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PUNISHMENT AND REDRESS IN INTERNATIONAL CRIMINAL JUSTICE

In order to understand how reparations for victims of mass atrocities became a concern for international criminal justice, it is important to consider the longer ideational and normative history underpinning this development. In this chapter, I sketch a brief conceptual history of reparations and international criminal justice and introduce some key concepts and terms used throughout this book. In particular, I show how the two main normative responses to mass atrocities – punishment of perpetrators and redress for victims – gradually converged over time, laying the ground for the emergence of reparations mandates at international(-ised) criminal courts.

1.1 NORMATIVE RESPONSES TO MASS ATROCITIES

More than seventy years after the Holocaust and the creation of the United Nations, violent conflicts and mass atrocity crimes remain the main challenge for the United Nations' objective of saving 'succeeding generations from the scourge of war'.[1] Despite the optimism that existed after the end of the Cold War to resolve conflicts and to rebuild shattered societies in the aftermath of civil war, mass violence has not disappeared from international affairs.[2] I use the term 'mass atrocity' as an umbrella

[1] Preamble of the 1945 UN Charter.
[2] See Karstedt, Susanne, 2012, 'Contextualizing Mass Atrocity Crimes: The Dynamics of "Extremely Violent Societies"', 9(5) *European Journal of Criminology*, 499–513.

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term to describe various acts of large-scale violence independently from narrow legal definitions.[3]

Despite an increase in international peace efforts, Paul Collier and colleagues found that almost 40 per cent of all countries that had emerged from violent conflicts relapsed back into conflicts within the first five years.[4] Collier and colleagues called this phenomenon the 'conflict trap'. Breaking these cycles of violence is a complex and long-term task. In 1992, UN Secretary-General Boutros-Ghali declared that building sustainable peace requires addressing 'the deepest causes of conflict'.[5] This proposition is supported by another strand of research that argues that rebuilding peace in these difficult contexts requires that the injustices of the past are addressed.[6] The underlying assumption is that there is a link between rebuilding peace in a post-conflict society and restoring justice, and only if this connection is addressed can the cycle of violence be broken.[7]

The scholarly field that deals with questions of justice after mass atrocities nowadays unites under the umbrella of 'transitional justice'.[8] I use 'transitional justice' as a term to describe the range of processes and mechanisms, which societies may use to deal with the legacy of mass violence and atrocities.[9] Societies with a legacy of mass abuse confront dilemmas that distinguish these contexts from other environments where justice responses are considered: difficult transitional contexts, large-scale victimisation, destruction of the judicial infrastructure and human capacities, severe economic obstacles and limited resources, to name just a few. How to conceive and attain justice under such circumstances has

[3] At times, I refer more specifically to 'international crimes' as those core crimes defined in the Rome Statute of the International Criminal Court, Art. 5–8. See Scheffer, David, 2006, 'Genocide and Atrocity Crimes', 1(3) *Genocide Studies and Prevention*, 229–250.

[4] Collier, Paul et al., 2003, *Breaking the Conflict Trap: Civil War and Development Policy*, World Bank Policy Research Report, Washington, DC, and Oxford, UK: Oxford University Press, 79–92, 100–118.

[5] *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc A/47/277, 17 June 1992, paras. 15 and 21.

[6] Mani, Rama, 2002, *Beyond Retribution: Seeking Justice in the Shadows of War*, Cambridge, UK: Polity Press and Malden, MA: Blackwell Publishers.

[7] See Lederach, John Paul, 1997, *Building Peace: Sustainable Reconciliation in Divided Societies*, Washington, DC: United States Institute of Peace Press.

[8] See Teitel, Ruti, 2000, *Transitional Justice*, Oxford and New York: Oxford University Press; and Arthur, Paige, 2009, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', 31(2) *Human Rights Quarterly*, 321–367.

[9] See *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2004, para. 8.

continued to preoccupy scholars and practitioners.[10] Some scholars have argued that mass atrocity contexts are 'extraordinary' in nature and that justice responses developed primarily to deal with the more 'ordinary' crimes in peaceful societies may not be adequate to address the challenging needs of conflict-affected societies.[11] They point to the difficulties associated with importing theories, concepts and practices designed primarily in the context of stable situations into the complex environment of societies emerging from mass atrocities.

While the transitional justice literature emphasises the multitude of justice needs in the aftermath of mass atrocities, including prosecution, truth-seeking, reparations and reconciliation, some issues have received more attention from the international community than others.[12] In particular, international justice has been informed by two main normative responses: the 'fight against impunity' through international prosecutions and the rise of human rights with its emphasis on victims of abuses. Together these two responses have shaped significantly how policymakers see and react to mass atrocities.[13] Both responses are associated with broader social and political movements, often referred to as the anti-impunity and human rights movements.[14] These two movements and the normative responses they produced have long ideational histories. Their expansion and actualisation during the twentieth century have been made possible by broader transnational processes of legalisation and institutionalisation that have gradually converged over time. It is at this point of convergence where my more focused story about reparations in international criminal justice begins. What follows is a brief account of how these developments unfolded and how scholars have tried to explain them.

[10] See Fletcher, Laurel E., and Harvey M. Weinstein, 2002, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', 24 *Human Rights Quarterly*, 573–639; and Nickson, Ray, and John Braithwaite, 2014, 'Deeper, Broader, Longer Transitional Justice', 11(4) *European Journal of Criminology*, 445–463.

[11] See Aukerman, Miriam J., 2002, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', 15 *Harvard Human Rights Journal*, 39–97; and Drumbl, Mark, 2005, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', 99(2) *Northwestern University Law Review*, 539–610.

[12] See Parmentier, Stephan, 2003, 'Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court', 41(1–2) *International Annals of Criminology*, 203–224.

[13] See Balint, Jennifer, 1997, 'Conflict, Conflict Victimization and Legal Redress, 1945–1996', 59(4) *Law and Contemporary Problems*, 231–247.

