INTRODUCTION

Behind the idea of bringing reparations to international criminal justice is the belief that international justice can be dispensed in a more victim-oriented manner. This belief was nurtured by two concurrent responses to mass atrocities during the second half of the twentieth century: punishment and redress. These two responses found expression in the 'fight against impunity' and the corresponding rise of international criminal justice, and the emergence of international human rights and the increasing attention paid to victims of crimes. Reparations have become one the most important conceptual formulations of victim-oriented justice. In 2005, the UN General Assembly even proclaimed a 'right to reparation' for victims of mass abuses.[1] However, while international criminal justice continued to gain new institutions and widespread support among states, the legal frameworks in place for reparations have remained fragmented and largely ineffective. The desire for more enforcement eventually drove advocates of reparations into the arms of international criminal justice. Maybe it was possible to have two for one, punish perpetrators and provide reparations to victims of mass atrocities within a single legal and institutional framework.

REPARATIONS AND INTERNATIONAL CRIMINAL JUSTICE

The promise that reparations can be delivered through international criminal justice has now been around for more than two decades. Coming

[1] *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 December 2005, para. 11.

into existence in 2002, the International Criminal Court (ICC) was the first international criminal tribunal to which victims can submit claims for reparations.[2] Following this example, some hybrid courts[3] have considered provisions on reparations, notably the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Cambodia. Yet, it is only in the last years that the first practice has emerged from these courts.

The adjudication so far of the first reparations claims before the ICC and ECCC has been arduous and revealed disagreement within and outside these courts over the nature, extent and purpose of reparations in international criminal justice. Considerable uncertainty surrounds whether these reparations schemes can live up to expectations placed upon them. At the same time, the international community continues to invest significant resources in international criminal justice institutions, and advocates do not give up hope for a more victim-friendly international justice system that can address the multiple needs of survivors of mass atrocities. It is high time to understand what is actually happening at these courts regarding reparations.

Against this background, a vigorous debate rages among practitioners and activists over the merits and limitations of these reparations schemes. Some judges have come out with critical reflections about the practicality of the ICC's victim participation and reparations mandate that go to the heart of the question about whether or not combining a system of victim redress with international criminal trials is the right approach.[4] This critique coincides with a general quest for meaning in international criminal justice. Payam Akhavan argues that 'the era of romanticisation of international criminal justice' is over, and 'as the romance fades away, we are confronted with the self-evident complexities and constraints of grafting idyllic rule of law conceptions on to the grim reality of societies emerging from mass atrocities'.[5] This much is true for reparations in international criminal justice. Yet, times of doubt are normal for maturing fields and open up new opportunities for scholars

[2] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, Art. 75.

[3] The terms 'hybrid court' and 'internationalised court' are used interchangeably in this book.

[4] Van den Wyngaert, Christine, 2011, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44 *Case Western Reserve Journal of International Law*, 465–496.

[5] Akhavan, Payam, 2013, 'The Rise, and Fall, and Rise of International Criminal Justice', 11(3) *Journal of International Criminal Justice*, 527–536, 527–529.

to re-examine international criminal justice – the purpose and function of novel reparations mandates is one key aspect in this re-evaluation.

Scholars have only gradually caught up with these developments.[6] Among the most authoritative research with an explicit focus on reparations in international criminal justice is the work of Conor McCarthy, Luke Moffett and Miriam Cohen.[7] While this literature has made important contributions towards theorising reparations and understanding its role in the legal frameworks of international criminal tribunals, the focus remains predominantly on legal aspects of reparations and on the ICC and its Trust Fund for Victims (TFV). What has largely been absent from this research is a perspective that considers the phenomenon within wider social and geographical contexts.[8] The limited attention in scholarly research to the ECCC's reparation mandate is particularly surprising considering the few precedents for this novel feature of international criminal justice.[9] This book therefore shifts the focus beyond the courtrooms in The Hague to other internationalised courts with reparations mandates.

