Cohen, Miriam: Realizing Reparative Justice for International Crimes: From Theory to Practice. Cambridge: Cambridge University Press, 2020. ISBN: 978-1-1084-7268-5. 259 pp. £ 85,-

The literature on victims in international law is becoming voluminous.[1] Reasons for this publishing phenomenon are no doubt manifold. It is not just a topical issue in the light of victim-centered developments over the last 35 years,[2] but also one underpinned by purely humanitarian motivations of those who examine how international law engages with the task of repairing harms sustained by individual victims of international crimes. This positive "inflation" of the scholarship as well as the growing body of victim-oriented black-letter law, however, both seem to lie somewhat at odds with how the situation of victims' right to reparations presents itself in practice before various judicial bodies.

Against this backdrop, Miriam Cohen's recent book is a valuable and timely contribution to an ongoing debate on the ways in which justice for victims should become instituted. The author offers an up-to-date analysis of existing regulations and engages with decisions and judgments of international, hybrid as well as domestic courts and tribunals. The primary objective

1 Eva Dwertmann, The Reparation System of the International Criminal Court (Leiden-Boston: Martinus Nijhoff Publishers 2010); Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge: Cambridge University Press 2012); Luke Moffett, *Justice for Victims before the International Criminal Court* (London-New York: Routledge 2016); Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (Turku: Abo Akademi University 2004); Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Cambridge/Antwerp/Portland: Intersentia 2011); T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford: Oxford University Press 2015); Tatiana Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court* (Leiden/Boston: Brill-Nijhoff 2017); Ghislain M. Mabanga, *La victime devant la Cour pénale international* (Paris: L'Harmattan 2009); Aurélien-Thibault Lemasson, *La victime devant la justice pénale internationale. Pour une action civile internationale* (Limoges: Pulim 2011); Omar Al-Farouq Abo Yousef, *Die Stellung des Opfers im Völkerstrafrecht unter besonderer Berücksichtigung des ICC-Statuts und der Rechte der Opfer von Völkerstrafrechtsverbrechen in der Schweiz* (Zürich: Schulthess Verlag 2008); Stefanie Bock, *Das Opfer vor dem Internationalen Strafgerichtshof* (Berlin: Duncker & Humblot 2010); Juliane Niendorf, *Extensive Opferbeteiligung im Verfahren vor dem Internationalen Strafgerichtshof. Eine kritische Betrachtung* (Berlin: Logos Verlag 2017); Esperanza Orihuela Calatayud, *Las víctimas y la Corte Penal Internacional. Análisis de la participación de las víctimas ante la Corte* (Navarra: Thomson Reuters 2014); Salvador Guerrero Palomares, *La defensa procesal de las víctimas ante la Corte Penal Internacional* (Navarra: Thomson Reuters 2014); Tomasz Lachowski, *Perspektywa praw ofiar w prawie międzynarodowym. Sprawiedliwość okresu przejściowego (transitional justice)* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2018).

2 Among others: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Adopted by General Assembly resolution 40/34 of 29.11.1985; Rome Statute of the International Criminal Court (ICC) adopted in 1998 with its victim-related provisions (i. a. Articles 68 and 75).

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of M. Cohen's work is to present a holistic account of reparations for international crimes. This is the reason why the author examines different subsystems of international law as well as domestic regulations of various states, and reflects on both judicial and non-judicial practices of granting reparations to victims of mass atrocities.

The book consists of six chapters. Alongside general remarks about the nature of justice and the conceptualisation of the right to reparations (chapter I), much debated issues of reparations to victims before international and hybrid bodies (chapter II) as well as the International Criminal Court (chapter III), the study also features excellent analyses in chapters IV and V concerning respectively the functioning of the Trust Fund for Victims (Article 79 of the Rome Statute) and the role of domestic bodies in realising reparative justice to victims of international crimes. These two chapters, which advance our understanding of other than strictly judicial (chapter IV) or international (chapter V) dimensions of reparations, are particularly useful additions to the body of scholarship since they address issues which have received much less scholarly attention to date. In chapter VI, in turn, the reader will find some interesting concluding remarks.

