

# What's in a Name? ‘Reparations’ at the Extraordinary Chambers in the Courts of Cambodia

Rachel Killean and Luke Moffett

## Introduction

The right to reparations in international law following wrongdoing initially developed in the context of state obligations to other states.<sup>1</sup> However, the right has since evolved both in terms of who might *claim* reparations, and who might be considered *responsible* for their delivery. In relation to the former, the growth of international human rights has led to widespread recognition of the right to remedy for victims of human rights violations.<sup>2</sup> In relation to the latter, the rise of individual accountability for atrocity,<sup>3</sup> has seen international criminal courts increasingly adopt reparation processes into their mandates.<sup>4</sup> This has been evidenced at the International Criminal Court (ICC), the Extraordinary African Chambers (EAC), the Kosovo Specialist Chambers (KSC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). While the expansion of reparations into the sphere of international criminal law has been praised as a means of delivering a more victim-oriented form of justice,<sup>5</sup> it has also raised significant concerns over reparations’ conceptualisation and delivery.<sup>6</sup> The experiences of transitional justice mechanisms and states recovering from mass violence demonstrate that implementing reparative measures for large victim

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<sup>1</sup> *Germany v Poland*, The Factory at Chorzów (Claim for Indemnity) (The Merits), Permanent Court of International Justice, File E. c. XIII. Docket XIV:I Judgment No. 13, 13 September 1928 [125].

<sup>2</sup> See, e.g. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('UN Reparation Principles'), A/RES/60/147, 16 December 2005, Principles 15 and 16.

<sup>3</sup> Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law* (Oxford University Press, 2009).

<sup>4</sup> Eva Dwertmann, *The Reparation System of the International Criminal Court* (Martinus Nijhoff) 2010, 22.

<sup>5</sup> See Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 82-84; Ralph Henman and Mark Findlay, *Exploring the Boundaries of International Criminal Justice* (Ashgate Publishing, 2011) 1-23; Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2009).

<sup>6</sup> Andreas O’Shea, ‘Reparations under International Criminal Law’ in Max du Plessis and Pete Stephen, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia, 2007) 181.

populations is rarely straightforward.<sup>7</sup> Institutions may face thousands of potential recipients, limited resources, implementation challenges, and restrictive legal frameworks.<sup>8</sup> Practical challenges around eligible recipients, funding, design and delivery risk limiting the positive impact on victimised populations.<sup>9</sup> Furthermore, as a relatively new phenomenon, practice around the delivery of reparations in international criminal law remains in a state of flux,<sup>10</sup> with courts often failing to establish principles prior to their first convictions.<sup>11</sup> The ICC has highlighted the paramount importance of delivering prompt, appropriate and adequate reparations to victims,<sup>12</sup> yet questions remain as to how and whether reparations for mass victimisation can be effectively delivered through a legal framework of individual accountability.<sup>13</sup>

The inclusion of reparation mandates in some international criminal courts has led to growing interest amongst legal practitioners and academics with regards to how judicially ordered reparations can be conceptualised, what principles should guide their implementation, and how they can be differentiated from other responses to periods of violence, such as assistance and more general development.<sup>14</sup> While frames of analysis for reparations for mass atrocity have often focused on large administrative programmes,<sup>15</sup> some principles underpinning judicially awarded reparations have begun to emerge.<sup>16</sup> These have been synthesised by Dixon as including: 1) the principle of responsibility, whereby reparations are understood as the responsibility of a wrong-doing party to make amends for their wrong-doing; 2) the principle of recognition, whereby individuals are recognised as having been wrong and

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<sup>7</sup> Riane Letschert and Theo van Boven, ‘Providing Reparation in Situations of Mass Victimization’ in Riane Letschert et al., *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011) 153-181.

<sup>8</sup> Carla Ferstman, ‘Reparations, Assistance and Support’ in Kinga Tibori-Szabo and Megan Hirst, *Victim Participation in International Criminal Justice* (Asser Press, 2017) 385 - 412.

<sup>9</sup> Gaelle Carayon and Jonathon O’Donohue, ‘The International Criminal Court’s Strategies in Relation to Victims’, *Journal of International Criminal Justice* 15 (2017), 567-591, 587.

<sup>10</sup> Ferstman, n.8, 385.

<sup>11</sup> For example, the ICC only established guiding principles for reparations after its first conviction in the Lubanga case in 2012, and has refused to set out definitive rules to guide subsequent cases. See *Prosecutor v Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06-2904, 7 August 2012, [181] (‘Lubanga Reparations Judgment’).

<sup>12</sup> *Prosecutor v Lubanga*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129-AnxA, 3 March 2015, [44] (‘Lubanga Reparations Appeal’)

<sup>13</sup> See Carayon and O’Donohue, n. 9.

<sup>14</sup> See e.g. Moffett, n.5; Christine Evans, *The Right to Reparation in International law for Victims of Armed Conflict* (Cambridge University Press, 2012); Carla Ferstman, Mariana Goetz and Alan Stephens, *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill, 2009).

<sup>15</sup> See Pablo De Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2008), 6-13.

<sup>16</sup> See e.g. Christoph Sperfeldt, Practices of Reparations in International Criminal Justice, A Thesis Submitted for the Degree of Doctor of Philosophy of the Australian National University, March 2018.

thereby having rights to reparations; 3) the principle of process, whereby reparations are designed and implemented in consultation with victims; 4) the principle of form, whereby reparations should target harms rather than needs, and should have greater symbolic significance; and 5) the principle of impact, whereby reparations are understood as having a transformative and/or healing effect because of their unique symbolic significance.<sup>17</sup> While this framework outlines dominant understandings of how reparations can be distinguished from other forms of development and assistance, reparations remain an ‘essentially contested concept’.<sup>18</sup> Accompanying this lack of a coherent theoretical understanding are the numerous and significant practical challenges that arise when institutions premised on individual accountability attempt to award reparations for mass victimisation. As a result, the practice of reparations is arguably developing ‘too quickly’, while its conceptual coherence as a means of redressing harm remains conflicted, contested and in flux.<sup>19</sup>

At a time where the practice of judicially awarded reparations for mass atrocity is still very much in flux, the practice of those tribunals who are tasked with their delivery can be instructive. In this spirit, this article seeks to contribute an analysis of the practice of the Extraordinary Chambers in the Courts of Cambodia. Established by the UN and Royal Government of Cambodia (RGC) in 2007,<sup>20</sup> the ECCC’s mandate is to prosecute senior leaders and those most responsible for crimes perpetrated by the Khmer Rouge regime, a violent revolutionary regime which held power in Cambodia from 1975-1979.<sup>21</sup> During the Khmer Rouge nearly a quarter of Cambodia’s eight million population was killed, starved or overworked to death.<sup>22</sup> Many more suffered serious harm as a result of the Khmer Rouge’s criminal policies, which included crimes against humanity, war crimes and the genocide of the ethnic Vietnamese and Cham populations.<sup>23</sup> The widespread nature of the crimes means

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<sup>17</sup> Peter Dixon, ‘Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo’ *International Journal of Transitional Justice* 10(1) (2016) 88-108.

<sup>18</sup> Sperfeldt, n.16, 31.

<sup>19</sup> Peter Manning, *Transitional Justice and Memory in Cambodia* (Routledge, 2016), 26.

<sup>20</sup> Ben Kiernan, ‘The Demography of Genocide in Southeast Asia’ 35(4) *Critical Asian Studies* (2003).

<sup>21</sup> See e.g. Ben Kiernan, *The Pol Pot Regime* (Yale University Press, 1996); David Chandler, *The Tragedy of Cambodian History* (Yale University Press, 1991); For survivor accounts see e.g. Loung Ung, *First They Killed My Father* (Mainstream Publishing, 2001); Pin Yathay, *Stay Alive My Son* (Cornell University Press, 2000).

<sup>22</sup> Kiernan, n. 20.

<sup>23</sup> Case 002/02, Trial Judgment, 002/19-09-2007/ECCC/TC, 16 November 2018, (‘Case 002/02 Trial Judgment’).

there is hardly a family living in Cambodia who would not have a legitimate claim to reparations.<sup>24</sup>

In this context, the ECCC remains to date the only opportunity for survivors to obtain reparations. Although neither the Agreement between the UN and the RGC nor the law establishing the Court explicitly provide for reparations, they were incorporated through the judicial creation of the Court's Internal Rules.<sup>25</sup> These Rules allow victims to participate as Civil Parties, with the ability to make a claim for 'collective and moral' reparations.<sup>26</sup> The introduction of this framework initially raised significant hopes that the ECCC would contribute to social reconstruction, healing and reconciliation in Cambodia.<sup>27</sup> In practice, indigent accused, a lack of funding and resources, and the scale of victimisation have all posed significant challenges to the Court's reparations mandate. As a result, the Internal Rules have been modified as the Court has progressed, and the practice in the Court's second case (split into sub-trials Case 002/01 and Case 002/02) has differed significantly from its first (Case 001).

As the ECCC delivered its third and potentially last reparation award in November 2018,<sup>28</sup> an analysis of its practice is particularly timely. Drawing from interviews conducted in March 2017 and December 2018 with survivors (75), Court practitioners (5) and civil society actors (9), this article examines the ECCC's practice of awarding reparations using Dixon's principles of responsibility (part one), recognition (part two), process (part three), form (part four) and impact (part five). As a result of this analysis, the article argues that the ECCC has awarded measures that have little connection to those responsible for the harm, and – although in some cases much appreciated by recipients - often fail to deliver a sense of recognition, reflect the needs and wishes of recipients, deliver material benefit, or have symbolic significance. Given the challenges facing judicial bodies such as the ECCC in delivering reparations, we suggest that a more modest and complementary approach is required, involving courts, states and other actors, rather than dominance by international criminal justice bodies over redress and its scope.

