REMEDYING VICTIMS OF KHMER ROUGE CRIMES WITH SUSTAINABLE HEALTHCARE THROUGH REPARATIONS OR TRANSITIONAL JUSTICE PRINCIPLES[*]

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"Nothing is settled permanently that is not settled right."
– Anonymous proverb

Introduction

1. Victims of large-scale human rights violations have a fundamental right to reparations grounded in the Universal Declaration of Human Rights ("UDHR")[1] and international human rights treaties such as the International Covenant on Civil and Political Rights ("ICCPR").[2] Unfortunately, rarely, if ever, are mechanisms adopted and implemented that would meaningfully redress the victims. The Cambodian victims of the violations of human rights committed during the Democratic Kampuchea ("DK") period of 1975 to 1979[3] – many

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[1] Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948, Art. 8.
[2] International Covenant on Civil and Political Rights, Adopted by General Assembly Resolution 2200 A(XXI) of 16 December 1966, Art. 3(a-b); Human Rights Committee, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. No. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 16.
[3] The DK period refers to the reign of the Communist Party of Kampuchea ("CPK") over Cambodia from 1975 to 1979. The CPK had its origins in the Indochinese Communist Party ("ICP"), established in 1930, which was strongly influenced by Vietnamese communists. When the ICP dissolved in 1951, the newly created party in Cambodia was the Khmer People's Revolutionary Party ("KPRP"), which tried to dominate groups fighting for independence. The KPRP was declared a "workers party" at its 1960 Congress and was identified by the Co-Investigating Judges in Case 002 as the "real starting point of the Cambodian communist movement." The existence of the CPK was not officially announced until 1977, when the party had been in power in Cambodia for more than two years. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2021, D427, paras. 18-20. During DK period, the CPK leaders sought to implement a rapid socialist revolution through the "great leap forward," which was to be achieved by implementing five policies: (a) movement of the population from towns and cities to rural areas; (b)

of whom were admitted as Civil Parties participating in proceedings at the Extraordinary Chambers in the Courts of Cambodia ("ECCC") – are no different.

2. On 17 April 1975, Phnom Penh fell to Khmer Rouge forces.[4] For the next three years, eight months, and 20 days, seeking to establish a "new, revolutionary State power," the Khmer Rouge pursued a policy of "completely disintegrat[ing]" Cambodia's economic and political social structures.[5] Virtually the entirety of the Cambodian population suffered during the DK period. Segments of the population were targeted for political persecution, murder, extermination, and forcible population transfers, while the population at large suffered from inhumane conditions of exhaustion, disease, and malnutrition.[6] Educated city people such as doctors or engineers were deprived of their political and economic status and transformed into peasants through re-education and hard labor work.[7] Doctors and nurses were purged and replaced by people who had no training.[8] Medical facilities and supplies were destroyed. Access to medical care depended on authorization from local authorities, who in many cases accused the sick of being "infiltrators" or "enemies."[9] Effectively, what minimal healthcare existed in Cambodia disappeared.

3. The impact of the DK period on the Cambodian population and healthcare system continues through today. The Royal Government of Cambodia ("RGC") remains reliant on foreign funding, with about 50% of its healthcare services being covered through grants and loans.[10] More worryingly, the quality of healthcare services, especially in rural areas, remains low with significant and persistent inequities.[11] Many Cambodians travel overseas to obtain healthcare, while others delay potential diagnoses by making their first visits to traditional

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establishment and operation of worksites and cooperatives; (c) reeducation of "bad elements" and killing "enemies," both inside and outside party ranks; (d) targeting of specific groups; and (e) the regulation of marriage." *Id*., paras. 156-157.

[4] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Closing Order indicting Kaing Guek Eav alias Duch, 7 August 2008, D99 ("Case 001 Closing Order"), para. 10.

[5] *Id.* (internal citation omitted).

[6] *Case of NUON Chea et al*., 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313 ("Case 002/01 Judgement") paras. 568-569; *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Case 002/02 Judgement, 16 November 2018, E465 ("Case 002/02 Judgement"), para. 1045.

[7] Case 002/01 Judgement, paras. 569, 571, 574; Case 002/02 Judgement, para. 1319.

[8] Case 002/02 Judgement, paras. 1197, 1319.

[9] *Id.*, para. 1050.

[10] World Health Organization, *The Kingdom of Cambodia Health System Review*, 2015, p. xxii.

[11] *Id.*, p. xix.

medicine practitioners or spiritual healers.[12] Those who seek care in provincial clinics are often misdiagnosed, with limited access to screening measures and effective treatments.[13]

4. Although virtually the entire population was severely traumatized during the DK period,[14] formal mental healthcare services for the survivors, as well as others, have been either lacking or woefully inadequate to meet demand.[15] According to Dr. Lor Vann Thary, who treated accused at the ECCC, from 1979 to 1992, there were effectively no mental healthcare services available in the country, but for limited services and short-term training courses on mental healthcare in the refugee camps along the Cambodian-Thai border.[16] Indeed, while in the early 1990s, 26 psychiatrists, 40-45 psychiatric nurses, and 600 primary care doctors were trained through international partnerships in basic mental healthcare services, funding for the program ended in 2006.[17]

5. Simply, Cambodia's healthcare system does not have the capacity or the required expertise to address the healthcare needs of the general population, let alone the special (and sustained needs) of victims of the DK period.

6. The ECCC – which was established by an Agreement between the United Nations ("UN") and RGC to "brin[g] to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations" in Cambodia between 17 April 1975 and 6 January 1979[18] – can only award non-compensatory and symbolic reparations.[19] Neither of the ECCC's founding documents – the Agreement and Establishment Law –

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[12] Sokummono Khan, Hean Socheata, and Phorn Bopha *In Cambodia, Cancer Patients Face Late Diagnosis, Few Treatment Options*, VOA CAMBODIA, 15 January 2021.
[13] *Id.*
[14] It is estimated that 11.2% of Cambodians continue to suffer from Post-Traumatic Stress Disorder ("PTSD") as a result of the events during the DK period while others have suffered from transgenerational trauma. Jeffrey Sonis et al., *Probable Posttraumatic Stress Disorder and Disability in Cambodia Associations With Perceived Justice, Desire for Revenge, and Attitudes Toward the Khmer Rouge Trials*, 302 JAMA 527, 532 (2009).
[15] World Health Organization, *The Kingdom of Cambodia Health System Review* (2015), p. 117, available at https://apps.who.int/iris/handle/10665/208213.
[16] Lor Vann Thary, *A Review of the Transcultural Psychosocial Organization (TPO) the Community Mental Health Program in Rural Cambodia*, 25 RCAPS 107, 108 (2009).
[17] Sarah J. Parry et. al., *Development of mental health care in Cambodia: barriers and opportunities*, 14 INT. J. MENT. HEALTH SYSTEM 1, 2 (2020).
[18] Agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003 ("Agreement"), Art. 1.
[19] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgment, 3 February 2012, F28 ("Case 001 Appeal Judgment"), para. 644.

provide for reparations.[20] Yet, despite lacking legislative authority,[21] when drafting the Internal Rules, the ECCC judges took it upon themselves to include the possibility for Civil Parties to seek reparations.[22] However, what was adopted by the judges differed from existing redress provisions in the Cambodian Code of Criminal Procedure and confined reparations at the ECCC to moral and collective awards.[23] Consequently, and due to the large number of victims expected to appear before the ECCC as Civil Parties – and the "inevitable difficulties of quantifying the full extent of losses suffered by an indeterminate class of victims" – unsurprisingly, the ECCC's Supreme Court Chamber held that reparations were "intended to be essentially symbolic, rather than compensatory."[24]

7. Since 1995, the Documentation Center of Cambodia ("DC-Cam") has been advocating that Cambodia and the international community can and should do more to repair victims of Khmer Rouge atrocities – by providing substantive as well as symbolic reparations. For example, DC-Cam has implemented nation-wide community forums that allow for reconciliation within communities[25] and supports a nation-wide genocide education program in collaboration with the Cambodian Ministry of Education, Youth and Sport.[26] It also continues to secure support for a national memorial service at the end of the ECCC proceedings, which would be presided over by the King of Cambodia.[27] As early as December 2010, Youk Chhang, the Executive Director of DC-Cam, has been seeking the ECCC's backing in promoting attention to mental healthcare for victims of the DK period.

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[20] Agreement; Law on the Establishment of the Extraordinary Chambers, NS/RKM/1004/006, 27 October 2004 ("Establishment Law").
[21] Göran Sluiter, Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers, 4 J. INT'L CIRM. JUST. 314, 320 (2006).
[22] Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9) ("ECCC Internal Rules"), 16 January 2015, Rule 23*quinquies.*
[23] Unlike the Cambodian Code of Criminal Procedure, which provides a wide range of classic civil law remedies (such as damages, return of loss of property, and restoration of damaged or destroyed property), the Internal Rules confine reparations at the ECCC to moral and collective awards. Case 001 Appeal Judgment, para. 643.
[24] Case 001 Appeal Judgment, para. 644.
[25] *See e.g.*, DC-Cam, Public Genocide Forum, last visited 8 May 2022.
[26] *See* Memorandum of Understanding on Framework of Teaching of "A History of Democratic Kampuchea (1975-1979)" between the Ministry of Education Youth and Sport and Documentation Center of Cambodia from 2018 to 2022.
[27] DC-Cam suggested that the event be held at the old Cambodian capital of Udong. Thousands of monks and religious leaders would be brought to the top of the mountain to hold a ceremony dedicating their merit to the victims of DK atrocities. DC-Cam believes this ceremony would help survivors to find relief from their suffering and present a fitting national (and international) gesture to formally close the ECCC's work. *See* Letter from Youk Chhang to Rong Chhorng, Head of Victims Support Section, 9 May 2011 (on file with author).

In Case 002 before the ECCC, for instance, he proposed that reparations awards include "improved access to services for trauma-related mental health problems throughout the country and increased resource allocation to improve the impact of the national mental health plan."[28]

8. As part of DC-Cam's ongoing initiative to implement a program that sustainably supports the health and welfare of survivors,[29] this paper explores: (a) to what extent providing healthcare services for DK period victims fits within the reparations frameworks of the international(ized) criminal courts and tribunals, including the ECCC; and (b) whether absent such possibilities, healthcare services should be provided as part of a transitional justice package designed to help Cambodian society sustainably deal with the legacy of the DK period.[30]

9. Part I analyzes the right to reparations from a historical perspective, States' obligations on right to reparations, and healthcare as a form of reparations. Part II analyzes the reparations provisions and jurisprudence of international(ized) criminal courts and tribunals. Part III analyzes the ECCC provisions and jurisprudence showing why providing healthcare services as a reparations measure is effectively unrealizable (as also shown in Part II). Part IV analyzes whether such sustainable healthcare services may fit as a transitional justice measure (as opposed to a form of reparations), presenting examples of recommendations on healthcare published by various truth and reconciliation commissions. After summarizing the findings in Parts I to IV, Part V provides recommendations on implementing a sustainable

[28] Letter from Youk Chhang to Rong Chhorng, Head of Victims Support Section, 9 May 2011 (on file with author). Youk Chhang has also championed a number of other initiatives aimed at the healing and restoration of victims of the Khmer Rouge, such as assisting the Royal Government of Cambodia draft a sub-decree concerning the preservation of bodily remains of victims found throughout the entire territory of Cambodia as physical evidence of crimes committed and transformation of grave sites into memorials. *See* Royal Government of Cambodia, No. 13, Circular on Preservation of remains of the victims of the genocide committed during the regime of Democratic Kampuchea (1975-1978), and preparation of Anlong Veng to become a region for historical tourism, 14 December 2001. *See also* Interview with Youk Chhang, 6 May 2022 (on file with author).

[29] Youk Chhang, *Survivors of the Khmer Rouge Regime Deserve More Than Symbolic Reparations*, VOA CAMBODIA, 16 April 2021.

[30] UN Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, UN Doc. No. S/2004/616, 23 August 2004 ("UN Secretary-General Report"), para. 8; UN Secretary General, *Guidance Note of the Secretary General: UN Approach to Transitional Justice*, March 2010, p. 2; *see also* BETH VAN SCHAACK, IMAGINING JUSTICE IN SYRIA 397 (Oxford University Press, 2020) (defining transitional justice as a concept that includes "judicial and non-judicial, formal and informal, retributive and reconciliatory [measures] that may be employed by societies in response to a legacy of authoritarianism or mass violence following a period of political transition").

healthcare initiative in Cambodia as a transitional justice measure and identifies further areas for exploration.

