Reparations for Victims of Mass Atrocities: Taking the Views of Victims into Account

*Christoph Sperfeldt**

Reparations have become one of the most important conceptual formulations of a more victim-oriented way of doing justice in the aftermath of mass atrocities.[1] This is now also true for international criminal justice. The International Criminal Court (ICC) became the first international criminal tribunal to which victims can submit claims for reparations.[2] Some hybrid courts have also considered provisions on reparations, notably the Extraordinary Chambers in the Courts of Cambodia (ECCC). However, the practice emerging from the first cases at the ICC and the ECCC has highlighted the problems associated with making the vision of victim-oriented justice a reality for affected populations. A key challenge for these courts remains how to consider the views and preferences of victims in the processes that shape reparations.

These observations address the more general tension between promoting universal laws and principles on reparations and maintaining sensitivity to each unique context, as well as the ownership of conflict-affected populations. More than any other aspect of their mandates, reparations force international criminal courts to move beyond their comfort zones and engage with the diverse contexts before them. At the core of this process is the courts' engagement with survivors of mass atrocities. Both court administrations and the predominantly legal scholarly literature on reparations tend to neglect this aspect of the making of reparations. Ambitious objectives stipulated in courts' rhetoric and policy in relation to engagement have therefore never been matched with the necessary attention and resources for their realisation.

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* University of Melbourne, Senior Research Fellow at the Peter McMullin Centre on Statelessness, Melbourne Law School. Previously he was Deputy Director at the Asian International Justice Initiative, and Senior Advisor with the Gesellschaft für Internationale Zusammenarbeit (GIZ) in Cambodia.

1 In 2005, the UN General Assembly even proclaimed a "right to reparation" for victims of mass abuses. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 16.12.2005, para. 11.

2 Rome Statute of the International Criminal Court, opened for signature 17.7.1998, Art. 75.

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The experience with the first two cases before the ECCC in Cambodia demonstrates the challenges. The ECCC introduced reparations alongside a system based on civil party participation. However, the scope of reparations is limited to "collective and moral" measures.[3] The reparations scheme has undergone a number of reforms since its initial adoption, in 2007, mainly with the goal to give judges more flexibility for considering reparations beyond the assets of convicted persons.[4] Criminal and reparations proceedings have so far been completed in *Case 001* and *Case 002/01*.[5] Victim participation played out quite differently in these cases, as they were distinct in their nature and scope. *Case 001* involved one defendant with charges centring around one major crime site – the Khmer Rouge's notorious torture centre, S-21. 93 civil parties were admitted on a preliminary basis to participate in *Case 001*.[6] The defendants in *Case 002*, on the other hand, were charged with a criminal plan that involved an extensive list of atrocities, including forced population transfers, genocide and forced marriages; covering dozens of crime sites across the country. More than 3,800 civil parties were admitted to participate in *Case 002*, initially represented by a dozen legal teams. How did civil party lawyers gauge and consider victims' views and preferences when formulating their reparations requests in these cases?

At the ECCC, there existed two moments at which civil parties' views and preference regarding reparations were solicited: the application process and consultations in preparation of reparations requests put forward by legal representatives. If a survivor of the Khmer Rouge regime chose to apply for civil party status, the application form contained a question, asking if applicants had any preference as to the form of "collective and moral reparations" that they would like to obtain, and if yes, to provide details.[7] ECCC and local Non-Governmental Organization (NGO) staff working on outreach to victims had great difficulties explaining the notion of "collective and moral" reparations. Judges had not provided a definition in the Internal Rules. Outreach staff left it therefore by and large to survivors to express their preferences. Considering that most applicants were rather poor and lived in rural areas, most asked for roads, schools, hospitals and other needed infrastructure projects. The lack of specificity, the inclusion of many development measures and the fact that civil parties had completed

[3] ECCC Internal Rules (v9), Rule 23 *quinquies*.

[4] See *C. Sperfeldt*, Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia, IntCrimLRev 12 (2012), 457 et seq.

[5] The Trial Chamber severed *Case 002* into sub-trials.

[6] Only 76 civil parties were declared admissible on appeal. These were represented by four legal teams.

[7] See ECCC Victim Information Form.

these forms years before their matter came to trial rendered much of this information of little use to those responsible for soliciting civil parties' requests. Despite the efforts that went into completing the applications, most of this information was never seriously used in determining the final reparations requests.