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<sup>24</sup> Kiernan, n. 20; Phuong Pham et al., 'So We Will Never Forget' Human Rights Centre, University of California, Berkeley (2009) 24.

<sup>25</sup> ECCC Internal Rules, passed 12 June 2007, last amended 16 January 2015. See Rachel Killean, *Victims, Atrocity and International Criminal Justice* (Routledge, 2018) 64-79.

<sup>26</sup> Internal Rules, *ibid*, 23. The meaning of this term is discussed in Part 4.

<sup>27</sup> Sperfeldt, n.16, at 160.

<sup>28</sup> Case 002/02, Trial Judgment, n. 23.

## 1. The Principle of Responsibility

Determining responsibility for mass atrocities can be complex; atrocities are not solely the acts of individuals, but a web of actions by state and non-state actors, acting individually, collectively and with inter-group collusion over a sustained period of time.<sup>29</sup> However, international criminal law's focus on the acts of individuals means reparations stem from a perpetrator's civil responsibility for the harm caused.<sup>30</sup> This principle of responsibility frames reparations as a form of accountability and compensatory justice,<sup>31</sup> meaning justice is done when wrong-doers make amends through some form of payment or assistance to those they have wronged.<sup>32</sup> This has been affirmed by the ICC, which has found that reparation orders must be directed against a convicted person.<sup>33</sup> Reflecting the links between reparation, accountability and compensatory justice, the Court noted that this requirement arose from the context in which reparations were being ordered, namely in the context of a legal system of establishing individual criminal liability for crimes.<sup>34</sup> The Court made explicit reference to the UN Basic Principles of Justice for Victims of Crime and Abuse of Power, which provides that 'offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents.'<sup>35</sup> Thus, the obligation to repair harm arose from the individual criminal responsibility for the harm.<sup>36</sup> The practice of awarding reparations against the convicted person has also been followed by the EAC, which ordered the former Chadian President Hissène Habré to pay compensation to victims following his conviction in 2016.<sup>37</sup> Although it has yet to produce any jurisprudence, the

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<sup>29</sup> Luke Moffett, Reparations for 'Guilty Victims': Navigating Complex Identities of Victim–Perpetrators in Reparation Mechanisms, *International Journal of Transitional Justice* 10(1) (2016) 146-167, 159.

<sup>30</sup> Nader Diab, 'Challenges in the Implementation of the Reparation Award against Hissein Habré' *Journal of International Criminal Justice* 16 (2018) 141-163, 150.

<sup>31</sup> Luke Moffett, 'Transitional justice and reparations: Remedyng the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs, *Research Handbook on Transitional Justice* (Elgar, 2017), 377-400, 388.

<sup>32</sup> Catherine Lu, *Justice and Reconciliation in World Politics*, (Cambridge University Press, 2017) p217.

<sup>33</sup> Lubanga Reparations Appeal, n.12, [32]; See International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (adopted 9 September 2002) r 98.

<sup>34</sup> Lubanga Reparations Appeal, n.12, [65].

<sup>35</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34, 29 November 1985, [8].

<sup>36</sup> Lubanga Reparations Appeal, n.12, [99].

<sup>37</sup> Chambre Africaine Extraordinaire d'Assises, 'Ministère Public c. Hissein Habré Jugement', 30 May 2016, reparations order included as an annex ('Habré Reparations Judgment'); Chambre Africaine Extraordinaire d'Assises d'Appel, 'Le Procureur Général c. Hissein Habré—Arrêt', 27 April 2017 (Habré Appeal Judgment').

KSC's Rules of Procedure and Evidence also indicate that reparation awards will be made 'against the convicted person'.<sup>38</sup>

In domestic law and international human rights law, approaches have emerged which obligate other actors to deliver redress, recognising that reparation is not only about the victims' relationship with the perpetrator, but about responding to harm and enabling victims to be restored to a position of dignity and justice.<sup>39</sup> This has been evidenced for example in Colombia, where the transitional justice reparation programme recognises victims 'without regard to who the perpetrator was'.<sup>40</sup> Internationally, the UN Reparation Principles support the principle of subsidiarity,<sup>41</sup> obliging states to establish reparation programmes and other assistance to victims if 'the parties liable for the harm suffered are unable or unwilling to meet their obligation'.<sup>42</sup> De Grieff argues that state-awarded reparations can increase levels of civic trust amongst survivors, delivering feelings of social solidarity and recognition by the state.<sup>43</sup> Reparations can be a materialisation of society's willingness to do things differently,<sup>44</sup> as well as a demonstration of a government's interest in and acceptance of responsibility for the wellbeing of its citizens.<sup>45</sup>

Nonetheless, the focus on individual accountability means little support for state-funded reparations can be found in the practice of international criminal courts. During the drafting of the Rome Statute of the ICC, there was some discussion of making ICC reparation principles binding on national jurisdictions, and of giving the Court powers to intervene when competent state authorities were not able to give effect to judgments. However, a number of states were reluctant to give the Court this power, others were keen to avoid creating any potential avenues for future state responsibility. As a result, the provisions were excluded, for fear that reparations would be completely dropped from the Statute.<sup>46</sup> Elsewhere, the Special

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<sup>38</sup> Kosovo Specialist Chambers, Rules of Procedure and Evidence, KSC-BD-03/Rev1/2017/1 (adopted 17 March 2017) r168.

<sup>39</sup> Lu, n.32, 236.

<sup>40</sup> Colombia Victims Law (Act 1448 of 2001) cited in Dixon, n. 17, 93.

<sup>41</sup> Moffett, n. 31, 390.

<sup>42</sup> UN Reparation Principles, n.2 [16].

<sup>43</sup> De Grieff, n.15, 466.

<sup>44</sup> *Ibid*, 451-477.

<sup>45</sup> Sharon Lean, 'Is Truth Enough? Reparations and Reconciliation in Latin America' in John Torpey (ed.), *Politics and the Past: On Repairing Historical Injustices* (Rowman and Littlefield, 2003) 169-192.

<sup>46</sup> See Christoph Sperfeldt, Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court, 17(2) *International Criminal Law Review* (2016) 351-377, 371-372. See also Christopher Muttukumar, 'Reparations to Victims' in Roy. S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999).

Tribunal for Lebanon only allowed for compensation to be sought in the Lebanese civil courts following a judgment,<sup>47</sup> while the EAC rejected Civil Parties' requests to declare the Chadian state responsible for reparations, finding that as the state was not party to the proceedings, it could not have obligations imposed upon it.<sup>48</sup>

The ECCC has followed this approach towards state responsibility, finding that unlike regional human rights courts, it has no power to adjudicate questions of state responsibility, has no jurisdiction over the Cambodian government, and cannot impose obligations on entities that were not party to the proceedings.<sup>49</sup> The Court has found that the most it can achieve is to encourage national authorities to demonstrate solidarity with victims by providing 'financial and other forms of support that contributes to their rehabilitation, reintegration, and restoration of dignity'.<sup>50</sup> This reticence reflects the Court's status as a criminal court. As stressed by one judge, while the government may have an obligation to provide reparations under international human rights law, it is not party to the Court's proceedings.<sup>51</sup>

Initially, the Court also reflected the principle of individual responsibility for reparations, with its Internal Rules stating that reparations 'shall be awarded against, and be borne by convicted persons'.<sup>52</sup> While reflecting dominant conceptual understandings of the principle of responsibility, this approach proved debilitating in practice. Victim representatives and civil society actors were aware of this risk from the start, highlighting the practical challenges of indigent accused,<sup>53</sup> and requesting that alternative funding sources be explored.<sup>54</sup> Requests that the Pre-Trial Chamber investigate and trace the accused's assets were also made, but rejected on the grounds that reparations could only be awarded against a 'convicted person',

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<sup>47</sup> Statute for the Special Tribunal for Lebanon, UNSC 1757 (30 May 2007), Art 25.

<sup>48</sup> Habré Reparations Judgment, n.37, [71]; Habré Appeal Judgment, n.37, [848].

<sup>49</sup> Case 001, Appeal Judgment, 001/18-07-2007-ECCC/SC, 3 February 2012 [663].

<sup>50</sup> *Ibid.*

<sup>51</sup> Interview, Phnom Penh, 13 January 2014.

<sup>52</sup> ECCC, Internal Rules, n.25, r 23(11).

<sup>53</sup> CHRAC and ECCC Victims Unit, *Reparations for Victims of the Khmer Rouge Regime, Report of a Conference Held in Phnom Penh from 26-27 November 2008* (Phnom Penh, 2009); CHRAC, 'Open Letter to the Members of the ECCC Plenary and the Rules Committee', 3 June 2009, [khmernews.wordpress.com/2009/06/05/open-letter-to-the-members-of-the-eccc-plenary-and-the-rules-committee/](http://khmernews.wordpress.com/2009/06/05/open-letter-to-the-members-of-the-eccc-plenary-and-the-rules-committee/) (accessed 14 January 2020).

<sup>54</sup> Case 001, Civil Parties' Co-Lawyers' Joint Submission on Reparations, 14 September 2009 [4].

and therefore assets could not be pursued prior to a conviction.<sup>55</sup> During Case 001, lawyers noted again that without alternative sources of funding, ‘the promise of providing justice through reparations to the victims...would be meaningless’.<sup>56</sup> These fears proved to be well-founded. The Court ordered only two reparations in Case 001: a declaration that all the Civil Parties admitted in Case 001 had suffered harm as a result of the accused’s crimes, and a compilation of all statements of apology and acknowledgement made by the accused during the trial.<sup>57</sup> These limited reparations were negatively received,<sup>58</sup> demonstrating how an accountability-based understanding of responsibility risks becoming ineffective where the wrong-doer is unable or cannot be made to provide reparations.

