which receive funds from the general UN budget, hybrid courts generally have relied on voluntary funding, leaving them vulnerable to financial gaps. To a significant degree, they took shape precisely because key donor States were unwilling to invest the financial and political capital needed to set up fully international courts."
44. For instance, as journalistic publications indicate, peace in the Democratic Republic of the Congo where the reparations awarded in Lubanga and Katanga need to be implemented, remains a convoluted matter (Cumming-Bruce, 2019). Similarly, several journalistic publications document the instability in Mali, where the reparations awarded in the Al Mahdi case need to be implemented (Mules, 2019).
45. This is not to assert that the reparations in case 002 are without criticism. Sperfeldt (2018) for instance, argued in his doctoral thesis, that this approach resulted in the de-judicialization of reparations as they are not linked with the guilty conviction of an accused person, potentially constituting a step backward to the protection of the victims' right to reparation.
46. The project, "What's Law Got to Do With It?" (currently developed at Tilburg University and funded by the Netherlands Research Organisation) aims to empirically asses the contribution of international criminal and human rights law to repairing the harm of victims of international crimes. For more information, see https://www.tilburguniversity.edu/research/institutes-and-research-groups/intervict/research/projects/reparations.

Funding

This work was supported by the Nederlandse Organisatie voor Wetenschappelijk Onderzoek [VIDI Research Grant].

Notes on contributors

Alina Balta is PhD Researcher with the International Victimology Institute Tilburg (INTERVICT), at Tilburg University. She is conducting research on the right to reparation for victims of international crimes, and to this end, scrutinizing the relevant case law of the ICC, ECCC, the Inter-American Court of Human Rights, and the European Court of Human rights. Alina's research is interdisciplinary, bringing victimological, psychological, and philosophical lens to international criminal and human rights law issues.

Manon Bax is a Dutch PhD student at INTERVICT (Tilburg University) and is studying collective reparations in international law and transitional justice. She uses a qualitative content analysis to map the development of collective reparations in several international criminal courts, human rights tribunals and transitional justice institutions such as truth commissions. Manon has gained a master's degree for the Research Master in Law (LLM) and for the Master Victimology and Criminal Justice (MSc) at Tilburg University.

Rianne Letschert is Professor in international law and victimology at Maastricht University, where she is also rector magnificus. She has written several articles and co-edited books relating to victims of international crimes and the role law may play in addressing the needs of victims and societies confronted with mass victimization. She has been expert consultant on victim issues for the Legal Representatives of Victims' Team of the Special Tribunal for Lebanon, is Trustee of Redress The Netherlands and member of the Dutch Advisory Committee of Life-long Convicted Persons that is entrusted with the task to advice on reintegration activities of life-long sentenced convicts.

المنارة للاستشارات
www.

References

Acquaviva, G. (2008). New paths in international criminal justice? The internal rules of the cambodian extraordinary chambers. *Journal of International Criminal Justice*, *6*(1), 129–151.

Akhavan, P. (2013). The rise, and fall, and rise, of international criminal justice. *Journal of International Criminal Justice*, *11*(3), 527–536.

Arendt, H., Jaspers, K., Köhler, L., & Saner, H. (1993). *Hannah Arendt/Karl Jaspers correspondence 1926–1969*. San Diego: Harvest Books.

Arendt, H., & Kohn, J. (2005). *Essays in understanding: 1933–1954: Formation, exile, and totalitarianism*. New York: Schocken Books.

Assembly of States Parties. (2002). *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the court, and of the families of such victims*. Retrieved from https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-06-ENG.pdf

Assembly of States Parties. (2005). *Regulations of the trust fund for victims*. Retrieved from https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf

Assembly of States Parties. (2009). *Report of the court on the strategy in relation to victims*. Retrieved from https://reliefweb.int/report/world/report-court-strategy-relation-victims-icc-asp845

Balta, A. D., Bax, A. M. H. M., & Letschert, R. M. (2018). Trial and (potential) error: Conflicting visions on reparations within the ICC system. *International Criminal Justice Review*, *29*(3), 221–248.

Bassiouni, M. C. (2006). International recognition of victims' rights. *Human Rights Law Review*, *6*(2), 203–279.

