Victims and Reparations in International Criminal Justice: African Initiatives

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Abstract

Two important African criminal justice initiatives, namely, the Extraordinary African Chambers (EAC) and the International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights (ACJHR-ICLS), illustrate the trend whereby victims can claim and receive reparations at international/hybrid criminal tribunals (ICTs). The International Criminal Court (ICC) started this trend. This article will examine whether the EAC and ACJHR-ICLS can contribute to victims' status as reparations claimants on substantive, procedural and institutional levels. The EAC-Statute as applied in *Habré* and the ACJHR-Statute constitute the primary sources of analysis as complemented by *inter alia* the law and/or practice of the ICC, Extraordinary Chambers in the Courts of Cambodia (ECCC) and the African Court on Human and Peoples' Rights (ACtHPR). This article generally finds that the realisation of victims' right to reparations at the EAC and ACJHR-ICLS depends on how normative and implementation deficits and challenges are handled.

Keywords

Victims, reparations, Extraordinary African Chambers, African Court of Justice and Human and Peoples' Rights-International Criminal Law Section.

1. Introduction

Victims were only witnesses at ICTs. However, the ICC by incorporating victim participation and, especially, reparations for victims added important restorative justice elements to ICTs that are predominantly retributive/deterrent-driven justice. Among African regional justice initiatives, victims can participate in proceedings and claim reparations at the EAC and ACJHR-ICLS. The EAC as the first African Union (AU)-backed hybrid criminal court discussed reparations for

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victims of mass atrocities in *Habré*. The ACJHR-ICLS will be the first regional criminal court and victims will claim reparations at it.

The main research question of this article is whether and to what extent the EAC and the ACJHR-ICLS may contribute to reparations for victims of mass atrocities. In light of *inter alia* comparative analyses, this article argues that the reparations systems of the EAC and the ACJHR-ICLS contain important substantive, procedural and institutional elements to realise the victims' status as reparations claimants provided that related challenges such as normative, jurisprudential and/or implementation deficits at these African justice initiatives are appropriately addressed. Reparations provisions of the EAC-Statute and especially the ACJHR-Statute are, as adapted, based on ICC-Statute reparations norms. Where relevant, ICC sources are considered for analytical comparisons. Since victims can be civil parties at the EAC, ECCC sources are also examined because victims can be civil parties at the ECCC.

The ACtHPR's emerging reparations jurisprudence is also examined when analysing the ACJHR-ICLS's reparations system. These bodies are different. The ACJHR-ICLS can determine criminal liability and order reparations against the convicted. The ACtHPR determines state responsibility and orders reparations against states. However, as the practice of the ICC, ECCC and EAC show, the ICTs have invoked and adapted reparations jurisprudence of human rights bodies. Moreover, the ACJHR-Human Rights Section is the ACJHR's successor and, alongside the ACJHR-ICLS and ACJHR-General Section, is part of the ACJHR. Judicial 'cross-fertilization' on reparations is expected.

This article has five parts. First, the EAC and ACJHR-ICLS are presented, focusing on victims and reparations. Second, the scope of reparations claimants and beneficiaries, namely, victim notion/categories, harm inflicted, and causal link between crimes and harm, is examined.

Third, victims' procedural status as reparations claimants and procedural rights are discussed. Fourth, reparations outcomes, i.e., reparations modalities (compensation, etc.), and reparations types (individual/collective), are analysed. Finally, reparations implementation, namely, Trust Funds for Victims and need for cooperation from states and other actors, is examined.

2. The EAC, ACJHR-ICLS, Victims, and Reparations

2.1. *The EAC and ACJHR-ICLS*

After victims undertook initiatives in different judicial fora, the Economic Community of African States found that an *ad-hoc* international tribunal could try ex-Chadian dictator Hissène Habré.[1] Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Court of Justice (ICJ) ordered Senegal, where Habré had been in exile, to prosecute or extradite Habré promptly.[2] The EAC was established within the Senegalese courts via an AU-Senegal Agreement on 8 February 2013 to prosecute those most responsible for international crimes, under (customary) international law and conventions ratified by Chad and Senegal, perpetrated in Chad from 7 June 1982 to 1 December 1990: during Habré's regime. On 30 May 2016, the EAC Trial Chamber convicted Habré (including a reparations order), largely confirmed (conviction/reparations order) by the EAC-Appeals Chamber (27 April 2017), for crimes against humanity (rape, sexual slavery, murder, summary execution, enforced disappearance, torture and inhumane acts), torture, and war crimes (murder, torture, cruel,

[1] *Hissene Habré v Senegal*, Judgement, ECW/CCJ/JUD/06/10, 18 November 2010, para. 58.
[2] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, ICJ Reports (2013) 422, § 122(6).

inhumane treatment and unlawful confinement of prisoners of war). Other than the ongoing reparations implementation, the completion of *Habré* marked the closure of the EAC.

As scholars have highlighted, the EAC is the first example of regionalization of international criminal justice.[3] The AU-Senegal agreement implemented the AU's plan to try Habré before a special court consisting of foreign and Senegalese judges, within Senegalese courts. Unlike other ICTs, the AU (not the UN) participated in the establishment of the EAC. Despite the initial lack of a competent organ, the AU declared its competence over Habré's alleged crimes.[4] Under the EAC-Statute (Article 11), the EAC-Trial Chamber and EAC-Appeals Chamber Presidents were nationals of AU Member States. The AU's involvement strengthened the EAC.[5] As Williams remarked, Senegal's exercise of universal jurisdiction under AU's auspices, which underlay the EAC creation, may evidence that AU States are not necessarily opposed to universal jurisdiction but to its exercise by European countries.[6] This reflects tensions within the AU and its Member States: commitment to human rights and international criminal justice *vis-à-vis* state sovereignty and 'African solidarity'.[7] Yet, this article overall agrees with scholars on the consideration of the EAC as an example of the 'Africanisation' of international criminal justice.[8]

Concerning the ACJHR, the yet-to-be-in-force Protocol on the ACJHR-Statute is subject to amendments under the Protocol on Amendments to the Protocol on the ACJHR-Statute (Malabo Protocol), which incorporates an ICLS to the ACJHR.[9] The ACJHR also presents General Affairs

[3] E. Cimiotta, 'The First Steps of the Extraordinary African Chambers', 13:1 *Journal of International Criminal Justice* (2015) pp. 191-193; S. Williams, 'The Extraordinary African Chambers in the Senegalese Court-An African Solution to an African Problem', 11:5 *Journal of International Criminal Justice* (2013) pp. 1144-1150.
[4] Assembly/AU/Dec.127 (VII), 2 July 2006, paras. 3-4.
[5] Cimiotta, *supra* note 3, pp. 192-193.
[6] Williams, *supra* note 3, pp. 1153-1154.
[7] *Ibid*., 1148.
[8] Cimiotta, *supra* note 3, p. 196.
[9] Respectively, Protocol on the Statute of the African Court of Justice and Human Rights, AU Assembly, AU doc. Assembly/AU/Dec.196(XI), 1 July 2008; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Assembly, AU doc. Assembly/AU/Dec.529(XXIII), 27 June 2014.

and Human Rights Sections.[10] The ACJHR-ICLS has jurisdiction over international, transnational and some serious domestic crimes.[11] When the ACJHR Protocol and annexed ACJHR-Statute will enter into force is unclear because 15 ratifications are needed.[12] As of 30 April 2019, ten states have signed it but none has ratified it. References herein concern the amended ACJHR Protocol and Statute.

Based on relevant literature, this article identifies three factors which may explain the creation of the ACJHR-ICLS.[13] First, the AU's claims of European countries' alleged abuses of universal jurisdiction when prosecuting African officials.[14] Second, the AU and its Member States have had increasing concerns regarding the ICC. The AU's initial cooperation with the ICC changed once the ICC indicted then Sudanese President Al-Bashir and worsened with the cases against Kenyan President Kenyatta and Vice-President Ruto. Then, the AU asked its Member States not to cooperate with the ICC to arrest and surrender African leaders.[15] Some African countries threatened to withdraw (South Africa, Gambia) or withdrew (Burundi) from the ICC.[16] The AU recommended a strategy for collective withdrawal from the ICC.[17] Third, AU Member States seek to fight impunity in Africa, including crimes outside the ICC's jurisdiction.

[10] ACJHR Protocol, Article 3.
[11] ACJHR-Statute, Articles 28A-28M.
[12] ACJHR Protocol, Article 11.
[13] M. Ssenyonjo and S. Nakitto, 'The African Court of Justice and Human and Peoples' Rights "International Criminal Law Section": Promoting Impunity for African Union Heads of State and Senior State Officials?', 16:1 *International Criminal Law Review* (2016) pp. 79-85; V. Nmehielle, 'Saddling the New African Regional Human Rights Court with International Criminal Jurisdiction', 7:1 *African Journal of Legal Studies* (2014) pp. 14-23; M. Sirleaf, 'Regionalism, Regime Complexes, and the Crisis in International Criminal Justice', 54 *Columbia Journal of Transnational Law* (2016) pp. 713-717.
[14] AU, Assembly/AU/Dec.243(XIII)Rev.1, Doc.Assembly/AU/11(XIII), 3 July 2009, para. 4.
[15] E.g., AU, Assembly/AU/Dec.245(XIII)Rev.1, 3 July 2009, para. 10.
[16] See M. Ssenyonjo, 'African States Failed Withdrawal from the Rome Statute of the International Criminal Court-From Withdrawal Notifications to Constructive Engagement', 17:5 *International Criminal Law Review* (2017) pp. 749-802.
[17] AU, Assembly/AU/Draft/Dec.1(XXVIII)Rev.2, 30-31 January 2017, para. 8.

The first two above-mentioned factors found in academic literature are arguably linked to alleged 'neo-colonialism'.[18] However, this article points out that most African situations were referred to the ICC by African states via self-referrals or the UN Security Council with the approval of African states. The Georgia situation and potential investigations into crimes committed outside Africa show that the ICC no longer exclusively focuses on Africa. The third factor (fight against impunity) may be questioned due to the clause on immunities of sitting heads of states and other senior officials under the ACJHR-Statute (Article 46A*bis*).