[14] See Engle, Karen, Zinaida Miller, and D.M. Davis, 2016, *Anti-Impunity and the Human Rights Agenda*, Cambridge: Cambridge University Press.

1.1.1 International Criminal Justice: An Expanding Field

Payam Akhavan declared that the creation of the contemporary international criminal justice system was 'a phenomenal revolutionary development' that 'signified a seismic shift in global governance' against a hitherto entrenched culture of impunity for mass atrocities.[15] The beginning of international criminal justice is often associated with the Nuremberg and Tokyo trials in the aftermath of World War II. This model altered the post–World War I justice model in two significant ways. First, it criminalised atrocities and replaced collective sanctions against entire states or nations with the idea of individual criminal responsibility.[16] And second, it shifted responses to mass atrocities – now considered crimes against all of humankind – from the national to the international level.[17] While the Cold War limited the advance of international criminal justice, Nuremberg's legacy remained alive. An imperative gradually took form in an anti-impunity movement, which emphasised criminal punishment in response to individual wrongdoing and stressed the responsibility of the international community to act when states failed to do so.[18]

The end of the Cold War set into motion a rapid expansion and proliferation of international criminal justice mechanisms.[19] The 'fight against impunity' through criminal prosecutions became a cornerstone of the international community's response to mass atrocities. This began during the early 1990s with the establishment by the UN Security Council of the two ad hoc tribunals for the former Yugoslavia and Rwanda, followed by the formation of a series of hybrid criminal courts, and culminating, in 1998, with the creation of the permanent International Criminal Court in The Hague.[20] Kathryn Sikkink and colleagues refer to this development as the 'justice cascade' – a global trend of holding

[15] Akhavan, Rise and Fall, 527–528.

[16] See Ratner, Steven R., Jason S. Abrams, and James L. Bischoff, 2009, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd edition, New York and Oxford: Oxford University Press.

[17] See Koskenniemi, Martti, 2004, 'Hersch Lauterpacht and the Development of International Criminal Law', 2(3) *Journal of International Criminal Justice*, 810–825.

[18] See Bass, Gary, 2000, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton: Princeton University Press.

[19] See Smeulers, Alette, Barbora Hola and Tom van den Berg, 2013, 'Sixty-Five Years of International Criminal Justice: The Facts and Figures', 13 *International Criminal Law Review*, 7–41.

[20] See Mettraux, Guénaël, 2005, *International Crimes and the Ad Hoc Tribunals*, Oxford and New York: Oxford University Press; and Romano, Cesare P., André Nollkaemper, and Jann K. Kleffner (eds.), 2004, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford and New York: Oxford University Press.

political leaders criminally accountable for past human rights violations through domestic or international prosecutions.[21] At the same time, the triumph of the global 'fight against impunity' has resulted in justice becoming more state-centric and synonymous with 'criminal justice'. It directed attention to individual accountability for atrocities rather than for instance addressing the underlying structural conditions of violence.[22]

International criminal justice developed from the anti-impunity movement as a new field with its own norms, institutions and actor networks.[23] Rather than a mere set of rules and institutions, viewing international criminal justice as a field – an interconnected social space or sphere of activity – enables an analysis of the networks or social movements and hence the actors that engage or compete with one another.[24] Peter Dixon and Chris Tenove suggest that international criminal justice developed at the intersection of three already established global fields, namely interstate diplomacy, criminal justice and human rights advocacy.[25] The authors show that this positioning at the crossroads of different fields has allowed international criminal justice to bring together a variety of actors, draw on multiple forms of authority and mobilise resources. Such an understanding goes beyond the narrower notion of international criminal law, which refers to the legal regime underpinning the field. Instead, it draws attention to the actors who continuously construct and transform the field.[26] The number and type of actors involved in the work of international criminal justice are considerable and stretch beyond the boundaries of its institutions.

[21] Sikkink, Kathryn, 2011, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, New York: W.W. Norton & Company.

[22] See Burgis-Kasthala, Michelle, 2017, 'Holding Individuals to Account Beyond the State? Rights, Regulation and the Resort to International Criminal Responsibility', in: Drahos, Peter (ed.), *Regulatory Theory: Foundations and Applications*, Canberra: ANU Press, 429–444.

[23] See Hagan, John, and Ron Levi, 2004, 'Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice', 1(4) *European Journal of Criminology*, 445–475; and Dezalay, Sara, 2017, 'Weakness as Routine in the Operations of the International Criminal Court', 17(2) *International Criminal Law Review*, 281–301.

[24] See also Bourdieu, Pierre, 1986, 'The Force of Law: Toward a Sociology of the Juridical Field', 38 *Hastings Law Journal*, 805–853.

[25] Dixon, Peter, and Chris Tenove, 2013, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', 7(3) *International Journal of Transitional Justice*, 393–412.

[26] Mégret, Frédéric, 2016, 'International Criminal Justice as a Juridical Field', 13 *Champ pénal/Penal field* (online version).

The international criminal justice field is also expanding, reaching deeper into international relations, peacebuilding and other fields.[27] This expansion and the struggles it produces are manifested in the variety of competing goals associated with international criminal justice, with some scholars advocating for more minimalist and others for more expansionist perspectives. Mirjan Damaska argues that international criminal courts should leave behind unrealistic aspirations, including satisfying the demands of victims, and play a more modest role by advancing accountability for mass atrocities.[28] Other scholars maintain that the extraordinary context of atrocities requires a new approach to criminal justice that is different from existing criminal justice models. This includes proposals for rethinking underlying legal principles or theories,[29] while others demand more attention to historical truth[30] or restorative justice.[31] Yet critical scholars argue that this expansion of international criminal justice into new areas has also crowded out or subordinated other ways of conceiving and doing justice.[32] These contestations over the goals and purpose of international criminal justice are not an abnormality but rather constitutive of the field. This book moves these contestations to the forefront of the analysis.