Bassiouni, M. C. (2008). *International criminal law. Volume 3: International enforcement* (3rd ed.). Leiden, the Netherlands: Martinus Nijhoff Publishers.

Bertelman, H. (2010). International standards and national ownership? Judicial independence in hybrid courts: The extraordinary chambers in the courts of Cambodia. *Nordic Journal of International Law*, *79*, 341–382.

Calavita, K. (2010). *Invitation to law & society: An introduction to the study of real law*. Chicago: The University of Chicago Press.

Chandler, D. P. (2000). *Voices from S-21: Terror and history in pol pot's secret prison*. Berkeley, USA: University of California Press.

Ciorciari, J. D., & Heindel, A. (2014a). Experiments in international criminal justice: Lessons from the Khmer Rouge tribunal. *Michigan Journal of International Law*, *35*(2), 369–442.

Ciorciari, J. D., & Heindel, A. (2014b). *Hybrid justice: The extraordinary chambers in the courts of Cambodia*. Ann Arbor, USA: University of Michigan Press.

Clark, J. N. (2008). The three Rs: Retributive justice, restorative justice, and reconciliation. *Contemporary Justice Review*, *11*(4), 331–350.

Council of Europe. (1990). *Explanatory Report to the Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome*. Retrieved from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5dd

Crawford, J. (1997). An international criminal court. *Connecticut Journal of International Law*, *12*(2), 255–263.

Cumming-Bruce, N. (2019). Hundreds of thousands flee congo violence, in region afflicted by Ebola. *New York Times*. Retrieved from https://www.nytimes.com/2019/06/18/world/africa/congo-ethnic-violence-ebola.html

De Greiff, P. (2006). Justice and Reparations. In P. de Greiff (Ed.), *The handbook of reparations* (pp. 451–478). Oxford, UK: Oxford University Press.

de Hoon, M. (2017). The future of the international criminal court: On critique, legalism and strengthening the ICC's legitimacy. *International Criminal Law Review*, *17*(4), 591–614.

de Wilde, Ooms and Versyp ("Vagrancy") v. Belgium. (European Court of Human Rights 1972). Retrieved from https://www.legal-tools.org/doc/1b87ca/pdf/

Deitelhoff, N. (2009). The discursive process of legalization: Charting islands of Persuasion in the ICC case. *International Organization*, *63*(1), 33–65.

Documentation Center of Cambodia. (2001). Searching for the truth – How the Khmer Rouge tribunal was agreed: Discussions between the Cambodian government and the UN. Retrieved from http://d.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm

Donat-Cattin, D. (2016). Article 75: Reparations to victims. In O. Triffterer & K. Ambos (Eds.), *Rome statute of the international criminal court: A commentary* (pp. 1853–1870). London, UK: Bloomsbury.

Drumbl, M. (2005). Collective violence and individual punishment. *Northwestern University Law Review*, *99*(2), 539–610.

Drumbl, M. (2007). *Atrocity, punishment, and international law*. Cambridge, UK: Cambridge University Press.

Evans, C. (2012). *The right to reparation in international law for victims of armed conflict*. Cambridge, UK: Cambridge University Press.

Extraordinary Chambers in the Courts of Cambodia. (2010a). Closing order, case 002. Retrieved from https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf

للاستشارات

www.

Extraordinary Chambers in the Courts of Cambodia. (2010b). *Opening speech by the plenary's president judge KONG srim during the 8th plenary of the extraordinary chambers in the courts of Cambodia (ECCC)*. Retrieved from https://www.eccc.gov.kh/sites/default/files/media/8th_plenary_president_speech_EN.pdf

Extraordinary Chambers in the Courts of Cambodia. (2014). *Overview of civil party reparation requests in case 002/01*. Retrieved from https://www.eccc.gov.kh/sites/default/files/articles/Annex%20Case%20002-01%20ReparationProjects.pdf

Extraordinary Chambers in the Courts of Cambodia. (2017a). *Civil party lead co-lawyers' supplemental submission on funding issues related to reparation projects in case 002/02 and request for guidance with confidential annexes*. Retrieved from https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E457_6_2_4_EN.PDF

Extraordinary Chambers in the Courts of Cambodia. (2017b). *Is the ECCC a Cambodian or an international court?* Retrieved from https://www.eccc.gov.kh/en/faq/eccc-cambodian-or-international-court

Extraordinary Courts in the Courts of Cambodia. (2015) *Internal Rules* (9th revised version). Retrieved from https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf

Fletscher, L. (2015). Refracted justice: The imagined victim and the international criminal court. In C. de Vos, S. Kendall, & C. Stahn (Eds.), *Contested justice: The politics and practice of international criminal court interventions* (pp. 302–325). Cambridge, UK: Cambridge University Press.