Nevertheless, scholars have described the ACJHR-ICLS as 'revolutionary' and the first regional criminal 'court'.[19] Thus, this article highlights the innovative features of the ACJHR-ICLS: merged within the ACJHR with sections that determine state responsibility, a broad subject-matter jurisdiction (including crimes particularly relevant to Africa), and jurisdiction over corporate criminal liability. However, academic literature has appropriately warned that quite a broad mandate and (likely) limited resources constitute important weaknesses.[20]

2.2. *Victims at the EAC and ACJHR-ICLS*

Victims actively participated in the process towards the creation of the EAC and Habré's conviction. As documented and examined by scholars, the joined work of Chadian victim associations and international NGOs was decisive,[21] e.g., after travelling to Chad to collect evidence, victims and their lawyers unsuccessfully attempted the prosecution of Habré at

[18] Sirleaf, *supra* note 13, pp. 766-768; Ssenyonjo and Nakitto, *supra* note 13, p. 83.
[19] D. Shelton and P. Carozza, *Regional Protection of Human Rights* (2nd ed., OUP, Oxford, 2013) p. 1019; Sirleaf, *supra* note 13, p. 724.
[20] Ssenyonjo and Nakitto, *supra* note 13, 86-90; A. Abass, 'Prosecuting International Crimes in Africa-Rationale, Prospects and Challenges' 24:3 *European Journal of International Law* (2013) pp. 943-944.
[21] C. Sperfeldt, 'The Trial Against Hissène Habré-Networked Justice and Reparations at the Extraordinary African Chambers' 21:9 *International Journal of Human Rights* (2017) pp. 1244-1246, 1253.

Senegalese courts in 2000.[22] Subsequently, victims triggered universal jurisdiction via a Belgian judge's arrest warrant; however, Senegal refused it and sent the case to the AU.[23] In 2001, victims complained at the UN Committee against Torture, which called on Senegal to prevent Habré from leaving Senegal,[24] found that Senegal violated the Convention against Torture by rejecting prosecution or extradition of Habré to Belgium and requested Senegal to implement related legislation,[25] which Senegal did. In 2006, the AU declared to have competence over Habré and ordered Senegal to prosecute and try him on behalf of Africa.[26]

This article claims that the EAC-Statute (Articles 14, 27, 28) contains relevant provisions on substantive, procedural and institutional aspects of victims' right to reparations, especially concerning civil parties, including *inter alia* norms on general principles on participation of victims as civil parties, reparations, and Trust Fund for Victims. Additionally, the Senegalese Criminal Procedure Code contains relevant articles. Other than reparations-related provisions, the EAC-Statute tackles victim protection, especially concerning victim-witnesses. The accused's right to a fair and public trial is subject to measures to protect victims and witnesses.[27] Senegal must guarantee, within its territory, witness and party protection: the AU-Senegal Agreement is invoked for witness protection; and witness/victim participant protection is an exception to recorded proceedings.[28] In *Habré*, 93 witnesses testified during trial and rape victim testimonies made the EAC-Trial Chamber include sexual violence-related charges.[29] The EAC-Trial Chamber

[22] R. Brody, 'The Prosecution of Hissene Habre' 35 *New England Law Review* (2000-2001) pp. 321-335; S. Høgestøl, 'The Habré Judgment at the Extraordinary African Chambers' 34:3 *Nordic Journal of Human Rights* (2016) p. 149.
[23] *Ibid*., p. 150.
[24] Letter from Chief of Support Services Branch- OHCHR to Reed Brody-HRW, April 2001.
[25] *Guengueng et al. v Senegal*, Communication No. 181/2001, Decision, CAT/C/36/D/181/2001, 19 May 2006, para. 10.
[26] AU, Assembly/AU/Dec.127 (VII), 2 July 2006, paras. 3-4.
[27] EAC-Statute, Article 21(2).
[28] EAC-Statute, Articles 34-36.
[29] Høgestøl, *supra* note 22, p. 153.

convicted Habré of having personally committed raped while in office as President, which constituted a legal first; however, the EAC-Appeals Chamber overruled this rape conviction on procedural grounds.[30]

Concerning victims, including the strengthening of their status as reparations claimants and beneficiaries, the ACJHR-ICLS as a regional criminal 'court' could present some advantages compared to the ICC. Based on academic literature, these advantages include: easier access to justice for victims, more proximity and faster access to crime sites, a more familiar or traditional reparations system, bigger impact on victims and their communities, and coordination with other AU bodies for reparations.[31] Also, it can partially complement the ICC,[32] which handles very few cases and, thus, more victims may benefit from participation and reparations. Nevertheless, the ACJHR-ICLS may potentially block the ICC's investigations and cases, affecting victims' interests, including those related to reparations. Additionally, the clause on immunity of serving Heads of State and other senior officials (ACJHR-Statute, Article 46A*bis*) would obstruct victims' reparations claims against those officials.[33] This may substantially affect victims' right to reparations. Scholars have pointed out that human rights NGOs have strongly criticized such clause.[34] There is no reference to the ICC principle of complementarity in the ACJHR-Statute; however, coordination between the ICC and the ACJHR-ICLS is necessary.

Under the ACJHR Protocol's Preamble, AU Member States are committed to protect and respect human rights; accept the AU's intervention in a member state in mass crimes contexts; and condemn, reject and commit to fight impunity. The Preamble refers to complementing national

[30] *Prosecutor v Habré*, Arrêt, EAC-Appeals Chamber, 27 April 2017, p. 225.
[31] Sirleaf, *supra* note 13, pp. 770-772, 774; C. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' 9:5 *Journal of International Criminal Justice* (2011) p. 1085.
[32] Ssenyonjo and Nakitto, *supra* note 13, p. 85.
[33] *Ibid*., p. 97.
[34] Sirleaf, *supra* note 13, p. 726.

and regional institutions to prevent and punish serious human rights violations. However, unlike the ICC-Statute's Preamble, victims are neglected.

ACJHR-Statute provisions on reparations are examined later. Concerning victim participation, if there is a reasonable basis, the Prosecutor shall request the Pre-Trial Chamber to authorize an investigation and "victims may make representations".[35] As for victim protection, the Pre-Trial Chamber may issue protective orders for witnesses and victims, and the Registry shall establish a Victims and Witness Unit to provide protective measures, security arrangements, counselling and other assistance for witnesses, victims, etc.[36] These provisions were transplanted from the ICC-Statute. The accused is "entitled to a fair and public hearing" but "subject to measures ordered by the Court for the protection of victims and witnesses".[37]

2.3. *Justice for Victims at the EAC and ACJHR-ICLS Reparations Systems*

Despite their actual and/or potential limitations, this article considers that the reparations systems of the EAC and the ACJHR-ICLS are examples of and (potentially) catalysts for restorative and/or remedial justice for victims of mass atrocities at ICTs. In accordance with well-recognised academic approaches, this article argues that the said reparations systems constitute manifestations of restorative justice: focus on victims and need to redress their harm,[38] as adapted to ICTs[39] which are still predominantly retributive/deterrence justice-driven.[40]

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[35] ACJHR-Statute, Article 46G(3).
[36] ACJHR-Statute, Articles 19*bis*, 22B(9)(a).
[37] ACJHR-Statute, Article 46A(2).
[38] H. Zehr, *Changing Lenses-A New Focus for Crime and Justice* (1st ed., Herald Press, Scottdale, 1990) pp. 212-214.
[39] E. Dwertmann, *The Reparation System of the International Criminal Court* (Martinus Nijhoff, The Hague, 2010) pp. 37-44; C. McCarthy, 'Victim Redress and International Criminal Justice' 10:2 *Journal of International Criminal Justice* (2012) p. 351.
[40] A. Cassese, *International Criminal Law* (2nd ed., OUP, Oxford, 2008) pp. 366-377.

Specialised literature aptly recognises that restorative justice was a driving force to introduce reparations systems at the ICC and ICTs and fill in the absence thereof at the ICTs for the ex-Yugoslavia and Rwanda.[41] Within this theoretical framework, the present article considers that the EAC and ACJHR-ICLS reparations systems pursue traditional goals of reparations as adapted to their institutional features. As Shelton identifies, these goals are: remedial, i.e., rectify the wrong done to the victim; restorative, i.e., victim-focused with inclusion of victims' community; and condemnatory, i.e., the offender is held responsible.[42]

Additionally, this article suggests the potential consideration of goals beyond remedial and restorative justice, i.e., transformative justice. This article finds that both literature on reparations for mass atrocities and international practice increasingly recognise that reparations need to address structural inequalities that predated and, in many cases, continued after mass atrocities and armed conflicts, particularly, concerning marginalization and discrimination of women.[43] As Manjoo meaningfully remarks, transformative justice requires that reparations do not simply restore victims to their situation prior to harm inflicted, which may actually be oppressive or discriminatory, but reparations should aim to change the *status quo*.[44]

Nevertheless, whether and to what extent ICTs such as the EAC and the ACJHR-ICLS should and/or can realistically provide transformative justice is open to debate. This article finds

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[41] L. Moffett, *Justice for Victims before the International Criminal Court* (Routledge, Abingdon, 2014) pp. 41-43; 49-50; Dwertmann, *supra* note 39, pp. 23-27.
[42] D. Shelton, *Remedies in International Human Rights Law* (3rd ed., OUP, Oxford, 2015) pp. 19-27; *Prosecutor v. Lubanga* (ICC-01/04-01/06-3129-AnxA), Order for Reparations, Appeals Chamber, 3 March 2015, para. 2.
[43] R. Manjoo, 'Introduction: Reflections on the concept and implementation of transformative reparations', 21:9 *International Journal of Human Rights* (2017) p. 1195; A. Durbach and L. Chappell, 'Leaving Behind the Age of Impunity-Victims of Gender Violence and the Promise of Reparations', 16:4 *International Feminist Journal of Politics* (2014) pp. 543-562; Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, 'Reparations to Women Who Have Been Subjected to Violence', UN Doc. A/HRC/14/22, 23 April 2010; *Gonzalez et al. ('Cotton Field') v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) IACtHR Series C No 205 (16 November 2009); Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 19–21 March 2007.
[44] Manjoo, *supra* note 43, pp. 1195, 1198.

that scholars' scepticism towards such prospects is overall justified.[45] Limited mandates and normative constraints of ICTs (reparations awards against individuals not states) and serious implementation and funding limitations (experiences of ICTs) underlie such scepticism. Thus, some scholars correctly consider that other transitional justice mechanisms such as regional human rights courts and, especially, administrative and legislative reparations programmes are better equipped to achieve transformative justice.[46] However, this article also claims that ICTs such as the EAC and the ACJHR-ICLS should within their limitations and when feasible endeavour to adopt transformative justice principles and approaches when they decide on reparations matters. Indeed, the ICC's reparations jurisprudence has adopted this approach.[47] Subject to adaptations, certain transformative justice elements may enhance victims' role as reparations claimants/beneficiaries at these African justice initiatives.