Moreover, many of these debates have a normative undertone and reveal longstanding ideological fault lines, but have often limited empirical grounding. They obscure the fact that little is actually known about reparations in international criminal justice, mainly because of the limited practice to date. Not a single reparations order from the ICC's first

[6] See Dwertmann, Eva, 2009, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Leiden: Brill Academic Publishers; Zegveld, Liesbeth, 2010, 'Victims' Reparations Claims and International Criminal Courts', 8 *Journal of International Criminal Justice*, 79–111; and Balta, Alina, Manon Bax, and Rianne Letschert, 2019, 'Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia', 45(1) *International Journal of Comparative and Applied Criminal Justice*, 15–38.

[7] McCarthy, Conor, 2012, *Reparations and Victim Support in the International Criminal Court*, Cambridge: Cambridge University Press; Moffett, Luke, 2014, *Justice for Victims Before the International Criminal Court*, Milton Park and New York: Routledge; and Cohen, Miriam, 2020, *Realizing Reparative Justice for International Crimes: From Theory to Practice*, Cambridge: Cambridge University Press. The latter was published when this book manuscript was being finalised, which has not allowed for a deeper engagement.

[8] See Wemmers, Jo-Anne, 2014, *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparation*, London and New York: Routledge.

[9] See Jeffery, Renée, 2014, 'Beyond Repair? Collective and Moral Reparations at the Khmer Rouge Tribunal', 13(1) *Journal of Human Rights*, 103–119; Sperfeldt, Christoph, 2012, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia', 12 *International Criminal Law Review*, 457–489; and Killean, Rachel, and Luke Moffett, 2020, 'What's in a Name? "Reparations" at the Extraordinary Chambers in the Courts of Cambodia', 21(1) *Melbourne Journal of International Law*, 1–29.

trials has been fully implemented at the time of writing, while the ECCC has only recently completed the implementation of two dozen reparations projects from its second case. Hence, the timing of the first-ever reparations orders by international(-ised) criminal courts provides an opportunity to complement the prevailing analysis of legal frameworks and jurisprudence with an analysis of the first *practice* of reparations emerging from these courts. At the ICC, Judge Van den Wyngaert has stated, 'The Court will have to assess whether the system it has installed is capable of reaching the objectives it has set for itself. By the time the first trials have run their full course, the Court will be in a position to do so.'[10] We are now arriving at this critical moment, where such an assessment is both feasible and necessary.

AIM AND OBJECT OF STUDY

This book is animated by the dissonance between the promise of reparations and its practice in international criminal justice. I explore this dissonance by examining the first attempts in international criminal justice to convert reparations for victims of mass atrocities from an idea to actual realisation. In this process, I regard reparations neither as an abstract norm nor a purely institutional outcome, but as produced and reconfigured by various forms of social action. Hence, the object of study is the different practices that constitute and shape reparations in international criminal justice. The goal is to identify these practices and to understand their genesis, development and interconnections. In mapping and tracing these practices, I examine how together they construct, change and give meaning to reparations in different contexts.

THE SOCIAL LIFE OF NORMS AND RIGHTS

Richard Wilson has called for the study of the 'social life of human rights'. Wilson referred to the social forms that coalesce in and around the formal legal or political processes associated with human rights, but which are usually hidden in practices behind those official processes.[11] This book brings such practices to the forefront of the analysis, and thus situates reparations in the specific social contexts, and not only the legal

[10] Wyngaert, 'Victims Before International Criminal Courts', 494.
[11] Adapted from Wilson, Richard, 2006, 'Afterword to "Anthropology and Human Rights in a New Key": The Social Life of Human Rights', 108(1) *American Anthropologist*, 77–83.

frameworks, in which they are pursued. This involves studying the birth, spread and materialisation of reparations across different legal, institutional and social settings. In the scholarly literature, these processes are usually studied separately and by different disciplines; obscuring the interconnectedness of practices that constitute the social life of transnational phenomena. This book brings these different strands of research and theories on law and society into conversation.[12]

Reparations have both normative and empirical dimensions. Yet, much of the literature is still formal and legalistic in nature.[13] This scholarship often starts with upfront definitions and theorising of reparations (reparations *are*…), which are then applied to different contexts. This approach does not reflect the more diffuse reality I encountered around the ECCC. While I certainly acknowledge the value of normative research and the normative impetus driving reparations advocates, my book focuses broadly on empirical aspects of reparations. The objective is to turn away from abstractions to see how reparations are used by practitioners and others involved in the making of reparations. Drawing on insights from legal anthropology, new legal realism and the sociology of law, this book uncovers and reveals the often hidden practices that together constitute, shape and give meaning to reparations in international criminal justice.[14]