Part I: The fundamental right to reparations for victims

A. Origin of the right to reparations as an effective remedy

10. The right to reparations was initially inspired by the "desire to diminish the evils of war."[31] In 1907, the high contracting parties to the Hague Convention IV on Regulations Concerning the Laws and Customs of War on Land States ("1907 Hague Convention IV") codified the right to an effective remedy,[32] laying the foundation for what would later be codified as the right to reparations for human rights violations.[33] Under Article 3, belligerents who violate the laws of war are responsible for acts committed by their armed forces and liable to pay compensation.[34] Corresponding to "the general principles of law on international responsibility," the high contracting parties, in adopting Article 3, sought to provide adequate recourse to the law for victims of violations of the 1907 Hague Convention IV – a right which was considered illusory if victims were required to take legal action against the government of the perpetrators through their own government.[35]

11. After two world wars, the drafters of the UDHR considered it paramount to codify the principle so "that all of us have an avenue for redress if our rights are violated."[36] Expanding the right to an effective remedy beyond violations of the laws and customs of war articulated in the 1907 Hague Convention IV to violations of human rights committed in peace time,[37]

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[31] Hague Convention (IV) respecting the Laws and Customs of War on Land, Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Preamble.
[32] *Id.*, Art. 3.
[33] CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 31 (Cambridge University Press 2012); INTERNATIONAL COMMISSION OF JURISTS, THE RIGHT TO A REMEDY AND REPARATIONS FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS' GUIDE 15, fn. 2 (revised edition, 2018) (citing the 1907 Hague Convention IV as among the international human rights instruments establishing the normative basis for the right to an effective remedy and the right to reparations for victims).
[34] Hague Convention (IV) respecting the Laws and Customs of War on Land, Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 3.
[35] Jean Pictet et. al., *Article 91- Responsibility*, *in* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1053 (Yves Sandoz et al. eds., 1987), para. 3646 (discussing the purpose and intent of Article 3 of the 1907 Hague Convention IV, since Article 91 of the Additional Protocol identically reproduces Article 3).
[36] Human Rights Committee, *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 8*, 17 November 2018.
[37] *See* UN, *The Foundation of International Human Rights Law*, last visited 13 April 2022 (stating that the UDHR is generally agreed to be the foundation of international human rights law).

Article 8 of the UDHR guarantees everyone "the right to an effective remedy for violations of fundamental rights granted ... by the constitution or by the law."[38] Subsequent international human rights treaties such as the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") further reinforced States' obligations to provide an effective remedy for violations of international human rights and humanitarian law.[39] Article 2(3)(a) of the ICCPR provides that States must ensure that any person whose rights or freedoms were violated have an effective remedy, "notwithstanding that the violation has been committed by persons acting in an official capacity."[40] Article 14 of the CAT obligates States to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[41]

12. Reparations are an "essential element of the right to an effective remedy"[42] and "occupy a special place" among remedies for violations of human rights because they immediately and specifically target individual victims.[43] While reparations are meant to repair victims of large-scale human rights violations,[44] they also achieve another goal: requiring an acknowledgement of responsibility for harm caused by an individual or a State.[45] The 1985

[38] Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948, Art. 8.
[39] International Covenant on Civil and Political Rights, Adopted by General Assembly Resolution 2200 A(XXI) of 16 December 1966, Art. 2(3); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/41 (1984), entered into force on 26 June 1987, Art. 14.
[40] International Covenant on Civil and Political Rights, Adopted by General Assembly Resolution 2200 A(XXI) of 16 December 1966, Art. 2(3)(a).
[41] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/41 (1984), entered into force on 26 June 1987, Art. 14.
[42] Human Rights Committee, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p. 90.
[43] UN Office of the High Commissioner for Human Rights ("OHCHR"), *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 2008 ("UN 2008 Rule of Law Report"), p. 2-3.
[44] Human Rights Committee, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. No. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 16 ("The Committee notes that, where appropriate, reparations can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."). *See also* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly Resolution 40/34 of 29 November 1985, ("UN Declaration on Victims' Rights"), paras. 8-11.
[45] UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. No. A/HRC/21/46, 9 August 2012, para. 24, fn. 10. The Human Rights Committee considers that "without reparations being granted to individuals whose human rights have been violated, the obligation to provide an effective

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("1985 Basic Principles") – adopted by the UN General Assembly without a vote (i.e., in the absence of objections)[46] – recommends various forms of restitution, compensation, and assistance that States should provide to victims towards fulfilling the right to an effective remedy.[47] While these Basic Principles are not legally binding, recommended measures include "necessary material, medical, psychological, and social assistance through governmental, voluntary, community-based and indigenous means."[48]

13. The 1985 Basic Principles include as victims persons who individually or collectively suffered harm as a result of serious violations of international human rights or humanitarian law and the "immediate family or dependants of direct victims."[49] They recommend that "[v]ictims should be informed of the availability of health and social services and other relevant assistance," that victims be readily afforded access to them, and that attention "be given to those who have special needs because of the nature of the harm inflicted."[50] They also recommend that States inform the general public and victims of violations of international human rights and humanitarian law of the right to effective remedies and to reparations, such as access to medical and psychological services.[51]

14. Building upon the framework of the 1985 Basic Principles, the UN Basic Principles on the Right to a Remedy ("2005 Basic Principles") provide that victims of gross violations of international human rights law and humanitarian law have the right to: "(a) [a]ccess to equal and effective justice; (b) [a]dequate, effective and prompt reparation for harm suffered; and

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remedy is not fulfilled." Human Rights Committee, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, July 2011, p. 90.

[46] UN Depository, *Resolution Guide, 40th Session*, https://www.un.org/depts/dhl/resguide/r40_resolutions_table_eng.htm (last visited 10 May 2022). *See also* UN General Assembly, *About the General Assembly*, https://www.un.org/en/ga/about/background.shtml (last visited 10 May 2022) ("In recent years, an effort has been made to achieve consensus on issues, rather than deciding by a formal vote, thus strengthening support for the Assembly's decisions. The President, after having consulted and reached agreement with delegations, can propose that a resolution be adopted without a vote.")

[47] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly Resolution 40/34, 29 November 1985 ("1985 Basic Principles").

[48] 1985 Basic Principles, para. 14.

[49] 1985 Basic Principles, para. 2.

[50] 1985 Basic Principles, para. 15.

[51] 1985 Basic Principles, para. 19.

(c) [a]ccess to relevant information concerning violations and reparation mechanisms."[52] Any reparations awarded should be "proportional to the gravity of the violations and the harm suffered."[53] Where the violations are attributable to individual perpetrators as opposed to a State, the responsible individuals should provide reparations to the victim.[54] Be that as it may, States should "establish national funds for reparation to victims and seek other sources of funds wherever necessary."[55]

B. Reparations and the right to health

15. The International Covenant on Economic, Social, and Cultural Rights ("CESCR") explicitly enshrines in Article 12 the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[56] In order to achieve the full realization of this right, Article 12(2) provides that States Parties shall take measures necessary for:

> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
>
> (b) The improvement of all aspects of environmental and industrial hygiene;
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; [and]
>
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

16. While the CESCR recognizes that State Parties have resource limitations which may prevent it from achieving the full realization of the right to health,[57] it nonetheless binds State Parties to a continuing obligation "to move as expeditiously and effectively as possible towards the

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[52] 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, Adopted by General Assembly Resolution 60/147, 21 March 2006 ("2005 Basic Principles"), para. 11.
[53] 2005 Basic Principles, para. 15.
[54] 2005 Basic Principles, para. 17.
[55] OHCHR, Committee on Economic, Social and Cultural Rights, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. No. E/CN.4/2000/62, 18 January 2000, para. 18.
[56] International Covenant on Economic, Social, and Cultural Rights ("CESCR"), Adopted by General Assembly Resolution 2200 A(XXI) of 16 December 1966, Art. 12. *See also* OHCHR, Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. No. E/C.12/2000/4, 11 August 2000, para. 53; Human Rights Council, Mental health and human rights, UN Doc. No. A/HRC/RES/36/13, 9 October 2017, para. 7 (recommending various forms of mental health services necessary to fulfill the right to mental health).
[57] CESCR, Art. 2(1).

full realization" of this right.[58] A State's compliance with its obligation to take appropriate measures is assessed in light of the resources – financial and others – available to it,[59] with Article 2(1) of the CESCR mandating inter-State cooperation regarding technical and financial assistance. The UN Office of the High Commissioner for Human Rights ("OHCHR"), a body whose mandate is to promote and protect human rights globally,[60] considers that Article 12 "imposes a duty on each State to ... ensure that everyone" has access to health facilities, goods, and physical and mental health services.[61] In particular, it encourages States "to promot[e] the participation of all stakeholders in the development of public policies ... integrating mental health services into primary and general health care."[62]

C. Providing healthcare as a reparations measure

17. Reparations programs range from the simple (e.g., awarding cash payments), to the highly complex (e.g., providing healthcare, educational, and housing support).[63] They can be symbolic (e.g., renaming a public space, building memorials, or including official policies) or substantial (e.g., providing compensation or a service package that includes educational, healthcare, or housing benefits).[64] The UN Rule-of-Law Tools for Post-Conflict States recommend a combination of both as part of "complex" reparations packages: programs that seek to reach a wider pool of victims by offering a variety of benefits through different means.[65] Since victims of different violations may not require the same kind of benefits, "having a broader variety of benefits means reaching more victims."[66]

18. Unsurprisingly, although they find "good reasons for reparation programmes to be concerned with health issues," the UN Rule-of-Law Tools for Post-Conflict States note several challenges in providing healthcare as a reparations measure.[67] Making existing medical

[58] OHCHR, Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. No. E/C.12/2000/4, 11 August 2000, para. 31.
[59] OHCHR, *Frequently Asked Questions on Economic, Social and Cultural Rights- Fact Sheet No. 33*, 2008, p. 13.
[60] OHCHR, *Mandate of UN Human Rights*, last visited 11 April 2022.
[61] OHCHR, Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. No. E/C.12/2000/4, 11 August 2000, para. 53.
[62] Human Rights Council, Mental Health and Human Rights, UN Doc. No. A/HRC/36/13, 9 October 2017, para. 7.
[63] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, 2008 ("UN Rule of Law Tools for Post Conflict States"), p. 22.
[64] *Id.*, p. 23.
[65] *Id.*, p. 22-23.
[66] *Id.*, p. 22.
[67] *Id.*, p. 24.

services available to victims may not be enough. With victims having special needs, existing services are generally insufficient. For instance, post-conflict States are unlikely to have adequate mental healthcare specialists experienced in treating torture victims.[68] Also, since States often cannot afford to build entirely new facilities for victims-patients, the quality of health services depends on the quality of existing institutions.[69] While having specialized teams dedicated to both providing services and liaising with regular service providers on behalf of victims may mitigate this problem, victims generally are not able to get the necessary care needed unless the required expertise is available.[70]

19. The UN Rule-of-Law Tools for Post-Conflict States recognize that collective healthcare reparations, while beneficial, may only have a minimal reparative capacity, since they do not specifically target victims.[71] Healthcare is a non-excludable good, and once made available, "it is difficult to keep others from consuming;" i.e., non-victims alike will use them.[72] Arguably, once benefits and services to victims become generally available, and the temporal ordering of their distribution becomes irrelevant, "the benefit dissipates."[73] If healthcare is considered a basic human right to which all citizens are entitled to enjoy, providing it simply fulfills an *existing* State obligation; it cannot be viewed as a remedy to victims for past abuses.[74] Realistically, however, many post-conflict States are simply unable or unwilling to make the requisite investment in providing meaningful access to healthcare services for the general population, let alone providing specific services for victims. Addressing this reality – how to provide relief specifically to victims while also increasing capacity for all in need of medical healthcare – remains a challenge.

20. The UN Rule-of-Law Tools for Post-Conflict States propose distributing healthcare benefits around non-basic services: "[b]eneficiaries then have a reason to think that they are receiving something that citizens do not ordinarily receive simply by virtue of being citizens."[75] They specifically recommend providing "[e]ducational, cultural, artistic, vocational and

[68] *Id.*, p. 23.
[69] *Id*., p. 24.
[70] *Id*., p. 25.
[71] *Id.*, p. 26.
[72] *Id.*
[73] *Id*.
[74] *Id.*, p. 27.
[75] *Id.*

specialized medical services targeting *the special needs of the victim population....*"[76] By including these non-basic services focused on the victims – in addition to supplementing basic medical services – reparations programs can retain their distinctiveness in providing a specific benefit to victims while also increasing the capacity of the State to provide medical care to all.