As academic literature has discussed, victims' right to claim and receive reparations at ICTs such as the EAC and ACJHR-ICLS has been influenced by and is overall consistent with international human rights law sources.[48] These include: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Reparations Principles),[49] and human rights case-law, particularly that of the Inter-American Court of Human

[45] Sperfeldt, *supra* note 21, pp. 1254-1255; L. Chappel, 'The Gender Injustice Cascade-'Transformative' Reparations for Victims of Sexual and Gender-based Crimes in the *Lubanga* case at the International Criminal Court', 21:9 *International Journal of Human Rights* (2017) pp. 1223-1242; S. Williams and E Palmer, 'Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia', 10:2 *International Journal of Transitional Justice* (2016) pp. 311-331.
[46] Manjoo, *supra* note 43, paras. 37-39, 84-85.
[47] *Lubanga*, *supra* note 42, paras. 34, 38, 67, 71-72.
[48] C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP, Cambridge, 2012) pp. 86-124; Moffett, *supra* note 41, pp. 43-45; A. Brouwer and M. Heikkilä, 'Victim Issues-Participation, Protection, Reparation, and Assistance' in G. Sluiter et al., (eds.), *International Criminal Procedure-Principles and Rules* (OUP, Oxford, 2013) pp. 1366-1372.
[49] UNGA Res 60/147 (2005) GAOR 60th Session.

Rights (IACtHR) and the European Court of Human Rights. These sources have been crucial for the ICC and ECCC to identify reparations principles and interpret reparations provisions of their instruments. The EAC also invoked international human rights law in *Habré*.[50]

International human rights law sources, including the emerging reparations jurisprudence of the ACtHPR, and ICC reparations principles (based on international human rights law) should be as adapted considered when the ACJHR establishes its rules on reparations principles and construes its jurisprudence. Moreover, scholars such as Zegveld have found that reparations for victims against the convicted at (international) criminal courts are consistent with general legal principles.[51] In concurrence with Bassiouni, Hencakerts and Doswald-Beck, this article considers that these judicial reparations are also consistent with international human rights/international humanitarian law and national practice.[52] Indeed, the EAC invoked international human rights law sources, and the applicable law at the ACJHR (ACJHR-ICLS included) incorporates "legal instrument[s] relating to human rights" and "international law".[53]

Finally, victims' status as reparations claimants and related rights, via civil party action or not, at ICTs evidences increasing inclusion of civil-law/inquisitorial elements to traditionally common-law/adversarial-oriented international criminal proceedings as relevant literature identifies.[54] Under the EAC-Statute (Article 14(5)), applied in *Habré*, the Senegalese Criminal Procedure Code concerning civil parties is an applicable subsidiary source. EAC reparations

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[50] E.g., *Habré*, *supra* note 30, para. 723.
[51] L. Zegveld, 'Victims' Reparations Claims and International Criminal Courts', 8:1 *Journal of International Criminal Justice* (2010) p. 85.
[52] C. Bassiouni, 'International Recognition of Victims' Rights', 6:2 *Human Rights Law Review* (2006) p. 203; J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. I* (ICRC/CUP, Cambridge, 2005) pp. 554-555.
[53] ACJHR-Statute, Article 28(c), (e).
[54] Brouwer and Heikkila, *supra* note 48, pp. 1367-1368; B. McGonigle-Leyh, *Procedural Justice?-Victim Participation in International Criminal Proceedings* (Cambridge, Intersentia, 2011) pp. 65-92.

provisions combine international and Senegalese law, which scholars researching on reparations at the EAC have noted and qualified as a mixture.[55]

3. Scope of Reparations Claimants and Beneficiaries

3.1. *Notion and Categories of Victims*

To identify (potential) contributions of the EAC and ACJHR-ICLS to the field of reparations for victims of mass atrocities, the delimitation of those who can claim and benefit from reparations is a crucial step. The EAC-Statute provides no 'victim' definition. After examining ICC and ECCC sources, the EAC-Appeals Chamber fleshed out the notion and categories of 'victim'. 'Victim' is anyone who suffered harm as a result of crimes under the EAC's jurisdiction.[56] Victims, including civil parties, consist in direct and indirect victims.[57] Indirect victims must prove their harm via evidence of relationship with direct victims, and are not limited to categories such as relatives because 'harm' determines indirect victim admissibility.[58] Overall, this categorization of victims is consistent with notions of victimhood and categories of victims found in relevant literature, which also recognises the existence of direct and indirect victims.[59] In Africa, 'family' goes beyond nuclear family.[60] The EAC was more flexible than the ECCC as it required no proof of affective links between direct victims and distant relatives.[61] However, the EAC-Appeals Chamber restrictively found that indirect victims can obtain reparations solely when the direct victim is dead because direct victims constitute the only holders of the right-to-reparations (transmissible by

[55] Sperfeldt, *supra* note 21, p. 1251.
[56] *Habré*, *supra* note 30, para. 583.
[57] *Ibid*., para. 584.
[58] *Ibid*., para. 585.
[59] Bassiouni, *supra* note 52, pp. 256-257.
[60] *Habré*, *supra* note 30, para. 586.
[61] *Ibid*., para. 587.

succession).[62] This constituted a step backwards *vis-à-vis* reparations case-law of other ICTs and human rights courts. Such jurisprudence has not conditioned reparations for indirect victims to the death of their relatives (direct victims).[63]

In *Habré*, 'direct victims' were: rape/sexual slavery victims; and massacre victims, i.e., survivors of arbitrary detention, torture and prisoners of war who suffered inhumane treatment.[64] Indirect victims suffer harm as a direct result of harm inflicted on any of his/her relatives due to crimes leading to conviction.[65]

Although civil parties are always victims, victims are not necessarily civil parties.[66] Civil parties are not the only reparations beneficiaries because those who fall into the EAC's victim definition hold the right to reparations at the EAC.[67] In *Habré*, 7396 victims were admitted as civil parties and 3489 applicants were rejected. Yet, the Commission of Inquiry into Crimes and Misappropriations Committed by ex-President Habré and his Accomplices had found around 40000 victims.[68] In March 2015, a Chadian court convicted 20 Habré-era security agents and awarded yet-to-be-paid compensation to 7000 victims.[69]

Like the ICC-Statute, the ACJHR-Statute contains no victim definition. The ACtHPR has invoked the UN Reparations Principle 8 victim definition: direct and indirect victims who individually or collectively suffered physical, mental or material harm as a result of serious violations.[70] This notion connects rights with harm and evidences, in Manjoo's words, a

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[62] *Ibid*., para. 589.
[63] E.g., *Case 001*, Appeal Judgment, Supreme Court Chamber, 3 February 2012, para. 418.
[64] *Prosecutor v Habré*, Judgement, EAC Trial Chamber, 30 May 2016, paras. 59-65.
[65] *Ibid*., para. 66.
[66] *Habré*, *supra* note 30, para. 593.
[67] *Ibid*., para. 599.
[68] Chad's Ministry of Justice (1992).
[69] Human Rights Watch, <https://www.hrw.org/news/2017/12/06/senegal-video-chad-ex-dictators-trial> visited on 1 February 2019.
[70] *Beneficiaries of Late Norbert Zongo et al. & the Movement on Human and Peoples' Rights v Burkina Faso*, Judgment on Reparations, ACtHPR, Application No 013/2011 (28 March 2014), para. 47.