These negative responses, combined with continued calls to ensure the implementation of reparations, spurred a change to the ECCC’s approach towards responsibility.<sup>59</sup> An amendment was made to the Internal Rules in 2010,<sup>60</sup> allowing for externally funded projects to be designed or identified in cooperation with the Court’s Victim Support Service (VSS), and then recognised as reparations by the Court following a judgment.<sup>61</sup> The Trial Chamber in Case 002/01 described this as a means through which the Chamber could recognise specific projects which:

contribute to [Civil Parties’] rehabilitation, reintegration and restoration of dignity where national or international authorities, non-governmental organisations or other potential donors, provide financial support and other forms of assistance to show solidarity with the victims.<sup>62</sup>

Under the amended rules Civil Parties can request that reparations be awarded against the accused.<sup>63</sup> However, the two modes of funding are mutually exclusive, and the Civil Party

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<sup>55</sup> Case 002, Pre-Trial Chamber, Decision on Appeal of Co-Lawyers for Civil Parties against Order on Civil Parties’ Request for Investigative Actions Concerning all Properties Owned by the Charged Persons, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 57), 4 August 2010 [23].

<sup>56</sup> *Ibid.* [32].

<sup>57</sup> Case 001, Trial Judgment, 001/18-07-2007-ECCC/TC, 26 July 2010, [682] – [683].

<sup>58</sup> Christoph Sperfeldt, ‘Collective Reparations at the ECCC’ 12 *International Criminal Law Review* (2012) 457, 464 citing James O’Toole, ‘Reparation remains a key issue’, *Phnom Penh Post*, 27 July 2010; John Ciocari, The Duch Verdict, *Cambodia Tribunal Monitor*, 28 July 2010; REDRESS, *Justice for Victims. The ICC’s Reparations Mandate* (REDRESS, 2011) at 22. See Parts 4 and 5.

<sup>59</sup> Internal Rules, n.25, r 23 *quinquies*.

<sup>60</sup> See Sperfeldt, n. 58, for a discussion on this process.

<sup>61</sup> Internal Rules, n.25, r 23 *quinquies* (b).

<sup>62</sup> Case 002/01, Trial Judgment, 002/19-09-2007/ECCC/TC, 7 August 2014, [1116].

<sup>63</sup> *Ibid.* n.3207.

Lead Co-Lawyers<sup>64</sup> are required to specify which avenue they are selecting. When Civil Party representatives requested that the Chamber couple the principle that the cost of reparations be borne by the accused with an order that costs be externally funded, the Trial Chamber rejected their argument, finding it not legally permissible.<sup>65</sup> The indigence of the accused has meant that in practice, the 24 reparation projects recognised across Cases 002/01 (11 projects) and 002/02 (13 projects – one partially recognised) have been exclusively externally funded, and primarily delivered by donor-funded civil society organisations operating in Cambodia.

It is here that the ECCC diverges from the principle of responsibility, as well as the practice of other courts. At the ICC, the practice since the *Lubanga* appeal has been that reparation awards can be made ‘through’ its Trust Fund, which can advance its ‘other resources’ in cases where the convicted person is indigent.<sup>66</sup> The Trust Fund’s ‘other resources’ can come from voluntary contributions from governments, international organisations, individuals, corporations and other entities’, from money and other property collected through fines or forfeiture, resources collected through awards for reparations, and resources allocated from the ICC’s Assembly of State Parties. However, the Court has made clear that this does not require a move away from the principle of responsibility.<sup>67</sup> Even if the convicted person is unable to comply with a reparations order for reasons of indigence, this does not exonerate that person from liability.<sup>68</sup> Similarly, the EAC’s Trust Fund is tasked with seeking voluntary contributions from countries and other willing parties, but also with searching for and recovering Habré’s assets. The voluntary aspect does not impact the primary liability of the accused.

The ECCC is therefore somewhat of an outlier in removing the option of applying for externally funded reparations which retain connection to the accused. Such an approach might be considered in keeping with the UN Reparation Principles’ finding that a victim has a right to a remedy and reparations on the basis of their harm, not on the identification, apprehension, prosecution and conviction of a perpetrator.<sup>69</sup> However, it goes beyond

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<sup>64</sup> Since the amendments to the Internal Rules in 2010, Civil Parties are collectively represented at trial by two Lead Co-Lawyers, one Cambodian and one international. See ECCC, Internal Rules Rev.5, 9 February 2010.

<sup>65</sup> Case 002/01, Trial Judgment, n.62, [1124].

<sup>66</sup> *Lubanga* Reparations Judgment, n.11, [5].

<sup>67</sup> *Ibid*, [70].

<sup>68</sup> *Ibid* [5].

<sup>69</sup> UN Reparation Principles, n.2, Principle 9.

international human rights law's inclusion of state-ordered reparations offered in social solidarity. Instead, it seems to reflect a broader principle of responsibility, where a society of states and global civil society more broadly may have a responsibility for reparations.<sup>70</sup> While pragmatic in the face of financial constraints and victim dissatisfaction – a common issue facing international criminal courts<sup>71</sup> – such an argument lacks a sound basis within international law, and there is little other transitional justice practice to support such an explicit separation of reparations from those liable for the crimes committed. Furthermore, victims may wish for perpetrators to be held liable as a form of accountability and corrective justice; such a wish is evident in surveys conducted with Civil Parties in Cambodia.<sup>72</sup> As it is, the ECCC's framing of externally funded projects that are not ordered against the accused as 'reparations' arguably stretches the principle of responsibility beyond dominant conceptualisations of reparations in the context of international trials.

The use of external funding also has implications for the recipients of reparations themselves. For one, projects which 'may well appropriately address the harm suffered by victims' but which had not obtained full funding, were not recognised as reparations.<sup>73</sup> For those that were, their reliance on voluntary contributions limited their long-term sustainability, potentially reducing their impacts, a problem the ICC Trust Fund also suffers from.<sup>74</sup> As noted by one interviewee who was involved in a reparation project:

I think of course [donors] fund two- or three-years projects... But people can't really see the results of justice [in that time] ... I think that really takes time.<sup>75</sup>

The use of external funding and the requirement that proposals have already obtained funding at the time of the judgment has further implications in the context of the principle of recognition. These issues are discussed further below.

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<sup>70</sup> Lu, n.32, 222.

<sup>71</sup> See e.g. Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018, ICC-ASP/17/14, 23 July 2018, 3.

<sup>72</sup> See e.g. Nadine Kirchenbauer et al., 'Victims Participation before the Extraordinary Chambers in the Courts of Cambodia', Baseline Study of the Cambodian Human Rights and Development Association's Civil Party Scheme for Case 002 (2013).

<sup>73</sup> Case 002/01, Trial Judgment, n.62, [1161].

<sup>74</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/69/518, 8 October 2014, [56]

<sup>75</sup> Interview, Phnom Penh, December 2018.

## 2. The Principle of Recognition

Recognition of victimhood is a key component of reparations that distinguishes it from broader measures of development or charity. As noted by Roht-Arriaza and Orlovsky, ‘What distinguishes reparations from assistance is the moral and political content of the former, positing that victims are entitled to reparations *because their rights have been violated...*’<sup>76</sup> This is reflective of human rights law, which considers public recognition of harm by those responsible a form of reparations.<sup>77</sup> The UN Reparation Principles defines measures of satisfaction as publicly acknowledging victims’ suffering, vindicating their dignity and reaffirming their moral standing as citizens in society.<sup>78</sup> The principle of recognition therefore includes a focus on acknowledgement of a specific rights violation, giving rise to secondary rights of remedy. As further noted by Roht-Arriaza and Orlovsky:

Reparations are distinguished first by their roots *as a legal entitlement* based on an obligation to repair harm, and second by an element of  as well as harm, atonement, or making good.<sup>79</sup>

As with other international criminal courts, the ECCC’s ability to recognise and acknowledge a legal entitlement to remedy is restricted by its jurisdictional limits.<sup>80</sup> However, within its limited mandate, the Court has shown itself willing to recognise a wide range of victims as having a legal entitlement to a remedy. This has been facilitated by the shift from individual Civil Party participation in Case 001, to the collective participation model adopted in the significantly larger Case 002. This collective model allowed the Court to recognise Civil Party applicants who were harmed by crimes which took place in sites other than those included in the indictment, and adopted a presumption of collective psychological injury, recognising Civil Party applicants who were a member of the same targeted group or

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<sup>76</sup> Naomi Roht-Arriaza and Katharine Orlovsky, ‘A Complementary Relationship: Reparations and Development,’ in Pablo de Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections* (Social Science Research Council, 2009), 172 emphasis added.

<sup>77</sup> See e.g. *El Amparo v Venezuela*, Reparations and Costs, Series C No. 28 (IACtHR, 14 September 1996) [35]; *Loayza-Tamayo v Peru*, Reparations and Costs, Series C No. 42 (IACtHR, 27 November 1998) [153].

<sup>78</sup> UN Reparation Principles, n.2. Principle 22(b, d, f, and h).

<sup>79</sup> Roht-Arriaza and Orlovsky, n. 76, 179, emphasis added.