1.1.2 Human Rights, the 'Victim' and the Emergence of Reparations

The expansion of international criminal justice is also linked to the growing importance of human rights – a source of support for the anti-impunity movement but also of new frictions and pressures. Scholars have chronicled, from different perspectives, the rise of human rights

[27] See Clarke, Kamari Maxine, 2009, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge: Cambridge University Press.

[28] Damaska, Mirjan, 2008, 'What Is the Point of International Criminal Justice?', 83 *Chicago Kent Law Review*, 329–365.

[29] See Robinson, Darryl, 2013, 'A Cosmopolitan Account of International Criminal Law', 26(1) *Leiden Journal of International Law*, 127–153; and Drumbl, Mark, 2007, *Atrocity, Punishment and International Law*, Cambridge: Cambridge University Press.

[30] See Joyce, Daniel, 2004, 'The Historical Function of International Criminal Trials: Re-thinking International Criminal Law', 73 *Nordic Journal of International Law*, 461–484.

[31] See Findlay, Mark, and Ralph Henham, 2009, *Beyond Punishment: Achieving International Criminal Justice*, Basingstoke: Palgrave Macmillian.

[32] See Schwobel, Christina (ed.), 2014, *Critical Approaches to International Criminal Law: An Introduction*, Milton Park: Routledge.

during the last century.[33] Two aspects of this development are of particular importance for reparations, namely a re-evaluation of the standing of the individual in its relationship to the state and the increased attention to remedies for individual victims of wrongdoing.

Hans Joas described the advent of a global human rights culture as an expression of a growing belief in the 'sacredness' of the individual person.[34] Collective experiences of violence and broader socio-structural changes have enabled this belief to become legalised and institutionalised.[35] Grounded in historical experiences of political persecution and state-sponsored crimes during World War II, the post-war human rights movement was determined to protect the individual from the state, mainly by constraining the state through law. Individual, inalienable rights became a tool through which this protection manifested and through which notions of absolute state sovereignty could be challenged.[36] The human rights movement's transnational ambition was to anchor the individual as a rights-holder in international law.[37] In contrast to the prevailing understanding of international law as governing interstate matters, progressive international human rights law-making and practice during the past decades has challenged the presumption that states are the only subjects of international law.[38] Ruti Teitel has identified this development in international law as a 'normative shift' – a gradual movement away from states towards protecting individuals.[39]

In relation to instances of serious human rights violations, the individual person requiring protection manifested in the figure of the 'victim'. The term 'victim' may be controversial, as it often connotes a passive and helpless figure. 'Survivor' may be a more appropriate word to use. While recognising that these labels are not static, I use both terms in this book.

[33] See Moyn, Samuel, 2010, *The Last Utopia: Human Rights in History*, Cambridge and London: Harvard University Press; and Teitel, Ruti, 1997, 'Human Rights Genealogy', 66 *Fordham Law Review*, 301–317.

[34] Joas, Hans, 2013, *The Sacredness of the Person: A New Genealogy of Human Rights*, Washington, DC: Georgetown University Press.

[35] See Madsen, Mikael Rask, and Gert Verschraegen (eds.), 2016, *Making Human Rights Intelligible: Towards a Sociology of Human Rights*, Oxford and Portland: Hart Publishing.

[36] See Reus-Smit, Christian, 2011, 'Struggles for Individual Rights and the Expansion of the International System', 65(2) *International Organization*, 207–242.

[37] See Neier, Aryeh, 2012, *The International Human Rights Movement: A History*, Princeton and Oxford: Princeton University Press.

[38] See Charlesworth, Hilary, 2017, 'A Regulatory Perspective on the International Human Rights System', in: Drahos, Peter (ed.), *Regulatory Theory: Foundations and Applications*, Canberra: ANU Press, 357–373.

[39] Teitel, Ruti, 2011, *Humanity's Law*, Oxford: Oxford University Press.

'Victim' is mainly used in relation to the International Criminal Court (ICC) and Extraordinary Chambers in the Courts of Cambodia (ECCC), as it is the term used in the courts' legal frameworks, as well as the legal discourse of international criminal law more generally.

The notion of the 'victim' also permeated the rhetoric of the human rights movement, which rose to the role of torchbearer for victims of mass atrocities.[40] A range of international human rights instruments enshrined various forms of protections for victims of crime. This was most comprehensively articulated in the 1985 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.[41] Following the end of the Cold War, a human protection imperative has taken hold in international policy and legal instruments, including in relation to human security, the *Responsibility to Protect (R2P), Protection of Civilians in Armed Conflict* and *the Women, Peace and Security* agenda. Didier Fassin describes a new kind of 'moral economy' that has spurred demands for rights and the obligation to provide assistance to others.[42]

The centrality of victims in the human rights movement led to a renewed emphasis on remedies in response to rights violations. Many international human rights treaties or regional human rights conventions have incorporated rules that establish the right to some form of remedy for an individual victim of crime.[43] As a result of the intermarriage of human rights with the progressive judicialisation of modern societies, these remedies are often structured through law and decided in courts, increasingly so at the international level. Some regional human rights systems, such as the European and Inter-American systems, are regarded as the most effective legal remedies available for individual victims of human rights violations. Reparations to individual victims for harm they suffered as a result of a human rights violation have become one of the most important remedies

[40] See Elias, Robert, 1986, *The Politics of Victimization: Victims, Victimology, and Human Rights*, New York: Oxford University Press; and Vanfraechem, Inge, Antony Pemberton, and Felix Ndahinda, 2014, *Justice for Victims: Perspectives on Rights, Transition and Reconciliation*, London and New York: Routledge.

[41] *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/RES/40/34, 29 November 1985.

[42] Fassin, Didier, 2012, *Humanitarian Reason: A Moral History of the Present*, Berkeley: University of California Press.