'community of harm' in cases of mass atrocities.[71] The ACtHPR did not limit victims to the deceased's first-degree heirs, including other relatives who can reasonably be regarded as suffering moral prejudice related to violations; and, concerning direct victim's closest relatives, it included direct victim's fathers, mothers, children, spouses and siblings.[72] Additionally, the ACJHR-ICLS should consider the victim definition contained in Rule 85(a) of the ICC Rules of Procedure and Evidence (ICC-Rules): "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court". The ACJHR-ICLS should also pay attention to categories of reparations beneficiaries identified by the ICC. These categories are based on international human rights law as adapted at ICTs—the ICC invoked *inter alia* international human rights law. Such categories are direct and indirect victims, i.e., those who: are direct victims' relatives, attempted to prevent crimes, suffered harm when helping or intervening on behalf of direct victims, or suffered personal harm as a result of these crimes.[73] In turn, these jurisprudential notions of direct and indirect victimhood are also consistent with relevant scholarship.[74]

3.2. *Harm Inflicted and Causal Link Between Crime and Harm*

As scholars state, the causal link between crime and harm is to be proven for the provision of reparations.[75] By applying this theoretical framework, the present article remarks that a well-determined causal link is necessary to establish which harm and whose harm are to be redressed. This impacts the size of the pool of reparations claimants at the African justice initiatives considered. By invoking the ECCC's case-law, the EAC-Appeals Chamber pointed out that 'harm'

[71] Manjoo, *supra* note 43, para. 47.
[72] Zongo, *supra* note 70, paras. 46-49.
[73] *Lubanga*, *supra* note 42, para. 6.
[74] Bassiouni, *supra* note 52, pp. 256-257.
[75] Shelton, *supra* note 42, p. 14.

caused as a result of EAC-jurisdiction crimes is crucial.[76] Victims must prove their personal harm caused by crimes.[77] Sexual violence victims were tortured, inhumanely treated and sexually abused: they suffered physical, material, moral and psychological harm.[78] Massacre victims suffered diverse kinds of harm as a direct consequence of crimes against humanity, war crimes and torture for which Habré was convicted.[79] Indirect victims, i.e., parents, guardians or close relatives of those tortured, disappeared or arbitrarily executed, are presumed to have suffered moral and/or material harm.[80]

By quoting ICC's jurisprudence, the EAC-Appeals Chamber found that the psychological harm suffered by an indirect victim is related to the death of the direct victim and the direct-indirect victim relationship.[81] Whereas direct victims must at least prove their identities as evidence of harm, indirect victims must additionally prove their relationship with direct victims.[82] By invoking jurisprudence of the ECCC, ICC and IACtHR, the EAC-Trial Chamber found that the reparations evidentiary standard is preponderance of evidence and used flexible evidentiary approaches as victims faced difficulties to obtain official documents.[83]

Civil parties are those who personally suffered harm directly caused by crimes.[84] Unlike the ECCC, the EAC quite flexibly required no proof of inflicted harm or causal link for civil party constitution and presumptions were used, i.e., harm was deduced from direct-indirect victim relationships, without requiring proof of specific affective links.[85] Whether this approach is

[76] *Habré*, *supra* note 30, paras. 594, 597.
[77] *Ibid*., para. 691.
[78] *Habré*, *supra* note 64, paras. 59, 62.
[79] *Ibid*., para. 64.
[80] *Ibid*., para. 67.
[81] *Habré*, *supra* note 30, para. 585 (invoking *Prosecutor v Katanga* (ICC-01/04-01/07-3728), Order for Reparations, Trial Chamber-II, 24 March 2017).
[82] *Ibid*., para. 748.
[83] *Ibid*., paras. 722-723, 738-741, 749-754.
[84] *Ibid*., paras. 746, 592.
[85] *Ibid*., para. 755-757.

advisable may be questioned due to the defence rights and high evidentiary standards at ICTs. Indeed, academic literature on victim participation and reparations has remarked upon the importance of considering the differences between ICTs and human rights courts.[86]

Article 45(1) of the ACJHR-Statute mentions "damage, loss or injury to, or in respect of victims". According to the ACtHPR, material and moral damages must be redressed,[87] and moral damages are "for the suffering and infliction caused to the direct victim, the emotional distress of the family members and non-material changes in the living conditions […]. Moral damages are not damages occasioning economic loss".[88] The ACtHPR has used moral harm presumptions concerning suffering of spouses, children, fathers and mothers of the deceased and has been flexible concerning victim status proof.[89] It found the causal link between violation and moral harm to be an automatic consequence of the violation: serious violations are presumed to cause grief to direct victims and their next of kin.[90] However, as the ICC and ECCC determined about themselves,[91] the ACJHR-ICLS is a criminal rather than a human rights 'court'. Thus, the ACJHR-ICLS should independently examine 'causal link'.

The ACtHPR considered that material damage affects economic/material interests and can immediately be assessed monetarily, and there must be a causal link between a violation and alleged prejudice.[92] It has applied direct causal link or simply causal link.[93] As scholars have noted,

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[86] D. Contreras-Garduno and J. Fraser, 'The Identification of victims before the Inter-American Court of Human Rights and the International Criminal Court and its Impact on Participation and Reparations', 7:1-2 *Inter-American and European Human Rights Journal* (2014) p. 192.
[87] *Zongo*, *supra* note 70, para. 26.
[88] *Mtikila v Tanzania*, Ruling on Reparations, ACtHPR, Application No 011/2011 (13 June 2014), para. 34.
[89] *Zongo*, *supra* note 70, paras. 50-54.
[90] *Lohe Issa Konate v. Burkina Faso*, Judgment on Reparations, ACtHPR, Application No. 004/2013 (3 June 2016), para. 58; *Zongo*, *supra* note 70, paras. 55-56.
[91] E.g., *Prosecutor v Lubanga* (ICC-01/04-01/06-2904), Decision Establishing the Principles and Procedures to be Applied to Reparations, Trial Chamber-I, 7 August 2012, footnote 377; *Case 001*, *supra* note 63, para. 431.
[92] *Zongo*, *supra* note 70, paras. 24, 27.
[93] *Mtikila*, *supra* note 88, paras. 30-32; *Konate*, *supra* note 90, para. 45.

the IACtHR and the European Court of Human Rights normally require 'direct' causal link; however, as this literature has also found, the IACtHR is quite flexible.[94] Considering this and that ACJHR-Statute (Article 45) was modelled after the ICC-Statute (Article 75), the causal link requirement should not be 'direct' at the ACJHR-ICLS. Indeed, ICC-Rule 85(a) and related jurisprudence require no 'direct' causal link.[95]

4. Victims' Procedural Status and Procedural Rights Concerning Reparations

4.1. *Procedural Status*

Discussion on victims' procedural status as reparations claimants and related procedural rights is necessary to determine the relevance of the African justice initiatives under examination as platforms where victims of mass atrocities can exercise their right to effectively claim reparations. Within the legal literature examined, these matters substantiate the notion of procedural justice for victims, namely, victims' access to justice and redress, and active participation in fair proceedings.[96] Similar to the ECCC and civil-law jurisdictions, victims were civil parties in *Habré*, i.e., they participated in criminal proceedings against the accused and sought reparations. Under the EAC-Statute (Article 14(1)), the competent chamber decided on civil party constitution during judicial investigation or trial.[97] Civil party requests were assessed during the judgment phase.[98]

[94] Contreras-Garduno and Fraser, *supra* note 86, p. 196.
[95] *Lubanga*, *supra* note 42, para. 10.
[96] L. Moffett, 'Elaborating Justice for Victims at the International Criminal Court', 13:2 *Journal of International Criminal Justice* (2015) p. 287; Manjoo, *supra* note 43, paras. 34-40.
[97] *Habré*, *supra* note 30, paras. 637-638.
[98] *Ibid*., para. 639.

Under Article 28(2) of the EAC-Statute, reparations are open to all victims individually or collectively regardless of their participation at the EAC. Unlike the ECCC, victims who were not civil parties or whose civil party applications were inadmissible can still claim and receive reparations at the EAC-Trust Fund for Victims.[99] This is necessary because factors such as lack of information/legal advice, financial limitations, distance, and/or threats prevent victim participation. Chad's Commission of Inquiry found around 40000 victims, i.e., many more victims than the 7396 civil parties in *Habré*. Under equal access to justice and due process principles, the EAC-Appeals Chamber: showed flexibility about victim identity proof; corrected some material omissions; applied certain presumptions; and accepted civil party constitutions.[100]

Under the AU-Senegal Agreement (Article 1(4)) and in absence of rules, the EAC-Appeals Chamber discussed ICC and especially ECCC legal sources to conclude that civil party application admissibility is subject to initial assessment (instruction/initial hearing) and final examination (judgment stage).[101] Among ICTs, civil parties only exist at the EAC and ECCC, and the ECCC-Rules, Senegalese and Cambodia laws are subsidiary applicable laws at the EAC and ECCC and are strongly influenced by French/civil-law.[102] The EAC-Trial Chamber assessed civil party application during the judgment stage to decide on civil actions.[103]

In accordance with Article 45 of the ACJHR-Statute, victims of ACJHR-ICLS-jurisdiction crimes can claim reparations. Unlike the EAC, the civil party status is absent from the ACJHR-ICLS. Article 45 is modelled after Article 75 of the ICC-Statute: there is no civil party status. However, as the ICC determined, victims as reparations claimants are authentic parties (not mere

[99] *Ibid*., paras. 606-609.
[100] *Ibid*., paras. 916-919.
[101] *Ibid*., para. 655.
[102] *Ibid*., paras. 657-658.
[103] *Ibid*., paras. 664-665.

participants) to post-conviction reparations proceedings.[104] Thus, at the ACJHR-ICLS victims as reparations claimants are parties to post-conviction reparations proceedings and should have suitable procedural rights. From a teleological perspective, legal scholars have indeed pointed out that the recognition and exercise of victims' procedural rights as parties to reparations proceedings are consistent with the goals of victims' participation and reparations related to criminal proceedings.[105] Like at the ICC, victims are not required to participate in trial to claim and receive reparations at the ACJHR-ICLS. This benefits victims who cannot and/or are unwilling to participate in trial. Nevertheless, unlike Article 68(3) of the ICC-Statute, the ACJHR-Statute lacks a general ACJHR-ICLS victim participation provision. As the ICC practice demonstrates, victim participation in pre-conviction proceedings may be related to victims' interest in and right to reparations.[106] The ICC has allowed reparations-related witness questioning and evidentiary matters during trial, but with due respect for the accused's rights.[107] As discussed in academic literature,[108] unlike the victim participant status, the ACJHR-Statute contains normative grounds for a strong victims' status as reparations claimants to be fleshed out in the ACJHR-Rules. Under the ACJHR-Statute (Article 38), the ACJHR shall establish ACJHR procedures in the ACJHR-Rules, including complementarity between the ACJHR and other AU bodies.