PRACTICES AS AN ANALYTICAL LENS

Anna Tsing reminds us that 'universal claims do not actually make everything everywhere the same',[15] rather universal aspirations should be 'considered as practical projects accomplished in a heterogeneous world'.[16] This book sheds light on the practical project that was born out of the impetus to make international criminal justice more victim-oriented by giving it an additional reparative function. I use the notion of 'practice' or 'practices' as an analytical lens to make visible

[12] Darian-Smith, Eve, 2013, *Laws and Societies in Global Contexts: Contemporary Approaches*, Cambridge: Cambridge University Press.
[13] See McEvoy, Kieran, 2007, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', 34(4) *Journal of Law and Society*, 411–440.
[14] See Burgis-Kasthala, Michelle, 2017, 'How Should We Study International Criminal Law? Reflections on the Potentials and Pitfalls of Interdisciplinary Scholarship', 17(2) *International Criminal Law Review*, 227–238.
[15] Tsing, Anna Lowenhaupt, 2005, *Friction: An Ethnography of Global Connection*, Princeton and Oxford: Princeton University Press, 11.
[16] Tsing, *Friction*, 16.

forms of social actions that together and simultaneously enable and constrain reparations. In doing so, I build on a long-established literature in sociology[17] and (legal) anthropology.[18] Attention to practices has gained more traction in scholarship; so much so that some scholars suggest a 'practice turn'.[19] But what does it mean to talk about 'practices'? The literature abounds with definitions.[20] At a basic level, they can be understood as socially meaningful patterns of actions that are embedded in particular organised contexts.[21] Vincent Pouliot adds that not everything that people do can be derived from rational thinking, norm-following or collective deliberation. Instead, practices are often unarticulated and informed by background knowledge, such as beliefs, identities, interests or preferences.[22] Such an understanding is distinct from the rules-based notion of 'practice' prevalent in law, where authoritative rules tell actors how they ought to act (e.g., in sentencing practices).[23] The notion of practices used in this book is broader and takes into account the fact that practitioners may at times struggle to

[17] Much of today's practice theory builds on earlier sociological scholarship, in particular Bourdieu, Pierre, 1977, *Outline of a Theory of Practice*, Cambridge: Cambridge University Press; and Giddens, Anthony, 1979, *Central Problems of a Social Theory: Action, Structure, and Contradiction in Social Analysis*, London: Macmillan.

[18] See Goodale, Mark, and Sally Engle Merry, 2007, *The Practice of Human Rights: Tracking Law Between the Global and the Local*, Cambridge: Cambridge University Press.

[19] See Schatzki, Theodore, Karin Knorr Cetina, and Eike von Savigny (eds.), 2001, *The Practice Turn in Contemporary Theory*, London and New York: Routledge; Adler, Emanuel, and Vincent Pouliot (eds.), 2012, *International Practices*, Cambridge: Cambridge University Press; Bueger, Christian, and Frank Gadinger, 2014, *International Practice Theory*, Basingstoke: Palgrave Macmillan; Nicolini, Davide, 2013, *Practice Theory, Work and Organisation: An Introduction*, Oxford: Oxford University Press; and Spaargaren, Gert, Don Weenink, and Machiel Lamers (eds.), 2016, *Practice Theory and Research: Exploring the Dynamics of Social Life*, London and New York: Routledge.

[20] Emanuel Adler and Vincent Pouliot define practices as 'socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world'. Adler, Emanuel, and Vincent Pouliot, 2011, 'International Practices', 3(1) *International Theory*, 1–36. Jens Meierhenrich describes 'practices' as 'recurrent and meaningful work activities – social or material – that are performed in a regularised fashion and that have a bearing, whether large or small, on the operation' of an international(-ised) criminal court. Meierhenrich, Jens, 2014, 'The Practices of the International Criminal Court: Foreword', 76(3–4) *Law & Contemporary Problems*, i–x, i.

[21] Adapted from Adler and Pouliot, 'International Practices', 4–5.

[22] See Pouliot, Vincent, 2008, 'The Logic of Practicality: A Theory of Practice of Security Communities', 62 *International Organization*, 257–288.