[43] For instance the 1948 Universal Declaration of Human Rights (Art. 8); 1950 European Convention on Human Rights (Art. 5(5)); the 1966 International Covenant on Civil and Political Rights (Art. 2(3), 9(5) and 14(6)); the 1966 Convention on the Elimination of All Forms of Racial Discrimination (Art. 6); the 1969 American Convention on Human Rights (Art. 10) and the 1984 Convention Against Torture (Art. 14).

enshrined in these treaties. In 2004, the UN secretary-general declared, '[I]n the face of widespread human rights violations, states have the *obligation* [italic by the author] to act not only against perpetrators, but also on behalf of victims – including through the provision of reparations'.[44] But what reparations exactly are and mean has been subject to debate.

1.1.3 Reparations: A Contested Concept and Emerging Norm

Despite the growing importance of reparations in the aftermath of mass atrocities, there exists little conceptual and theoretical agreement in the literature on reparations. A review of the field noted a lack of 'a cohesive theoretical framework to guide our understanding of the overarching justification, purpose and aims of reparations and how they relate to theories of justice'.[45] And yet the use and meaning of reparations have expanded over time, while simultaneously remaining ambiguous and unsettled. Reparations could therefore be regarded as what Gallie describes as an 'essentially contested concept' – a concept that is complex, variously describable and open in character.[46] The 'right to reparations' is the associated norm that attempts to capture the concept and use it for the purposes of an expanding human rights agenda.

Despite the term's contested nature, the scholarly literature on reparations continues to proliferate.[47] This is visible in the wide array of normative and empirical inquiries into reparations in the aftermath of mass atrocities.[48] The increasing legalisation and judicialisation of

[44] *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc S/2004/616, 23 August 2004, para. 54.

[45] Laplante, Lisa, 2014, 'The Plural Justice Aims of Reparations', in: Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun, and Friederike Mieth (eds.), *Transitional Justice Theories,* Milton Park: Routledge, 66–84, 67.

[46] Gallie, W. B., 1956, 'Essentially Contested Concepts', 56 *Proceedings of the Aristotelian Society*, New Series,167–98.

[47] See De Greiff, Pablo (ed.), 2006, *The Handbook of Reparations,* Oxford, UK: Oxford University Press; De Feyter, Koen, et al. (eds.), 2005, *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations,* Antwerp and Oxford: Intersentia; and Ferstman, Carla, and Mariana Goetz (eds.), 2020, *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, 2nd revised ed, Leiden: Martinus Nijhoff Publishers.

[48] While I recognise that the demarcation between the two situations is rather fluid, this book is not concerned with reparations for historical injustices. Refer to Barkan, Elazar, 2000, *The Guilt of Nations: Restitution and Negotiating Historical Injustices,* Baltimore, MD and London: John Hopkins University Press; and Torpey, John (ed.), 2003, *Politics and the Past: On Repairing Historical Injustices,* Lanham, MD: Rowman and Littlefield Publishers.

reparations have also provided a terrain for legal scholars to engage with reparations.[49] This literature is filled with a variety of terms, such as 'reparations', 'restitution', 'compensation', 'remedy' and 'redress', that are often used without clear distinction.[50] The term 'reparations', as used in this book, refers generally to both the *form* of relief given and the *measures* taken to respond to harm suffered by injured individuals and/or groups. As such the term embraces both the substance as well as the process through which reparations may be obtained.[51] Given that the term refers to different forms and measures, I mostly use the plural (reparations) throughout this book, rather than its singular version.

Jo-Anne Wemmers suggests a helpful classification of existing definitions of reparations, distinguishing legal, criminological and victimological categories.[52] Actors in the international criminal justice field draw on these different categories to justify a certain course of action.

International lawyers have made attempts at different levels, both under international human rights and international humanitarian law, to establish a more coherent conceptual basis for the various elements of reparations.[53] The most prominent attempt emerged from the former UN Commission on Human Rights. In 1989, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities entrusted Special Rapporteur Theo van Boven with the task of preparing a study on the right to reparations for victims of 'gross violations of human rights'. In 1993, van Boven delivered his final report proposing basic principles and guidelines on this topic.[54] After long negotiations the UN General Assembly eventually adopted, on 16 December 2005,

[49] See Bottigliero, Ilaria, 2004, *Redress for Victims of Crimes under International Law,* Leiden and Boston: Martinus Nijhoff Publishers; and Randelzhofer, Albrecht, and Christian Tomuschat (eds.), 1999, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights,* The Hague and Boston: Martinus Nijhoff Publishers.

[50] Haasdijk, Suzan, 1992, 'The Lack of Uniformity in the Terminology of the International Law of Remedies', 5(2) *Leiden Journal of International Law*, 245–263.

[51] I keep here with the general understanding outlined in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter *Basic Principles and Guidelines* 2005).

[52] Wemmers, Jo-Anne, 2014, 'The Healing Role of Reparations', in: Wemmers, Jo-Anne (ed.), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparations*, London and New York: Routledge, 221–233.

[53] The International Law Association also established a Committee on Reparation for Victims of Armed Conflict. See Evans, Christine, 2012, *The Right to Reparations in International Law for Victims of Armed Conflict*, Cambridge: Cambridge University Press.

[54] UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993.

the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter *Basic Principles and Guidelines*).[55]

The main rationale of the *Basic Principles and Guidelines* was not to create new legal obligations for states but to assemble the various reparations provisions of existing human rights treaties and other international law instruments and to unite them under one conceptual framework. The concept of reparations, as advanced by the *Basic Principles and Guidelines*, includes five forms of reparations: restitution, compensation, rehabilitation and guarantees of non-repetition.[56] In conceiving of reparations as an umbrella concept that combines various forms of redress in response to mass atrocities, the *Basic Principles and Guidelines* provided a new way to communicate about reparations. It did so by expanding the scope and meaning of the norm. A number of provisions go beyond the needs of individual victims and address society as a whole. Guarantees of non-repetition in particular comprise an extensive agenda for good governance.