Hence, consultations became the most important modality through which courts and lawyers sought the views of civil parties. *Vinck* and *Pham* describe consultations "as a participatory process to inform the design of accountability mechanisms that better reflect the population's needs and expectations".[8] The nature and extent of consultations depended on the number of victims involved and the amount of resources available for such tasks. The smaller number of civil parties in *Case 001* allowed for more intensive consultations. Structured consultations on reparations began during the trial phase and were at times conducted among the individual legal groups of civil parties, at times in larger meetings of civil parties facilitated by NGOs. These face-to-face meetings provided opportunities for two-way communication and took place almost on a monthly basis. These gatherings allowed for more sustained consultations than was possible in *Case 002* with thousands of participating civil parties. It gave participating civil parties a better understanding of the limitations of the ECCC's mandate and a more genuine say in the formulation of the final reparations request in *Case 001*.[9]

Rules amendments enacted before the *Case 002* trial required civil parties to submit to the Trial Chamber "initial specification" of their requests at the beginning of the trial. This meant that at least some consultations with civil parties had to be organised *prior* to the start of the trial – a situation different from the ICC, where most consultations were held in the reparations phase after a conviction. Given the lack of resources at the ECCC, it was decided that each of the legal teams in *Case 002/01* would be responsible for consulting with their clients. While some of the smaller legal teams representing less than one hundred clients were able to engage in more regular

[8] *P. Vinck/P. Pham*, Consulting Survivors: Evidence from Cambodia, Northern Uganda, and Other Countries Affected by Mass Violence, in: S. Stern/S. Straus (eds.), The Human Rights Paradox: Universality and Its Discontents, 108.

[9] These reparations requests included a compilation of apologetic statements made by the defendant; psychological and physical health care; funding of educational programs; the erection of memorials at S-21 and civil parties' communities; and inclusion of civil parties' names in the judgement. See *Case 001*, "Civil Parties' Co-Lawyers' Joint Submission on Reparations", Civil Parties, E159/3, 14.9.2009. Most requests were subsequently rejected by the Trial and Supreme Court Chamber, as the convicted person was assessed to be indigent.

consultations with their clients, larger teams such as those representing more than a thousand clients faced considerable challenges.

Intermediary NGO support was critical for these consultations. Yet, the reliance on NGO funding for consultations meant that some civil parties whose participation was facilitated by more well-resourced NGOs had more opportunities for consultations with their lawyers than others. As a result, these consultations were uneven, with few legal teams providing evidence of systematic client consultations. No reliable data exist to determine how many civil parties had a say in the reparations requests that were put forward in their names. Most legal teams simply submitted a list of project ideas.

A key challenge during those consultations was, in the words of one civil party lawyer, the great discrepancy between "what we can offer" and "what the clients need".[10] Initial consultations with civil parties often unfolded in similar ways, with civil parties when asked about their preferred forms of reparations stating that they wanted X and Y. Outreach workers or lawyers then responded that this was not possible, because ECCC reparations were limited to "collective and moral reparations". When civil parties then said that they did not understand, lawyers and outreach actors tried to illustrate what in their view would be permissible forms of reparations by suggesting Z. Such guided consultation practices dominated the consultations in *Case 002*. Pre-conceived notions by those conducting consultations at the ECCC of what would be permissible "collective and moral" reparations re-shaped the outcomes from the initial preferences civil parties had articulated. In this process, NGOs and lawyers relied on known international precedents of collective reparations. In their initial specification, the Civil Party Lead Co-Lawyers requested reparations falling into four broad categories: (1) memorialisation / remembrance; (2) rehabilitation; (3) documentation / education; and (4) other awards – reflecting by and large what representatives thought was permissible and feasible under the ECCC's reparations mandate.[11] In its judgement in *Case 002/01*, the Trial Chamber recognised eleven reparations projects proposed by the civil party lawyers.[12]

The account of civil party consultations at the ECCC confirms the crucial role of intermediaries' and lawyers' practices in shaping civil parties' reparations requests. These practices allowed aligning civil parties' requests

[10] Author's interview with international civil party lawyer, Phnom Penh, 15.5.2015 (on file).

[11] *Case 002*, Initial Specifications for Reparations Requests in Case 002, presented at the Initial Hearing on 29.6.2011, Transcript E1/6.1/TR002/20110629 Final EN.

[12] *Case 002/01*, Judgement, Trial Chamber, Case File No. 002/19-09-2007/ECCC/TC, E313, 7.8.2014, paras. 1151-1160.

with what was seen to be feasible in the framework of the ECCC's reparations mandate. While many civil parties accepted these limitations, others dissented.[13] More importantly, it clouded the vision of lawyers and outreach workers about civil parties' genuine preferences by confusing what the Court had to offer with what the civil parties actually desired. The gap between what the ECCC could offer and what civil parties wanted was not always unbridgeable, but outreach resources were never sufficient to fill this space with civil parties' own, at times modest, views and ideas about reparative measures.

Incorporating the voices of survivors is certainly a challenge for all judicial mechanisms, and administrative ones for that matter. This is even more true for reparations delivered through courts, where communicative practices are dominated by concerns about managing expectations among survivors, and voices of victims are filtered through various representatives. Such practices help those working at and around these institutions to discipline the multitude of demands originating from survivor communities and to make them fit the stringent requirements of legal proceedings. Yet, only a more genuine involvement of survivors will ensure that reparations outcomes are appropriate and accepted by survivors.

[13] See *J. Bernath*, Civil Party Participation and Resistance at the Khmer Rouge Tribunal, in: B. Jones/J. Bernath (eds.), Resistance and Transitional Justice, 2017, 103 et seq.