21. In sum, although the right to reparations is cemented in international humanitarian and human rights law, the extent to which a State can fulfill the right through physical and mental health services for victims is largely dependent on the State's resources. Victims may not receive adequate (or any) care where a State does not have the capacity to provide such services, depriving individuals of their fundamental right to a reparations award as an effective remedy and the larger society of an effective healing process after large-scale human rights violations. This gap between the victims' fundamental right to reparations and actual realization of this right merits assessing further how reparations frameworks and obligations have been interpreted by international(ized) criminal courts and tribunals.

Part II: The scope of the right to reparations and implementation at the international(ized) criminal courts and tribunals

22. The inclusion of reparations principles in the statutes of international(ized) criminal courts and tribunals is a relatively recent development.[77] Notably, the charters of the International Military Tribunals in Nuremberg and Tokyo made no mention of victims, let alone reparations.[78] More than 50 years later, the Statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") – drafted by the UN Security Council ("UNSC") under Chapter VII of the UN Charter in 1993 and 1994 respectively[79] – provided only scant references to victims,

[76] *Id*. (emphasis in original).
[77] Christine Evans, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 87 (Cambridge 2012).
[78] Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 82 UNTS 280, 8 August 1945; Charter of the International Military Tribunal for the Far East, 19 January 1946, amended 26 April 1946.
[79] UNSC Res 827 (25 May 1993) UN Doc. S/RES/827, establishing the ICTY; UNSC Res 925 (1 July 1994) UN Doc. S/RES/935, establishing ICTR.

primarily concerning their protection during the proceedings.[80] There were no direct references to reparations in the ICTY and ICTR Statutes, other than restitution, which the ICTY and ICTR could order as a penalty against the Accused "in addition to imprisonment."[81] Yet unlike the procedures of the courts and tribunals discussed below, requests for restitution could only be initiated by the Prosecution or Chambers, not victims themselves.[82]

A. Victims' right to reparations at the International(ized) Criminal Courts and Tribunals

1. Special Court for Sierra Leone ("SCSL")

23. The SCSL was established in 2002 by an agreement between the UN and Government of Sierra Leone pursuant to UNSC Resolution 1315 to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" since 30 November 1996.[83] Like the UNSC-drafted Statutes of the ICTY and ICTR, the SCSL Statute provides scant reference to victims and no references to reparations.[84] The SCSL Rules of Procedure and Evidence, however, provided for transfer of SCSL conviction decisions to the authorities of the States concerned, allowing for the possibility of victims to seek reparations in domestic courts.[85]

24. Rule 105(B) of the SCSL Rules of Procedure and Evidence specifically provided that "[p]ursuant to the relevant national legislation, a victim or persons claiming through him or her may bring an action in a national court or other competent body to obtain compensation."[86] Aside from a decision denying a prosecution request to seize Sam Hinga Norman's assets, which mentioned Rule 105 as "providing the machinery for compensation

[80] *See* ICTY Statute, Arts. 15 (providing that the Judges shall adopt rules of procedure and evidence for, *inter alia*, "the protection of victims and witnesses"), 18(2) (providing the Prosecutor the power to question victims), 20(1) (providing that the Trial Chambers must ensure that trials are conducted with due regard for the protection of victims), 22 (providing that the Rules of Procedure and Evidence must include rules regarding the protection of victims). *See also* ICTR Statute, Arts. 14, 17(2), 19(1), 21.
[81] Under Article 24(3) of the ICTY Statute – mirrored in Article 23(3) of the ICTR Statute," the Tribunal may, in addition to imprisonment, "order the return of any property and proceeds acquired by the criminal conduct, including by means of duress, to their rightful owner."
[82] ICTY Rules of Procedure and Evidence, Rule 105(A). ICTR Rules of Procedure and Evidence, Rule 105(A).
[83] Statute of the Special Court for Sierra Leone, 16 January 2002 ("SCSL Statute"), p. 1, Art. 1.
[84] *See* SCSL Statute, Arts. 15(2), 15(4), 16(4), 17(2).
[85] SCSL Rules of Procedure and Evidence, Rule 105(A).
[86] SCSL Rules of Procedure and Evidence, Rule 105(B).

to victims in a post-conviction setting,"[87] there does not appear to be any SCSL jurisprudence on reparations. When Amnesty International raised the issue of reparations with officials and staff at the SCSL, "the response has been that the Special Court has neither the mandate nor the resources to consider reparations and that they fall within the remit of the [truth and reconciliation commission], rather than the Special Court."[88]

2. Special Panels for Serious Crimes in East Timor ("East Timor Tribunal")

25. The East Timor Tribunal operated from 2002 to 2006 and was established by the UN Transitional Administration in East Timor ("UNTAET") to try cases of "serious criminal offences" including genocide, war crimes, and crimes against humanity which took place in East Timor in 1999.[89] The Transitional Rules of Criminal Procedure for the Tribunal was established pursuant to UNSC Resolution 1272 pending the drafting of a comprehensive criminal procedure code in East Timor.[90] Section 49.2 of the Transitional Rules provided that the Court *may* make an order requiring "the accused to pay compensation or reparations to the victim in an amount determined by the Court," and that such payment "shall be credited toward satisfaction of any civil judgment also rendered in the matter." No jurisprudence exists interpreting or applying these rules on reparations.[91]

3. Special Tribunal for Lebanon ("STL")

26. The STL was established by an agreement between the UN and Lebanon pursuant to UNSC Resolution 1664[92] to have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death

[87] *Prosecutor v. Norman*, SCSL-04-14-PT, Norman – Decision on *Inter Partes* Motion by the Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) or at Any Other Bank in Sierra Leone, 19 April 2004, para. 10.
[88] Amnesty International, *Special Court for Sierra Leone – Statement to the National Victims Commemoration Conference Freetown*, 1 and 2 March 2005, p. 5.
[89] UNAET, On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, para. 1.1-1.3; Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, ICTJ, March 2006, p. 1; Special Panels of the Dili District Court, *Hybrid Justice*, last visited 13 April 2022.
[90] UN Transitional Administration in East Timor, On Transitional Rules of Criminal Procedure, UNTAET/REG/2000/30, 25 September 2000, p. 1.
[91] *See* CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 112 (Cambridge University Press 2012).
[92] UN Security Council, Resolution 1664, UN Doc. No. S/RES/1664, 29 March 2006.

or injury of other persons.[93] Where "the personal interests of victims are affected," the STL Chambers "shall permit their views and concerns to be presented and considered at stages of the proceedings[.]"[94] The STL may also "identify victims who have suffered as a result of the commission of crimes" committed by the convicted person and "transmit to the competent authorities of the State concerned the judgment finding the accused guilty of a crime that has caused harm to a victim."[95] Based on the STL's decision, and pursuant to national legislation, victims may bring an action for compensation in a national court or other competent body.[96] In other words, the STL did not provide an internal mechanism for reparations.

27. In *Ayyash et al.*, the Appeals Chamber confirmed that victims participating in STL proceedings "cannot seek compensation from the Tribunal directly."[97] Noting that victims participating in proceedings at the International Criminal Court ("ICC") may seek compensation, and that victims at the ECCC can make claims for collective and moral reparations, the Appeals Chamber found that "the rights of victims to compensation or reparation before these national or international tribunals cannot inform the rights of [victims] before the Tribunal."[98] Even if ICC and ECCC jurisprudence informed on other aspects of victims participation at the STL, and despite the "extensive procedural rights and power" afforded to victims at the STL, the Appeals Chamber concluded that there are no equivalent reparations provisions in the STL framework.[99]

4. Extraordinary African Chambers

28. The Extraordinary African Chambers ("EAC") operated between 2013 and 2017 based on an agreement between the African Union and Senegal to try crimes committed in Chad between 1982 and 1990.[100] The Statute of the EAC provided for a Trust Fund for Victims

[93] Special Tribunal for Lebanon Statute, Adopted by Security Council Resolution 1757, 30 May 2007 ("STL Statute"), Art. 1.
[94] STL Statute, Art. 17.
[95] STL Statute, Art. 25(1)-(2).
[96] STL Statute, Art. 25(3).
[97] *Prosecutor v. Ayyash*, STL-011/01/A-1/AC & STL-11/01/A-2/AC, Decision on the Admissibility of the LRV Appeal Against Sentence and Modalities of Victim Participation, 24 February 2021, para. 15.
[98] *Id*.
[99] *Id*., paras. 14-15.
[100] Extraordinary Chambers of Africa Statute, ("EAC Statute"). Unofficial translation by Human Rights Watch available at https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers#.

and reparation measures, both established for victims of crimes within the jurisdiction of the EAC.[101] The Trust Fund for Victims was to be financed by voluntary contributions from foreign governments, international institutions, and other entities wishing to support victims.[102] Reparations were to be open to all victims, individually or collectively, whether or not they participated in the proceedings before the Chambers.[103] Although reparations were ordered in the conviction of former Chadian dictator Hissène Habré, the Trust Fund for Victims was never established and the reparations ordered were never enforced.[104]

5. Kosovo Specialist Chambers ("KSC")

29. The KSC was established pursuant to an international agreement ratified by the Kosovo Assembly and incorporated as a Constitutional Amendment in the Kosovo Constitution[105] to try certain crimes allegedly committed during and after the Kosovo conflict, including war crimes and crimes against humanity.[106] It is a hybrid international court that applies Kosovo law as well as customary international law and international human rights law.[107] The agreement and its ratification in domestic law provides the legal basis for the Law on Specialist Chambers and Specialist Prosecutor's Office.[108]

30. Article 22 of the Kosovo Constitution provides that human rights and fundamental freedoms – guaranteed, *inter alia*, by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ICCPR, and the CAT – are directly applicable in Kosovo and, in case of conflict, have priority over provisions of laws and other acts of public institutions.[109] Article 54 of the Kosovo Constitution guarantees "the right of judicial

[101] EAC Statute, Arts. 27(1-2), 28.
[102] EAC Statute, Art. 28.
[103] EAC Statute, Art. 28(2).
[104] *Prosecutor v. Hissein Habré*, Appeals Chamber Judgment, 27 April 2017, paras. 926-942 (available in French only); Reed Brody, *Hissène Habré's Victims Continue Fight for Reparations*, HRW, 26 May 2021.
[105] Republic of Kosovo, Amendment of the Constitution No. 24, Article 162, 3 August 2015 ("Amendment No. 24"); Assembly of Republic of Kosovo, Law No. 04/L-274, Law on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo, 24 August 2020.
[106] Republic of Kosovo, Amendment No. 24, Article 162, 3 August 2015, para. 1 (citing its international obligations to in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011); *see also* Parliamentary Assembly Council of Europe, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, 7 January 2011.
[107] Republic of Kosovo, Amendment No. 24, Article 162, 3 August 2015, para. 1.
[108] Republic of Kosovo, Law on Specialist Chambers and Specialist Prosecutor's Office, Law No.05/L-053, 3 August 2015, ("KSC Law"), Art. 2.
[109] Constitution of the Republic of Kosovo (2008), Art. 22.

protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."