As for certain general procedural rights such as notification or provisional measures, the ACJHR-Statute mentions 'parties' to the case. When the ACJHR-Rules are drafted, 'parties' should be understood including post-conviction reparations proceedings. Otherwise, 'parties'

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[104] *Prosecutor v Lubanga* (ICC-01/04-01/06-2953), Decision on the Admissibility of the Appeals Against Trial Chamber I's "Decision Establishing the Principles and Procedures to be Applied to Reparations" and Directions on the Further Conduct of Proceedings, Appeals Chamber, 14 December 2012, para. 67.
[105] Dwertmann, *supra* note 39, p. 220.
[106] *Prosecutor v Ruto and Sang* (ICC-01/09-01/11), Transcripts, 10 September 2013, p. 39, line 17.
[107] *Prosecutor v Lubanga* (ICC-01/04-01/06-1119), Decision on Victims' Participation, Trial Chamber-I, 18 January 2008, paras. 120-122.
[108] J. Pérez-León-Acevedo, 'Victims at the Prospective International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights', 17:3 *International Criminal Law Review* (2017) pp. 466-467, 476-477.

would be limited to the Prosecution and defence, excluding reparations claimants. Unless otherwise mentioned, 'parties' include reparations claimants herein.

4.2. *Procedural Rights*

In assessing whether the EAC and ACJHR-ICLS can appropriately deliver procedural justice for victims of international crimes, the recognition and effective exercise of a set of meaningful procedural rights are pivotal as they materialise victims' role as parties to reparations proceedings. In *Habré*, the EAC-Appeals Chamber identified procedural rights to be exercised, as proper parties, personally or via their lawyers, including the rights to: be notified; call witnesses; question the accused, witnesses and participants via the Chamber's President; be heard; request additional information, expertise or on-site transportation; and submit conclusions.[109] These rights are quite similar to those found in the ECCC's applicable law. Additionally, civil parties successfully requested provisional measures so that Habré's real estate and bank accounts could be seized for reparations.[110] Furthermore, civil parties can upon a reparations order request upfront compensation payment—in *Habré*, the EAC-Trial Chamber only granted 10 per cent of the requested compensation.[111]

Concerning procedural rights under the EAC-Statute, Article 27(3), which is modelled after the ICC-Statute (Article 75(3)), states that, the EAC before issuing reparations orders "may invite observations from or on behalf of (…) victims". Thus, observation submissions were appropriately not limited to civil parties but included other 'victims'. The EAC-Statute (Article 14(2)-(4)) contains civil party legal representation provisions as applied in *Habré*: victims constituted groups

[109] *Habré*, *supra* note 30, paras. 635-636.
[110] *Habré*, *supra* note 64, paras. 77-80.
[111] *Ibid*., paras. 73-74.

and had joint legal representatives. Under Article 25(1), civil parties can appeal "with respect to their civil interests solely". In *Habré*, civil parties appealed the reparations order for errors of law and fact. Unlike the ECCC,[112] the EAC-Appeals Chamber did not authorise civil parties to file new evidence to support civil party constitution requests during appeals.[113] However, the Chamber invited victims whose civil party constitutions were inadmissible to appear before the EAC-Trust Fund.[114] Concerning the ACJHR-ICLS, procedural rights of reparations claimants may be identified under the ACJHR-Statute.[115] First, pursuant to Article 45(1), which copies Article 75(1) of the ICC-Statute, victims may ask the ACJHR-ICLS to "determine the scope and extent of any damage, loss or injury to, or in respect of, victims and [the ACJHR-ICLS] will state the principles on which it is acting". Second, under Article 45(3), which copies Article 75(4) of the ICC-Statute, "[b]efore making an order the Court may invite and take account of representations from or on behalf of the (…) victims". By following requests of the ICC Trial Chambers, victims' lawyers submitted written representations.[116] They also replied to the submissions of other parties and participants. The ACJHR-ICLS should consider widening this procedural right. Unlike what the ICC-Statute and ACJHR-ICLS-Statute establish, those written submissions should be filed not only upon the ACJHR-ICLS's requests but also (and mainly) upon victims' own initiative to better reflect victims' procedural status as parties to reparations proceedings. Third, the right to notification involves parties and their counsels (Articles 34A(2), 37). Fourth, the ACJHR can *motu proprio* or on party application order provisional measures to preserve party rights (Article 35). Fifth, ACJHR hearings are public unless the ACJHR, *motu proprio* or upon party application,

[112] *Case 001*, *supra* note 63, para. 501.
[113] *Habré*, *supra* note 30, para. 768.
[114] *Ibid*., para. 769.
[115] *See also* Pérez-León-Acevedo, *supra* note 108, pp. 477-480.
[116] *E.g*., *Lubanga*, *supra* note 91, paras. 13, 20-175.

decides otherwise (Article 39). Sixth, parties can claim judgment revision under conditions (Article 48(1)). Finally, Article 45(4), which resembles Article 75(6) of the ICC-Statute, states that nothing in Article 45 prejudices victims' rights under national or international law.

Unlike the ICC-Statute (and ICC-Rules), there are some procedural rights not included in the ACJHR-Statute, which the future ACJHR-Rules should incorporate to arguably provide better grounds for the realisation of victims' status as parties to reparations proceedings. First, victims may participate in and request postponement of reparations hearings as Article 76(3) of the ICC-Statute and ICC-Rule 143 establish. During reparations hearings, witness/expert questioning by victims' lawyers is not subject to pre-conviction stage limitations (ICC-Rule 91(4)). Second, victims may request the Chamber to appoint reparations experts, and submit observations on expert reports (ICC-Rule 97(2)). Third, victims can via their lawyers appeal reparations orders under the ICC-Statute (Article 82(4)). The right to appeal awards is important because it manifests and realises the status of victims as parties to reparations proceedings. At the ICC, victims' lawyers have appealed reparations orders and responded to defence submissions—even if some victims did not participate in trial.[117] The ACJHR has jurisdiction over ACJHR-Statute crimes "subject to a right of appeal".[118] Under the ACJHR Statute (Article 18(2)), the Prosecutor or the accused may appeal decisions of the Pre-Trial or Trial Chamber. Thus, there is no reference to reparations claimants as holders of the right to appeal reparations orders. However, Article 34B prescribes that the ACJHR shall define appeals rules. Therefore, the ACJHR-Rules must explicitly mention reparations claimants as holders of the right to appeal reparations orders directly or via their lawyers.

[117] *Lubanga*, *supra* note 104, para. 69.
[118] ACJHR-Statute, Article 28(d).

5. Outcomes of Reparations Proceedings

5.1. *Modalities of Reparations*

Both modalities and types of reparations constitute the main outcomes of judicial reparations proceedings and, thus, manifestations of what academic literature generally refers to as substantive justice, namely, what victims can receive.[119] The contents of reparations outcomes may significantly inform to what extent the EAC and the ACJHLR-ICLS are appropriate platforms for victims as reparations claimants/beneficiaries. Under Article 27 of the EAC-Statute, reparations modalities "are restitution, compensation and rehabilitation". Unlike the ACJHR-Statute and the ICC-Statute which word these modalities as illustrative, Article 27 seems to be exhaustive. Nevertheless, in *Habré* civil parties filed admissible claims for symbolic reparations modalities that the EAC considered.

Concerning compensation, according to the EAC-Appeals Chamber, each victim can only obtain one award and, if the civil party is dead, the right to compensation is extinguished unless his/her first-degree relatives can prove their relationship with him/her.[120] The EAC-Trial Chamber granted amounts lower than the figures requested by civil parties.[121] However, EAC compensatory figures are actually (much) higher than those ordered by human rights bodies and, especially, than the nominal USD 250 individual compensation granted in *Katanga* at the ICC. Rape/sexual slavery victims, massacre victims and indirect victims were granted CFA Francs 20, 35 and 10 million per person respectively (approximately EUR 30500, 53300, and 15250). Redress should be comprehensive, without loss or profit.[122] By following the jurisprudence of the ECCC, French and

[119] Moffett, *supra* note 96, pp. 287-288.
[120] *Habré*, *supra* note 30, para. 606.
[121] *Habré*, *supra* note 64, paras. 60-63, 68.
[122] *Ibid*., para. 58.

Senegalese courts, judicial discretion was invoked to assess harm and determine amounts.[123] Civil party requests of receiving the total requested compensation were rejected. Compensatory amounts granted were found to be reasonable and higher than figures under international and national jurisprudence.[124] The granting of the total amount requested would have been unreasonable and difficult to recover, affecting the effectiveness of the EAC.[125]

Since the global compensation amount was CFA Francs 82.29 billion (approximately EUR 124 million) for 7396 civil parties, Habré's wealth cannot cover all individual reparations, and his confiscated goods and assets were placed at the EAC-Trust Fund for Victims for compensation.[126] The prompt implementation of compensatory awards is also justified for currency depreciation.

In ordering compensation above the convicted person's known wealth, the EAC followed domestic practice; however, as Sperfeldt has importantly remarked, this is inconsistent with international case-law that has been more careful to achieve feasible compensation.[127] To order high compensations without having secured sufficient resources may do more harm than good, including potential re-victimisation.

In *Habré*, civil parties also requested other reparations measures: development projects, monuments in memory of victims, teaching of Chadian history relevant to *Habré* in Chadian schools, a commemoration day, and centres for practical training of victims' children.[128] As examined later, the EAC rejected them because of the lack of details and the need for Chad's involvement. Under UN Reparations Principles 22 and 23 and definitions found in scholarship, these reparations modalities are satisfaction, i.e., measures to commemorate and/or apologize to

[123] *Habré*, *supra* note 30, paras. 928-932.
[124] *Ibid*., paras. 934, 941-942.
[125] *Ibid*., para. 935.
[126] *Ibid*., paras. 939-940.
[127] Sperfeldt, *supr*a note 21, p. 1253.
[128] *Habré*, *supra* note 64, para. 69.

victims, cease violations, and determine the truth; and/or guarantees of non-repetition, i.e., measures to prevent serious human rights violations.[129] Rehabilitation was not requested. This must be criticised because it is inconsistent with the realisation of the victims' right to receive full redress for the harm inflicted. Since rehabilitation includes medical and psychological care and all victims of mass atrocities suffer some level of psychical and/or psychological damage, legal scholars have highlighted the importance of rehabilitation as a reparations modality.[130] Civil party lawyers should have claimed rehabilitation and/or EAC judges should have ordered it, especially concerning sexual crime victims. Rehabilitation is necessary concerning serious abuses as the UN Principle 21, ICC's jurisprudence (*Lubanga*, *Katanga*, *Al-Mahdi*), and ECCC's case-law evidence (*Cases 001, 002/01).*

Modelled after Article 75(2) of the ICC-Statute, Article 45(2) of the ACJHR-Statute provides that "appropriate reparations" include "restitution, compensation and rehabilitation". This open-ended phrasing arguably includes satisfaction and guarantees of non-repetition, which literature labels as symbolic or non-monetary reparations.[131] At the ICC and ECCC, these modalities have been granted, except for compensation at the ECCC because of normative limitations. Moreover, the ICC and ECCC have invoked human rights courts case-law (particularly IACtHR's jurisprudence) and UN Reparations Principles to give contents to reparations modalities as adapted to ICTs.[132] That the ACJHR-Statute lists diverse reparations modalities is appropriate for reparations for victims of mass atrocities since combined material, rehabilitative and symbolic elements are necessary to redress harm.