M. Cohen demonstrates that nowadays victims of international crimes may find themselves in different legal contexts depending on whether *their* case is brought before an international, hybrid or a domestic court. In these diverse institutional settings, victims are equipped with various legal instruments for advancing their claims and expressing their expectations. These systemic divergences are notable especially in terms of reparative justice given that international law still lacks a separate branch of international civil (tort) law that would allow victims to bring actions against individual offenders (tortfeasors) to a hypothetical international (civil) court.[3] In consequence, the victim's right to reparations will operate in a different manner depending on the institutional context in which it is invoked (p. 5). For example, as regards international criminal trials, the condition that the conviction must precede victims' reparative claims (e. g. Article 75 of the Rome Statute) has effectively limited the scope of harms that may become repaired in this particular legal setting.

These issues notwithstanding, M. Cohen argues persuasively that international criminal justice should be viewed as a two-way endeavour that is focused not just on an offender, but also assigns a separate role to the victims. This – admittedly – was not how the crime phenomenon and responses to it have traditionally been understood in international criminal law. What made

3 See also Maya Steinitz, *The Case for an International Court of Civil Justice* (Cambridge: Cambridge University Press 2018).

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the shift from a retributivist to a mixed model of justice over the last 75 years possible, however, was precisely an inadequacy of the strictly punitive response to mass atrocities. M. Cohen suggests that "[g]iven the less important role of retribution as a justification for punishment in this context, it is understandable how victim redress could make its way into international criminal law" (p. 17). Moreover, the author maintains that reparative and punitive justice may go hand-in-hand as far as their functionalist justification is concerned. She advances the view that not just punishment, but also reparations may bring retributive, deterrent and preventative effects (pp. 24-27). Despite their inherently different nature, mechanisms of reparative justice are therefore not precluded by the criminal law-perspective. On the contrary – they may effectively supplement it.

Before the entry into force of the International Criminal Court's (ICC's) Rome Statute in 2002, reparative justice had played only a minor role in international criminal law. With respect to the International Criminal Tribunal for the former Yugoslavia (ICTY), M. Cohen explains that "practical considerations played an important role in the decision not to have the tribunal deal with claims for reparations" (p. 58). While these worries may have been justified when the ICTY and the International Criminal Tribunal for Rwanda (ICTR) were being created, the fact that victims of atrocities committed in the former Yugoslavia and Rwanda did not have effective instruments of redress has left a mark on these tribunals' legacy (p. 62). Moreover, it was not positively assessed by other actors (e. g. Non-Governmental Organisations [NGOs]) and stakeholders (e. g. some states) as well. Not surprisingly, therefore, subsequent international and hybrid tribunals have been afforded more diversified mandates than *ad hoc* tribunals, including the power to order reparations to the crime victims (e. g. Article 75 of the Rome Statute). As a result, reparative justice is currently accepted as a necessary component of international criminal law.

But the said development has not been as uniform and as linear as it may seem at first sight. An analysis conducted by M. Cohen portrays many internal divergences in terms of victim-related regulations between new judicial bodies such as the ICC, the Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Special Tribunal for Lebanon (STL). International criminal law still does not employ a uniform model for redressing victims' harms. The proliferation of international and hybrid criminal tribunals in recent times has resulted in the emergence of new procedural (e. g. rules of participation) and substantive (e. g. forms of reparations) provisions relating to victims of international crimes. While one may question whether it is sensible to design separate and oftentimes considerably different procedural frameworks for each new supranational criminal tribunal, bearing in

mind the existing legal diversity one has to share M. Cohen's view that it is still too early to contend "which model is best suited to the international level" (p. 74).