31. Article 22 of the KSC Law explicitly provides for reparations.[110] Under Article 22(3), victims have the right in criminal proceedings before the KSC to "notification, acknowledgement, and reparation." Article 22(3) further provides that the KSC Rules of Procedure and Evidence shall "include provisions relating to the reasonable reparation to Victims from an accused who has pled or been adjudged guilty of a crime(s) directly resulting in harm to the Victims," and that the KSC "shall also determine the content and procedure for submission and acceptance of any application to participate in the proceedings and declaration of damage."[111]

32. Where the KSC Trial Panel or Court of Appeals Panel finds an accused guilty of a crime, "it may make an order directly against that accused specifying appropriate reparation to, or in respect of, Victims collectively or individually."[112] The Trial Panel may also invite representations on behalf of the "accused, Victims, other interested persons or interested States before making a reparations order."[113] The Panels are limited to ordering "only the convicted person to make restitution or pay compensation to a Victim or to Victims collectively" or "the forfeiture of property, proceeds and any assets used for or deriving from the commission of the crime[.]"[114] The Panels may also appoint experts to assist in determining the scope of reparations and may also invite Victims' Counsel and the convicted person to make observations on such expert reports.[115]

Prosecutor v. Mustafa (2021)

33. In *Prosecutor v. Mustafa* before the KSC, Salih Mustafa, Commander of a guerilla unit operating within the Kosovo Liberation Army ("KLA"),[116] was charged with war crimes including arbitrary detention, murder, torture, and cruel treatment.[117] Five victims were

[110] KSC Law, Art. 22.
[111] KSC Law, Art. 22(3).
[112] KSC Law, Art. 22(8).
[113] KSC Law, Art. 22(11).
[114] KSC Law, Art. 44(6).
[115] Kosovo Specialist Chambers Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, as amended on 29 and 30 April 2020, ("KSC Rules"), Rule 168.
[116] *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00019/A01/, Indictment, 19 June 2020, para. 2.
[117] *Id.*, para. 7.

admitted to participate in the case.[118] Noting that the KSC Rules[119] provide that a reparations order must be issued with the trial judgment in case of a conviction, or at the latest, in the sentencing judgment, the Trial Panel found it necessary to inquire whether it would be appropriate to refer victims to civil litigation in other courts in Kosovo as permitted under Article 22(9) of the Kosovo law.[120] Finding that Article 22(9) provides no criteria for when it is appropriate to refer victims to civil litigation in Kosovo courts, the Trial Panel was of the view that it required an expert report to clarify whether the national courts in Kosovo "offer a realistic avenue" for reparations and, if ordered by a national court, whether they could be enforced.[121]

34. The Trial Panel appointed three anonymous experts to provide a report.[122] It was specifically interested in knowing whether: "(i) victims in similar cases, if any, effectively received compensation after proceedings before national courts in Kosovo; and (ii) such victims have ever benefited from restitution from the Victim Compensation Fund referred to in Articles 19(1) and 62(1) of the Kosovo Criminal Procedure Code or from any other relevant compensation program, such as the Law No. 05/L-036 on Crime Victim Compensation."[123] Additionally, in the event the Trial Panel would decide not to refer victims to civil litigation in Kosovo and if the convicted person would be unable to pay any reparations ordered by the Panel, the experts were requested to answer whether:

    a. Victims of crimes under the jurisdiction of the KSC could benefit from restitution from the Victims Compensation Fund or from any other relevant compensation program, such as the Law No. 05/L-036 on Crime Victim Compensation;

    b. Victims of crimes under the jurisdiction of the KSC could benefit from restitution under these compensation programs while remaining anonymous; and

[118] *Prosecutor v. Mustafa*, KSC-BC-2020-05, F00105/RED, Public Redacted Version of Second Decision on Victims' Participation, 30 April 2021.
[119] KSC Rules 173(2), 176(2).
[120] *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00124/1, Decision on the appointment of expert(s), 20 May 2021 ("Mustafa Expert Decision"), paras. 13-14, 18-19.
[121] *Id*., para. 20.
[122] *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00184/RED, Third decision on the appointment of expert(s), 3 September 2021, para. 12.
[123] *Id*., para. 13.

c. To preserve anonymity, the Registrar could apply for restitution under these compensation programs on the victims' behalf.[124]

35. In their reports, the three experts pointed to similar shortcomings in the Kosovo judicial system in the event the Trial Panel would decide to refer victims to civil litigation in Kosovo, including the: (a) lack of Kosovo law providing for anonymous civil claims; (b) corruption and interference in the Kosovo legal system and lack of efficient accountability structures in the Kosovo legal system; (c) length of civil proceedings; (d) problems concerning execution of awards issued against assets located in third countries which lack judicial cooperation agreements or diplomatic ties with Kosovo; (e) lack of sufficient resources to provide legal aid; and (f) uncertainty regarding the application of statutes of limitations to claims advanced by victims of war crimes.[125]

36. Based on this information, the Trial Panel concluded that referring victims to civil litigation in Kosovo courts would not provide a realistic avenue for victims to claim reparations.[126] Specifically, it found that referring victims to Kosovo courts bears the risk of infringing upon measures taken by the KSC to protect victims in the proceedings before it, namely, the full range of in-court protective measures used to protect victims' identities during their testimonies.[127] According to the Second Expert's assessment, to which the Trial Panel paid heed, "if victims are not willing and ready to proceed with civil claims in Kosovo with their identity revealed, every other discussion regarding the judicial system in Kosovo may not be of any use in practical terms."[128] In light of the foregoing, the Trial Panel decided that it would issue a reparations order, directing the Victims Counsel to make submissions on the presentation of evidence for the purposes of reparations.[129]

37. The reparations procedure in the KSC appears to be promising insofar as the *Mustafa* Trial Panel has taken proactive measures to determine the appropriate venue for victims to make their claims. Nonetheless, it remains to be seen whether practical issues – such as funding,

[124] *Id*., para. 15.
[125] *Prosecutor v. Mustafa*, KSC-BC-2020-05/F00310/RED, Decision on the application of Article 22(9) of the Law, setting further procedural steps in the case, and requesting information, 4 February 2022, paras. 21-23, 35.
[126] *Id*., para. 39.
[127] *Id*., paras. 38-39.
[128] *Id*., para. 38.
[129] *Id*., para. 44.

seizure of assets located outside of Kosovo, and the political will of Kosovo and other States to enforce reparations orders – will allow victims to receive their due compensation and rehabilitation.

B. Victims' right to reparations at the ICC

38. Established by an international treaty adopted in 1998 – the Rome Statute of the International Criminal Court ("Rome Statute") – the ICC is the world's first and only permanent international criminal court for the investigation and prosecution of genocide, crimes against humanity, and war crimes.[130] The Rome Statute provides for reparations, allowing victims to file claims for and be awarded reparations from a convicted person.[131] It also requires the ICC to establish principles relating to reparations, including the modalities of restitution, compensation, and rehabilitation.[132] These principles and modalities have been codified through the Rules of Procedure and Evidence ("ICC Rules"), which were adopted (and modified) by the Assembly of States Parties ("ASP") – the ICC's management oversight and legislative body, which is composed of representatives of the States that have ratified or acceded to the Rome Statute.[133]

39. The Rome Statute provides that the ICC Chambers may, either upon request or on its own motion in exceptional circumstances, "determine the scope and extent of any damage, loss and injury to, or in respect of, victims" and must state the principle on which it is acting – i.e., restitution, compensation, or rehabilitation.[134] An order for reparations may be made directly against a convicted person or through the Trust Fund for Victims ("TFV").[135] Relevant States have the opportunity to make observations before a reparations order is made[136] and the Court may also determine whether it is necessary to seek State cooperation in accordance with Part 9 of the Rome Statute governing international cooperation and judicial assistance.[137] To provide greater effectiveness, the Rome Statute also requires States

[130] Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002 ("Rome Statute").
[131] Rome Statute, Art. 75(1).
[132] Rome Statute, Art. 75(1).
[133] ICC, *Assembly of State Parties*, https://www.icc-cpi.int/asp.
[134] Rome Statute, Art. 75(1).
[135] Rome Statute, Art. 75(2).
[136] Rome Statute, Art. 75(3).
[137] Rome Statute, Art. 75(4).

Parties to give effect to reparations decisions in accordance with Part 10 of the Statute governing enforcement.[138]

40. "Victims" at the ICC are defined as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."[139] Victims may also include "organizations or institutions who have suffered direct harm to any of their property which is dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."[140] While victims are free to choose a legal representative, to ensure the efficiency of proceedings where there are "a number of victims," the Chamber may request that the victims or group of victims choose a common legal representative.[141] If victims are unable to choose a common legal representative or representatives within the time limits set by the Chamber, it may request the Registrar to choose one or more common legal representatives.[142] Victims or groups of victims who lack the means necessary to pay for a common legal representative chosen by the Court may also receive assistance from the Registry, including financial assistance.[143]

41. A victim's request for reparations must be made in writing and filed with the Registrar and include the following: (a) the identity and address of the claimant; (b) a description of the injury, loss, or harm; (c) the location and date of the incident and the person or persons the victim believes to be responsible for his or her injury, loss, or harm; and (d) where restitution of assets is sought, the property or other tangible items and a description of them.[144] The Regulations of the Court ("ICC Regulations") provide for a standard form for victims to present their requests for reparations, which is made available to victims, groups of victims, international organizations, and NGOs, which may assist in its dissemination.[145] In cases

[138] Rome Statute, Art. 75(5). Part 10 of the Rome Statute governs the enforcement of sentences issued by the ICC, the role of States in enforcing sentences of imprisonment, supervision of enforcement, transfer of persons upon completion of sentence, limitations on prosecution or punishment of other offences, fines and forfeiture measures, sentence review concerning reduction of sentences, and escape. Rome Statute, Arts. 103-111.
[139] ICC Rules of Procedure and Evidence, as amended by Resolution ICC-ASP/17/Res.2 on 11 December 2018, ("ICC Rules"), Rule 85(a).
[140] ICC Rules, Rule 85(b).
[141] ICC Rules, Rule 90(1)-(2).
[142] ICC Rules, Rule 90(3).
[143] ICC Rules, Rule 90(5).
[144] ICC Rules, Rule 94(1).
[145] ICC Regulations of the Court, as amended on 12 November 2018, ("ICC Regulations"), Regulation 88.

where the Chamber proceeds on its own motion to order reparations, it must ask the Registrar to notify its intention to the person or persons against whom the Chamber is making a determination, and to the extent possible, the victims, interested persons, and interested States.[146] In such a case, a victim may request that the Chamber *not* make an order for reparations and the Chamber must not proceed to make an individual order in respect of that victim.[147]

42. During the reparations proceedings, the Trial Chamber may hear witnesses and examine evidence in deciding whether to order an award for reparations.[148] Considering the scope and extent of the damage, loss, or injury, the ICC Rules provide that the Chamber may award reparations on an individual basis, collective basis, or both.[149] To assist it in determining the scope and extent of the damage, loss, or injury and suggest various options concerning the appropriate types and modalities of reparations, the Chamber may also appoint experts.[150]

43. Individual awards for reparations must be made directly against a convicted person and where it is impossible or impracticable to make individual awards directly to each victim, the Chamber may order that an award for reparations against a convicted person be deposited with the TFV.[151] Also, when the number of victims and the scope, forms, and modalities of reparations make collective awards more appropriate, the Chamber may order that an award for reparations against a convicted person be made through the TFV.[152] The ICC Rules also provide that, following consultations with interested States and the TFV, the Chamber may also order an award for reparations to be made through the TFV to an intergovernmental, international, or national organization approved by the TFV.[153] The ICC Presidency is responsible for seeking the cooperation and assistance of States in enforcing reparations awards.[154]

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[146] ICC Rules, Rule 95(1).
[147] ICC Rules, Rule 95(2).
[148] ICC Regulations, Regulation 56.
[149] ICC Rules, Rule 97(1).
[150] ICC Rules, Rule 97(2).
[151] ICC Rules, Rule 98(1)-(2).
[152] ICC Rules, Rule 98(3).
[153] ICC Rules, Rule 98(4).
[154] ICC Rules, Rule 217.