[23] See Karp, David J., 2013, 'The Location of International Practices: What Is Human Rights Practice?', 39 *Review of International Studies*, 969–992.

verbalise or explain their actions. This comes closer to Wilson's objective of studying the 'hidden practices' that lie behind formal processes. This book examines such practices and describes how practitioners came to adopt them.

The notion of practices provides an analytical lens that brings different legal and social science perspectives into dialogue around a common conceptual focal point.[24] Employing practices as an analytical lens means shifting the scholarly focus from upfront theorising to empirically examining how reparations are conceived and produced by the actions of various actor communities. Rather than starting with preconceived notions of reparations (reparations as an ideal), the practice-based approach in this book foregrounds what institutions and professionals – judges, lawyers, diplomats, non-governmental organisation (NGO) workers and others – are *doing* with regard to reparations.[25] Reparations are seen as constituted and performed through a set of practices. Making these practices visible through field observations and practitioner interviews grounds theorising of reparations within their surrounding social, political and institutional contexts. The result is a more dynamic and contextual understanding of reparations.

Practices develop through and are carried out by communities of practice. Etienne Wenger and colleagues characterise a community of practice as sharing three basic elements: 'a domain of knowledge, which defines a set of issues; a community of people who care about this domain; and the shared practice that they are developing to be effective in their domain'.[26] Background knowledge, such as shared beliefs, goals or reasoning, is often crucial to understanding what brings different members of such communities together and disposes them to act in a similar manner.[27] The social life of reparations viewed from this angle emerges from, and is characterised by, interconnected and overlapping communities and sets of practices – variously described as practice bundles, arrangements, clusters or assemblages. Whilst the study of practices in sociology

[24] See Adler and Pouliot, 'International Practices', 28.
[25] See Massoud, Mark, 2016, 'Ideals and Practices in the Rule of Law: An Essay on Legal Politics', 41(2) *Law & Social Inquiry*, 490.
[26] Wenger, Etienne, Richard McDermott, and William Snyder, 2002, *Cultivating Communities of Practice: A Guide to Managing Knowledge*, Boston: Harvard Business School Press, 27.
[27] Adler and Pouliot, 'International Practices', 16–18.

and anthropology has traditionally focused on smaller social phenomena, such as daily routines or professional habits, practice scholars have moved to apply such approaches to larger transnational phenomena.[28]

STUDYING THE PRACTICES OF REPARATIONS

In conceptualising reparations in international criminal justice as a bundle of different practices, this book makes reparations visible as a multi-dimensional and socially constructed practical project. My socio-legal inquiry into reparations seeks to identify what practices exist, how they come to be, how they work, and what meanings and effects they produce. I do so by way of 'thicker' narratives that embrace the complexities of actors' practices and make visible patterns of action involved in reparations. Ultimately, I am interested to explore how these practices shape the possibilities and meanings of reparations. Reparations in international criminal justice, I argue here, are construed, contested and produced through the interconnection of these sets of practices as they are performed by varied communities of actors across different times and places. Appreciating the nature and effects of these practices provides us with a deeper understanding of the discrepancies that exist between the reparations ideal and how it imperfectly functions in diverse mass atrocity situations.

This book is not the first to apply a practice-based approach to matters of international law[29] or international criminal justice.[30] But it is the first study to apply a practice lens to examine reparations as a broader social phenomenon. Neither the doctrine-driven study of international criminal law nor macro-level institutional explanations scrutinise the everyday working of international(-ised) criminal courts and their inner life as bureaucratic institutions – a dimension that I experienced to be crucial in the making of reparations. Jens Meierhenrich drew attention to the

[28] See Schatzki, Theodore, 2016, 'Keeping Track of Large Phenomena', 104 *Geographische Zeitschrift*, 4–24.

[29] See Rajkovic, Nikolas, Tanja Aalberts, and Thomas Gammeltoft-Hansen (eds.), 2016, *The Power of Legality: Practices of International Law and Their Politics*, Cambridge: Cambridge University Press, 1–25; and Kurasawa, Fuyuki, 2007, *The Work of Global Justice: Human Rights as Practices*, Cambridge: Cambridge University Press.