Furthermore, in terms of the functioning of the ICC, M. Cohen takes an unequivocally critical view on the Court's flexibility in relation to the procedure and substantive aspects of reparations by analysing the reparations orders in the cases of *Lubanga, Al Mahdi* and *Katanga*.[4] The author rightly notes that the ensuing jurisprudential inconsistency has "caused delays and uncertainties in the process" (p. 110). Moreover, she claims that both victims and convicted persons have been "left in the dark" as far as the calculation of the final sum of reparations is concerned. M. Cohen's plea for more transparency and efficiency is entirely justified (pp. 110-111). Another postulate that may be found in the book refers to the temporal element. M. Cohen notes in this respect that the delays in the implementation of reparation orders have "a potential for revictimisation" of those affected by international crimes (p. 116). This is certainly true. Consequently, victims may be injured not just in a primary sense by those who inflict harms on them through the commission of international crimes, but also in a secondary way due to an inefficiency and errors of the international criminal justice system.

In terms of the scope of recognised victimhood, one should not forget that not all victims – even if they fall within the confines of the situation or even the specific case – will have a chance to interact (directly or indirectly) with the Court. Following other scholars,[5] M. Cohen introduces a useful distinction between those victims who become *judicially recognised* and those who remain *invisible* in the eyes of the Court (p. 123). By definition, justice can be delivered only to the former group. But while the hierarchy of victimhood that stems from the Court's practice is no doubt controversial, it does not characterise only the ICC. That said, it is arguably in this institutional context that the said "gradation of victimhood" may lead to more tangible consequences for the victims given their stronger position before the ICC in comparison to other international criminal courts and tribunals. The ICC's potential to leave – either a positive, or a negative – impact on affected individuals is therefore proportionately greater. Accordingly, M. Cohen's conclusion that "there is a gulf between the rhetoric and the reality which stands in the way of advancing the system of <justice for victims>" is premised on strong factual and legal arguments (p. 125). This conclusion is

4 In March 2021, the ICC issued the fourth reparations order in the case of *Ntaganda. The Prosecutor v. Bosco Ntaganda*, Reparations Order, ICC-01/04-02/06-2659, 8.3.2021.

5 Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', Law & Contemp. Probs. 76 (2013), 235-262.

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also deeply worrying. For despite the lapse of 20 years since its establishment, the ICC still appears to be in the process of testing various approaches and solutions. One may only hope for a more predictable and uniform approach to reparations and victim participation in the Court's practice in the future.

Judicial aspects aside, M. Cohen is clearly supportive of the ICC's Trust Fund for Victims (TFV), which plays an administrative role in reparation proceedings and their implementation within the ICC system. Indeed, the author maintains that it is sensible to have a separate organ that has "eyes on the ground" and is responsible for designing and implementing reparations (pp. 138-139). In addition, the TFV plays a crucial role in providing humanitarian assistance to the victims, thereby representing "the expression of a need to bridge a gap that in many cases is left by a criminal approach to reparations" (p. 144). The assistance mandate may thus mitigate various systemic and practical imperfections of the ICC's reparation mechanism due to the latter's inextricable nexus to the criminal phase and the guilty verdict.

Apart from noting the TFV's positive sides, however, M. Cohen does not turn a blind eye on the problems faced by the Fund as well. On the contrary, she reflects on the timing of various assistance programs, and rightly concludes that they "should be put in place sooner in certain situations" (p. 146). In this respect, it is also worth noting that in some cases many years may pass before victims receive any assistance – not to mention reparations – ordered by the TFV and the Court. These temporal complications are not accidental, however. Trying to explain their roots, M. Cohen has identified financial (insufficient funds) and organisational (human capacity) causes of this situation within the TFV's operation (pp. 146-147).

When considered from the victim's perspective, the history of international criminal law represents a gradual and constant advancement of their case and position. All the same, given various organisational (e. g. financial) and practical (e. g. length of processes and implementation, indigence of the defendants) challenges faced by the ICC's model of reparations, one cannot categorically exclude the possibility that the creators of subsequent supranational criminal tribunals will decide to take a step back and transfer reparative powers to domestic bodies instead of international or hybrid tribunals.