44. To implement reparation awards, the Rome Statute also provides for a TFV, managed according to criteria determined by the ASP.[155] In addition to the ASP's duties in overseeing the activities of the Presidency, the Prosecutor, and the Registrar regarding the ICC's administration – and holding annual sessions on the budget – the ASP also monitors the Board of Directors of the TFV.[156] The TFV is funded by voluntary contributions, money, and other property collected through fines or forfeiture, resources collected through reparation awards, and other resources the ASP may decide to allocate.[157]

45. The Board of Directors of the TFV is tasked with establishing mechanisms ensuring verification of the sources of funds received by the TFV, their nature, and the level of voluntary contributions.[158] TFV resources can only benefit "victims of crimes within the jurisdiction of the Court" and their families who have "suffered physical, psychological and/or material harm" as a result of such crimes.[159] Subject to the order of the Chamber, the TFV must at a minimum consider "the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group."[160]

46. When the ICC orders the implementation of a reparations award against a convicted person through the TFV, the Secretariat of the TFV must prepare a draft implementation plan, which requires approval by the Board of Directors before its implementation.[161] The draft implementation plan must specify "the names and locations of victims to whom the award applies," and "any procedures that the TFV intends to employ to collect missing details, and methods of disbursement."[162] If the ICC orders that a reparations award be made to an intergovernmental, international, or national organization, the draft must include the: "(a) concerned organization(s) and ... their relevant expertise;" (b) a list of the specific functions the organization will fulfill pursuant to the Chamber order; and (c) "a memorandum of

[155] Rome Statute, Art. 79.
[156] Rome Statute, Art. 112.
[157] Regulations of the Trust Fund for Victims, Adopted by ASP Resolution 4/Res.3 ("TFV Regulations"), Regulation 21; *See also e.g.*, Annex to the Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, 3 December 2005, paras. 22-30 (establishing guidelines on voluntary contributions such as how they may be screened and monitored).
[158] TFV Regulations, Regulation 29.
[159] TFV Regulations, Regulation 48.
[160] TFV Regulations, Regulation 55.
[161] TFV Regulations, Regulation 54.
[162] TFV Regulations, Regulation 59.

understanding and/or other contractual terms between the Board of Directors and the concerned organization(s) setting out the roles and responsibilities, monitoring, and oversight."[163] The TFV must provide updates to the relevant Chamber on the progress of reparations awards, in accordance with the Chamber's reparations order. After the implementation period, the TFV must "submit a final narrative and financial report to the relevant Chamber."[164]

47. When the names/locations of the victims are unknown, or where the number of victims is impossible or impracticable for the Secretariat to determine with precision, the Secretariat "shall set out all relevant demographic/statistical data about the group of victims" and "list options for determining any missing details for approval by the Board of Directors."[165] The Secretariat of the TFV must also verify whether any persons claiming to be beneficiaries are in fact members of the beneficiary group.[166] The Board of the TFV determines the standard of proof for such verification.[167] The final list of beneficiaries is then subject to the approval of the Board of the TFV.[168]

48. Subject to the approval of the Board of Directors, the TFV must determine the modalities of reparations awards to beneficiaries "taking into account their present circumstances and locations."[169] For collective awards, the TFV's draft implementation plan must set out the precise nature of a collective award, if it has not already been specified by the ICC, as well as the methods for its implementation, and is subject to the approval of the ICC.[170] The TFV may use intermediaries such as States, intergovernmental organizations, or national or international NGOs to facilitate the implementation of collective awards where doing so "would provide greater access to beneficiaries and would not create any conflict of interest."[171]

[163] TFV Regulations, Regulation 73.
[164] TFV Regulations, Regulation 58.
[165] TFV Regulations, Regulation 60.
[166] TFV Regulations, Regulation 63.
[167] TFV Regulations, Regulation 62.
[168] TFV Regulations, Regulation 64.
[169] TFV Regulations, Regulation 66.
[170] TFV Regulations, Regulation 69.
[171] TFV Regulations, Regulations 67, 69.

1. *Prosecutor v. Lubanga* (2012-2019)

49. In *Prosecutor v. Lubanga*, the first case before the ICC, Thomas Lubanga Dyilo was convicted for the war crimes of enlisting child soldiers under the age of 15 and actively using them in hostilities.[172] The *Lubanga* Trial Chamber's Decision established principles and procedures to be applied to reparations and addressed the proper scope of reparations awards and their implementation. The Trial Chamber specifically addressed, *inter alia*: (a) individual and collective reparations; (b) the beneficiaries of reparations; (c) the modalities of reparations; and (d) the implementation of collective reparations through the TFV.

50. The Legal Representatives of Victims ("LRVs") requested both individual and collective reparations.[173] They claimed that individual reparations were appropriate for the individual child soldiers who suffered and that collective awards were important for the rehabilitation of the community, child soldiers, and family members.[174] The TFV cautioned against a broadly individualistic approach to reparations given the TFV's resource constraints in assessing thousands of applications for individual awards, arguing that an individual approach may do more harm since child recruitment is not always treated as a crime in the relevant districts and that acceptance of individuals awards could spark reprisals.[175] The Office of the Public Counsel for Victims ("OPCV") submitted that modalities of reparations should include collective reparations focused on reintegration and rehabilitation in the form of various social services providing medical and psychological care for child soldiers and their relatives.[176]

51. Concerning implementation of individual and collective awards, the TFV proposed that its implementation plan focus on: "a) psychological and social support; b) broad participation in decision making; c) sensitivity to cultural diversity; d) gender equality; and e) the

[172] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 1358.
[173] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2869-tENG, Observations of the V02 group of victims on sentencing and reparations, 18 April 2012, paras. 16-20.
[174] *Id*. *See also Prosecutor v. Lubanga*, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012 ("*Lubanga* Decision Establishing Principles"), paras. 219-220.
[175] *Lubanga* Decision Establishing Principles, para. 44.
[176] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2863, Observations on issues concerning reparations, 18 April 2012, paras. 86-87, 97; Lubanga Decision Establishing Principles, paras. 219-220.

importance of the symbolic nature of reparations."[177] The TFV reasoned that the above elements had been outlined by the UN Office on Drugs and Crime as key to all reparation programs and would best serve the victim population intended to benefit from the plan.[178] The TFV also proposed a five-step implementation plan:

> (1) establish which localities should be involved in the reparations process; (2) engage in consultations with the targeted localities; (3) conduct an assessment of harm; (4) have public debates regarding reparation principles and procedures; and (5) collect proposals for collective reparations developed in each locality to be subsequently presented to the Chamber for approval.[179]

52. The Trial Chamber found that "individual and collective reparations are not mutually exclusive, and they may be awarded concurrently."[180] Considering the uncertainty surrounding the number of victims in the case and the limited number of individuals that applied for reparations, it considered collective reparations appropriate in order to reach unidentified victims.[181] It considered that when such collective reparations are awarded, they "should address the harm the victims suffered on an individual and collective basis," including through the provision of medical services (mental and physical), general rehabilitation, housing, education, and training.[182]

53. Turning to the beneficiaries of reparations, the Trial Chamber held that in order to assess whether an "indirect victim" may be included in a reparations scheme, "the Court should determine whether there was a close personal relationship between the indirect and direct victim."[183] It found that under ICC Rule 85(b), reparations may be granted to legal entities such as non-governmental, charitable and non-profit organizations, government agencies, public schools, hospitals, or institutions that benefit members of the community.[184] The Trial Chamber further held that in order to substantiate victim status in reparation proceedings,

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[177] *Lubanga* Decision Establishing Principles, para. 171.
[178] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2872, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, para. 186, fn. 120 (citing UN OFFICE ON DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES (2006)).
[179] *Lubanga* Decision Establishing Principles, para. 282.
[180] *Id.*, paras. 219-220 (citing Inter-American Court of Human Rights, *Case of the Moiwana Community v. Suriname*, Preliminary objections, merits, reparations and costs, Judgment of 15 June 2005, paras 194 and 201).
[181] *Lubanga* Decision Establishing Principles, para. 219.
[182] *Id.*, para. 221.
[183] *Id.*, para. 195.
[184] *Id.*, para. 197.

official or unofficial documentation is appropriate, and in the absence of documentation a statement by two credible witnesses may suffice.[185]

54. The Trial Chamber endorsed the TFV's recommendation of a community-based rehabilitative approach and its five-step plan toward implementing the award.[186] It reasoned that such a collective award would be "more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures."[187]

55. Lastly, noting that Lubanga had been declared indigent and no assets or property had been identified that could be used for the purposes of reparations, the Trial Chamber found that he is only able to contribute to non-monetary reparations.[188] Since any participation by Lubanga in symbolic reparations, such as a public or private apology to the victims, would require his agreement, the Trial Chamber did not order these measures to form part of the reparations order.[189] As such, the Trial Chamber's reparations order did not contain any reparations order against Lubanga himself, but rather, through the TFV.[190]

56. On appeal, there appeared to be confusion as to whether the Trial Chamber ordered reparations on a collective *and* individual basis.[191] The Appeals Chamber noted that some of the parties' and participants' submissions were based on the understanding that the Trial Chamber ordered reparations on both bases, with individual reparations requests to be decided upon by the TFV as opposed to the Trial Chamber.[192] Other submissions appeared to be premised on the understanding that the Trial Chamber did not order individual reparations at all.[193] Based on its reading of the Trial Chamber's decision, the Appeals Chamber considered that the Trial Chamber decided to award only *collective* reparations,

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[185] *Id*., para. 198.
[186] *Id*.
[187] *Id*., para. 274 (citing *Prosecutor v. Lubanga*, ICC-01/04-01/06-2872, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, paras. 16, 153-180, 244).
[188] *Id*., para. 269.
[189] *Id*.
[190] *Id*.
[191] *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, 3 March 2015 ("*Lubanga* Appeal Judgment on Reparations Principles"), para. 136.
[192] *Id*.
[193] *Id*.

citing its finding that it "*endorses* this suggestion of the [TFV] that a *community-based* approach … would be more beneficial and have greater utility than *individual awards*."[194]

57. In determining the correctness of the Trial Chamber's decision to award only collective reparations, the Appeals Chamber found that there is no requirement "to rule on the merits of the individual requests for reparations" when collective reparations are ordered.[195] Noting that the Court's legal texts provide for two distinct procedures for reparations (individual and collective),[196] it considered that a Trial Chamber's determination to award collective reparations "operates as a decision denying, as a category, individual reparation awards."[197] Since none of the parties alleged errors concerning the Trial Chamber's decision to award reparations on a collective basis, the Appeals Chamber did not *proprio motu* review the Trial Chamber's assessment of the factors it considered in determining that collective reparations would be more appropriate.[198]

58. Finding that "an award of collective reparations to a community is not necessarily an error," the Appeals Chamber clarified that such a holding should not be interpreted as "precluding other members of the affected communities from being able to benefit from activities undertaken by the Trust Fund" and that "the meaningfulness of reparation programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes."[199] Although the ICC's legal texts do not refer to awards "to a community," the Appeals Chamber understood the Trial Chamber's reference to a community "to mean reparations to victims who are members of that community."[200] It reasoned that, notwithstanding this omission, "it follows that where an award for reparations is made to the benefit of a *community*, only members of the community meeting the relevant criteria are eligible."[201]

59. Nonetheless, the Appeals Chamber found that the Trial Chamber erred in ordering the Registry to transmit the individual application forms for reparations to the TFV for it to

[194] *Id*., para. 140, citing *Lubanga* Decision Establishing Principles, para. 274 (emphasis in original).
[195] *Lubanga* Appeal Judgment on Reparations Principles, para. 152.
[196] *Id*., para. 149.
[197] *Id*., para. 152.
[198] *Id*., para. 153.
[199] *Id*., paras. 212, 215.
[200] *Id*., para. 210.
[201] *Id*., para. 211 (emphasis added).

consider whether it would be appropriate for victims who applied for reparations to be included in any reparations program implemented by the TFV.[202] The Appeals Chamber found that, despite correctly recognizing the voluntary nature of victims' participation in reparations programs, the Trial Chamber erroneously made their participation in such programs dependent on whether the TFV "considers it appropriate."[203] Noting that when the victims made their applications, they applied for either individual awards or a collective award without knowing the kind of collective program that would ultimately be adopted, the Appeals Chamber found that "it is necessary to seek the victims' consent when a collective award is made."[204]

60. Furthermore, the Appeals Chamber found that, contrary to the Regulations of the Registry, the Trial Chamber did not include any clause regarding confidentiality when transmitting applications to the TFV.[205] Accordingly, the Appeals Chamber considered it appropriate to include in the order for reparations an instruction to the Registrar to consult with the victims, through their legal representatives, in order to seek their consent to the disclosure of confidential information to the TFV.[206] The TFV was also directed to seek the consent of victims to participate in collective reparations programs once the collective reparations award contained in the draft implementation plan have been approved.[207]

61. Lastly, the Appeals Chamber found that the Trial Chamber erred in not making its reparations order against Lubanga *and* through the TFV.[208] It understood the Trial Chamber's decision as interpreting the terms "through the [TFV]" in Article 75(2) of the Rome Statute as replacing the terms "against the convicted person" due to Lubanga's indigence, which it found to be an error.[209] The Appeals Chamber considered that issuing an order for reparations "against" the convicted person and acting "through" the TFV are not mutually exclusive concepts.[210] In other words, even if reparations are ordered "through" the

[202] *Id*., paras. 158-60.
[203] *Id*., para. 160.
[204] *Id*.
[205] *Id*., para. 161.
[206] *Id*., para. 162.
[207] *Id*.
[208] *Id*., para. 76.
[209] *Id*., para. 70.
[210] *Id*.