Despite these advancements in the legal sphere, the overwhelming challenges in mass atrocities settings have frustrated state-centric judicial responses, providing an opening for other disciplines to engage with the debate. One of the most influential perspectives has emerged from criminology under the banner of 'restorative justice'. This field of research has encouraged different ways of thinking about responses to crime, especially by challenging the dominance of retributive policies in legal systems.[57] The various conceptions of restorative justice generally emphasise efforts to repair the harm caused by wrongdoing and the relational dimension of this process by involving all concerned parties and stakeholders. This scholarship has led to a diffusion of restorative justice perspectives in many debates about reparations in mass atrocity settings.[58] It is also a common term used in the context of the ICC's reparations

[55] *Basic Principles and Guidelines* 2005.

[56] *Basic Principles and Guidelines* 2005, paras. 19–23.

[57] See Braithwaite, John, 2002, *Restorative Justice and Responsive Regulation* Oxford: Oxford University Press; Von Hirsch, Andrew, Julian Roberts, and Anthony Bottoms (eds.), 2003, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford and Portland: Hart Publishing; and Van der Spuy, Elena, Stephan Parmentier and Amanda Dissel (eds.), 2008, *Restorative Justice: Politics, Policies and Prospects,* Cape Town: Juta.

[58] See McEvoy, Kieran, and Tim Newburn, 2003, *Criminology, Conflict Resolution and Restorative Justice,* Basingstoke: Palgrave Macmillan.

mandate.[59] Yet other scholars have pointed to the difficulties associated with applying the concept to war crimes trials. Such contexts involve only selected prosecutions of higher-level perpetrators, mostly not those directly committing the acts that affected the victims before them, and lack its deliberative element.[60]

Scholars from a victimological perspective share some of the same concerns with restorative justice scholars, but they emphasise the centrality of the needs and perspectives of survivors and victimised communities in the justice process.[61] The relational and societal dimension that concerns restorative justice scholars moves into the background and is instead replaced by a more victim-centred notion of 'reparative justice', with an emphasis on the rights of victims.[62] Proponents of this approach believe that reparative justice more adequately describes the ICC's reparations mandate.[63]

It is not the goal of this book to find the most appropriate definition of reparations in international criminal justice but rather to explore how various actors advance different understandings of reparations. There is a difference between defining and conceptualising: while defining aims to settle on the meaning of a term, conceptualising keeps the ambiguities alive and makes the mapping of contestations and uses in the practices of different actor communities part of the inquiry.

Dimensions of Reparations

With reparations practices expanding into new geographical areas, more scholars have examined the imperfect attempts at providing reparations to victims of mass atrocities, bringing to the forefront the concerns of culturally diverse communities affected by mass atrocities.[64] There

[59] See Garbett, Claire, 2017, 'The International Criminal Court and restorative justice: Victims, Participation and the Process of Justice', 5(2) *Restorative Justice*, 198–220.

[60] See Clamp, Kerry (ed.), 2016, *Restorative Justice in Transitional Settings*, Florence: Routledge.

[61] See Letschert, Rianne, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (eds.), 2011, *Victimological Approaches to International Crimes: Africa*, Antwerp: Intersentia.

[62] See Danieli, Yael, 2009, 'Massive Trauma and the Healing Role of Reparative Justice', 22(5) *Journal of Traumatic Stress*, 351–357.

[63] See Goetz, Marianna, 2014, 'Reparative Justice at the International Criminal Court: Best Practice or Tokensim?', in: Wemmers, Jo-Anne (ed.), *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparations,* London and New York: Routledge, 53–70.

[64] See Shaw, Rosalind, and Lars Waldorf, with Pierre Hazan (eds.), 2010, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, Stanford, CA: Stanford University Press; and Rubio-Marin, Ruth (ed.), 2009, *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, New York: Cambridge University Press.

exists much controversy in this literature about the impact and efficacy of reparations mechanisms.[65] The discussion often centres on strategic dimensions that require consideration when conceiving, designing or implementing reparations policies and programmes. Key dimensions include the goal, the substance and the modalities of reparations.

As to the goal or purpose of reparations, an established principle in law is full restitution. According to the *Basic Principles and Guidelines*, the idea behind this principle is to restore the victim to the situation before the gross violations occurred and to compensate in proportion to the harm suffered.[66] In the context of mass atrocities, however, two problems arise when adopting full restitution as the goal of reparations. It is impossible to measure and repair all harm in these situations, because of the magnitude of the human rights violations that occurred. No amount of reparations for victims can truly 'make whole what has been smashed',[67] or provide 'repair for the irreparable'.[68] Moreover, the return to the situation prior to the violations might not at all be desirable for many victims, because they may never have been in a satisfactory position in the first place, due for instance to economic inequalities or discrimination. It is therefore often argued that reparations should not just be backward-looking but also comprise forward-looking and transformative elements.[69]

Another dimension relates to the types of reparations measures that are appropriate in a specific situation. The main classification of the substance of reparations has been made along the lines of individual and collective measures, and material and non-material forms of reparations.[70] Contrary to the predominantly individualised approach to reparations applied in domestic settings dealing with ordinary crimes, programs aiming to address the consequences of mass atrocities often

[65] See Kent, Lia, 2012, *The Dynamics of Transitional Justice: International Models and Local Realities in East Timor*, Oxford: Taylor & Francis.

[66] *Basic Principles and Guidelines* 2005, para. 19.

[67] Torpey, John, 2007, 'Modes of Repair: Reparations and Citizenship at the Dawn of the New Millennium', 18 *Political Power and Social Theory*, 207–226.

[68] Minow, Martha, 1998, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press, 117.

[69] See Rombouts, Heidy, and Stephan Parmentier, 2009, 'The International Criminal Court and Its Trust Fund Are Coming of Age: Towards a Process Approach for the Reparation of Victims', 16 *International Review of Victimology*, 149–182; and Gready, Paul, and Simon Robins, 2014, 'From Transitional to Transformative Justice: A New Agenda for Peace', 8 *International Journal of Transitional Justice,* 339–361.

