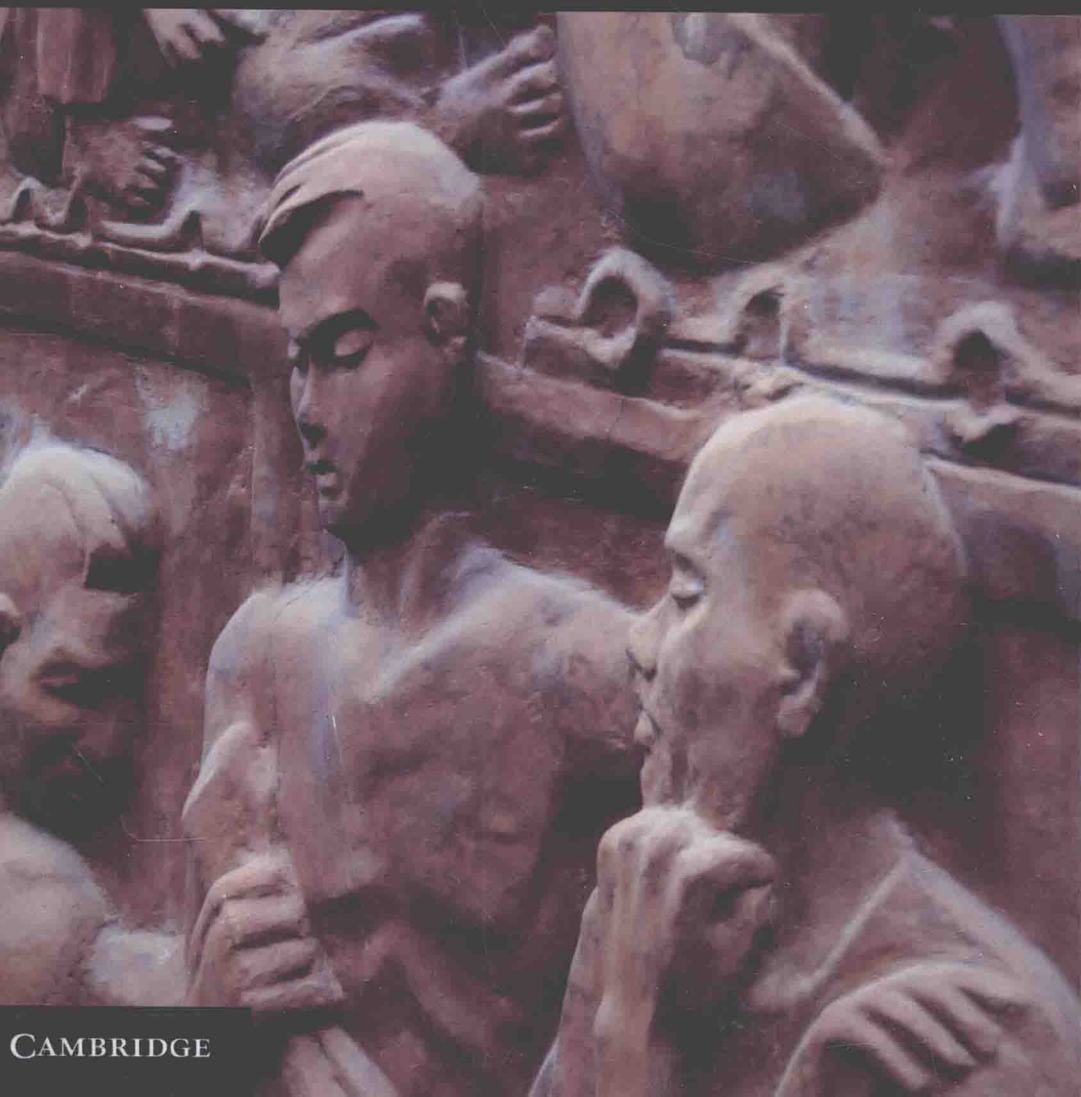


CONOR MCCARTHY

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Reparations and Victim Support in the International Criminal Court



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Reparations and Victim Support in the International Criminal Court

Alongside existing regimes for victim redress at the national and international levels, in the coming years international criminal law and, in particular, the International Criminal Court, will potentially provide a significant legal framework through which the harm caused by egregious conduct can be addressed. Drawing on a wealth of comparative experience, Conor McCarthy's study of the Rome Statute's regime of victim redress provides a comprehensive exploration of this framework, examining both its reparations regime and its scheme for the provision of victim support through the ICC Trust Fund. The study explores, in particular, whether the creation of a regime of victim redress has a role to play as part of a system for the administration of international criminal justice and, more generally, whether it has such a role alongside other regimes, at the national and international levels, by which the harm suffered by victims of egregious conduct may be redressed.