In this respect, M. Cohen first notes the overall scarcity of international mechanisms. This factor already limits the scope of victimhood that may be recognised and redressed by international courts and tribunals. A more important argument, however, is premised on pragmatic reasons since – as Cohen notes – "national courts are already in place" all around the world, which means that they do not have to be set up from scratch for the sole purpose of conducting international criminal trials (p. 165). Indeed, on both

economic and logistical levels, domestic courts may oftentimes be better positioned to deal with victims' claims since they are – by definition – closer to the witnesses, affected communities and other evidentiary materials (p. 166). From this it follows that at least in some cases, victims may be better off if their victimisation were to be examined by a domestic, rather than an international court or tribunal.

On the other hand, the ensuing picture of the domestic-international dichotomy does not represent the whole legal and practical reality given that domestic courts often happen to be hardly ideal as far as the victims' right to redress is concerned. To substantiate this point, M. Cohen mentions political and institutional obstacles that victims of international crimes have faced when trying to pursue their cases before domestic judicial bodies (p. 166). Consequently, at least in some situations, domestic courts – despite their logistical and organisational advantages – may not be able to examine a case in an independent and efficient manner. In this regard, it is worth recalling that an ineffectiveness of domestic responses to mass victimisation in the post-conflict context has been one of the main reasons for establishing previous international and hybrid criminal courts.

After considering all these pros and cons, M. Cohen reaches a systemic suggestion. She submits that "[i]nternational criminal justice should not be fragmented in the sense that international and national proceedings and mechanisms operate in a dissociated and parallel manner. They should feed off each other, and work in conjunction" (p. 167). This claim points to an important, even if sometimes overlooked, fact that each institutional setting (ICC, ICTY, ICTR, STL, ECCC etc.) is separate only in an "abstract legal reality". What this means is that victims may oftentimes have no choice but to move across these various juridical subsystems and mechanisms when their victimisation becomes an object of manifold criminal proceedings.[6] In such a case, one day their harms may be examined by one court (e. g. international), and the other day by another court (e. g. domestic or even local). The consequence of this diversity is that it puts additional burdens on the victims themselves. It requires from them to be familiar with various rules and principles and to face myriad procedural challenges and obstacles created by regulations of each tribunal. Most importantly, however, victims will be treated differently (as participants, witnesses, claimants, parties etc.) by these bodies given the specific features of their individual mandates. This institu-

6 Nevertheless, usually there are too few, rather than too many criminal proceedings in the post-conflict context (accountability gap). That said, one can find examples of situations and proceedings where the above objections are clearly applicable (e. g. victims from Myanmar – ongoing trials before the ICJ, ICC and domestic courts).

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tional, substantive and procedural fragmentation of international criminal law may therefore create a justifiable confusion among the victims.

For this reason, M. Cohen's plea for consistency and for a more systemic way of thinking about these issues should be carefully examined and taken into consideration in the future. M. Cohen's book, in turn, should be recognised as a useful source of information and a reference point for those who possess normative powers to modify binding regulations or even totally transform practices of affording reparations to victims of international crimes.

Patryk Gacka, Warsaw[7]

7 This review paper was financed from the budgetary funds for science in Poland for the years 2016-2021 as part of the research project within the Diamond Grant program (0172/DIA/2016/45).

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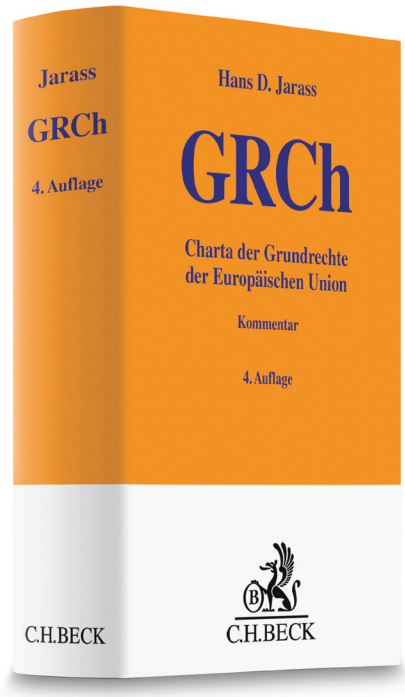

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