[70] See Vandeginste, Stef, 2003, 'Reparation', in: Bloomfield, David, Teresa Barnes and Luc Huyse (eds.), *Reconciliation after Violent Conflict: A Handbook*, Stockholm: IDEA, 145–161.

consider collective forms of reparations.[71] While material reparations usually include monetary compensation or the return of property, non-material measures are more of a symbolic nature, including the search for disappeared persons, public apologies or commemoration acts. When designing a reparations program in the aftermath of mass atrocities, the challenge is to put together a balanced and appropriate package of reparations measures that takes into account the characteristics of the respective situation, and the wants and needs of those affected by violence.

Finally, questions arise as to how reparations should be provided and to whom. The discussion of the modalities of reparations has frequently focused on the mechanisms, judicial or non-judicial, through which reparations are rendered and at what levels, national or international. Judicial approaches to reparations may face serious obstacles in the context of mass atrocities, where there might be no functioning judicial system to rely on.[72] Contemporary reparations programs have thus often considered non-judicial approaches, particularly by way of administrative mechanisms. All approaches will need to tackle the difficult question: To whom reparations should be addressed? Identifying and targeting the beneficiaries of reparations is inherently selective and involves differentiation of victimhood that comes with undesirable dynamics, including victim competition or politicisation of victimhood.[73] Strategic choices need to be made by policymakers weighing the difficulties and advantages of each approach, while taking into consideration the circumstances in each context.

In sum, the concept of reparations has become broader over time, now comprising a range of different forms and modalities that previously had not been associated with the term. In fact, reparations have absorbed an entire transitional justice agenda. It was this broad concept that was subsequently enshrined in the norm of a 'right to reparations' in international human rights law, most prominently in the *Basic Principles and Guidelines*. Yet the continuous conceptual expansion of reparations also posed challenges for applying it in practice – different goals have been pulling in different directions. This may explain in

[71] See International Center for Transitional Justice, 2009, 'The Rabat Report: The Concept and Challenges of Collective Reparations', New York.

[72] See Mertus, Julie, 2000, 'Truth in a Box: The Limits of Justice through Judicial Mechanisms', in: Amadiume, Ifi, and Abdullahi An-Na'im (eds.), *The Politics of Memory: Truth, Healing and Social Justice*, London and New York: Zed Books, 142–161.

[73] See De Waardt, Mijke, 2013, 'Are Peruvian Victims Being Mocked? Politicization of Victimhood and Victims' Motivations for Reparations', 35 *Human Rights Quarterly*, 830–849.

part why, despite the success of the *Basic Principles and Guidelines* in discourses, the adoption of the norm was not accompanied by more progress regarding the institutionalisation and implementation of reparations. Advocates turned therefore to other fields that were viewed to be more effective in attracting attention and resources, including international criminal justice.

1.2 REPARATIONS AND INTERNATIONAL CRIMINAL JUSTICE

While the historical evolution of the anti-impunity and the human rights movements was never fully separate, these movements initially pursued different normative and institutional pathways during the post–World War II period. Since the late 1980s, however, the two movements have gradually re-converged. The human rights movement increasingly raised the flag of the anti-impunity imperative. Liberal transitions in the aftermath of the Cold War and a yearning for more enforcement of a largely aspirational rights catalogue drove more human rights advocates into the arms of the state-centric, criminal law–driven anti-impunity movement.[74] Karen Engle, who chronicled this convergence, concluded that 'since the beginning of the twenty-first century, the human rights movement has been almost synonymous with the fight against impunity'.[75]

The dual objective of punishment and redress is visible in the *Basic Principles and Guidelines*, which emphasises that an effective remedy consists of two elements: access to justice and reparations. In obliging states to investigate human rights violations and to prosecute those responsible for the violations, the document affirms the alignment of the anti-impunity and human rights movements. The growing support among the human rights community for criminal punishment in response to atrocities has been instrumental for the success of contemporary international criminal justice (see Figure 1.1). The price of this rapprochement has been a push by human rights non-governmental organisations (NGOs) for more victim-oriented international criminal justice.[76] Demands for more consideration of victim redress in international criminal justice led to

[74] See Commission on Human Rights, *Question of the Impunity of Perpetrators of Human Rights Violations*, revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

[75] Engle, Karen, 2015, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', 100 *Cornell Law Review*, 1069–1127, 1070.

[76] See Funk, Markus, 2010, *Victims' Rights and Advocacy at the International Criminal Court*, Oxford: Oxford University Press.

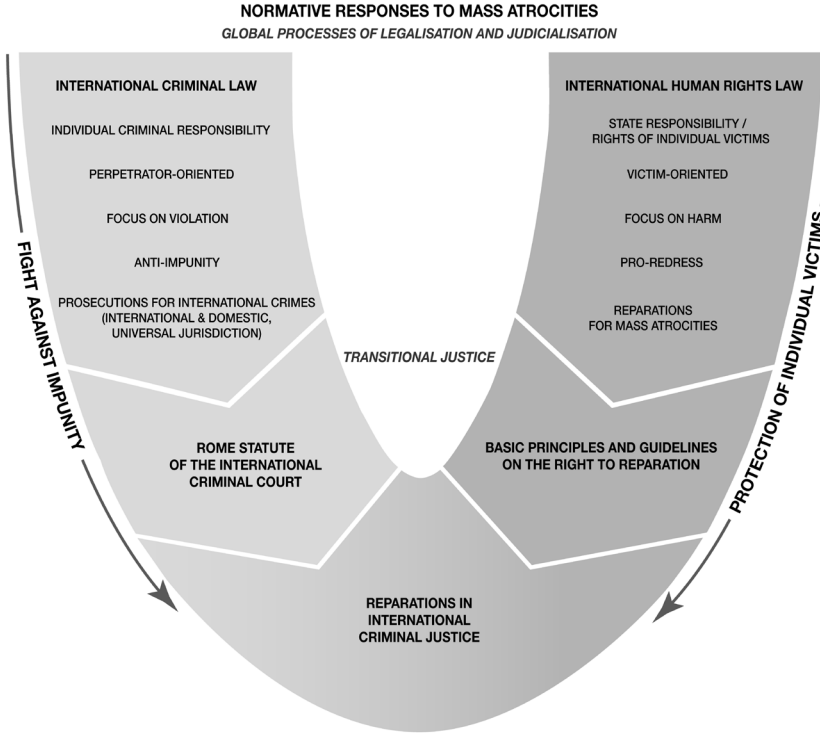

Figure 1.1 Convergence of normative responses to mass atrocities

transformations in the existing legal framework and institutional architecture. Promoting an active role of victims in the criminal justice process and ensuring reparations for victims were seen as two central elements to turn the human rights movement's vision into reality.