<sup>80</sup> Rachel Killeen, ‘Constructing Victimhood at the Khmer Rouge Tribunal: Visibility, Selectivity and Participation’ 24(3) *International Review of Victimology* (2018) 273-296.

community as a direct victim.<sup>81</sup> This goes beyond the ICC's approach, where broader notions of collective harm have been excluded, and the concept of harm has been limited to the specific charges against the accused.<sup>82</sup>

While the Court has been fairly expansive in its recognition of legal entitlements to remedies, it is questionable whether its approach to reparation awards has drawn sufficient links between that legal entitlement and acknowledgment of the specific wrongdoing experienced by victims. In light of Civil Parties' collective participation as a single group and the focus on 'collective and moral' reparations, the Court has focused on reparations which 'encompass the entire consolidated group of Civil Parties', regardless of the specific harms suffered.<sup>83</sup> Going beyond the collective Civil Parties, the Court has also awarded reparations which have been described as 'benefiting the wider community of unrepresented victims' as well as the Civil Parties themselves.<sup>84</sup> For example, reparations in Case 002/01 included a Remembrance Day, which, as argued by the Lead Co-Lawyers, will 'necessarily offer benefit to victims and Cambodian society more generally'.<sup>85</sup> Similarly, several art and education projects were awarded in Case 002/02, also designed to have a broader community impact.<sup>86</sup> Thus, reparations were distanced from the interactional relationship between perpetrator and specific Civil Parties, and become more general acknowledgement of suffering offered to the consolidated group, and in some cases the wider community of victims.<sup>87</sup>

This can on the one hand be seen as a positive; such an approach potentially expands the beneficiaries of such measures, narrowing the 'reparation gap' that can emerge when some victims are recognised and others are not by reparation measures.<sup>88</sup> As observed by one transitional justice practitioner, 'everybody' in Cambodia was victimised by the Khmer Rouge,<sup>89</sup> and victims may perceive reparations as recognition of their harm regardless of whether they have participated in the Court's process. However, such expansive inclusion

<sup>81</sup> Case 002, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 002/19-09-2007-ECCC-PTC, 24 June 2011.

<sup>82</sup> See e.g. *Prosecutor v. Lubanga*, Decision on 'indirect victims', ICC-01/04-01/06-1813, 8 April 2009, [49].

<sup>83</sup> Case 002/02, Trial Judgment, n.23, [4414].

<sup>84</sup> Case 002/01, Trial Judgment, n.62, [1114].

<sup>85</sup> Lead Co-Lawyers' Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations (Internal Rule 80bis (4)), 12 February 2013, [8].

<sup>86</sup> Case 002/02, Trial Judgment, n.23, [4420] – [4433].

<sup>87</sup> The outer limits to the Court's broad interpretation can be found in the Trial Chamber's rejection of a project focusing on indigenous minorities on the grounds that the accused were not convicted of targeting indigenous minorities. See Case 002/02, Trial Judgment, n.23, [4466].

<sup>88</sup> Moffett, n.5, 161.

<sup>89</sup> Interview, Phnom Penh, March 2017.

may stretch such measures to the extent that they no longer have symbolic value as reparations which recognise individual victims' entitlement to a remedy for their harm. Indeed, in Case 001, it was suggested that the value of a reparation (in this case the accused's apologies) might transcend the time and space of the courtroom, delivering satisfaction beyond the 'immediate audience' of the Civil Parties.<sup>90</sup> This unusual statement framed reparations not as something linked to the recognition and redress of specific victims' harm, but as a more general recognition of wrongdoing.

The principle of recognition was arguably further limited in Cases 002/01 and 002/02 by the retrospective recognition of projects as reparations. Many of the projects put forward as reparations had commenced, and in some cases been implemented and completed prior to a final judgment having been given.<sup>91</sup> The Trial Chamber has described this as being in keeping with the purpose of the change to the reparations framework, which was to enable, with donor assistance and that of external collaborators, the realization of meaningful reparations within a reasonable time.<sup>92</sup> Such an approach raises challenges to the principle of recognition; to legally recognise wrongdoing and harm requiring redress at the time of the projects' implementation would have negatively impacted the presumption of innocence. In Case 002/01, the Trial Chamber emphasised that 'the determination of the criminal responsibility of the Accused and the factual findings are the sole prerogative of the ECCC' and directed that a disclaimer be added to a reparation measure involving a book chapter on the history of the Khmer Rouge regime.<sup>93</sup> In line with this, reparation measures in Case 002/02 were 'developed in consideration of the right of the accused to be presumed innocent, such that the subject matter is derived from the experiences suffered by Civil Parties'.<sup>94</sup> While the projects therefore may have delivered a sense of recognition of harm having been suffered, the requirement that they maintain the presumption of innocence may have inhibited their ability to recognise wrongdoing giving rise to a legal right to redress. The Lead Co-Lawyers also emphasised that 'any projects that are ready for implementation prior to the conclusion of proceedings would be implemented as *proposals* until there is a final

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<sup>90</sup> Case 001, Appeal Judgment, n. 49, [677].

<sup>91</sup> Case 002/02, Trial Judgment, n.23, [4420-4433].

<sup>92</sup> ECCC, Trial Chamber Memorandum, Indication of Priority Projects for Implementation as Reparation (Internal Rule 80bis(34)), 3 December 2012, [2].

<sup>93</sup> Case 002/01, Trial Judgment, n.62, [1147].

<sup>94</sup> ECCC, Lead Co-Lawyers' Submission on the Implementation of Judicial Reparation Awards for Case 002/02, 15 July 2016, [5].

conviction, if any.<sup>95</sup> Thus, while the majority of the projects proposed were subsequently endorsed by the Court as measures which recognise victims' suffering and right to reparations, they were not necessarily endowed with this symbolic value at the time they are being implemented and therefore being experienced by the Civil Parties themselves. This is considered further in the context of the principle of impact in Part 5. We now turn to the principle of process.

### 3. The Principle of Process

If reparations are to be used as a means through which a sense of justice can be delivered to victims, then they should be understood both in terms of their substance and their procedures.<sup>96</sup> Process can also play an important role in conveying recognition,<sup>97</sup> as consultation can provide acknowledgment of survivors' legally enforceable rights to a remedy.<sup>98</sup> The importance of process is acknowledged by the UN Reparation Principles, which set out procedural guidance for creating reparation programmes that ensure victims' access, participation, protection, information and non-discrimination.<sup>99</sup> As noted by REDRESS:

for victims, justice is an experience. It is as much about the way that they are treated, consulted and respected procedurally throughout the reparation process, as it is about the substantive remedy, material or otherwise, they may be granted as part of the end result.<sup>100</sup>

Procedural justice theory has received growing attention as a means of increasing victim satisfaction with transitional justice process.<sup>101</sup> Procedural justice theory posits that fair

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<sup>95</sup> Case 002/02, Civil Party Lead Co-Lawyers' Final Claim for Reparation in Case 002/02 with Confidential Annexes, 002/19-09-2007-ECCC/TC, 30 May 2017, [5], emphasis added. However, a similar disclaimer was requested in relation to the Khmer Rouge App and the curriculum developed for the teacher and university lecturer training and workshops. See Case 002/02 Trial Judgment, n. 23, para 4455.

<sup>96</sup> Dixon, n.17, 99.

<sup>97</sup> Brandon Hamber, 'Repairing the Irreparable: Challenges Facing Compensation and Reparations in Societies in Transition' Paper Presented at the CAIN Seminar Series hosted by INCORE and ARK, University of Ulster, 8 October 2009, 9.

<sup>98</sup> *Ibid*, 11.

<sup>99</sup> UN Reparation Principles, n. 2, Principles 24, 25 and 27.

<sup>100</sup> REDRESS, Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making, Report of Proceedings, The Hague, 1-2 March 2007, 48.

<sup>101</sup> See e.g. Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia, 2011); Moffett, n.5; Killeen, n. 25; Sanja Kutnjak Ivković and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts*, (Oxford University Press, 2011); Stephen Cody, 'Procedural Justice, Legitimacy and Victim Participation in Uganda' in

procedures can also enhance participant satisfaction with outcomes and sense of justice overall. Fair procedures are those that are trustworthy, neutral, respectful and which enable participants to present their views and concerns.<sup>102</sup> Enabling victim participation has been highlighted as a means through which victims can ‘take back control of their lives’,<sup>103</sup> and be ‘instilled with a sense of empowerment and control’.<sup>104</sup> From a pragmatic perspective, victim participation in the design and implementation of reparations can help to craft appropriate and adequate measures that ‘fit’ their harm, as well as strike a balance between their expectations, rights and the feasibility of resources and capacity.

In international criminal contexts, the ICC has repeatedly emphasised the importance of victim input when designing and implementing reparations, finding that victims should be able to participate throughout the reparations process and should receive adequate support in order to make their participation is substantive and effective.<sup>105</sup> In the *Lubanga* Appeal Order, the Court noted that for appropriate reparations to be delivered, it was crucial that victims’ voices are heard in their design and implementation.<sup>106</sup> As noted by the Chamber, this requirement flows naturally from the fact that the most appropriate modalities of reparations will be based on the specific circumstances of the wrongdoing, and should follow the identification of the types of harm caused to victims.<sup>107</sup>

Consultation also provides a way of ensuring reparations reflect local cultural and customary practices, which the Court found they should do whenever possible, unless such practices ‘are discriminatory, exclusive or deny victims equal access to their rights.’<sup>108</sup> The importance of consultation was highlighted again in the case of *Al Mahdi*, when the Court found that the Trust Fund’s failure to consult with the Legal Representatives of Victims raised concerns that reparation measures were inappropriate and did not reflect the expectations of the victims in

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Nobuo Hayashi and Cecilia Bailliet, *The Legitimacy of International Criminal Tribunals*, (Cambridge University Press, 2017) 376 – 398.

<sup>102</sup> Tom Tyler, ‘Procedural Justice, Legitimacy, and the Effective Rule of Law’, 30 *Crime and Justice* (2003) 283-357.

<sup>103</sup> Yael Danieli, ‘Victims: Essential Voices at the Court’ Victims’ Rights Working Group Bulletin, Issue 1, September 2004, 1.

<sup>104</sup> Jonathon Doak, ‘The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions’ 11 *International Criminal Law Review* (2011) 263, 271.

<sup>105</sup> *Lubanga* Reparations Judgment, n.10, [29].

<sup>106</sup> *Ibid.*, [70].

<sup>107</sup> *Ibid.*, [200].