CONOR MCCARTHY is a visiting fellow at the British Institute of International and Comparative Law. He is called to the bar of England and Wales and has previously worked at a number of international courts and tribunals including the International Criminal Court and the European Court of Human Rights.

Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelation.

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To my parents

Foreword

The field of post-conflict reparation is one that is now increasingly populated with a wide assortment of different institutions, processes and regimes ranging from human rights courts and supervisory mechanisms to ad hoc claims commissions, not to mention a multitude of reparations arrangements often, though by no means always, established at the national level in the aftermath of protracted periods of civil war or repression.

Into this heterogeneous patchwork of institutions, mechanisms and procedures the International Criminal Court's regime of redress has been interposed. The Court's regime of victim redress – encompassing both a system of Court-ordered reparations and a broader system of redress sponsored by the ICC's Trust Fund for Victims – was a somewhat controversial addition to the Statute of the International Criminal Court. While some delegations, for instance the French, were strongly supportive from a relatively early stage,¹ others were cautious or even sceptical. This caution was reflected in the International Law Commission's own Draft Statute for an International Criminal Court, which served as a precursor for negotiations leading to the Rome Statute and which made rather modest proposals on this subject.²

The Rome Statute, in this as in other respects, went considerably further. Yet nearly fifteen years on from the Rome Conference, much

¹ See e.g. Articles 130(3), 92(4) and 153, Working Paper of France, Draft Statute for an International Criminal Court, 6 August 1996, A/AC.249/L.3. See further Proposal of France, Article 45 *bis*, 5 December 1997, A/AC.249/1997/WG.4/DP.3.

² See Article 47(3), Draft Statute for an International Criminal Court, in Vol. II, Part Two, *Yearbook of the International Law Commission* 1994, A/CN.4/SER.A/1994/Add.1, p. 60 (providing for the possibility of fines against perpetrators and for the establishment of a trust fund for victims of crimes within the jurisdiction of the Court).

uncertainty surrounds the new regime. There is uncertainty as to the role that it can play alongside the many others that exist at both the national and international levels. Perhaps more fundamentally, there is uncertainty as to whether the framework of international criminal law is an appropriate context within which the harm caused by the excesses of war or large-scale violence can or should be addressed.

It is too early as yet to offer definitive responses to these fundamental questions, not least because of the ICC's limited practice to date on matters of reparations. But it is perhaps now, when the development of practice is at its infancy, that the exploration of the uncertainties surrounding the regime, its role and purpose, is most valuable.

Conor McCarthy's study of the International Criminal Court's regime of reparations and victim support provides a timely and thoughtful study of these important issues. Care is taken by the author to place the ICC's regime within its proper context, both historical and current. Drawing on a rich body of comparative practice, the study provides a comprehensive and measured analysis of the ICC's regime of redress, using the comparative material to provide a critical analysis of its possibilities and limitations. In so doing, it considers some controversial areas including: the concept of 'harm'; the victims who may benefit from reparations and how this may be determined; the form reparations principles may take in the specific context of international criminal law; and the relationship between the Court and national systems in the implementation and enforcement of reparations decisions.

The work is not, however, confined to issues pertaining to the Rome Statute's regime itself. The study also addresses broader questions to which the creation of the regime gives rise. A thoughtful analysis is offered as to the potential role of the ICC's system of redress alongside cognate regimes at the national and international levels, offering a careful and balanced analysis of whether the ICC has a distinct and beneficial contribution to make within this wider context. More generally, the study offers a sustained engagement with the question of whether international criminal law, and specifically the system created by the Rome Statute, is an appropriate context within which to deal with the egregious excesses of armed conflict and other forms of large-scale violence falling within the jurisdiction of the Court.