[129] Bassiouni, *supra* note 52, pp. 270-271.
[130] *Ibid*., p. 270; Dwertmann, *supra* note 39, p. 148; Shelton, *supra* note 42, p. 394.
[131] *Ibid*., pp. 377-401.
[132] E.g., *Lubanga*, *supra* note 91, paras. 184-186, 222-241; *Case 001*, *supra* note 63, paras. 672-717.

The ACtHPR found that reparations modalities may be restitution, compensation, satisfaction, rehabilitation, and non-repetition, granted singly or jointly.[133] Concerning restitution, elimination of (unfair) criminal convictions from the victim's judicial record was granted.[134] Recovery of the Ogieks people's ancestral land through delimitation, demarcation and titling process has been requested in a case, which is yet-to-be-decided as for reparations.[135]

The ACtHPR invoked the principle of full reparations to redress pecuniary/non-pecuniary harm suffered to underlie compensation quantification.[136] It found that compensatory amounts should be determined equitably case-by-case,[137] and exemplified compensable harm.[138] Compensable non-pecuniary/moral damages include trauma suffered and distress caused to direct victims and their next of kin. Material and/or pecuniary damages include loss of income and physical belongings, and expense reimbursement. The ICC's jurisprudence has identified similar examples, based on mainly international human rights law,[139] and quantified some of them.[140] This may also shed light on the ACJHLR-ICLS's future practice. According to scholars and the ICC, institutions that have (likely) limited available resources, e.g., the ACJHR-ICLS, should order compensation only if this is proportionate and appropriate, economic harm is quantifiable, there are available funds, and a victim group is definable.[141]

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[133] *Zongo*, *supra* note 70, para. 29; *Konate*, *supra* note 90, para. 15(b).
[134] *Ibid*., para. 23.
[135] *African Commission on Human and People's Rights (ACmHPR) v. Kenya*, Judgment, ACtHPR, Application No 006/2012 (26 May 2017), para. 219.
[136] *Zongo*, *supra* note 70, para. 60.
[137] *Ibid*., para. 61.
[138] *Mtikila*, *supra* note 88, paras. 29-32, 35-36, 52, 58; *Konate*, *supra* note 90, paras. 37-51, 79-82, 86-87.
[139] E.g., *Lubanga*, *supra* note 42, para. 40.
[140] *Katanga*, *supra* note 81, paras. 190-239; *Prosecutor v Al-Mahdi* (ICC-01/12-01/15-236), Reparations Order, Trial Chamber-VIII, 17 August 2017, paras. 116-134.
[141] P de-Greiff and M Wierda, 'The Trust Fund for Victims of the ICC-Between Possibilities and Constraints', in Koen de-Feyter et al. (eds.), *Out of the Ashes-Reparations for Victims of Gross and Systematic Human Rights Violations* (Intersentia, Cambridge, 2005) p. 239; *Lubanga*, *supra* note 91, para. 226.

Concerning satisfaction, besides finding that its judgments and reparations decisions constitute satisfaction, the ACtHPR has ordered the responsible state to publish the ACtHPR decision in the official gazette and on an official website.[142] Victims have also requested a National Reconciliation Forum to address conflict sources.[143] The ICC has ordered memorials and commemoration/forgiveness ceremonies.[144] Concerning guarantees of non-repetition, the ACtHPR ordered the responsible state to reopen investigations to prosecute and try perpetrators.[145]

As the ACtHPR's case-law evidences, certain reparations modalities, particularly guarantees of non-repetition and some satisfaction measures, demand state implementation. Accordingly, the ACJHR-ICLS must adapt some of these modalities, which were conceived to be granted against and implemented by states, to the features of ICTs. The ICC's practice (and ECCC's case-law) may provide guidance.

5.2. *Types of Reparations: Individual and Collective Awards*

Unlike the ECCC-Rules, which only provide for collective and moral reparations (Rule 23*quinquies*(1)), Article 28 of the EAC-Statute states that reparations may be awarded "individually or collectively". Scholars have importantly observed that collective reparations is an ambiguous notion as it may refer to types of goods distributed (or manner of their distribution) or 'subjects', i.e., collectivities.[146] Civil parties were only granted individual compensations in *Habré*. The EAC rejected collective award requests because: civil parties provided insufficient elements for assessment, and most requests fell into Chad's exclusive competence and/or involved Chad's

[142] *Zongo*, *supra* note 70, paras. 98-100; *Mtikila*, *supra* note 88, paras. 37, 45.
[143] *ACmHPR*, *supra* note 135, para. 219.
[144] *Al-Mahdi*, *supra* note 140, para. 90.
[145] *Zongo*, *supra* note 70, paras. 103-110.
[146] Manjoo, *supra* note 43, p. 1197.

sovereignty or approval—the EAC cannot order injunctions against Chad.[147] A similar situation happened in ECCC *Case 001* with Cambodia.[148]

According to the EAC-Appeals Chamber, individual compensation is insufficient for torture victims and collective and moral reparations offer holistic answers.[149] Nevertheless, it rejected collective awards because of the limited financial capacity of the convicted and the EAC-Trust Fund for Victims,[150] as well as Chad's lack of a positive answer.[151] Since requested collective reparations (school teaching, memorials, development projects, etc.) involve Chad's sovereignty and collective/moral reparations would be uncertain and hypothetical, the EAC-Appeals Chamber denied civil parties' request of allocating 30 per cent of funds to collective reparations.[152]

However, the EAC-Appeals Chamber appropriately highlighted the essential character of collective reparations and invited the EAC-Trust Fund for Victims to work with victim associations to set up a feasible reparations programme, and encouraged civil parties and the EAC-Trust Fund to realise those reparations projects.[153] Whether this will happen remains to be seen. Nevertheless, considering the likely problems to implement individual compensations, collective awards should have also been ordered. In any event, the EAC-Appeals Chamber correctly emphasized the pertinence of collective reparations because Habré's regime perpetrated mass crimes and collective and individual reparations are not mutually exclusive,[154] as the ICC similarly found.[155]

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[147] *Habré*, *supra* note 64, paras. 69-71; *Habré*, *supra* note 30, paras. 859-861, 867-871, 874.
[148] *Case 001*, *supra* note 63.
[149] *Habré*, *supra* note 30, para. 842.
[150] *Ibid*.
[151] *Ibid*., para. 843.
[152] *Ibid*., paras. 845-846, 848-849.
[153] *Ibid*., paras. 847, 873.
[154] *Ibid*., para. 872.
[155] *E.g*., *Katanga*, *supra* note 81, para. 265.

Like the ICC-Statute, the ACJHR-Statute makes no reference to individual or collective reparations. However, under ICC-Rules 97(1) and 98, the ICC has granted individual and/or collective awards. Without explicitly referring to 'individual' and 'collective' awards, the ACtHPR has granted individual compensation and restitution and collective symbolic measures.[156] The ACJHR-Rules should include individual and collective awards. Moreover, the ACJHR-ICLS should not follow the ECCC's case-law and certain ICC's practice (*Lubanga*) that only granted collective awards, and should instead adopt the ICC's approach in *Katanga* and *Al-Mahdi* where individual and collective awards were ordered.[157] Most scholars such as Bassiouni have remarked that collective and individual reparations can be granted concurrently.[158]

In the context of mass crimes and limited resources at ICTs, the ACJHR-ICLS should focus on collective reparations and the EAC should have also ordered at least symbolic collective awards in *Habré*. Based on academic discussions, this article argues that collective reparations for victims of mass atrocities are important for the following reasons. First, international crimes and related harm have a collective nature because mass atrocities mainly involve crimes that directly target specific groups and, indeed, individual victimization stems from attacks against the respective community or group (collective victims).[159] Collective awards may address identity-based violations, including attacks against ethnic groups or villages, and systematic gender crimes. Second, there are practical challenges, especially funding, to implement individual reparations and collective reparations may be more pragmatic.[160] Third, authors such as Megret have persuasively

[156] See *supra* 5.1.
[157] *Prosecutor v Lubanga* (ICC-01/04-01/06-3129), Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, Appeals Chamber, 3 March 2015.
[158] Bassiouni, *supra* note 52, pp. 261-262.
[159] *Ibid*., p. 257; L. Magarrell, *Reparations in Theory and Practice* (ICTJ, New York, 2007) p. 5.
[160] F. Megret, 'The Case for Collective Reparations before the International Criminal Court', in J. Wemmers (ed.), *Reparation for Victims of Crimes against Humanity* (Routledge, Abingdon, 2014) pp. 177-179.

argued that collective reparations may lead to better transitional justice processes and outcomes.[161] Within also transitional justice studies, de-Greiff has indeed pointed out that the reconstruction of the rule of law is "an aim that has a public, collective dimension", and must be considered.[162]

Nevertheless, individual reparations should not be excluded at African justice initiatives. Victims may prefer individual awards, which for example occurred with some victims in *Lubanga* (ICC). As Magarrell points out, collective reparations are not easily implementable and may be resisted by individual victims if individual dimensions of crimes are neglected.[163] Furthermore, international human rights law norms are normally expressed in individual terms and individual reparations acknowledge the value of each individual as a rights holder.[164] Indeed, UN Reparations Principles and the IACtHR's jurisprudence evidence the need for a combination of individual and collective awards to provide comprehensive, prompt and proportional reparations to victims of mass atrocities.[165]

To benefit from collective awards granted to attacked communities, the ICC-Appeals Chamber required that community members must have suffered harm resulting from crimes leading to conviction.[166] Thus, there are community members who are not eligible to receive reparations. Conversely, the IACtHR has by adopting a flexible community-based approach ordered awards for entire communities in cases of massacres.[167] However, the ACJHR-ICLS as a criminal judicial forum should adopt the ICC's harm-oriented approach.