<sup>108</sup> *Ibid.*, [145].

any way.<sup>109</sup> The Chamber found that involving the victims' representative was necessary to ensure the appropriate implementation of reparations, and criticized the Trust Fund for failing to explain how proposed measures corresponded to the victims' expectations and needs.<sup>110</sup>

At the ECCC, meaningful participation in the design of reparations has posed significant challenges. For one, intermediaries and lawyers faced the task of managing victims' expectations.<sup>111</sup> Confusion as to the meaning of 'moral and collective', combined with difficulties in translating the concept of 'reparations' limited the extent to which intermediaries and lawyers could meaningfully engage with victims' wishes and needs.<sup>112</sup> Yet consultation should expand beyond an exercise in expectation management, instead facilitating dialogue and ongoing communication with victim communities. As set out in the ICC Strategy on Victims, consultation and communication should be, 'two-way ... to conduct interactive activities, to listen to victims and respond to what they are saying, and to take into account victims' concerns'.<sup>113</sup> To facilitate such a dialogue, providers of reparations need to be upfront and clear about the limitations of their mandate from the beginning of the consultation process.<sup>114</sup> In the case of the ECCC, uncertainty over the scope of reparations often led to consultations which largely focused on what could *not* be achieved. This restricted the scope for victims to meaningfully express their needs and wishes,<sup>115</sup> failed to fully prevent the raising of hopes for specific outcomes,<sup>116</sup> and led to 'growing dissatisfaction of the beneficiaries vis-à-vis efforts to avoid unrealistic expectations'.<sup>117</sup>

Participation in the design of reparations was further complicated by the diverse sizes of the populations involved in Cases 001 and 002. The relatively small number of Civil Parties in Case 001 (93 at the beginning, reducing to 90 by the end of the trial hearings) enabled regular and in-depth consultations.<sup>118</sup> This was praised by the Civil Parties themselves, who reported

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<sup>109</sup> *The Prosecutor v Ahmad Al Faqi Al Mahdi*, Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations, ICC-01/12-01/15, 12 July 2018, [20].

<sup>110</sup> *Ibid.*, [98].

<sup>111</sup> Sperfeldt, n.16, 185.

<sup>112</sup> Alex Bates, 'Transitional Justice in Cambodia: Analytical Report' *The Atlas Project* (2010).

<sup>113</sup> ICC, Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, 1 November 2009, [22].

<sup>114</sup> Killean, n. 25,140.

<sup>115</sup> Sperfeldt, n.16,184.

<sup>116</sup> Rachel Killean, 'Procedural Justice in International Criminal Courts' 16 *International Criminal Law Review* (2016) 1-38, 28-30.

<sup>117</sup> Timothy Williams, Julie Bernath, Boravin Tann and Somaly Kum, *Justice and Reconciliation for the Victims of the Khmer Rouge? Victim Participation in Cambodia's Transitional Justice Process*, Marburg: Centre for Conflict Studies; Phnom Penh: Centre for the Study of Humanitarian Law; Bern: Swisspeace, 2018, 118.

<sup>118</sup> Sperfeldt, n.16, 278.

positive effects from having regular meetings with other survivors.<sup>119</sup> However, while the process was deemed meaningful, this did not result in the Civil Parties' being able to influence the eventual form of reparations, as the majority of their requests were rejected. If the principle of process is to be understood as having both symbolic and pragmatic value, then in Case 001 it cannot be considered as having fully been implemented, due to the disconnect between the wishes expressed and the awards eventually made.

In Cases 002/01 and 002/02, the involvement of nearly 4,000 victims, the multiple intermediary and Civil Party lawyer teams working with them, and the challenges associated with accessing adequate outreach resources led to significant variances in consultation practices. As one civil society member observed 'only two groups...actually did individual consultations... from maybe three-quarters of the lawyer submissions, it was unclear how they arrived at their conclusions.'<sup>120</sup> Lawyers often had to rely on NGO intermediaries due to a lack of resources, meaning Civil Parties with connections to NGOs had greater opportunities for consultation than those without. This led to Lead Co-Lawyers being 'overwhelmed...you had twelve legal teams plus half a dozen NGOs submitting reports and data'.<sup>121</sup> This was then condensed into a short report drafted by the Lead Co-Lawyers and VSS, which although 'largely based on the data' submitted by lawyers and NGOs, was also 'vastly different' in scope and content.<sup>122</sup>

In Case 002/02, the process appeared to become more court-driven. In their final request, the Lead Co-Lawyers outlined the process of consultation which had informed their requests for reparation. This included Civil Party Forums and Victim Consultation and Information Forums on Case 002 Proceedings and involved 1,942 Civil Parties. Implementing partners were also invited to present projects and seek the views of the Civil Parties.<sup>123</sup> While some of the projects drew from expressed wishes of Civil Parties, others originated from the NGOs themselves, or were shaped by the donors funding their work. Some of these were specifically designed to be reparations, while others were pre-existing projects which were rebranded as reparative. For example, one civil society practitioner explained that 'it's the

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<sup>119</sup> Eric Stover, Mychelle Balthazard and Alexa Koenig, 'Confronting Duch: Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia' 93(882) *International Review of the Red Cross* (2011) 503-546.

<sup>120</sup> Interview, Phnom Penh, December 2018.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> Case 002/02, Final Claim, n.95, [6].

idea that happened some years ago...[we] wanted to do something innovative.<sup>124</sup> When asked if the project had always been designed as a reparation, the interviewee explained that this came later, and was a means of accessing funding sources. Another interviewee discussed a plan to work with survivors of the regime in general, before being encouraged by their donor to instead ‘integrate this project as a form of reparation project... I think that, first off, we never thought that it’s coming to be a reparation project.’<sup>125</sup> This does not mean that the Civil Parties were denied space to express views and wishes, as explained by two civil society interviewees:

We had some concepts or ideas and then we brought them to consult with the Civil Parties. Once they totally agreed or they had some ideas about that, then we developed the proposal, and then we submitted it to the relevant donors... So, they do understand about this and they come up with different ideas to share with us.<sup>126</sup>

We explained about the objective of the project, then we narrowed the scope to come to a common understanding of what we all want to achieve.<sup>127</sup>

Pitching projects rather than seeking to understand the needs and wishes of Civil Parties from the bottom up suggests an at best watered-down form of consultation. Furthermore, this was not always the case, as expressed by another civil society practitioner,

We never get feedback from the Civil Parties, frankly... We just propose and present to the court that it benefits the Civil Parties... But they appreciate and they’re happy with what we show them.<sup>128</sup>

Such an approach constrains the ability of Civil Parties to participate in the design of reparations. This has been reflected in studies conducted with Civil Parties. A survey in 2018 demonstrated that while two-thirds of Civil Party respondents felt they had been consulted and that their views had been considered, in-depth interviews revealed discontent concerning that process of consultation. Many felt there was a discrepancy between the views they had

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<sup>124</sup> Interview, Phnom Penh, December 2018.

<sup>125</sup> Interview, Phnom Penh, December 2018

<sup>126</sup> Interview, Phnom Penh, December 2018.

<sup>127</sup> Interview, Phnom Penh, December 2018.

<sup>128</sup> Interview, Phnom Penh, December 2018.

expressed and the awards delivered (discussed further below), with some observing that the ECCC and donors demonstrated a preference for the proposals of NGOs rather than the requests of Civil Parties themselves.<sup>129</sup> This was also reflected in interviews, with one civil society practitioner expressing her exasperation at the preference for donor priorities over the voices of survivors:

We work for people, not to fulfil the donor's need. We work to fulfil the needs of the community members. We want transparency, open communication, feedback in the design, input from people. What they need, what's the real problem. But then, we never tackle those.<sup>130</sup>

Anecdotally, within the Cham Islamic minority group, survivors told us that they had hoped for assistance in the rebuilding of mosques, educational scholarships or museums.<sup>131</sup> As they said 'we don't want anything else.'<sup>132</sup> However, an interviewee from within the Court noted the difficulty of developing requests which focused on religion, as donors 'focus on gender based violence, women's rights, health development.'<sup>133</sup> In practice, the Court recognised a film and an exhibition about ethnic minority experiences under the regime as reparations specifically responding to the harm of the Cham group.<sup>134</sup> Thus, while there was evidence of consultation in the ECCC's design of reparations, there was also evidence of disconnection between the views expressed and the awards given. This is discussed in the following sections on the principles of form and impact.

#### 4. The Principle of Form

International human rights law sets out that reparation can include five forms: restitution; compensation; rehabilitation; measures of satisfaction; and guarantees of non-repetition.<sup>135</sup> These measures are intended to complement each other and compensate for the weaknesses of any isolated approach.<sup>136</sup> Thus, a range of reparation measures should be adopted that

<sup>129</sup> Williams et al., n.117, 117. See also Rachel Killean and Luke Moffett, 'Representation, Agency and Voice: Victim Legal Representation before the ICC and ECCC' *Journal of International Criminal Justice* 15(4) (2017)

<sup>130</sup> Interview, Phnom Penh, December 2018.

<sup>131</sup> Interview, Kampong Cham, March 2017.

<sup>132</sup> Interview, Koh Thom, March 2017.

<sup>133</sup> Interview, Phnom Penh, March 2017.

<sup>134</sup> Case 002/02, Trial Judgment, n.23, [4457].

<sup>135</sup> UN Reparation Principles, n.2, Principle 20.

<sup>136</sup> *19 Merchants v. Colombia*, Merits, Reparations and Costs, Series C No. 109 (IACtHR, 5 July 2004), [222].

reflect both the characteristics of the situation and the specific needs and wishes of the victims.<sup>137</sup> For instance in cases of disappearances, regional human rights courts have awarded compensation for pecuniary and non-pecuniary damages, as well as obligating states to investigate the circumstances, identify, recover and return the body, and provide other measures of satisfaction.<sup>138</sup> In the instance of attacks on cultural heritage with resulting economic loss, the ICC has found that reparations should be designed to assist in the restoration of that lost economic activity.<sup>139</sup> The UN Guidance on reparations for conflict-related sexual violence suggests that appropriate reparations should be a combination of measures based on ‘a full understanding of the gendered-nature and consequences of the harm suffered for both males and females’<sup>140</sup> Similarly, appropriate rehabilitation measures should take into account the victim’s age, gender and disability.<sup>141</sup> Importantly, reparations should be appropriate in that they respond to the nature and circumstances of the *harm*.