Herman, J. (2012). Realities of victim participation: The civil party system in practice at the extraordinary chambers in the courts of Cambodia (ECCC). *Contemporary Justice Review*, *16*(4), 461–481.

Hermann, D. J. (2017). Restorative justice and retributive justice: An opportunity for cooperation or an occasion for conflict in the search for justice. *Seattle Journal for Social Justice*, *16*(1), 71–103.

Hirsch Ballin, E. (2018). The value of international criminal justice: How much international criminal justice can the world afford? *International Criminal Law Review*, *19*(2), 1–13.

Hoven, E. (2014). Civil party participation in trials of mass crimes a qualitative study at the extraordinary chambers in the courts of Cambodia. *Journal of International Criminal Justice*, *12*(1), 81–107.

Hoven, E., & Scheibel, S. (2015). Justice for victims' in trials of mass crimes: Symbolism or substance? *International Review of Victimology*, *21*(2), 161–185.

International Criminal Court. (2010) *Final report by the focal points (Chile and Finland). Stocktaking of international criminal justice: The impact of the Rome Statute system on victims and affected communities*. Retrieved from https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.a-ENG.pdf

International Criminal Court. (2013). *Rules of procedure and evidence* (2nd ed.). Enschede, The Netherlands: PrintPartners Ipskamp. Retrieved from https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf

International Criminal Court. (2018). *The ICC at a glance*. Retrieved from https://www.icc-cpi.int/Publications/ICCAtAGlanceENG.pdf

International Criminal Court. (2019). *The states parties to the rome statute*. Retrieved from https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

Jeffery, R. (2014). Beyond repair? Collective and moral reparations at the Khmer Rouge tribunal. *Journal of Human Rights*, *13*(1), 103–119.

Jørgensen, N. (2018). *The elgar companion to the extraordinary chambers in the courts of Cambodia*. Cheltenham, UK: Edward Elgar Publishing.

Kendall, S. (2015). Beyond the restorative turn: The limits of legal humanitarianism. In C. de Vos, S. Kendall, & C. Stahn (Eds.), *Contested justice: The politics and practice of international criminal court interventions* (pp. 352–376). Cambridge, UK: Cambridge University Press.

Killean, R. (2017). Pursuing retributive and reparative justice within Cambodia in research handbook on transitional justice. In C. Lawther, L. Moffett, & D. Jacobs (Eds.), *Research handbook on transitional justice* (pp. 466–487). Cheltenham, UK: Edward Elgar Publishing.

Klosterman, T. (1998). The feasibility and propriety of a truth commission in Cambodia: Too little? Too late? *Arizona Journal of International and Comparative Law*, *15*(3), 833–869.

Law on the Establishment of the Extraordinary Chambers for the Prosecution of the Crimes committed in Democratic Kampuchea (with inclusion of amendments as promulgated on 27 October 2004). (Cambodia, 27 Oct, 2004). Retrieved from https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf

Letschert, R. M., & Groenhuijsen, M. S. (2011). Global governance and global crime – Do victims fall in between. In R. M. Letschert & J. J. M. van Dijk (Eds.), *The new faces of victimhood: Globalization, transnational crimes and victim rights* (pp. 15–40). Dordrecht, the Netherlands: Springer.

Letschert, R. M., & Parmentier, S. (2014). Repairing the impossible: Victimological approaches to international crimes. In I. Vanfrachem, A. P. Pemberton, & F. Ndahinda (Eds.), *Justice for victims: Perspectives on rights, transition and reconciliation* (pp. 210–228). Abingdon, UK: Routledge Publishing.

Luban, D. (2013). After the honeymoon: Reflections on the current state of international criminal justice. *Journal of International Criminal Justice*, *11*(3), 505–515.

