

PRACTICES OF REPARATIONS IN INTERNATIONAL CRIMINAL JUSTICE

Combining interdisciplinary techniques with original ethnographic fieldwork, Christoph Sperfeldt examines the first attempts of international criminal courts to provide reparations to victims of mass atrocities. The observations focus on two case studies: the Extraordinary Chambers in the Courts of Cambodia, where Sperfeldt spent over ten years working at and around, and the International Criminal Court's interventions in the Democratic Republic of Congo. Enriched with first-hand observations and an awareness of contextual dynamics, this book directs attention to the 'social life of reparations' that too often get lost in formal accounts of law and its institutions. Sperfeldt shows that reparations are constituted and contested through a range of practices that produce, change and give meaning to reparations. 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 functions imperfectly in different contexts.

CHRISTOPH SPERFELDT is Senior Lecturer at Macquarie Law School, Macquarie University. He was Deputy Director at the Asian International Justice Initiative, where he supported human rights, transitional justice and rule of law programmes in Southeast Asia. Prior to this, he was Senior Advisor with the German Development Cooperation (GIZ) in Cambodia. He holds a PhD from the School of Regulation and Global Governance at the Australian National University.

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IN INTERNATIONAL CRIMINAL
JUSTICE

Christoph Sperfeldt
Macquarie University





Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

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PREFACE

‘What are “reparations”?’, asks Yang Oun when a local Cambodian non-governmental organisation (NGO) worker tries to inform him about the reparations mandate of the Extraordinary Chambers in the Courts of Cambodia (ECCC), a criminal tribunal set up by the Cambodian government and the United Nations in the capital Phnom Penh. Yang Oun belongs to Cambodia’s ethnic Vietnamese minority and resides in one of the many picturesque but poor floating villages on the Tonle Sap Lake, roughly two-and-a-half-hour drive – and another hour boat ride – north of Phnom Penh. During its reign 40 years ago, the Khmer Rouge persecuted him and his community. Yang Oun lost many family members, and he survived the atrocities because he fled to Vietnam. Years later, he decided to participate in the trials ‘to tell everyone about our suffering’. Reparations were initially not on his mind, but it is a field in the form that he is required to fill in for his application. My Cambodian colleague patiently assists him, as Yang Oun has never learned the Khmer script. I accompany this local NGO’s field mission in my capacity as an advisor of the German development cooperation (*Gesellschaft für Internationale Zusammenarbeit* [GIZ]) to Cambodia’s largest human rights NGO coalition.

On this beautiful, if sweltering, day in the wet season of 2008, I have the feeling that much of our discussion gets lost in translation. The NGO worker acknowledges the language difficulties – the Khmer and Vietnamese language equivalents to the word ‘reparations’ are more similar to monetary compensation. Yang Oun thinks for a moment and then asks whether he could get some money to send his three kids to school and perhaps organise a Buddhist ceremony for his deceased relatives. My colleague explains that this is not possible as the ECCC’s mandate is limited to ‘collective and moral reparations’. Yang Oun raises his eyebrows; my colleague looks briefly at me and then says, ‘It means that you cannot get money’. Yang Oun is unperturbed and with admirable logic retorts, ‘Well, then I would like a school to be built in our community, so that our children can learn’. The NGO worker replies that this is also not allowed

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under the mandate and that it is anyway the government's responsibility to build schools – reparations should be for the personal harm he suffered during the Khmer Rouge time. Yang Oun looks over the lake into the distance and shrugs. 'Well, I will be happy if the Tribunal can give justice'. My Cambodian colleague seems satisfied with the answer and writes 'justice' into the reparations field of the application form.

The encounter with Yang Oun and many others in communities in rural Cambodia showed me how abstract are international concepts, such as reparations. Such concepts are often portrayed as universal in their meaning but they are not self-evident in various local communities around the world – indeed sometimes not even at the very institutions promoting these concepts. In outreach activities that I attended, it often felt as if the ECCC was engaging in an educational programme to convey a concept that was too abstract and removed from people's lives; and once it took hold, it created expectations that the Court could not live up to.