There are inevitable limits on what the law can deliver in terms of reparation, particularly in the context of mass atrocity.<sup>142</sup> Unless property or rights can be restored to an individual or community, restitution is often seen as inappropriate and inadequate.<sup>143</sup> This was frequently highlighted by our respondents. As one survivor expressed, ‘we have lost something huge [that you] cannot imagine... the lost is unbelievable.’<sup>144</sup> Reparations cannot bring back the dead, nor undo the various and serious harms suffered. To suggest that reparations can cancel out the loss or suffering would be perverse, as would an attempt to put a price on the loss of a loved one or the experience of genocide. This was iterated both by survivors, who observed that ‘nothing can be compensated’,<sup>145</sup> and civil society actors, who acknowledged the limits they faced in designing reparations: ‘we cannot compensate something that has been already

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<sup>137</sup> Sperfeldt, n.16, 37.

<sup>138</sup> See e.g. *Molina Theissen v. Guatemala*, Reparations and Costs, Series C No. 108 (IACtHR, 3 July 2004); *Varnava and others v Turkey*, (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), Judgment (ECtHR, 18 September 2009).

<sup>139</sup> *The Prosecutor v Al Mahdi*, Reparations Order, ICC-01/12-01/15-236, 17 August 2017, [83].

<sup>140</sup> Guidance Note of the UN Secretary General, Reparations for Conflict-Related Sexual Violence, June 2014, 5.

<sup>141</sup> UNGA, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3, Article 39; UNGA, Convention on the Rights of Persons with Disabilities, UNGA A/RES/61/106, 24 January 2007, Article 16.

<sup>142</sup> Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press, 1998)117.

<sup>143</sup> See e.g. *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Series C No. 15 (IACtHR, 10 September 1993) [87]; *Croatia v Serbia*, ICJ, Volume 1, 1 March 2001, [8.81].

<sup>144</sup> Interview, Pomhea Kandal, March 2017.

<sup>145</sup> Interview, Kampong Cham, March 2017.

lost. If your father died, he cannot come back, if you lost your property, it not going to come back...<sup>146</sup>

With regards to the four remaining types, each measure in itself is unlikely to be considered an appropriate response to the harm caused by international crimes. Compensation without measures of satisfaction can be seen as ‘blood money’ and insufficient to remedy the gravity of violations of personal integrity and human life.<sup>147</sup> As observed by Hamber, compensation may be limited in its psychologically reparative powers, particularly if unaccompanied by other measures, and should therefore be seen as one component rather than an isolated solution.<sup>148</sup> In order to be meaningful it may require accompanying levels of recognition, responsibility and acknowledgment of the individual and the collective.<sup>149</sup> In the *Katanga* case at the ICC, \$250 was awarded to the survivors of a massacre in Ituri, DRC. The ICC found that compensation along with collective and symbolic measures enabled ‘victims to regain their self-sufficiency and to make decisions for themselves on the basis of their needs.’<sup>150</sup> Indeed, compensation can, as argued by Shelton, ‘supply the means for whatever part of the former life and projects remain possible and may allow for new ones.’<sup>151</sup>

In recognition of the fact that individual reparations may struggle to address the nature and gravity of mass atrocities, international courts have incorporated collective forms of reparation.<sup>152</sup> However, recognition of the challenges facing individualised awards has not prohibited their consideration in several courts, including the ICC, EAC and KSC. In contrast, the ECCC makes no provision for individual reparations, precluding compensation. Instead, the Rules allow Civil Parties to claim ‘moral and collective reparations.’ These are defined as those which ‘acknowledge the harm’ suffered by Civil Parties and which ‘provide benefits’ which address that harm.<sup>153</sup> The reference to ‘moral’ implies a focus on harms such as emotional distress and damage to social structures and values, rather than on material

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<sup>146</sup> Interview, Phnom Penh, March 2017.

<sup>147</sup> Claire Moon, ‘Who’ll Pay Reparations on My Soul? Compensation, Social Control and Social Suffering’ *Social and Legal Studies* (2012) 1-13.

<sup>148</sup> Hamber, n. 97, 3-4.

<sup>149</sup> *Ibid*, 14.

<sup>150</sup> *Prosecutor v Katanga*, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG, 24 March 2017, [285].

<sup>151</sup> Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2015) 291.

<sup>152</sup> Friedrich Rosenfeld, ‘Collective Reparations for Victims of Armed Conflict’ 92 *International Review of the Red Cross* (2010) 731-746.

<sup>153</sup> Internal Rules, n.25, r 23 *quinquies*.

harms such as the destruction or loss of property.<sup>154</sup> This has been justified as being ‘due to the specific character of the ECCC’, a reference to the challenges associated with attempting to deliver individual reparations to the multitude of individuals who suffered harm under the regime.<sup>155</sup> Calls for the Court to reconsider this position have been steadfastly resisted and the Court’s approach has been accepted to some extent, although some Civil Parties have continued to voice dissatisfaction and disappointment at this reality.<sup>156</sup>

In the Court’s first case, the only reparations ordered were a declaration that all the Civil Parties admitted in Case 001 had suffered harm as a result of the accused’s crimes, and a compilation of all statements of apology and acknowledgement made by the accused during the trial.<sup>157</sup> Among the rejected projects were requests for the erection of memorials and pagodas, education programmes, health care, and individual monetary payments.<sup>158</sup> In rejecting these requests, the Court rejected forms of reparation that have previously been endorsed by the UN’s Reparation Principles, as well as human rights courts.<sup>159</sup> The limited reparations awarded cannot be considered sufficient; the UN Human Rights Committee has found that symbolic reparations alone are an ineffective and inadequate remedy.<sup>160</sup> A court finding of a violation, while a measure of satisfaction, cannot by itself sufficiently remedy the harm caused by serious violations.<sup>161</sup> Similarly, the compilation of apologies, while acknowledged as a form of satisfaction and reparation in the UN Reparation Principles,<sup>162</sup> may fail to deliver adequate and appropriate relief when offered by themselves or deemed insincere.

At the ECCC, the inadequacy of Case 001’s reparations was reflected in the fact that half of the Civil Party legal teams appealed the decision.<sup>163</sup> Civil party lawyers described the ECCC as failing to ‘take its unique and distinct mandate on Civil Party action seriously and

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<sup>154</sup> Renée Jeffery, ‘Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal’ 13 *Journal of Human Rights* (2014) 103.

<sup>155</sup> ECCC, Joint Statement by Judicial Officers (2007); Case 001, Trial Judgement, n.57, [667] – [675].

<sup>156</sup> Killean, n. 116, 28.

<sup>157</sup> Case 001, Trial Judgment, n.57, [682] – [683].

<sup>158</sup> Ibid, [652].

<sup>159</sup> Jeffery, n.154, 105.

<sup>160</sup> *Albert Wilson v the Philippines*, UN Human Rights Committee, Communication No. 868/1999, UN Doc. CCPR/C/79/D/868/1999 (2003), [5.14].

<sup>161</sup> *Kaya v Turkey*, (158/1996/777/978), Judgment (ECtHR, 19 February 1998) [139].

<sup>162</sup> UN Reparation Principles, n.2, Principle 22.

<sup>163</sup> Case 001, Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties Group 2’, 2 November 2010; Case 001, Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgment of 26 July 2010, 5 October 2010.

meaningfully’, and criticised its failure to issue ‘reparation orders which are meaningful to victims of serious, mass and horrendous crimes’.<sup>164</sup> The decision was also criticized by trial observers and civil society actors, who described the decision as ‘sorely lacking’ and ‘unable to meet the majority of victims’ requests’.<sup>165</sup> However, the Supreme Court Chamber reaffirmed the decision. It was held that the Court could not grant reparations that required government funding, or that were unrealistic due to the accused’s indigence, as to do so would be ‘confusing and frustrating for the victims’.<sup>166</sup> While the Chamber therefore supported the rejection of the other proposed projects, it acknowledged that the requests could also be considered appropriate forms of reparation, and urged donors to assist in implementing these awards. The Chamber claimed that the ECCC should be considered a ‘starting point’ for reparations, and that it should not be ‘overloaded with utopian expectations that would ultimately exceed the attainable goals of transitional justice’.<sup>167</sup>

Such statements reflect the tensions in transitional justice between providing reparative measures that are adequate and appropriate, and providing measures that are practically feasible.<sup>168</sup> As argued by Laplante, the ‘lack of legal fidelity’ to the concept of remedy within transitional justice systems reflects the challenges of trying to redress the harm of thousands to millions of victims.<sup>169</sup> Practice in this regard is mixed. At the EAC, significant financial awards were made without a clear strategy for funding their implementation.<sup>170</sup> As noted by Diab, the ‘vast majority of victims’ in universal jurisdiction cases have not been able to enforce monetary awards.<sup>171</sup> In contrast, other international and regional criminal courts have acknowledged this tension, and the need for flexibility in the granting of reparations.<sup>172</sup> They have adopted a similar approach to the ECCC in terms of their belief that reparations should be capable of implementation, leading them to reject awards that cannot be sufficiently funded.<sup>173</sup> Some have argued that this is problematic; for example Diab describes

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<sup>164</sup> Case 001, Transcript of Appeal Proceedings, 001/18-07-2007-ECCC/SC, 30 March 2011, 58.

<sup>165</sup> Ciorciari, n.58; REDRESS, n.58.

<sup>166</sup> Case 001, Appeal Judgment, n.49, [668].