المنارة للاستشارات

www.

McCarthy, C. (2012a). *Reparations and victim support in the international criminal court*. Cambridge, UK: Cambridge University Press.
McCarthy, C. (2012b). Victim redress and international criminal justice: Competing paradigms, or compatibleforms of justice. *Journal of International Criminal Justice*, *10*(2), 351–372.
McCarthy, C. (2015). The rome statute's regime of victim redress: Challenges and prospects. In C. Stahn (Ed.), *The law and practice of the international criminal court* (pp. 1203–1223). Oxford, UK: Oxford University Press.
McGonigle, B. (2009). Two for the price of one: Attempts by the extraordinary chambers in the courts of Cambodia to combine retributive and restorative justice principles. *Leiden Journal of International Law*, *22*(1), 127–149.
McGonigle Leyh, B. (2011). *Procedural justice? Victim participation in international criminal proceedings*. Antwerp, Belgium: Intersentia.
McGonigle Leyh, B. (2012). Victim-oriented measures at international criminal institutions: Participation and its pitfalls. *International Criminal Law Review*, *12*(3), 375–408.
Menkel-Meadow, C. (2019). Uses and abuses of socio-legal studies. In N. Creutzfeldt, M. Mason, & K. McConnachie (Eds.), *Routledge handbook on socio-legal theory and methods* (pp. 1–36). New York: Routledge.
Moffett, L. (2015). Elaborating justice for victims at the international criminal court: Beyond rhetoric and the hague. *Journal of International Criminal Justice*, *13*, 281–331.
Moyn, S. (2010). *The last utopia. Human rights in history*. Cambridge, Mass: Belknap Press of Harvard University Press.
Mules, I. (2019). Mali's security crisis: A cycle of exploitation and corruption. *Deutsche Welle*. Retrieved from https://www.dw.com/en/malis-security-crisis-a-cycle-of-exploitation-and-corruption/a-48067929
Neiman, S. (2015). *Evil in modern thought: An alternative history of philosophy*. Princeton Classic ed., Princeton: Princeton University Press.
Nickson, R. (2017). Unmet expectations and the legitimacy of transitional justice institutions: The ICTY and the ECCC. In C. Brants & S. Karstedt (Eds.), *Transitional justice and the public sphere: Engagement, legitimacy, contestation* (pp. 125–146). Oxford, UK: Hart Publishers.
Pemberton, A., & Letschert, R. M. (2017). Justice as the art of muddling through. In C. Brants & S. Karstedt (Eds.), *Transitional justice and its public sphere: Engagement, legitimacy, contestation* (pp. 17–40). Oxford, UK: Hart Publishers.
Prosecutor v. Ahmad Al Faqi Al Mahdi. (Reparations Order), ICC-01/12-01/15 (Trial Chamber VIII, ICC 2017).
Prosecutor v. Ahmad Al Faqi Al Mahdi. (Public redacted version of "Corrected version of Draft Implementation Plan for Reparations) ICC-01/12-01/15-265-Conf (Trial Chamber, ICC 2018a).
Prosecutor v. Ahmad Al Faqi Al Mahdi Al Mahdi. (Public Redacted Version of 'Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations), ICC-01/12-01/15-273-Red (Trial Chamber, ICC 2018b).
Prosecutor v. Ahmad Al Faqi Al Mahdi Al Mahdi. (Public redacted version of "Updated Implementation Plan") ICC-01/12-01/15-291-Conf-Exp (Trial Chamber, ICC 2018c).
Prosecutor v. Germain Katanga. (Order for Reparations pursuant to Article 75 of the Statute), ICC-01/04-01/07 (Trial Chamber II, ICC 2017a).
Prosecutor v. Germain Katanga. (Public redacted document Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017), ICC-01/04-01/07-3728 (Trial Chamber, ICC 2017b).
Prosecutor v. Jean Pierre Bemba Gombo. (Final decision on the reparations proceedings), ICC-01/05-01/08, (Trial Chamber, ICC 2018).
Prosecutor v. Kaing Guek Eav. 001/18-07-2007-ECCC/TC, (Trial Chamber, ECCC 2010).
Prosecutor v. Kaing Guek Eav. 001/18-07-2007-ECCC/SC (Appeals Chamber, ECCC 2012).
Prosecutor v. Nuon Chea and Khieu Samphan. E145 (Trial Chamber, ECCC 2011). Retrieved from https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E145_EN.PDF
Prosecutor v. Nuon Chea and Khieu Samphan. 002/19-09-2007/ECCC/SC (Appeals Chamber, ECCC 2014).
Prosecutor v. Nuon Chea and Khieu Samphan. 002/19-09-2007/ECCC/TC (Trial Chamber, ECCC 2018).
Prosecutor v. Thomas Lubanga Dyilo. (Observations of the V02 group of victims on sentencing and reparations), ICC-01/04-01/06, (Trial Chamber, ICC 2012b).
Prosecutor v. Thomas Lubanga Dyilo. (Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10), ICC-01/04-01/06, (Trial Chamber, ICC 2012c).
Prosecutor v. Thomas Lubanga Dylio. (Decision establishing the principles and procedures to be applied to reparations), ICC-01/04-01/06-2904 (Trial Chamber, ICC 2012a).
Prosecutor v. Thomas Lubanga Dylio. (Decision on the "Request for extension of time to submit the draft implementation plan on reparations"), ICC-01/04-01/06-3161 (Trial Chamber, ICC 2015a).
Prosecutor v. Thomas Lubanga Dylio. (Judgement on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012), ICC-01/04-01/06 A A 2 A 3 (Appeals Chamber, ICC 2015b).