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[161] *Ibid*., pp. 179-180.
[162] P. de-Greiff, 'Introduction-Repairing the Past Compensation for Victims of Human Rights Violations', in P de-Greiff (ed.), *The Handbook of Reparations* (OUP, Oxford 2006) p. 14.
[163] Magarrell, *supra* note 159, p. 6.
[164] *Ibid*., p. 5.
[165] E.g., *Plan de Sánchez Massacre v Guatemala* (Reparations) IACtHR Series C No 116 (19 November 2004), para 125.
[166] *Lubanga*, *supra* note 157, para. 214.
[167] *Plan de Sánchez Massacre*, *supra* note 165, para. 86.

6. Reparations Implementation

6.1. *Trust Funds for Victims*

To enable or maximize the impact of ICTs on reparations for victims of mass atrocities, the respective reparations systems include Trusts Funds for Victims where victims' status as reparations claimants/beneficiaries can be also enhanced. Under the EAC-Statute (Article 28(1)), which follows the ICC-Statute (Article 79), a Trust Fund is to be established for victims of EAC-jurisdiction crimes. This was created by the AU Assembly Resolution AU/Dec.615 (XXVII) (July 2016). Its Statute was adopted by the AU General Assembly (January 2018).[168] Unlike the ICC-Statute, the EAC-Statute (Article 28(1)) states that the EAC-Trust Fund "shall be financed by voluntary contributions from foreign governments, international institutions, non-governmental organizations and other entities". The EAC-Trust Fund Statute (Article 15(1)) establishes that this Fund will be financed via convicted person's assets, and voluntary contributions of the AU Member States, international institutions, NGOs, etc.

By invoking the practice of the ICC-Trust Fund for Victims, the EAC-Appeals Chamber ordered the EAC-Trust Fund to use the convicted person's confiscated wealth and voluntary contributions only for victims.[169] Like ICC-Rule 98(3), Article 27(2) states that the EAC may order that reparations be made through the EAC-Trust Fund, which is tasked with reparations implementation.[170] Unlike the EAC, the ECCC lacks a Trust Fund. Despite ongoing challenges, this article argues that the EAC-Trust Fund could in theory enhance reparations implementation, which is illustrated as follows.

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[168] AU, Statute of the Trust Fund for Victims of Hissène Habré's crimes, EX.CL/1040(XXXI) Annex.
[169] *Habré*, *supra* note 30, para. 614.
[170] *Ibid*., para. 899.

The EAC-Appeals Chamber directed the EAC-Trust Fund to do the following in *Habré*.[171] Victims whose civil party constitution requests were inadmissible can submit evidence at the EAC-Trust Fund. It has to examine new evidence filed and can grant reparations. Concerning the 7396 civil parties in *Habré*, the EAC-Trust Fund has to implement reparations. Regarding victims absent from *Habré*, the EAC-Trust Fund should decide on their reparations requests under the EAC-Statute (Article 28(2)). It should ensure reparations for civil parties and victims, and be in association with victims to guarantee victim participation and consideration of victim interests and needs.

While victims appropriately can still claim and receive reparations at the EAC-Trust Fund (post-conviction), reparations are largely limited to civil parties at the ECCC (pre-conviction). However, the convicted person's estate is insufficient to pay the ordered CFA Francs 82.29 billion (approximately EUR 124 million).[172] To implement individual compensations, the EAC-Trust Fund has to survey Habré's financial situation, freeze and seize instrumentalities, property, and assets linked to or owned by Habré; and Habré's current/future confiscated goods and assets shall be deposited with the EAC-Trust Fund.[173]

Concerning the ACJHR-ICLS, Article 46M of the ACJHR-Statute by largely reproducing Article 79 of the ICC-Statute provides for a Trust Fund for Victims. Under Article 46M(1),(3), the AU Assembly shall establish it within the ACJHR jurisdiction "for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims", and "shall be managed according to criteria to be determined by the Assembly". Under Article 46M(2), the ACJHR "may order money and other property collected through fines or forfeiture to be transferred, by order of

[171] *Ibid.*, paras. 606-609.
[172] *Ibid.*, p. 226.
[173] *Ibid.*

the Court, to the Trust Fund". ICC's practice shows that Trust Funds are pivotal to prepare and execute reparations order implementation plans, especially concerning collective awards and considering reparations claims. The ACJHR-Statute omits Article 75(2) *in fine* of the ICC-Statute: "[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund". However, ACJHR-Rules should include a similar provision. Most reparations will be likely implemented via the ACJHR-Trust Fund as the ICC's practice illustrates.

The offender's accountability underlies reparations at ICTs.[174] As the ACJHR-ICLS and ICC determine individual criminal liability, convicted persons are the addressees of reparations orders of ICTs.[175] Upon normative/jurisprudential clarification, the ACJHR-Trust Fund should when necessary advance resources; however, the convicted remains responsible and must refund.[176]

6.2. *Need for Cooperation from States and Other Actors*

The crucial importance of cooperation from state and other actors to mainly implement the EAC and ACJHR-ICLS awards is discussed here. Without such cooperation, these judicial reparations systems become much less effective, which directly affects reparations claimants/beneficiaries.

The EAC lacks the mandate to order reparations against Chad. However, similar to the ICC and ECCC experiences, *Habré* shows the need for cooperation from states and other actors for reparations implementation. Habré concentrated state powers; however, civil parties unsuccessfully requested the EAC-Trial Chamber to declare Chad to be civil responsible for compensation against Habré.[177] Nevertheless, Chad's participation as civil responsible during trial

[174] *Lubanga*, *supra* note 157, para. 65.
[175] ACJHR-Statute, Article 45(2); ICC-Statute, Article 75(2).
[176] *Lubanga*, *supra* note 157, para. 115.
[177] *Habré*, *supra* note 64, paras. 75-76.

was required. The EAC-Trial Chamber should have consulted Chad prior to examining collective reparations requests.[178] The EAC-Appeals Chamber did so but Chad replied in the negative. Chad considered that: teaching Chadian history, a commemoration day and construction of monuments fall into its competence; civil parties conducted no study on development projects; and collective reparations be granted via the EAC-Trust Fund.[179] Sperfeldt has critically remarked that Chad as a state has not fully assumed responsibility for abuses committed by a previous Chadian regime, which indeed limits the EAC's restorative justice impact and compromises potential transformative effects.[180] Although his critique is valid, it remains true that the EAC cannot order awards against Chad. Thus, whether the EAC and other ICTs are the best place to aim at transformative justice may be questioned. To guarantee prompt and effective operationalization of the EAC-Trust Fund, the EAC-Appeals Chamber has called the AU and diverse actors, particularly states interested in cooperating.[181] It invoked UN Principle 13, "States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate".

The EAC-Appeals Chamber ordered that: the EAC-Trust Fund, in collaboration with associations assisting victims and interested states, implements collective and moral reparations; and goods, fines or confiscations are placed with the EAC-Trust Fund.[182] The EAC-Trust Fund oversights the convicted person's financial situation to seize Senegalese courts to cover convicted person's instrumentalities of goods and execute reparations under the EAC-Statute (Article 37). The EAC-Trust Fund can request expert opinions and issue cooperation requests, and must with

[178] EAC-Statute, Article 27(3); *Habré*, *supra* note 30, para. 862.
[179] *Ibid*., paras. 863-866.
[180] Sperfeldt, *supra* note 21, pp. 1250, 1254.
[181] *Habré*, *supra* note 30, para. 611.
[182] *Ibid*., paras. 612-613.

victim association assistance disseminate the EAC-Appeals Chamber's reparations order so that victims are informed.[183] The EAC-Appeals Chamber invited the EAC-Trust Fund to contact Chad, interested states, interested organisations and civil party associations regarding the eventual realization and implementation of collective and moral reparations.[184] Interested states were also invited to cooperate with the EAC-Trust Fund to execute individual reparations and guarantee collective reparations.[185] Academic literature has rightly been sceptical to the transformative impact of these reparations (particularly compensation) in Chadian society, especially because of the lack of cooperation from Chad.[186] The EAC should have established some mechanism similar to the ECCC's: judicial approval of collective reparations projects, timely designed, voluntarily funded and/or executed by several actors (ECCC, civil parties, NGOs, Western governments and Cambodia).[187] The *Consortium de Sensibilisation sur les Chambres Africaines Extraordinaires* has met victims for information and discussion concerning reparations implementation, and victims have posed questions and/or expressed concerns about reparations implementation delay, reparations funding, and scope of beneficiaries.[188]

Concerning the ACJHR-ICLS, the need for cooperation from states and other actors can be examined under normative and funding considerations as academic literature suggests.[189] Concerning normative aspects, the lack of (adapted) contents of Article 75(4) of the ICC-Statute in the ACJHR-Statute may undermine the ACJHR-ICLS reparations implementation regime. Under Article 75(4) of the ICC-Statute and upon conviction, the ICC may seek state cooperation

[183] *Ibid*., paras. 612-615.
[184] *Ibid*., p. 226.
[185] *Ibid*.
[186] Sperfeldt, *supra* note 21, pp. 1253-1254.
[187] *Case 002/01*, Judgement, Trial Chamber, 7 August 2014, paras. 1109-1164.
[188] EAC Interactive Forum <http://forumchambresafricaines.org/communication-les-demandes-des-victimes-concernant-le-fonds-au-profit-des-victimes-dans-le-proces-hissein-habre/> visited on 1 February 2019.
[189] *See* Pérez-León-Acevedo, *supra* note 108, pp. 477-480, 481.

to give effect to reparations orders. Pursuant to the ICC-Statute (Article 93(1)), the ICC can ask States Parties "identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture". Article 46L(2)(f) of the ACJHR-Statute reproduces these norms. Identification and freezing of the convicted person's assets is fundamental to guarantee reparations funding.[190] Protective measures are necessary to secure funds for victim reparations. For timely seizure or freezing of the convicted person's assets and/or properties, state cooperation is required.[191] Another ACJHR-Statute normative gap is the lack of the adapted contents of Article 75(5) of the ICC-Statute: States Parties shall give effect to reparations decisions. That AU Member States must give effect to ACJHR-ICLS reparations awards is assumed. Nevertheless, the ACJHR-Rules should make it explicit.