The first step was to enhance the standing of victims in international criminal justice. A historical view on the role of victims in the international criminal trial reveals 'a road from absence to presence, and from invisibility to the visibility of victims'.[77] Victims had no active role to play during the post–World War II trials in Nuremberg and Tokyo.[78] This model influenced the resumption of international criminal justice after

[77] Karstedt, Susanne, 2010, 'From Absence to Presence, from Silence to Voice: Victims in International and Transitional Justice since the Nuremberg Trials', 17(1) *International Review of Victimology*, 9–30, 9.

[78] See Moffett, Luke, 2012, 'The Role of Victims in the International Criminal Tribunals of the Second World War', 12 *International Criminal Law Review*, 245–270.

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the end of the Cold War. The two ad hoc tribunals for the former Yugoslavia and Rwanda struggled to relate their processes to conflict-affected populations. Both tribunals had no provisions for the participation of victims in their proceedings, apart from that of witnesses of crime.[79] It was the ICC that, for the first time in international criminal law, granted victims extensive participation rights and allowed them to submit claims for reparations.[80] Some hybrid courts have also adopted provisions on victim participation, most notably the ECCC.[81]

Yet the marriage between punishment and redress in international criminal justice was not an easy one. Although the inclusion of victim redress was celebrated at the time as an advancement of international law, today, a debate rages among scholars and practitioners over the merits and limitations of victims' roles in international criminal justice. At one end of the spectrum are those who are concerned that the inclusion of victims in an international criminal trial threatens a careful balance of long-established legal principles. They worry about a fair trial for the accused and overburdening still young international criminal justice institutions with unreasonable expectations.[82] Indeed, 'the idea that a criminal court should concern itself with questions of reparations just does not feel right for many lawyers'.[83] On the other end of the spectrum, scholars and activists advocate for a victim-oriented approach to international criminal justice.[84] Some suggest that factors such as the legitimacy and the overall accountability of the system require that victims are recognised as the 'rightful constituency' for international criminal justice.[85] It is within this broader

[79] Stover, Eric, 2005, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, Philadelphia: University of Pennsylvania Press.

[80] See McGonigle Leyh, Brianne, 2011, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Antwerp and Oxford: Intersentia; and Moffett, Luke, 2015, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court', 26 *Criminal Law Forum*, 255–289.

[81] See Killean, Rachel, 2018, *Victims, Atrocity and International Criminal Justice*, Abingdon: Routledge; and Elander, Maria, 2018, *Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal*, Abingdon: Routledge.

[82] See Chung, Christine, 2008, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?', 6(3) *Northwestern Journal of International Human Rights*, 459–545.

[83] O'Shea, Andreas, 2007, 'Reparations under International Criminal Law', in: Du Plessis, Max, and Stephen Peté (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerp and Oxford: Intersentia, 179–196, 181.

[84] See Pena, Mariana, and Gaelle Carayon, 2013, 'Is the ICC Making the Most of Victim Participation?', 7 *International Journal of Transitional Justice*, 518–535.

[85] See Findlay, Mark, 2009, 'Activating a Victim Constituency in International Criminal Justice', 3 *International Journal of Transitional Justice*, 183–206.

debate about the role of victims in international criminal justice where questions of reparations were eventually considered.

1.2.1 The Absence of Reparations at the Ad Hoc Tribunals

Before I examine in more detail the emergence of reparations at the ICC and the ECCC, it is important to address their absence at the two ad hoc international criminal tribunals that preceded the permanent ICC – the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It is curious that the state representatives who negotiated the statutes of these two tribunals did not consider reparations when their fellow diplomats only five years later voted for a reparations mandate for the ICC in Rome. A closer look reveals that reparations were present during the drafting of the ad hoc tribunals' legal frameworks, but they never gained sufficient support from the small group of states involved in the negotiations.[86]

Faced with serious crimes against civilian populations in the former Yugoslavia, the UN Security Council, on 22 February 1993, adopted Resolution 808, in which it established an ad hoc international criminal tribunal.[87] French diplomats, who circulated a proposal in preparation for drafting the tribunal's statute and became in Rome the main state proponent for reparations, were in 1993 still sceptical of including such provisions:

> [I]t does not seem reasonable to admit civil actions before the Tribunal. That would lead to a flood of claims, which the international court would not be in a position to process effectively. It seems preferable to proceed from the principle that it will be for the national courts to rule on claims for reparation by victims or their beneficiaries.[88]

Not all proposals were opposed to a reparations mandate. For instance, the Conference on Security and Cooperation in Europe (CSCE) forwarded a draft convention providing for victims to participate in the criminal proceedings and 'the right to claim restitution of property and

[86] Because the ICTR largely followed the ICTY Statute and Rules of Procedure and Evidence, I focus on the ICTY legal framework. See Morris, Virginia, and Michael Scharf, 1995, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis*, New York: Transnational Publishers.

[87] SC Res 808, UN Doc S/RES/808, 22 February 1993.