www.

Prosecutor v. Thomas Lubanga Dylio. (Additional Programme Information Filing), ICC-01/04-01/06 (Trial Chamber I, ICC 2017).
Prosecutor v. Thomas Lubanga Dylio. (Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims), ICC-01/04-01/06-3289 (Trial Chamber, ICC 2018).
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-01/09-01/11 (Trial Chamber V(A), ICC 2013).
REDRESS. (2018). *Making sense of reparations at the international criminal court*. Retrieved from https://redress.org/wp-content/uploads/2018/06/Making-sense-of-Reparations-at-the-ICC_Background-paper_20062018.pdf
REDRESS. (2019). *No time to wait: Realising reparations for victims at the international criminal court*. Retrieved from https://redress.org/wp-content/uploads/2019/02/20190221-Reparations-Report-English.pdf
Roht-Arriaza, N. (2004). Reparations decisions and dilemmas. *Hastings International and Comparative Law Review*, *27*, 157–219.
Rome Statute of the International Criminal Court (last amended 2010). United Nations General Assembly, (Jul. 17, 1998). Retrieved from https://www.refworld.org/docid/3ae6b3a84.html
Schabas, W. (2001). *An introduction to the international criminal court*. Cambridge, UK: Cambridge University Press.
Schiff, B. N. (2008). *Building the international criminal court*. Cambridge, UK: Cambridge University Press.
Schiff, D. N. (1976). Socio-legal theory: Social structure and law. *The Modern Law Review*, *39*(3), 287–310.
Shelton, D. (2006). *Remedies in international human rights law* (2nd ed.). Oxford: Oxford University Press.
Skillbeck, R. (2008). Defending the Khmer Rouge. *International Criminal Law Review*, *8*(3), 423–445.
Sperfeldt, C. (2012). Collective reparations at the extraordinary chambers in the courts of Cambodia. *International Criminal Law Review*, *12*(3), 457–490.
Sperfeldt, C. (2013). From the margins of internationalized criminal justice lessons learned at the extraordinary chambers in the courts of Cambodia. *Journal of International Criminal Justice*, *11*, 1111–1137.
Sperfeldt, C. (2017). Rome's legacy: Negotiating the reparations mandate of the international criminal court. *International Criminal Law Review*, *17*(2), 351–377.
Sperfeldt, C. (2018). Practices of reparations in international criminal justice (Unpublished Doctoral Dissertation, Australian National University, Canberra, Australia).
Stahn, C. (2015). Justice civilisatrice? The ICC, post-colonial theory, and faces of 'the local'. In C. de Vos, S. Kendall, & C. Stahn (Eds.), *Contested justice: The politics and practice of international criminal court interventions* (pp. 46–84). Cambridge, UK: Cambridge University Press.
Stover, E., Balthazard, M., & Koenig, K. A. (2011). Confronting duch: Civil party participation in case 001 at the extraordinary chambers in the courts of Cambodia. *International Review of the Red Cross*, *93*(882), 503–546.
Teitel, R. (2011). *Humanity's law*. Oxford, UK: Oxford University Press.
Teitel, R. (2014). *Globalizing transitional justice: Contemporary essays*. Oxford, UK: Oxford University Press.
Tonry, M. (2011). Can twenty-first century punishment policies be justified in principle? In M. Tonry (Ed.), *Retributivism has a past: Has it a future?* (pp. 3–29). Oxford, UK: Oxford University Press.
Triffterer, O., & Ambos, K. (Eds.). (2016). *Rome statute of the international criminal court: A commentary*. London, UK: Bloomsbury.
United Nations General Assembly. (1999). Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135. Retrieved from https://www.legal-tools.org/en/doc/3da509/
United Nations General Assembly. (2003). *Report of the secretary-general on the Khmer Rouge trials*. Retrieved from http://www.unakrt-online.org/sites/default/files/documents/A-57-769%281%29.pdf
United Nations General Assembly. (2005). *Report of the secretary-general on Khmer Rouge trials*. Retrieved from http://www.refworld.org/docid/43f30fcf0.html;
United Nations International Law Commission. (1993). *Revised Report of the Working Group on a Draft Statute for the International Criminal Court*. Retrieved from https://digitallibrary.un.org/record/171306
van Boven, T. (2009). Victims' rights to a remedy and reparation: The new United Nations principles and guidelines. In C. Ferstman, M. Goetz, & A. Stephens (Eds.), *Reparations for victims of genocide, war crimes and crimes against humanity* (pp. 19–40)). Leiden, the Netherlands: Martinus Nijhoff Publishers.
van Boven, T. (2010). 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. Retrieved from http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf
van Genugten, W. J. M., van Gestel, R. A. J., Groenhuijsen, M. S., & Letschert, R. M. (2009). Loopholes, risks and ambivalences in international lawmaking; The case of framework convention on victim's rights. In F. W. Winkel, P. C. Friday, G. F. Kirchhof, & R. M. Letschert (Eds.), *Victimization in a multidisciplinary key: Recent advances in victimology* (pp. 1–79). Nijmegen, the Netherlands: Wolf Legal Publishers.