TFV, the Trial Chamber must still direct the order "against" the convicted person."[211] Thus, while an order for reparations must be issued "in *all* circumstances against the convicted persons," "such an order for reparations can – *in addition* – be made through the Trust Fund."[212]

62. Following the Appeals Judgment, the Appeals Chamber provided an opportunity to the parties to make submissions prior to the Trial Chamber setting the amount of the reparations award.[213] The TFV, OPCV, and LRVs then located and identified eligible victims and made their submissions before the Trial Chamber, which determined Lubanga's scope of liability and the size of the reparations award.[214]

63. The Trial Chamber found that all the potentially eligible victims had established their identity,[215] considering that the documentation provided by potentially eligible victims was sufficient and the witnesses who provided statements for those without acceptable documentation were credible.[216] Turning to a causal nexus between the harm and the crime of which the person was convicted, the Trial Chamber found that 36 out of 385 potentially eligible direct victims could not establish that Lubanga used them to actively participate in hostilities, and that 12 out of 88 potentially eligible indirect victims either could not establish the direct victim's child-soldier status, that Lubanga used the victim in hostilities, or a close personal relationship with the direct victim.[217]

64. The Trial Chamber found that service-based collective reparations were appropriate,[218] reasoning that the 425 eligible victims constituted a collective group because they were all harmed as a result of the crimes for which Lubanga was convicted, i.e., war crimes consisting of conscription and use of child soldiers, even though they did not suffer the same harm.[219]

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[211] *Id*.
[212] *Id*., para. 76 (emphasis in original).
[213] *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129-AnxA, Amended Order for Reparations (Annex A to 'Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012'), 3 March 2015, para. 80.
[214] *Prosecutor v. Lubanga*, ICC-01/04-01/06-3379-Red-Corr-tENG, Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 21 December 2017, ("2017 *Lubanga* Decision Setting the Size of the Reparations Award"), paras. 260-263.
[215] *Id*., para. 77.
[216] *Id*., paras. 74-77.
[217] *Id*., paras. 155, 169.
[218] *Id*., para. 194.
[219] *Id*.

It also encouraged relevant State Parties to facilitate enforcement of reparations awards, considering that State facilitated initiatives in partnership with the TFV are encouraged under Articles 75(5) and 109 of the Rome Statute.[220]

65. On appeal of the Decision on the Size of the Reparations Award, the Lubanga Defence raised six grounds of appeal and the LRV for V01 raised three grounds, relating *inter alia* to: (a) the methodology applied in awarding collective reparations; and (b) the assessment of individual applications.[221]

66. The Appeals Chamber held that a Trial Chamber should not be limited in determining the scope for the purpose of reparation awards by only being able to review requests for reparations it had received, which may result in an incomplete picture of the harm actually caused.[222] It considered that collective reparations "may take forms that do not necessarily require identifying individual victims at any stage of the reparations process," such as for symbolic reparations.[223] It reasoned that limiting reparations only to the requests for awards received "would contravene the principle that reparations 'oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts.'"[224] Depending on the type of reparations contemplated and the information available, the Appeals Chamber held that the Trial Chamber can rely on estimates as to the cost of reparations programs in setting the size of the reparations award.[225]

67. Although many potential victims did not submit supporting documents for their written allegations, the Appeals Chamber found that this does not prevent a finding of victimhood.[226] It reasoned that the Trial Chamber's discretion allows it to consider a victim's account in light of the totality of the evidence even in the absence of supporting documents or reasons

[220] *Id.*, paras. 298, 300.
[221] *Prosecutor v. Lubanga*, ICC-01/04-01/06-3466-Red, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable,' 18 July 2019, para. 8.
[222] *Id.*, para. 79.
[223] *Id.*, para. 82.
[224] *Id.*, para. 83 (citing *Lubanga* Appeal Judgment on Reparations Principles, para. 151).
[225] *Prosecutor v. Lubanga*, ICC-01/04-01/06-3466-Red, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable,' 18 July 2019, para. 108.
[226] *Id.*, para. 202.

for the absence of supporting documents.[227] It considered that the Trial Chamber, in deciding what reparations are appropriate under Article 75(2) of the Rome Statute, must consider how many victims are likely to come forward and benefit from collective reparations programs during the implementation phase and to obtain as concrete of an estimate as possible.[228]

68. In December 2020, nearly two decades after the events for which Lubanga was convicted, the Trial Chamber approved the reparations program proposed by the implementation partner selected by the TFV.[229] The approved program includes projects aimed at mental and physical healthcare, as well as projects aimed at improving the socio-economic situations of victims, including schooling, university, professional training, language courses, remedial schooling, income-generating activities, subsistence allowances, and pensions.[230] However, the Trial Chamber noted that the implementation of these collective reparations "will have to take place in a complex security and health context."[231] In its quarterly report for Quarter 3 of 2021 (July to September), the TFV reported that despite difficulties in the identification of victims due to COVID-19 and the security situation in the Democratic Republic of Congo (which worsened during the reporting period), 123 victims benefitted from psychological and/or physical rehabilitation services.[232]

2. *Prosecutor v. Katanga* (2017)

69. In *Prosecutor v. Katanga*, Germain Katanga was convicted of murder as a crime against humanity, and attacking a civilian population, murder, destruction of property and pillaging as war crimes.[233] The applicants for reparations alleged that they suffered: (a) material harm as a result of the destruction of houses, outbuildings of houses, and business premises; (b) physical harm; (c) and psychological harm from the concerned attacks.[234] The LRV specifically advanced four types of collective modalities: (a) housing support; (b)

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[227] *Id*., paras. 203-204.
[228] *Id*., para. 224.
[229] *Prosecutor v. Lubanga*, ICC-01/04-01/06-3495, Décision faisant droit à la requête du Fonds au profit des victimes du 21 septembre 2020 et approuvant la mise en œuvre des réparations collectives prenant la forme de prestations de services, 14 December 2020 (available in French only).
[230] *See id*., paras. 142-52.
[231] *Id*., para. 114.
[232] TFV Management Brief Q3/2021, 1 July – 30 September 2021, p. 11.
[233] *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, 7 March 2014, p. 658-659.
[234] *Prosecutor v. Katanga*, ICC-01/04-01/07-3728-tENG, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017 ("*Katanga* Reparations Order"), paras. 76, 108, 112.

an income-generating activity measure; (c) education assistance; and (d) mental health services.[235] The *Katanga* Trial Chamber's Order for Reparations addressed, *inter alia*: (a) the concept of victim; (b) the definition and substantiation of harm; and (c) the types and modalities of reparations, including their implementation.

70. The Trial Chamber held that the four conditions for victim participation – i.e., that the applicant be a natural or legal person, that he or she suffered harm, that the crime which caused the harm falls within the Court's jurisdiction, and that there is a causal nexus between the harm suffered and the crime – also applies at the reparations phase.[236] It also attached one condition that "the crime which caused the harm" must be a crime for which the person in question was convicted.[237] Recognizing that the harm suffered by a victim – by virtue of the commission of a crime – may be the cause of harm to persons other than the direct victims, the Trial Chamber held that a natural person may be a direct victim or an indirect victim.[238]

71. Turning to the definition and substantiation of harm, the Trial Chamber recalled that the definition of harm includes "injury, loss or damage," and that material, physical, and psychological harms are "species of harm encompassed by Rule 85."[239] As for material harm resulting from the destruction of a house, outbuilding, or business premises, the Trial Chamber considered that this can be established by: (a) a statement of the applicant alleging such destruction; (b) a residence certificate or similar evidence in the name of the applicant, dated and signed by a person acting in an official capacity, stating that the immovable property belonging to the Applicant was destroyed in an attack; and (c) the Trial Chamber's findings "concerning the destruction of enemy property as a war crime[.]"[240] Concerning physical harm, the Trial Chamber found that, by and large, the documents submitted by the applicants did not specify that the wounds were sustained in the attack and thus did not establish the causal nexus to the requisite standard of proof.[241]

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[235] *Id*., para. 302.
[236] *Id*., para. 37.
[237] *Id*., para. 37.
[238] *Id*., para. 39.
[239] *Id*., para. 74; ICC Rules, Rule 85.
[240] *Katanga* Reparations Order, para. 85.
[241] *Id*., para. 111.

72. Noting that some applicants alleged psychological harm connected to the death of a relative, the Trial Chamber treated such psychological harm by determining whether: (a) the harm alleged ensued from one or more of the crimes for which Katanga was convicted; (b) the applicant is an indirect victim (i.e., that the death of a direct victim in the attack had been established); and (c) the applicant had a close personal relationship with the direct victim.[242] Conversely, other applicants alleged psychological harm connected to the experience of the attack rather than the death of a relative – i.e., the harm ensued from seeing and/or fleeing the atrocities perpetrated.[243] In such cases where it was proven that the person suffered other harm during the attack – even if he or she made no explicit allegations of psychological harm – the Trial Chamber decided to make a finding that the applicant suffered psychological harm.[244] In other words, the Trial Chamber presumed that applicants suffered repercussions on their mental health if they were affected in a material or physical way by the attack.[245]

73. Five applicants born after the attack alleged transgenerational psychological harm – a phenomenon described by an expert report as "social violence … passed on from ascendants to descendants with traumatic consequences for the latter."[246] While the Trial Chamber noted the findings of the expert report, which spoke of transgenerational trauma present in many children whose parents experienced the attack, the Trial Chamber also paid heed to the Defence observations that: "[t]he report remains extremely vague and hypothetical" and "therefore insufficient to establish a sufficient close link between the crimes for which Mr Katanga was convicted and any eventual harm which would be endured by the children born after the Bogoro attack."[247] Even though the Trial Chamber found that the applicants "in all likelihood, suffer[ed] from transgenerational harm," there was no evidence to establish the causal nexus between the trauma suffered and the attack.[248] Nonetheless, the Chamber recommended that the children in question be monitored and afforded particular attention.[249]

[242] *Id*., para. 114.
[243] *Id*., para. 123.
[244] *Id*.
[245] *Id*.
[246] *Id*., para. 132.
[247] *Id*., para. 133.
[248] *Id*.
[249] *Id*.

74. The Trial Chamber went on to hold that individual and collective reparations were appropriate because, while not all victims suffered the same harm, they perceived themselves as part of the same group subjected to the same attack in the concerned community.[250] It reasoned that collective reparations were appropriate to: (a) address shared needs and the complexity of the suffering; (b) achieve reconciliation; and (c) to maximize limited resources.[251] The Trial Chamber further held that so long as reparations confer a benefit exclusively to an individual, even if that involves the use of an organization or other group as an intermediary, then the award qualifies as an individual reparation.[252]

75. Considering that the crux of collective reparations is "the perception of the members of the group who experienced shared harm,"[253] the Trial Chamber found that collective reparations are an "open concept" – implemented through various modalities in order to benefit both the community and the individual.[254] Reparations "may, therefore, benefit a group ... which predated the crime, but also any other group bound by collective harm and suffering as a consequence of the crimes of the convicted person."[255] In order to receive collective reparations, the Trial Chamber considered that "a group or category of persons may be bound by a shared identity or experience," or by victimization arising from "the same violation or the same crime within the jurisdiction of the Court."[256]

76. On appeal, the LRV claimed that the Trial Chamber erred in its application of the standard of proof to the applicants claiming transgenerational harm and failed to take into account all of the evidence pertaining to those applications.[257] Noting that the Trial Chamber did not dismiss the transgenerational nature of the personal harm which it considered to be established for the five applicants, the LRV submitted that "the admission of the transgenerational nature of the trauma itself is sufficient to establish such a nexus where the harm to the parent is considered to be linked to the attack."[258] In the Appeals Chamber's

[250] *Id.*, paras. 275, 288.
[251] *Id.*, paras. 289, 292.
[252] *Id.*, para. 271.
[253] *Id.*, para. 275.
[254] *Id.*, para. 278.
[255] *Id.*
[256] *Id.*, para. 274.
[257] *Prosecutor v. Katanga*, ICC-01/04-01/07-3778, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute," 8 March 2018, para. 227.
[258] *Id.*

view, the Trial Chamber's conclusion that the causal nexus had not been established was contradictory to its statement that the five applicants were "in all likelihood" suffering from transgenerational harm.[259] Finding that the Trial Chamber erred in failing to properly reason its decision, the Appeals Chamber found it impossible to assess the reasonableness of the Trial Chamber's finding that the causal nexus was not established[260] and remanded the issue of transgenerational harm to the Trial Chamber to reassess and determine whether the five applicants should be awarded reparations.[261]