[30] See the contributions to the *Law & Contemporary Problems* special issue (Volume 76, 2014), and De Vos, Christian, Sara Kendall, and Carsten Stahn (eds.), 2015, *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge: Cambridge University Press.

multiple ways in which such institutions are 'produced, reproduced and reconfigured as a result of the particular and contingent beliefs, preferences, and strategies of the individuals (as well as collectives) acting *within* them as well as *upon* them'.[31] What is it that practitioners at and around these courts do when they conceive reparations for victims of far-flung conflict-affected situations? Viewing reparations as constituted through a set of specific practices enables us to unpack the inner workings of the institutions involved.[32] This allows us to study not only courts' bureaucracies but also the network of actors that exists around them and extends to the different geographical areas where international criminal justice intervenes.

LOCATING PRACTICES OF REPARATIONS

Much of the literature on international justice is caught in a dichotomy of the 'global' and the 'local', or the 'above' and 'below'.[33] These analytical categories have inspired scholarship on the relationship between international norms and local practices.[34] Various concepts, such as 'norm localisation'[35] or 'vernacularisation',[36] have tried to capture the dynamic process through which international norms are reframed or reconstituted to suit local cultural understandings and social orders. However, my own experience and field research resonates with Leila Ullrich's finding that the meta-categories of the 'global' and the 'local' create many blind spots, especially regarding conflicting justice visions within international institutions and local communities. Ullrich notes that 'the fault lines of justice contestations run not only between the

[31] Meierhenrich, Jens, 2014, 'The Practice of International Law: A Theoretical Analysis', 76(3–4) *Law & Contemporary Problems*, 1–83, 8.
[32] See Sarfaty, Galit, 2009, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank', 103(4) *American Journal of International Law*, 647–683.
[33] See Sharp, Dustin, 2014, 'Addressing Dilemmas of the Global and the Local in Transitional Justice', 29 *Emory International Law Review*, 71–117.
[34] See Behrends, Andrea, Sung-Joon Park, and Richard Rottenburg (eds.), 2014, *Travelling Models in African Conflict Management: Translating Technologies of Social Ordering*, Leiden and Boston: Brill Academic Publishers.
[35] Acharya, Amitav, 2004, 'How Ideas Spread: Whose Norms Matter? Norm Localisation and Institutional Change in Asian Regionalism', 58 *International Organization*, 239–275.
[36] Merry, Sally Engle, 2006, *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago: Chicago University Press, 28–35.

ICC and affected communities, but also through the Court and victim communities'.[37] I found it productive to put these contestations over reparations at the forefront of my observations. This has enabled me to capture the diverse and often contradictory justice agendas that play out among court officials, legal professionals, local NGOs and victim representatives.[38] What all these approaches have in common is that they leave accounts of smooth and linear flows of transnational ideas, norms and people behind and focus instead on the messy, dynamic and contested practices that make up the social life of transnational phenomena and more than often produce unpredictable outcomes and effects.

Thus, instead of structuring my observations along the lines of international and national levels, I examine reparations by looking at the different phases of its social life where the 'global' and the 'local' are often simultaneously present and where the use and meaning of reparations are contested by diffuse constellations of actors and institutions. I identify four phases that are key in the social life of reparations in international criminal justice:

- *norm-making*, when vague ideas about reparations are turned into concrete rules for international(-ised) criminal courts;
- *engagement with survivors and conflict-affected populations* in the specific situations into which these courts intervene;
- *adjudication of reparations* by international(-ised) criminal courts;
- *implementation* of reparations awards in specific localities.

These phases are not meant to depict a linear or chronological representation of the making of reparations, nor do they encapsulate the totality of practices surrounding reparations in international criminal justice. Yet, these four phases and the practices associated with them are essential in understanding the pursuit of reparations across time and space.

RESEARCH APPROACH

In order to make practices visible, it is necessary to go beyond legal texts and explore the concrete social and institutional contexts in which practices are performed. Beyond documentary analysis, I therefore used an ethnographically informed research approach, including interviews, to

[37] Ullrich, Leila, 2016, 'Beyond the "Global-Local Divide": Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court', 14(3) *Journal of International Criminal Justice*, 543–568, 547.
[38] See Wiener, Antje, 2014, *A Theory of Contestation*, Berlin: Springer; and Tsing, *Friction*.