<sup>167</sup> *Ibid.*, [655].

<sup>168</sup> Killean, n. 25, 88.

<sup>169</sup> Lisa Laplante, Negotiating Reparation Rights: The Participatory and Symbolic Quotients, 19 *Buffalo Human Rights Law Review* (2012-2013) 217-250, 222.

<sup>170</sup> Habré Appeal Judgment, n.27, 226.

<sup>171</sup> Diab, n.30, 150.

<sup>172</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2(2) *Yearbook of the International Law Commission*, 2001, 96.

<sup>173</sup> Ferstman, n.8, 389.

unenforceability as the ‘curse’ of reparations.<sup>174</sup> However, others have argued that doing so would have at least acknowledged the victims’ harms, rights and entitlement to those measures.<sup>175</sup> In refusing to do so, the Court severely disappointed the Civil Parties, and opened itself up to criticisms over its inability to deliver positive impacts to victims. As argued by Williams et al., ‘the adoption of an outcome-oriented transitional justice process could undermine the credibility of the victim-centred and victim-sensitive approach to transitional justice’.<sup>176</sup>

As a result of the change to the Internal Rules in 2010, the reparation awards looked very different after Case 002. In Case 002/01,<sup>177</sup> the Trial Chamber endorsed eleven projects, including public memorials, the construction and maintenance of a regional community peace learning centre, mental health programs including testimonial therapy sessions, permanent exhibitions on aspects of Case 002/01, new educational material for teachers on the Khmer Rouge regime, and the distribution of the trial judgement and relevant informational material.<sup>178</sup> In Case 002/02, the Trial Chamber recognised thirteen further projects as reparations. These were categorised as constituting guarantees of non-repetition, measures of satisfaction, and rehabilitative measures. Under the category of guarantees of non-repetition, the Court recognised an app on Khmer Rouge history, a Khmer Rouge history teacher and university lecturer training workshop, a media project promoting civil courage, a community media project exploring the experiences of the Cham, a classical dance performance about forced marriage, an exhibition on the experience of ethnic minorities during the regime and a legal and civic education project for minority Civil Parties. Under the category of measures of satisfaction, the Chamber recognised an illustrated book of the accounts of Civil Parties, a song writing contest, an exhibition about a security centre, and a repository of documents related to the trial. Under the category of rehabilitative measures, the Chamber recognised two final projects which provided mental and physical health services.

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<sup>174</sup> Diab, n. 30, 150.

<sup>175</sup> Ferstman, n.8, 403.

<sup>176</sup> Williams et al., n.117, 118.

<sup>177</sup> Due to the size of the case, and fears over the advanced ages of the accused, Case 002 has been split into a series of sub-trials. For commentary on this decision see Sarah Williams, ‘The Severance of Case 002 at the ECCC: A Radical Trial Management Technique or a Step Too Far?’ 13(4) *Journal of International Criminal Justice* (2015) 815 – 843.

<sup>178</sup> Case 002/01, Trial Judgment, n.62, [1151-1160].

These awards were not appealed by the Civil Parties and seem to have been generally well received by the Civil Parties' legal representatives.<sup>179</sup> Amongst our interviewees, the reparation awards were praised by some civil society actors for delivering something of substance despite limitations, and for their potential to benefit society:

This is the first court that created such reparation projects – it's very important to heal the society.<sup>180</sup>

Several of the reparations can be linked to specific needs of survivors. For example, three awards incorporate rehabilitative mental health services,<sup>181</sup> while one seeks to provide minority groups with information related to applying for the Cambodian citizenship lost during the regime.<sup>182</sup> However, the majority of the projects primarily focus on raising awareness of victims' suffering amongst Cambodian society, recognising their harm, and sharing information about the trial and Civil Parties' role in the process. While arguably linked to the desire expressed by many Civil Parties that the younger generation be made aware of what happened during the regime, we would submit that the dominance of such measures means that the awards overall fall short of adequate and appropriate reparations.<sup>183</sup> Symbolic reparations in the form of acknowledgment and apology can certainly be considered important aspects of reparation. As noted by de Greiff, symbolic reparations can broadcast to society victims' suffering as 'carriers of meaning', allowing the wider community to tune into what happened in the past.<sup>184</sup> However, symbolic measures without other more tangible forms of repair may struggle to effectively remedy victims' suffering,<sup>185</sup> and are a departure from juridical notions of remedy. Indeed, in such cases symbolic reparations may even become a source of tension: a reminder for victims of their continuing suffering, and of being left to cope by themselves with the consequences of the past and a diminished quality of life.<sup>186</sup> To be adequate and appropriate, reparations should aim to both

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<sup>179</sup> Sperfeldt, n.16, 240.

<sup>180</sup> Interview, Phnom Penh, December 2018.

<sup>181</sup> 'I can say that to me from my personal view, from when I worked directly with the CPs [they] would like to get free medical service' Interview, Phnom Penh, December 2018

<sup>182</sup> See references to this request in Lyma Nguyen and Christoph Sperfeldt, *A Boat Without Anchors* (Jesuit Refugee Service Cambodia, 2012).

<sup>183</sup> Ferstman, n.8, 389.

<sup>184</sup> Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, [33].

<sup>185</sup> *Albert Wilson v the Philippines* (2003), [5.14].

<sup>186</sup> Ereshnee Naidu, Symbolic Reparations and Reconciliation: Lessons from South Africa, 19 *Buffalo Human Rights Law Review* (2012-2013) 251-272, 268-269.

publicly acknowledge and alleviate victims' harms. This is now explored further in the context of 'impact'.

## 5. The Principle of Impact

The principle of impact suggests reparations can be distinguished from other forms of assistance through their healing, remedial and/or transformative effect.<sup>187</sup> As Dixon notes, there is an extensive body of work examining the healing potential of reparations, which is often linked to the 'unique symbolic significance' of reparations compared to other forms of assistance.<sup>188</sup> As Danieli argues, 'It's not the money but what the money signifies – vindication.'<sup>189</sup> This has been acknowledged at the ICC, which has noted that 'one important aspect of a reparative measure is the fact that the victim knows it is aimed at repairing the harm suffered' and has made clear it will 'reject any project framed in a way that does not make it clear to the victims that the activity they are participating in is a reparative measure for the harm suffered'.<sup>190</sup> In this sense, the principle of impact is interlinked with those of recognition and responsibility discussed above. However, the principle also goes further, looking beyond the symbolic significance of labelling measures 'reparations', to consider whether they adequately remedy the harm and alleviate the victim's suffering.<sup>191</sup>

In Case 001, the symbolic value and healing potential of publishing the accused's apologies was explicitly rejected by many civil parties, who considered the apologies insincere in light of the accused's 'not guilty' plea.<sup>192</sup> Such an explicit rejection by Civil Parties undermines the principle of impact. With no symbolic value and no meaningful healing potential, the

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<sup>187</sup> Dixon, n.17, 101. While it is not discussed here, it is worth noting that the transformative impact of international criminal reparations has subsequently been critiqued, see e.g. Sarah Williams and Emma Palmer, 'Transformative Reparations for Women and Girls at the ECCC' 20(2) *International Journal of Transitional Justice* (2016) 311-331; Louise Chappell, 'The Gender Injustice Cascade: 'transformative' Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga case at the ICC' 21(9) *The International Journal of Human Rights* (2017) 1223 – 1242; Brianne McGonigle Leyh and Julie Fraser, 'Transformative Reparations: Changing the Game or More of the Same' *Cambridge International Law Journal* (2019) 33-59.

<sup>188</sup> *Ibid.*

<sup>189</sup> Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice,' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill, 2009) 59-60.

<sup>190</sup> *The Prosecutor v Al Mahdi*, Decision on Implementation, n.109, at 101.

<sup>191</sup> *Lubanga* Reparations Appeal, n.12, [200].

<sup>192</sup> Stover, Balthazard and Koenig, n.119.

extent to which this award can be framed as a ‘reparation’ at all is questionable.<sup>193</sup> While the Case 002 reparation awards have not prompted the same explicit rejections as followed Case 001, evidence suggests that for some Civil Parties, the inadequacy of the forms of reparation awarded prohibited symbolic healing. Some found it hard to understand why the ECCC had attracted so much funding without any being made available to fund more substantial reparations.<sup>194</sup> As expressed by a Civil Party representative ‘villagers have heard that the ECCC got a budget of \$15 million to process the trials...[they would] prefer some of this money to benefit the people who suffered from the Khmer Rouge regime.’<sup>195</sup> Others, who had hoped to obtain individual reparations, noted other contexts in which victims had received compensation, such as the 2010 Water Festival stampede.<sup>196</sup> Those who had requested medical services expressed disappointment that they had not received the same treatment as other groups, as highlighted by one group of victims:

We want to get a card to show that ‘Okay, I’m a CP I can get free service everywhere.’ So, the soldiers in Cambodia they have the card, so we want to claim the same as the government offers to the soldiers.<sup>197</sup>

In addition to hoping for forms of reparation that were not forthcoming, some Civil Parties simply did not see a personal benefit in the forms that were awarded. For example, one civil party lawyer shared an anecdote of trying to convince Civil Parties that an educational project would benefit them:

So that we try to explain to a Civil Party... Yes, it is reparation if you consider that you want to explain to the younger generation what happened to you. You can be invited to tell your story, so the benefit is huge.... I remember it was difficult to make them understand that it is reparations ...<sup>198</sup>

The challenges of delivering a sense of symbolic significance were enhanced by the retrospective recognition of projects, as discussed above in Part 2. In cases where proposed

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<sup>193</sup> Sperfeldt, n.16, at 276.

<sup>194</sup> James P. Bair, ‘From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Court of Cambodia’, 31 *University of Hawaii Law Review* (2009) 508, 537.

<sup>195</sup> Interview, Kompong Chhnang, March 2017.