It remains to be seen whether, in the end, the ICC's system of reparations and victim support will provide an effective means of remedying some of these effects or whether the challenges the Court faces in this area – of which there are many – will prove too great a burden for

resolution through legal processes established in the context of international criminal law. Whatever the answer to these questions, the present study represents a significant and timely contribution to this debate.

James Crawford
Whewell Professor of International Law
University of Cambridge
1 August 2011

Acknowledgements

The initial inspiration for this book emerged during the period I spent in Rwanda and Sierra Leone. In the course of my time in those countries part of my work involved travelling to towns and villages and interviewing or speaking with victims and witnesses about their experiences and past events. The situation of impoverishment in which most victims lived, not to mention the severely debilitating injuries many had endured, were often immediately apparent. Equally apparent, however, was the fact that, despite the huge sums of money poured into international tribunals to enable the prosecution and punishment of a relatively small group of individuals, many victims had limited or no understanding of the work of such institutions let alone a sense of having received anything tangible from their work. Instead, in countries blighted by poverty and weak infrastructure, many victims were simply left to fend for themselves or rely on their family, friends and neighbours to cope with their injuries and re-establish their lives.

This present book is, at least in part, inspired by this experience. In substance it is based on my doctoral thesis completed at the University of Cambridge, under the supervision of Dr Roger O'Keefe. In the course of my PhD research there are many people who have provided support, assistance, advice and friendship without whom the experience of preparing this body of research would have been a much less fulfilling and more arduous one. I have benefited immensely from the vibrant international law research community at the Lauterpacht Centre and, in particular, from discussions with its fellows and residents. The community of researchers both at the Law Faculty, Jesus College and elsewhere at Cambridge University has also provided a tremendously supportive environment in which to undertake academic research and this is something which I have valued greatly.

Many members of the Law Faculty have also been very helpful both in the development of my own research and more generally. In particular, I thank James Crawford, Guglielmo Verdirame, Zachary Douglas and Christine Gray. Special mention must be made of my thesis supervisor, Dr Roger O'Keefe, whose encouragement and support have benefited this work considerably. The thoroughness and care with which he commented on and critiqued my work were invaluable, and I am very much indebted to him for this. I am also very grateful to the many friends who have provided encouragement and support throughout my PhD. I am particularly indebted to Kate Parlett, Stephen Moore, Nick Godfrey, Christopher Thomas, Lee Schab, Patrick Wade, Michael Kelly, David Koller and Megan Hirst.

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In the final stages of preparing this work I have been fortunate to be appointed to a visiting research fellowship at the British Institute of International and Comparative Law (BIICL). The staff at BIICL have made me feel enormously welcome. Not only has the fellowship afforded me facilities and space in which I could take this work forward but the research community at BIICL also provided much-needed encouragement and support in the final stages of this project's completion. This research was also facilitated by the UK's Arts and Humanities Research Council and I would like to gratefully acknowledge its financial support, which has funded my studies at both masters and doctoral levels. Without the Council's support this project would not have been possible.

In developing my ideas and research agenda, several members of staff at the International Criminal Court and other international criminal tribunals, including Enrique Carnero Rojo, Gilbert Bitti, Morten Bergsmo, Fiona McKay, David Koller, Caroline Wojtylak, Megan Hirst, Sevtlanda Pouplard and Nicole Lewis, have given me their time (in a non-official capacity) together with information and practical assistance. I

am grateful to them all. In addition, in interpreting various provisions of the Rome Statute and various related instruments it was, at times, useful to make reference to the equally authentic Chinese, Arabic, French, Spanish and Russian texts into which these instruments have been rendered. I wish to express my gratitude to Ekaterina Shutova (Russian), Sun Chenguang (Chinese) and Samir Mahmoud (Arabic) where their linguistic abilities have compensated for my lack thereof. Except where otherwise stated, I have provided the translations of French and Spanish texts.

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The cover image is of a relief sculpture serving as a memorial for prisoners of war in the Hỏa Lò Prison, Hanoi, Vietnam.

Finally, my family have been immensely supportive throughout this whole process and it is they to whom I owe the greatest debt. Emma, Nick and Anna have all provided encouragement and help along the way. I am especially grateful to my parents, Nora and Harry, who unstintingly encouraged me to pursue my interests and who never failed to support my educational ambitions in any way they could. This book is dedicated to them.

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