المنارة للاستشارات
www.

Vasiliev, S. (2016). Trial process at the ECCC: The rise and fall of the inquisitorial paradigm in international criminal law. In S. Meisenberg & I. Stegmiller (Eds.), *The extraordinary chambers in the courts of Cambodia: Assessing their contribution to international criminal law* (pp. 389–433). The Hague, the Netherlands: Asser Press.

Velásquez-Rodríguez v. Honduras. IACtHR Series C No. 4 (Inter-American Court of Human Rights 1988).

Washburn, J. (1999). The negotiation of the Rome statute for the international criminal court and international lawmaking in the 21st century. *Pace International Law Review*, *11*(2), 361–377.

Wemmers, J. (2012). Victims' rights are human rights: The importance of recognizing victims as persons. *Temida*, *15* (2), 71–83.

Wenzel, M., Okimoto, T. G., Feather, N. T., & Platow, M. J. (2008). Retributive and restorative justice. *Law and Human Behavior*, *32*(5), 375–389.

Williams, S. (2016). Transformative reparations for women and girls at the extraordinary chambers in the courts of Cambodia. *International Journal of Transitional Justice*, *10*(2), 311–331.

Zegveld, L. (2018). Victims as a third party: Empowerment of victims? *International Criminal Law Review*, *19*(2), 321–345.

Zehr, H. (1990). *Changing lenses: A new focus for crime and justice*. Scottsdale, USA: Herald Press.

Zhang, B. (2016). Recognizing the limits of victims participation: A comparative examination of the victim participation schemes at the ECCC and ICC. In S. Meisenberg & I. Stegmiller (Eds.), *The extraordinary chambers in the courts of Cambodia: Assessing their contribution to international criminal law* (pp.515–534). The Hague, the Netherlands: Asser Press.

المنارة للاستشارات

www.