Financial cooperation from states and other actors will also be crucial for the ACJHR-ICLS reparations implementation as evidenced by funding challenges that the ICC-Trust Fund for Victims faces. The ACJHR-ICLS cannot issue reparations orders against states but only against the convicted who are mostly indigent at ICTs. The ECCC and ICC have relied exclusively or mainly on donations for reparations funding. Donations and contributions by States Parties, institutions and individuals have constituted ICC collective reparations funds.[192] Donations also constitute most of the AU budget.[193] Whereas the 2017 AU budget was USD 782.1 million, AU Member States' contributions totalled USD 205.1 million.[194] The approved 2019 AU budget saw a substantial decrease.[195] Also, the ACtHPR substantially relies on donations, e.g., out of its 2016

[190] *Lubanga*, *supra* note 91, para. 277.
[191] *Prosecutor v Bemba* (ICC-01/05-01/08-8), Décision et Demande en Vue d'obtenir l'identification, la Localisation, le Gel et la Saisie des Biens et Avoirs Adressées à la République Portugaise, Pre-Trial Chamber-III, 27 May 2008.
[192] ICC-ASP/15/14), 16 August 2016, para. 10.
[193] Amnesty International, *Malabo Protocol-Legal and Institutional Implications of the Merged and Expanded African Court* (2016) p. 31.
[194] Doc.EX.CL/Dec.919(XXIX), AU Executive Council, 13-15 July 2016, p. 1.
[195] African Union, <https://au.int/en/pressreleases/20180706/financial-reforms-african-union-lead-massive-cuts-union%E2%80%99s-budget> visited on 1 February 2019.

budget that was USD 10.386 million, partner funds meant USD 2.451 million.[196] Furthermore, key donors may hesitate to contribute to the ACJHR because of important normative deficits. There are concerns about the real (political) intentions behind the ACJHR-ICLS. An EU representative said that the lack of the EU's support for the Malabo Protocol is because this instrument "includes the provision of immunity for sitting Heads of State and senior state officials and lacks complementarity with the ICC".[197] Additionally, as the ICC's practice shows, the funding of reparations bodies is expensive.[198]

Accordingly, continuous funding will enable the ACJHR-Trust Fund for Victims to implement ACJHR-ICLS-ordered reparations. Fundamental normative changes in the ACJHR-Statute related to immunities and ICC complementarity should enhance the legitimacy of the ACJHR-ICLS. Thus, external donor support may substantially increase. Proper funding should strengthen victims' chances to receive effective and proportional reparations as UN Reparations Principle 15 prescribes. This can avoid re-victimization, which may happen if reparations are only symbolic. As suggested or implied in legal literature, individual compensation and other individual and collective reparations modalities should be combined concerning mass atrocities.[199] This may boost the legitimacy and effectiveness of the ACJHR-ICLS, particularly as for victims.

In any event, unlike the EAC, ICC and ECCC, Article 46C(1) of the ACJHR-Statute endows the ACJHR-ICLS with "jurisdiction over legal persons" but "with the exception of States". Under Article 46C(5), criminal responsibility of legal persons does not exclude individual criminal liability for the same crimes. Since international crimes have involved corporations, these provisions may mean additional funds to finance ACJHR-ICLS reparations awards.

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[196] Executive Council, *Report on the Activities of the ACtHPR*, (EX.CL/999(XXX)), 22-27 January 2017, para. 34.
[197] *EU Statement at the African Judicial Dialogue*, 6 November 2015, Arusha, Tanzania, p. 3.
[198] ICC-ASP/15/10, 17 August 2016, paras. 699, 787.
[199] Bassiouni, *supra* note 52, pp. 265-275.

Furthermore, like the EAC-Statute (Article 27(4)), Article 45(4) of the ACJHR-Statute reproduces Article 75(6) of the ICC-Statute: "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law". Unlike the EAC and ICC, this provision can be implemented at the ACJHR. The ACJHR is the only international court which can establish individual and state responsibility. Individual criminal liability and state responsibility are complementary: two sides of the same coin in Cançado-Trindade's words.[200] The same or overlapping facts can lead to determination of both liabilities, normally at two courts, e.g., *Democratic Republic of Congo vs Uganda* (ICJ)[201] and cases related to the Democratic Republic of Congo (ICC).

At the ACJHR, victims may claim reparations at the ACJHR-ICLS and ACJHR-Human Rights Section, related to respectively individual criminal responsibility and state responsibility for the same or overlapping facts. This is clearly the situation when perpetrators are/were (former) state agents. Scholars have recognised that actions committed by non-state actors can lead to state responsibility if the state breaches due diligence obligations.[202] This applies when the state is aware of an actual or immediate risk against certain person(s) and had a reasonable opportunity to prevent it.[203] Mainstream academic literature accepts that a heightened duty is applicable when a certain (vulnerable) group was previously targeted.[204] The ACtHPR found state responsibility and reparations for lack of due diligence in trying non-state actors responsible for murders.[205] Moreover, as the IACtHR determined and Judge Eboe-Osuji recognized in the ICC's collapsed

[200] A. Cançado-Trindade, *International Law for Humankind* (Brill/Nijhoff, Leiden, 2010) pp. 367-374.
[201] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.
[202] D. Shelton and A. Gould, 'Positive and Negative Obligations', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP, Oxford, 2013) pp. 577-582.
[203] *Cotton Field*, *supra* note 43, para. 282.
[204] I. Bantekas and L. Oette, *International Human Rights Law and Practice* (2nd ed., CUP, Cambridge, 2016) p. 350.
[205] *Zongo*, supra note 70, para. 30.

Ruto and Sang, reparations for victims are not subject to conviction.[206] The ACJHR-ICLS and ACJHR-Human Rights Section must coordinate with each other, especially to determine the specific role of responsible states and reach fair reparations awards. This should lead to 'tripartite' reparative complementarity: the ACJHR-ICLS, the ACJHR-Human Rights Section, and states.

7. Conclusion

The EAC and the prospective ACJHR-ICLS constitute quite interesting cases of AU regionalization of international criminal justice and the first regional criminal 'court' respectively, at which victims can claim and receive reparations. In *Habré*, the EAC construed the scope of victimhood for reparations via the adapted use of *inter alia* the law and practice of the ECCC and the ICC and international human rights law sources. The ACJHR-ICLS should consider similar sources, particularly ICC sources. Indeed, the ACJHR-ICLS could benefit from the EAC's reparations case-law. Victims as civil parties exercised their reparations-related procedural rights in *Habré*. Although the civil party status is absent from the ACJHR-Statute, victims as reparation claimants at the ACJHR-ICLS are parties to post-conviction reparations proceedings and, thus, must have suitable procedural rights. These can be derived (as adapted) from ICC sources. In *Habré*, victims could not receive collective and moral reparations due to implementation limitations and rehabilitation *per se* was neither requested nor ordered; however, the EAC ordered important individual compensations. Such exclusive focus on individual compensations should be criticized. It is inconsistent with the goal of holistic reparations for victims recognised in international practice and affirmed in relevant literature. Thus, the ACJHR-ICLS should when

[206] *Velásquez-Rodríguez v Honduras* (Merits) IACtHR Series C No 4 (29 July 1988), para. 194.5; *Prosecutor v Ruto and Sang* (ICC-01/09-01/11-2027-Red-Corr), Decision on Defence Applications for Judgments of Acquittal-Reasons of Judge Eboe-Osuji, 5 April 2016, paras. 201-210.

feasible grant both individual and collective awards that combine compensation, rehabilitation, restitution and symbolic modalities to provide meaningful but feasible reparations.

Nevertheless, to realise these reparations outcomes, besides (potential) normative/jurisprudential deficits, ICTs such as the EAC and ACJHR-ICLS face important implementation challenges. Unlike human rights courts, those bodies order reparations against individuals rather than states. Accordingly, the success of reparations implementation in *Habré* depends on financial and non-financial cooperation from states and other international community actors. The same applies to the ACJHR-ICLS. Nevertheless, the ACJHR-ICLS is part of the ACJHR, i.e., victims may receive reparations out of dual state-individual liability determination (ACJHR-Human Rights Section and ACJHR-ICLS) for the same or overlapping facts. The ACJHR-ICLS should indeed consider ACtHPR reparations case-law. Additionally, the Trust Funds for Victims of the EAC and the ACJHR-ICLS are necessary to design and execute reparations implementation plans. .

Overall, the reparations law and/or practice of the EAC and ACJHR-ICLS are consistent with international law sources and relevant scholarship. In this context, the reparations systems of these two African justice initiatives arguably provide important grounds for the realisation of victims' right to claim and receive reparations. However, the full and effective realisation of such a potential outcome depends on whether and to what extent normative, jurisprudential and implementation deficits and challenges are properly handled.