Two years later, in 2010, I was asked by GIZ to advise the ECCC Victims Support Section (VSS) on their collective reparations programme. Having worked for three years alongside Cambodian civil society to move the trials against former senior Khmer Rouge cadres forward, I was enticed by the prospect of engaging with activities that would focus more on the survivors. Coming to the Court as an outsider, the first thing that struck me was how contested the reparations mandate was within the Court and among its legal and administrative professionals. Many lawyers conveyed to me that it should not be the role of a criminal court to engage in this type of work, and the administration was reluctant to invest any resources into this aspect of the ECCC's mandate. Both lawyers and administrators believed that not much would happen anyway. I wondered at the time, perhaps somewhat naively, wasn't it a good thing to do something for the survivors of the Khmer Rouge, when all those previous years the focus had been merely on prosecuting a handful of suspected elderly perpetrators? Why was there so much resistance within the Court to reparations? And why did the institution take on these unwanted reparative functions in the first place? This experience became the starting point when years later I decided to write my doctoral dissertation at the Australian National University (ANU) on reparations in international criminal justice.

These two experiences with the internal dynamics of these courts and the way they engage with survivors provided two pieces in a larger puzzle about how the idea of reparations gradually materialises in the world. Other pieces were still missing. Yet, my experience showed me that this

process is not linear but messy, marked by contestations and the competing understandings and motivations of a range of different actors. This process transcends the boundaries of courts and states, and reaches simultaneously from local villages over courtrooms of internationalised tribunals to the diplomatic arenas where global justice and reparations frameworks are negotiated and legalised. This book is an attempt to identify these pieces and, where possible, to put them together – although I am aware of the fact that no coherent picture might emerge in the end.

As someone who has worked both practically around such tribunals and now reflects on them academically, I have often pondered how to overcome the continuing divide between scholars and practitioners. Jens Meierhenrich noted that many who are theoretically imaginative about international criminal courts have only little practical experience, and most of those who are experienced with their operation have feeble theoretical imagination. In contrasting the twin dangers ‘imagination without knowledge’ and ‘knowledge without imagination’,¹ he points to some of the challenges involved with integrating in-depth empirical work with creative theorising.² Some of the best theoretical work I have come across in my review of the literature for this book had little grounding in empirical research, while many practitioners with inside knowledge of the courts and their practices struggle to articulate broader theoretical insights that go beyond the mere descriptive. My experience around the ECCC has made me realise that grasping the day-to-day reality of the work of lawyers, administrators, NGO intermediaries, diplomats, survivor representatives and so many more is key to explaining the operation and effects of international criminal justice, even more so in relation to reparations.

My background influences my positioning as a scholar. The experiences in Cambodia and beyond gave me a preconception that addressing questions of justice in the aftermath of mass atrocities is important to survivors, even decades after the violations occurred. I was personally involved in a number of events that I describe in this book – ranging from my engagement with Cambodian NGOs on ECCC-related outreach and victim participation activities through my GIZ assignment at the Cambodian Human Rights Action Committee (CHRAC, 2007–2010) to my

¹ Borrowed from Alfred North Whitehead’s quote, ‘fools act on imagination without knowledge, pedants act on knowledge without imagination’.

² Meierhenrich, Jens, 2014, ‘The Practice of International Law: A Theoretical Analysis’, 76(3–4) *Law & Contemporary Problems*, 1–83, 1–2.

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advisory role at the ECCC VSS (2010–2011) where I was involved in, among other things, the reparations consultations for civil parties in Case 002. Even after my GIZ jobs had come to an end, I continued to visit Cambodia regularly in my capacity as deputy director of the Asian International Justice Initiative (2012–2017) – a joint programme of the Center for Human Rights and International Justice at Stanford University and the East-West Center – which supported a trial-monitoring programme at the ECCC. Observations from these experiences may have coloured my perspective. Yet, overcoming the barriers between scholarly and practitioner accounts requires acknowledging and dealing with such influences in the research design.³ Whilst my personal and professional engagement with my research subject shaped this book in many ways, it also provided me access and insider knowledge that I might otherwise not have had. With legal professional networks operating and continuously migrating across different international courts, it also gave me a head start for my subsequent research at the International Criminal Court.

³ See Merry, Sally Engle, 2005, 'Anthropology and Activism: Researching Human Rights Across Porous Boundaries', 28(2) *Political and Legal Anthropology Review*, 240–257.

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And it is here that I will end by conveying my deep gratitude to all my Cambodian friends, colleagues and the Khmer Rouge survivors who initially inspired my research.