[88] *Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, forwarding a report of the Committee of French Jurists to study the establishment of an international criminal tribunal to judge the crimes committed in the former Yugoslavia*, UN Doc S/25266, 10 February 1993, Introduction, 9, para. 100.

appropriate compensation'.[89] Yet even most NGO submissions, including from Amnesty International, did not think that the task of dealing with reparations should be carried out necessarily by the tribunal but should be carried out instead through an auxiliary mechanism.[90] The United Nations Claims Commission, established after the 1991 Gulf War, was frequently cited as a precedent. Despite these calls for reparations, most states ignored the matter. The United States, which was influential in the formulation of the statute, did not contemplate remedies for victims.[91] Most states at that time and even prominent human rights NGOs did not believe that a criminal tribunal would be the most adequate avenue for addressing reparations.

When the Security Council approved the statute, a modest provision on restitution of property survived under Article 24(3), which allowed the trial chamber to order the return of any property acquired by criminal conduct to their rightful owners.[92] Morris and Scharf contend that 'this was considered to be particularly important in light of the reports of persons being deprived of their property by means of duress as part of the practice of ethnic cleansing'.[93] An almost identical provision was later included in the ICTR statute under Article 23(3). However, states were mindful to exclude notions of state responsibility, limiting the restitution provisions to transactions between individuals. While both ad hoc tribunals recognised victims' right to restitution of property, they did not provide any further remedies for victims of other serious international crimes. In fact, the Security Council's resolution had made punishing

[89] *Draft Convention on an International War Crimes Tribunal for the Former Yugoslavia*, Art. 33. Submitted as annex to document *Letter dated 18 February 1993 from the Permanent Representative of Sweden to the United Nations addressed to the Secretary-General, forwarding the decision by the Conference on Security and Cooperation in Europe on the proposal for an international war crimes tribunal for the former Yugoslavia*, UN Doc S/25307, 18 February 1993, Annex 6. Reproduced in Morris and Scharf, *An Insider's Guide*, 287–288.

[90] Amnesty International proposed 'the establishment of a separate international commission to process compensation claims against individuals as well as claims against states'. Amnesty International, 1993, 'Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia', *AI Index Eur 48/02/93*, Recommendations XI. Reproduced in Morris and Scharf, *An Insider's Guide*, 403.

[91] See Morris and Scharf, *An Insider's Guide*, 32; and *Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, UN Doc S/25575, 12 April 1993, Annex II with draft charter.

[92] See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 3 May 1993, para. 114.

[93] Morris and Scharf, *An Insider's Guide*, 284.

those most responsible for serious international crimes 'the sole purpose'[94] of the ICTY. The Security Council simply left no space for additional purposes such as providing reparations to victims.[95]

The ICTY statute provided that the tribunal's judges adopt Rules of Procedure and Evidence (RPE).[96] The influence exerted by US lawyers led to a system that was predominately modelled on Anglo-American jurisdictions. The final RPE only contain one rule on restitution and one on compensation – two concepts familiar from domestic criminal laws.[97] The ICTR judges adopted similar rules.[98] The term 'reparations' was not used at that time. The year the ICTY statute was negotiated was also the year Theo van Boven published the first draft of the *Basic Principles and Guidelines* – but its hallmark achievement, the re-conceptualisation of reparations, did not have an impact on the ad hoc tribunals.

To date, neither the prosecutors nor the chambers of both ad hoc tribunals have had recourse to the restitution procedure.[99] Likewise, while Rule 106 of both tribunals confirmed that victims may bring an action for compensation before a national court, a former senior ICTY staff member said, 'No one at the ICTY seriously believed in the 1990s that anyone would receive compensations through the domestic courts of the former Yugoslavia'.[100] Indeed, the practice of the ad hoc tribunals has shown that the central premise behind their compensation provision – namely that domestic jurisdictions would handle reparations claims and that they could rely on the tribunals' criminal judgements in this process – can be described as ineffective at best. My interviews with representatives who attended the ICC Rome conference confirmed that the non-implementation of the tribunals' restitution provisions and the lack of any further reparative

[94] SC Res 827, UN Doc S/RES/827, 25 May 1993, para. 2.

[95] Morris and Scharf argue that 'there was no indication that the Security Council intended this tribunal to deal with questions of victim compensation'. Morris and Scharf, *An Insider's Guide*, 286.

[96] ICTY, *Rules of Procedure and Evidence*, adopted on 11 February 1994.

[97] ICTY, *Rules of Procedure and Evidence*, adopted on 11 February 1994, Rule 105 on restitution and Rule 106 on compensation.

[98] ICTR, *Rules of Procedure and Evidence*, adopted on 29 June 1995, Rule 105 on restitution and Rule 106 on compensation.

[99] Expressions of intention to raise the issue of restitution can be found in pretrial briefs by the prosecutor, but this has not been pressed through to trial. Chifflet, Pascale, 2003, 'The Role and Status of the Victim', in: Boas, Gideon and William Schabas (eds.), *Developments in the Case Law of the ICTY*, Leiden and Boston: Martinus Nijhoff Publishers, 75–111, 101.

[100] Interview with senior ICTY prosecutor, 22 October 2015.

measures at domestic levels drove advocates to take a stronger position on victim reparations during the ICC negotiations.[101]

1.3 CONCLUSION

The incorporation of reparations into international criminal justice became possible due the confluence of two normative responses to mass atrocities: the 'fight against impunity' that enabled the formation of international criminal justice, and the rise of international human rights with its emphasis on redress for victims of mass atrocities. In fact, reparations became the human rights movement's new battle cry for a more victim-oriented justice response to mass atrocities. The *Basic Principles and Guidelines* eventually enshrined a broad, all-encompassing conceptualisation of reparations. The ability to absorb different interests and goals into a single concept and human rights norm enabled the term to proliferate and allowed new conversations across different justice fields, including international criminal justice. Despite this apparent success at the normative level, reparations remained at its core a contested concept with little uptake at national levels, where it most mattered to conflict-affected populations. It is in this context and moment in time that the ICC, and some years later the ECCC, were being conceived. The uncertainties, euphoria and scepticism surrounding reparations all reappeared simultaneously when the foundations for the two institutions were laid during the negotiation of the courts' legal frameworks.

[101] Interview with international NGO representative (ICC5), 16 May 2015.

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