77. On remand, the Trial Chamber again rejected the five applications alleging transgenerational harm, finding that the causal nexus to the crimes had not been established.[262] It explained that it would assess the applications on a case-by-case basis considering circumstantial evidence as a whole to determine whether the psychological harm suffered by the applicants was the result of a crime for which Katanga was convicted, taking into account the evidence submitted, in particular, mental health certificates.[263] Additionally, it took note of the current scientific debate on the phenomenon of transgenerational transmission of trauma.[264] It considered in general that the closer the date of birth of the applicant to the date of the attack, the more likely it is that the attack had an impact on the applicant, especially if no other traumatic events occurred between the date of the attack and the date of the applicant's birth.[265] Conversely, it considered that the farther the applicant's date of birth from the date of the attack, the more likely it was that other factors and events may have contributed to the applicant's suffering.[266] Noting that a medical examination of one of the applicants noted that the pathology in question involved several factors, the Trial Chamber recalled the principles applicable to the causal nexus – the proximate cause standard – which is that the crime must be sufficiently related to the harm to be considered the cause of that harm.[267] Unfortunately, the Trial Chamber's *de novo* assessment of the five applications is heavily

[259] *Id*., para. 238.
[260] *Id*., para. 239.
[261] *Id*., para. 260.
[262] *Prosecutor v. Katanga*, ICC-01/04-01/07-3804-Red-tENG, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, 19 July 2018, p. 31.
[263] *Id*., para. 28.
[264] *Id*.
[265] *Id*., para. 29.
[266] *Id*., para. 30.
[267] *Id*., para. 31.

redacted, making it impossible to see how it assessed the evidence in drawing its conclusions.[268]

3. *Prosecutor v. Ntaganda* (2021)

78. In *Prosecutor v. Ntaganda*, Bosco Ntaganda was convicted of: (a) crimes against humanity for actions that included murder, rape, sexual slavery, persecution, forcible transfer and deportation; and (b) war crimes that included intentionally directing attacks against civilians, ordering the displacement of the civilian population, and conscripting and enlisting child soldiers.[269] The LRVs and OPCV submitted that collective reparations through, *inter alia*, medical and psychological rehabilitation with individualized components in the form of compensation were appropriate in order to aid victims' economic development and to not "cheapen" the effects of reparations by only issuing collective reparations.[270] The *Ntaganda* Trial Chamber's Reparation Order expanded on the reparation principles relating to victims, harm, the types and modalities of reparations, and the goals of reparations.

79. The Trial Chamber held that two main principles of the Rome Statute must direct the purpose of a reparations order: (a) "oblige those responsible for serious crimes to repair the harm they caused;" and (b) ensure offenders are held accountable for their actions.[271] The Trial Chamber also held that a reparations order must be victim-centered by providing victims adequate access in all stages of the proceedings, outreach activities, full and meaningful consultation, and "a voice in the design and implementation of reparations programmes ... allowing them to shape the reparation measures according to their needs."[272] Recalling the "do no harm" principle, the Trial Chamber held that it should have particular application when: "(i) … conducting victim identification and eligibility screening; (ii) … developing reparation orders and plans; and (iii) … carrying out the approved reparation measures."[273]

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[268] *Id*., paras. 35-140.
[269] *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment, 8 July 2019, p. 535-38.
[270] *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2633-Red, Public Redacted Version of the "Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks" (ICC-01/04-02/06-2633-Conf), paras. 53, 60; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2632, Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers, 18 December 2020, paras. 31-33.
[271] *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2659, Reparations Order, 8 March 2021 ("*Ntaganda* Reparations Order"), para. 2.
[272] *Id*., paras. 45-47.
[273] *Id*., para. 52.

80. Turning to principles relating to harm, the Trial Chamber held that the ICC must consider various types and layers of harm such as damage to a life plan, transgenerational harm, or harm suffered by persons as members of a family or community.[274] It explained that "damage to the life plan or project of life," differs from loss of earnings and refers to the lack of self-realization of a person "who, in their vocations, aptitudes, circumstances, potential, and aspirations, may have reasonably expected to achieve certain things in their life."[275] It considered that this type of damage "implies loss or severe diminution of prospects for personal development, in a manner that is irreparable or reparable only with great difficulty," but can be addressed through particular modalities of reparations.[276] Considering that the crimes under the ICC's jurisdiction often result in mass victimization, it reasoned that "members of families and communities may be affected by traumatic events suffered collectively by individual members of the group, by reasons of the group's disintegration, breaking up, or scattering."[277]

81. As for transgenerational harm, the Trial Chamber adopted the *Katanga* Trial Chamber's definition of the phenomenon,[278] yet departed from its reasoning concerning causation. Unlike the *Katanga* Trial Chamber, the *Ntaganda* Trial Chamber considered that children of direct victims may have suffered transgenerational trauma regardless of the date when they were born, if they could show that their harm was a result of the crimes for which Ntaganda was convicted.[279] It also considered that while children born out of rape are considered direct victims, they may also be affected by transgenerational harm as indirect victims.[280] It further explained that the causal link between the crime and the harm is to be determined in light of the specific circumstances of the case.[281] Also unlike the *Katanga* Trial Chamber, the *Ntaganda* Trial Chamber's reparations order did not perform an in-depth factual analysis of the victims applications in assessing the causal nexus.

[274] *Id*., para. 71.
[275] *Id*., para. 72.
[276] *Id*.
[277] *Id*., para. 74.
[278] *Id*., para. 73, citing *Katanga* Reparations Order, para. 132: "[A] phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter."
[279] *Ntaganda* Reparations Order, para. 182.
[280] *Id*., para. 182.
[281] *Id*., para. 76.

82. The Trial Chamber went on to hold that the modalities of reparations under Article 75 of the Rome Statute are meant to address the various types of harm subject to reparations and may have symbolic, preventative, or transformative value and may assist in promoting reconciliation.[282] It considered that reparations awards "should support programmes that are self-sustainable," which allows victims, their families, and their communities to benefit from measures for the longer-term.[283] It also considered that reparations programs must be effective and strive to meet victims' expectations, "particularly when preference has been expressed for reparations that are meaningful, transformative, and self-sustainable, rather than symbolic or charitable in nature."[284]

83. Considering these principles, the Trial Chamber found the following measures appropriate to address the harm caused to the direct and indirect victims of the crimes for which Ntaganda was convicted and directed the TFV to design an implementation on these bases:[285]

    a. Restitution: "is directed at the restoration of an individual's life, restoring the victim to the original situation, whenever possible, including a return to one's family, home, previous employment, providing continuing education, or the returning of lost or stolen property."[286] Restitution may also be appropriate for legal bodies such as schools or other institutions.[287] It should, to the extent possible, restore victims to their circumstances before the crime was committed, even if full restitution is unachievable.[288]

    b. Compensation: "is a form of economic relief, consisting usually in the award of funds or any other act ordered by the Court, as payment for the damages suffered."[289] It can pertain to pecuniary or non-pecuniary losses and is a substitute remedy provided as a means of redress when there is no way to undue the effect of the violation through other measures.[290] In this regard, the Trial Chamber endorsed the TFV's request for sufficient

[282] *Id*., para. 82.
[283] *Id*., para. 91.
[284] *Id*.
[285] *Id*., paras. 200, 212.
[286] *Id*., para. 83.
[287] *Id*., para. 83.
[288] *Id*., para. 201.
[289] *Id*., para. 84.
[290] *Id*.

flexibility to prepare an implementation plan that is responsive to the needs of the victims and adjusted to the realities, and instructed the TFV to include a recommendation as to compensation, including the amount.[291]

c. Rehabilitation: is "aimed at addressing the medical and psychosocial conditions of the victims" and may include "medical services and healthcare, psychological, psychiatric, and social assistance, as well as any relevant legal and social services."[292] Rehabilitation "should aim at the restoration of a function or the acquisition of new skills required as a result of the changed circumstances of a victim due to the crimes" and enable maximum self-sufficiency and function for the individual concerned.[293] A holistic rehabilitative approach should aim to restore, as far as possible, victims' independence, physical, mental, social, and vocational ability, and full inclusion and participation in society, which may include community-oriented medical (and psychological) services.[294] Rehabilitation measures may also include assistance with rehabilitation and housing, psychosocial rehabilitation, treatment for those who suffer from any addiction, as well as "re-integrative and social services; community and family-oriented assistance and services, including mediation; vocational training and education, along with micro-credits, income generating opportunities or sustainable work that promote a meaningful role in society."[295] Trauma-based counselling to victims may also be important to respond to their psychological rehabilitation needs and "such support should be extended to victims, both at the entry point and during their participation in such a reparations program."[296]

d. Satisfaction: "refers to measures that acknowledge the violation and aim to safeguard the dignity and reputation of the victim" and may be appropriate to repair non-pecuniary harms.[297] Satisfaction measures may include "establishing or assisting campaigns that are designed to improve the position of the victims; issuing certificates

[291] *Id*., para. 202.
[292] *Id*., para. 87.
[293] *Id*., para. 203.
[294] *Id*.
[295] *Id*.
[296] *Id*., para. 204.
[297] *Id*., para. 88.

that acknowledge the harm individual victims experienced; setting up outreach and promotional programmes to inform victims of the outcome of the trial; and educational programs" aimed at reducing the stigmatization and marginalization of victims of rape, sexual slavery, as well as child soldiers.[298]

e. Symbolic reparations: may also contribute to the process of rehabilitation but "must bear in mind the victims' views that any symbolic measure must also serve a practical purpose."[299] One of the symbolic measures proposed was the construction of a community center to be named after Abbé Bwanalonga to foster reconciliation between the different sectors of the community that he worked with.[300]

84. In sum, this survey of international(ized) criminal courts and tribunals shows a lack of authority to order States to provide healthcare as a form of reparations. Reparations awards may only be issued *against a convicted person*, even if they are supplemented through a trust fund as in the ICC. Similarly, reparations awards are limited to victims, i.e., those who have suffered harm as a result of the crimes within an international(ized) criminal court or tribunal's jurisdiction, as opposed to the general population.[301] While the ICC has ordered the provision of physical and mental healthcare services to victims as part of reparations awards, these programs are limited to approved victims (as opposed to the general populace) and are funded by the TFV (as opposed to the State of the perpetrator or State where victims are located).[302]

Part III: The Civil Parties' right to reparations at the ECCC

85. The ECCC is an extraordinary chamber established within the existing court structure of Cambodia to bring to trial "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and the international conventions recognized by Cambodia,

[298] *Id*., para. 207.
[299] *Id*., para. 208.
[300] *Id*.
[301] *Lubanga* Decision Establishing Principles, paras. 195-196.
[302] *See Prosecutor v. Lubanga*, ICC-01/04-01/06-3495, Décision faisant droit à la requête du Fonds au profit des victimes du 21 septembre 2020 et approuvant la mise en œuvre des réparations collectives prenant la forme de prestations de services, 14 December 2020.

that were committed during the period from 17 April 1975 to 6 January 1979."[303] The ECCC was established by an agreement between the RGC and the UN reached on 6 June 2003.[304] Under Article 2(1) of the Agreement, the ECCC has "personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement."

86. Although neither of the ECCC's founding documents – the Agreement and Establishment Law – explicitly mentioned reparations, they were incorporated into the Judge-made Internal Rules ("ECCC Internal Rules").[305] The purpose of the ECCC Internal Rules was "to consolidate applicable Cambodian procedure for proceedings before the ECCC" and in accordance with Article 12(1) of the Agreement – which, in certain circumstances, allows for recourse to procedural rules at the international level – to "adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or consistency with international standards."[306]

87. The ECCC Internal Rules allowed victims to participate in ECCC proceedings as Civil Parties, who are entitled to "support[] the prosecution" and "[s]eek collective and moral reparations."[307] To be admitted as a Civil Party, the individual must have been "clearly identified" and demonstrated that he/she had in fact suffered physical, material, or psychological injury as a direct consequence of one of the crimes alleged against the charged person.[308] After a conviction decision, the Civil Parties were entitled to "collective and moral reparations."[309] Collective and moral reparations may include an acknowledgement of the harm suffered and/or the provision of benefits.[310]

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[303] Establishment Law, Art. 1.
[304] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003 ("Agreement").
[305] By contrast to the Rules of Procedure and Evidence adopted by the Judges at the ICTY and ICTR, judges at the ECCC were more limited in the creation of procedural issues as Article 33 new of the Establishment Law had limitations precluding them from effectively exercising such legislative power. M. G. Karnavas, 'Bringing Domestic Cambodian Cases into Compliance with International Standards,' (2014) 1 *Cambodia Law and Policy Journal* 45, at 58.
[306] ECCC Internal Rules, preamble.
[307] ECCC Internal Rules, Rule 23(1)(b).
[308] ECCC Internal Rules, Rule 23*bis*(1).
[309] ECCC Internal Rules, Rule 23*quinquies*(1).
[310] ECCC Internal Rules, Rule 23*quinquies*(1).