<sup>196</sup> Killean, n.116, 28.

<sup>197</sup> Interview, Phnom Penh, December 2018

<sup>198</sup> Interview, Phnom Penh, March 2017.

reparations were ongoing at the time of judgment, it was clear that those responsible for their delivery were taking steps to imbue the projects with symbolic value:

Every time that I am working directly with a civil party, we assure them and we inform again and again, this is the reparation. You are not forgotten as Khmer Rouge survivors.<sup>199</sup>

Yet, in the case of retrospective recognition, this became unrealistic and even insensitive when a significant amount of time has passed, and Civil Parties' priorities had changed. Interviewees spoke of being 'embarrassed' to go back to Civil Parties and explain that the project had been deemed a reparation so long after their implementation:

If we had consulted let's say in 2009 and got a judgment in 2012 or something, I think that would have had a real symbolic value to them. Because they were really invested in the process at the time. Now, it feels almost awkward to talk about it.<sup>200</sup>

Perhaps unsurprisingly given these challenges, surveys conducted in 2018 highlighted that of the Civil Parties surveyed, 60% of those who had participated in one or more reparation project said they did not know about any reparation projects.<sup>201</sup> Of those respondents, a quarter also indicated that they had not been involved in any reparation projects, despite being known to have been so. One reparation, the introduction of a National Remembrance Day, was only known to 3.2% of the Civil Party respondents. As noted by one respondent in that study: 'Since...the judges decided that it was the day to pay respect to those deceased...have they ever informed us about that?'.<sup>202</sup> This was reflective of earlier research conducted in 2016, in which more than 90% of Civil Parties were not aware of reparation projects.<sup>203</sup> This does not mean that the projects had no value. When asked if it would have mattered if their project had not been accepted as a judicially recognised reparation, two respondents involved in delivering proposed projects opined:

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<sup>199</sup> Interview, Phnom Penh, December 2018.

<sup>200</sup> Interview, Phnom Penh, December 2018.

<sup>201</sup> Williams et al., n.117, 116.

<sup>202</sup> *Ibid.*

<sup>203</sup> Christoph Sperfeldt, Melanie Hyde and Mychelle Balthazatd, Voices for Reconciliation: Assessing Media Outreach and Survivor Engagement for Case 002 at the Khmer Rouge Trials, East West Center and WSD Handa Center for Human Rights and International Justice (2018), 57.

I don't think that this would negatively affect our project implementation since we have very active support from the Civil Parties themselves.<sup>204</sup>

No, the project is run. I just know that the Civil Parties appreciated it.<sup>205</sup>

As observed by another practitioner:

I think it really mobilised a lot of resources and energies. And in a way, I think a lot of Civil Parties benefitted from that, directly or indirectly... a lot of people could tell their story, a lot of people were invited to additional activities, to the court, could participate in film projects. So, people have that still, and I think that's all very valuable. Do people see that as a reparation? I'm not sure.<sup>206</sup>

This last point highlights that while projects may have been appreciated regardless of their status as a judicially awarded reparation, evidence suggests that in practice the symbolic value of reparations may have been relatively limited in Cambodia. Part of this may be due to the retrospective recognition. With little being done to notify Civil Parties that projects had been declared reparative, it is questionable whether the projects could really deliver a sense of symbolic significance. As the interviewee above continued:

I think you need to think more about the symbolism. And there's much more symbolic action and ceremonial action, perhaps, involved in this to convey this than just, 'We announce it, hereby repair is done.'<sup>207</sup>

International criminal courts face significant practical and resource-related challenges in delivering reparations. However, it is important to at least attempt to deliver measures which are capable of delivering something of material value and symbolic significance. In the ECCC's case, the initial practical limitations resulted in reparations that were deemed inadequate by many Civil Parties. Subsequently, a focus on retrospectively recognising feasible but in some cases less meaningful projects has resulted in the delivery of reparations which, while not without benefits, are arguably limited in their remedial impact.

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<sup>204</sup> Interview, Phnom Penh, December 2018.

<sup>205</sup> Interview, Phnom Penh, December 2018.

<sup>206</sup> Interview, Phnom Penh December 2018.

<sup>207</sup> Interview, Phnom Penh, December 2018.

## Conclusion

This article has evaluated the ECCC's approach to reparations through the principles of accountability, recognition, process, form and impact. In doing so, it has sought to explore the broader conceptual incoherence of reparations within transitional justice, as well as the challenges which can face international criminal bodies tasked with delivering reparations in practice. In this section we make two concluding arguments.

The first is that using Dixon's principles of responsibility, recognition, process, form and impact to analyse the ECCC's practice highlights the conceptual and practical difficulties of applying principles of 'reparations' to awards granted by international criminal courts. In an attempt to respond to the backlash that followed Case 001 and deliver something meaningful to Civil Parties, the ECCC has awarded measures that have little connection to the Civil Parties' specific harms or those responsible for them. Such measures have often failed to deliver a sense of recognition and symbolic significance, and have often had little connection to the wishes of victims as expressed throughout the process. While the awards made were in some cases appreciated by recipients, the form and impact of the reparations could not be considered appropriate and adequate redress for the harm suffered during the regime. These critiques do not mean that they had no positive impacts at all – far from it. Rather, we argue that they fit uneasily within the concept of 'reparations'.<sup>208</sup> At a time when the practice of reparations in international criminal law is still emerging, the framing of such measures as reparations arguably risks stretching the concept to the extent that it ceases to have symbolic meaning.

There are practical risks associated with the ECCC's approach, as well as theoretical challenges. In claiming that 'reparations' have now been awarded to victims of the Khmer Rouge, the ECCC deflects attention away from states' obligations towards victims of atrocity,<sup>209</sup> crowding out the space for reparations to be advocated for locally. In the vacuum between expectation and capacity the vernacular of reparations was misappropriated to be a vehicle for donors' projects, rather than ensure an effective remedy. This is reflective of a

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<sup>208</sup> Lisa Magarrell, Reparations in Theory and Practice, *International Centre for Transitional Justice* (2007), 2.  
<sup>209</sup> Sperfeldt, n.16, 317.

broader issue that emerges when international criminal courts adopt reparation mandates. We cannot compare the reparations capabilities of international criminal bodies with human rights courts or large administrative reparation bodies in transitional societies. They are *sui generis*, given their narrow focus on the responsibility of an individual in victimising hundreds or thousands of individuals.<sup>210</sup> That said, international criminal courts are often the only opportunity for victims to seek reparations, raising real issues with regards to victims' rights to redress. Arguably, in adopting such a remit such courts risk closing the door to future claims by victims. This becomes particularly problematic when the reparations awarded by those courts fail to adequately address harm, as was particularly evident in Case 001 at the ECCC. The Supreme Court Chamber has said that 'On the policy level, it should be emphasised that ECCC criminal proceedings are to be considered as a contribution to the process of national reconciliation, possibly a starting point for the reparation scheme, and not the ultimate remedy for nation-wide consequences of the tragedies during the DK.'<sup>211</sup> In Case 002/01 the judges further stated that, 'The Chamber also wishes to remind donors that they have the option to support measures that have not been specifically endorsed in this judgment'.<sup>212</sup> Thus, the Court itself acknowledges that it cannot fully deliver on the promise of reparations. Unfortunately, it has remained the only avenue for redress. As one transitional justice practitioner said, if remedying victims' harm is considered important there needs to be a national reparation programme that puts victims at the centre.<sup>213</sup> With the Cambodian government looking unlikely to take on any such programme, it may be that much of the harm experienced by victims of the Khmer Rouge will remain without legal remedy.

Our second argument is therefore that there needs to be more discussion around reparative complementarity, and explorations of how international, domestic, regional and hybrid bodies along with donors and civil society can best cooperate in maximising victims' redress across different judicial fora.<sup>214</sup> It might be that this requires considering the possibility of introducing claims commissions or national reparation bodies alongside the establishment of any future tribunals. It may also require memorandums of understanding with states and intergovernmental organisations that already deliver or support reparation programmes, such as the International Organisation for Migration, UN Development Programme and the World

<sup>210</sup> Indeed, this has been stressed by the ECCC itself, see Case 001 Appeal Judgment, n.49, [639] – [641].

<sup>211</sup> Case 001, Appeal Judgment, n.49, [655].

<sup>212</sup> Case 002/01 Trial Judgment, n.62, [1164].

<sup>213</sup> Interview, Phnom Penh, December 2018.

<sup>214</sup> See Luke Moffett, 'Reparations for victims at the International Criminal Court: a new way forward?', 21(9) *The International Journal of Human Rights* (2017) 1204-1222.

Bank, to assist on capacity building. International criminal justice bodies could also support domestic reparations by sharing information and evidence that can assist the work of a domestic reparation body in mapping out victims' harms or tracing the assets of those responsible for violations. Indeed, there is some evidence of an emerging tendency amongst international criminal bodies to engage more with states and other bodies. In Côte d'Ivoire the ICC Trust Fund is directing its assistance mandate to facilitate legal access to victims to apply through the domestic reparation programme.<sup>215</sup> In the Hissène Habré the creation of a trust fund coincides with a domestic criminal judgment that found the state responsible alongside members of Habré's regime for reparations.<sup>216</sup> By engaging in greater complementarity, rather than giving international criminal justice bodies dominance over the scope of redress, more might be done to meaningfully, adequately and appropriately respond to legacies of mass violence. In the context of Cambodia, the reality is that such redress looks unlikely to be delivered in the future.

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<sup>215</sup> See e.g. Report of the Board of Directors of the Trust Fund for Victims Sixteenth Session of the Assembly of States Parties New York, 4 December 2017, ASP-16, 4-5.

<sup>216</sup> République du Tchad, Cour Criminelle Spéciale de N'Djamena, Arrêt Criminel, Répertoire No 01/15 du 25 mars 2015, 12.