88. Civil Parties could make a single submission for reparations, seek a limited number of awards, and in doing so, were required to provide: "(a) a description of the awards sought; (b) reasoned argument as to how the request addresses the harm suffered and specify, where applicable, the Civil Party group within the consolidated group to which they pertain; and (c) the specific mode of implementation[.]"[311] In deciding the modes of implementation of reparations awards, the Trial Chamber could: (a) "order that the costs … shall be borne by the convicted person;" or (b) "recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented."[312] Enforcement of orders for costs against the convicted person was to be "done by appropriate national authorities in accordance with Cambodian law on the initiative of any member of the collective group."[313] However, if the "verdict specifies that a particular award shall be granted in relation only to a specified group,"[314] any member of the specified group could initiate enforcement of that award instead.[315] Any specific projects ordered must have been "designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding."[316]

1. The Transcultural Psychological Organization

89. Before analyzing the ECCC's reparations orders, it is worth discussing one of the NGO-led initiatives to assist witnesses and Civil Parties before the ECCC, especially since strengthening its services was one of the requested reparations measures in Case 001.[317] Working in connection with the ECCC's Witness and Expert Unit and the Victims Support Section, the Transcultural Psychological Organization provided a range of psychosocial services through Cambodian mental health experts.[318] Services ranged from on-site psychological support before, during, and after ECCC proceedings, to trauma treatment, community-based truth-telling, and memorialization initiatives, including activities to raise

[311] ECCC Internal Rules, Rule 23*quinquies*(1).
[312] ECCC Internal Rules, Rule 23*quinquies*(3).
[313] ECCC Internal Rules, Rule 113(1).
[314] ECCC Internal Rules, Rule 113(1).
[315] ECCC Internal Rules, Rule 113(1).
[316] ECCC Internal Rules, Rule 23*quinquies*(3)(b).
[317] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Civil Parties' Co-Lawyers' Joint Submission on Reparations, 14 September 2009 ("CPG Joint Submission"), para. 20.
[318] Transcultural Psychological Organization Cambodia, *Justice & Relief for Survivors of the Khmer Rouge*, last visited 13 April 2022.

awareness of trauma, torture, and mental health issues within the wider Cambodian population.[319]

90. The Transcultural Psychological Organization offered services primarily to ECCC Civil Parties as well as their families and communities.[320] One such service included "testimonial therapy" in which a counselor assists the individual in processing painful memories into written testimony to be read aloud by monks or other religious officials in the presence of survivors, community members, local authorities, and NGOs.[321] While the Transcultural Psychological Organization's services were not provided *as* a reparations benefit and suffered from funding issues, much can be learned from its experience and challenges.[322]

2. Prosecutor v. KAING Guek Eav ("Duch") (2010-2012)

91. In April 1999, S-21 Chairman Kaing *Guek Eav* (alias "Duch") emerged from obscurity in western Cambodia after becoming a born-again Christian.[323] He spoke to western journalists fully admitting to his role as Chairman of S-21[324] describing the gruesome details of the executions performed at S-21, and implicated other Khmer Rouge cadres such as Nuon Chea, Khieu Samphân, Ieng Sary, Kè Pork, and Ta Mok.[325] He was arrested in May 1999 and was detained for more than eight years by the Cambodian Military Court.[326] He was then transferred and tried as the first Accused before the ECCC in Case 001, where he was convicted of crimes against humanity, including murder, extermination, enslavement, imprisonment, torture, persecution on political grounds, and other inhumane acts.[327]

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[319] *Id.*
[320] *Id.*
[321] *Id.*
[322] Open Society Justice Initiative, *Performance And Perception: The Impact Of The Extraordinary Chambers In The Courts Of Cambodia*, 2016, p. 92.
[323] *See* Anthony C. LoBaido, *Pol Pot's Nazi-Style Experiments*, WND, 7 June 1999, last visited 13 April 2022; Nic Dunlop and Nate Thayer, *Duch Confesses*, Far Eastern Economic Review, 6 May 1999.
[324] *See* Christophe Peschoux, *Interview with Kaing Guek Eav, also known as Duch, Chairman of S-21*, Monash University, 28-29 April 1999; Nic Dunlop and Nate Thayer, *Duch Confesses*, Far Eastern Economic Review, 6 May 1999.
[325] *See* Christophe Peschoux, *Interview with Kaing Guek Eav, also known as Duch, Chairman of S-21*, Monash University, 28-29 April 1999, p. 10-15, 21-24.
[326] *Case of KAING Guek Eav*, 001/18-07-2007/ECCC-OCIJ, Closing Order, 8 August 2008, D99, paras. 3, 166, 626.
[327] Case of *KAING Guek Eav*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, E188 ("Duch Trial Judgment"), para. 567.

92. The Civil Party Groups ("CPGs") in Case 001 against Duch claimed that they were either direct or indirect victims of the events at S-21 and S-24 security centers,[328] with 21% of the CPGs specifically requesting a form of reparation for medical-related services.[329] These CPGs argued that other reparations programs, such as the Program for Reparations and Comprehensive Health Care for Victims of Human Rights Violations in Chile (discussed in Part IV below), provided victims free counseling and support for psychological and other mental problems, and that torture, forced labor, malnutrition, and poor conditions of detention during the DK period deeply impacted the health of the victims.[330]

93. The CPGs argued that the scope of ECCC Internal Rule 23 allowed for the creation and support of medical centers and counseling, since they are "vital in facilitating broader societal recognition."[331] At a minimum, the CPGs requested that the reparations award against Duch include:

> the compilation and dissemination of statements of apology made by KAING Guek Eav throughout the trial acknowledging the suffering of victims, including comments by the Civil Parties; access to free medical care (both physical and psychological), including free transportation to and from medical facilities; funding of educational programs which inform Cambodians of the crimes committed under the Khmer Rouge regime and at S-21 in particular; erection of memorials and pagoda fences at S-21 (Choeung Ek and Prey Sar) as well as in the local communities of the Civil Parties; and inclusion of the names of the Civil Parties in Case 001 in the final judgment, along with a description of their connection to S-21.[332]

94. Considering Duch's indigence, the CPGs requested that the Trial Chamber should "declare the ECCC competent to ensure reparation awards are implemented by the RGC in accordance with its international obligations, or by the Victims Unit through a voluntary trust fund."[333] The CPGs further requested that the Victims Unit be given a mandate to undertake wider consultation (beyond that of the Civil Party Groups) on how reparations can be approached in the Cambodian context, and that the Trial Chamber "delineate its

[328] *Id.*, paras. 645-649.
[329] Case of *KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Civil Parties' Co-Lawyers' Joint Submission on Reparations, 14 September 2009 ("CPG Joint Submission"), E159/3, para. 17.
[330] *Id.*, paras. 18-21.
[331] *Id.*, paras. 8-10.
[332] Duch Trial Judgment, para. 652.
[333] *Id.*, para. 653; CPG Joint Submission, para. 2, fn. 3.

framework for the enforcement and implementation of any reparations awards."[334] The CPGs also requested that the Transcultural Psychosocial Organization, which had already been providing free psychological assistance to witnesses and CPGs, should be "supported and reinforced" through a reparation award.[335]

95. The Trial Chamber granted only two reparations requests to: (a) include the names of civil parties and their relatives who died at S-21 in its judgment; and (b) compile and publish statements of apology by the convicted person.[336] It held that the ECCC "lacks the competence to enforce reparations awards," that reparations can only be enforced within the Cambodian court system,[337] and that reparations at the ECCC were intended to be essentially symbolic rather than compensatory.[338] Considering "the large number of Civil Parties expected before the ECCC and the inevitable difficulties of quantifying the full extent of losses suffered by an indeterminate class of victims," it reasoned that such limitations on the Trial Chamber's powers to award reparations were considered necessary.[339]

96. The Trial Chamber justified its refusal to grant specific reparations by holding that it cannot impose legal obligations on the Cambodian Government, and that the Court lacks the resources to fulfill such obligations. It explained that unlike regional human rights courts, the ECCC is not empowered to adjudicate questions of State responsibility and to order States to make reparations to their citizens upon a finding of gross violations of international human rights.[340] Specifically, it found that the ECCC has no jurisdiction over Cambodian or other national authorities or international bodies and that there is no mechanism allowing the ECCC to substitute or supplement awards made against an indigent accused with funds provided by national authorities or third parties.[341] Finding that the ECCC Internal Rules limit the type of reparations that it may accord to victims, the Trial Chamber stated that, at most, it can "merely encourage national authorities, the international community and other

[334] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Civil Party Group 1 – Final Submission, E159/7, 10 November 2009, para. 124.
[335] CPG Joint Submission, para. 20.
[336] Duch Trial Judgment, paras. 667-668.
[337] *Id*., para. 661.
[338] *Id*.
[339] *Id*.
[340] *Id*., para. 663.
[341] *Id*, paras. 662-663.

potential donors to show solidarity to the victims by providing financial and other forms of support that contributes to their rehabilitation, reintegration, and restoration of dignity."[342]

97. Accordingly, the Trial Chamber found that the CPG's requests for access to free healthcare and educational resources were "outside the scope of available reparations before the ECCC."[343] The requested measures "by their nature [were] not symbolic but instead designed to benefit a large number of individual victims" and were neither particularized nor readily quantifiable within the available resources of the Chamber."[344] Reasoning that the "provision of free medical care to a large and indeterminate number of victims may purport to impose obligations upon national healthcare authorities,"[345] the Trial Chamber considered that even if such awards could be considered moral or collective reparations consistent with the Internal Rules, "proof would be required as to the link between the measure sought by each claimant and the crimes for which KAING Guek Eav has been found responsible."[346]

98. On appeal, the CPGs claimed that the Trial Chamber erred because: (a) the ECCC can order reparations that require the government's assistance in "non-pecuniary and administrative support rather than a financial contribution;"[347] and (b) Duch's indigence should not prevent the ECCC from issuing reparation orders because such orders are not dependent on the convicted person's financial capacity.[348] The Supreme Court Chamber found no errors on these two issues.

99. The Supreme Court Chamber held that because both the ECCC's reparation mandate is limited to convicted persons and the ECCC framework does not provide for a mechanism to invite representations from the State, it would violate principles of procedural fairness to "bind orders against the State."[349] Agreeing with the Trial Chamber's reasoning that the ECCC Chambers have no jurisdiction over matters that are not statutorily conferred upon

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[342] *Id*.
[343] *Id*., para. 674.
[344] *Id*.
[345] *Id*.
[346] *Id*.
[347] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Appeal Against Judgment on Reparations by Co-Lawyers For Civil Parties- Group 2, 2 November 2010, F13, paras. 21-25.
[348] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, 3 February 2012 ("Duch Appeal Judgment"), para. 636.
[349] *Id.*, para. 656 (citing ICC Rome Statute, as amended on 29 November 2010, Art. 75(3), which allows the ICC to invite representations from or on behalf of interested States).

them,[350] the Supreme Court Chamber considered that any reparation claim is "predestined for rejection" if it seeks "in effect, a measure falling within governmental prerogatives," including in claims for "State apology, organisation of health care, institution of national commemoration days, and naming of public buildings after the victims."[351] Nonetheless, it also held that domestic courts "are bound to give effect to the ECCC reparation orders against convicted persons, similar to any other reparation order issued by domestic courts."[352]

100. The Supreme Court Chamber also affirmed the Trial Chamber's "implicit finding" that it is necessary to limit reparation awards to what can realistically be implemented, "in consideration of the actual financial standing of the convicted person."[353] Considering the indigent nature of the convicted person, the Supreme Court Chamber held that an award must be practically attainable in accordance with the ECCC reparations framework, which limits reparations requests to those "seeking a limited number of measures" and provides that "proposed projects are to be financed either by the convicted person or by external donors."[354]

3. The Addendum to the Agreement

101. On 11 and 26 August 2021, representatives of the UN and RGC signed an Addendum to the Agreement, based on consultations on transitional arrangements for the completion of the work of the ECCC and performance of residual functions.[355] The Addendum entered into force on 12 January 2022, following approval by the UN General Assembly and promulgation and signing of the instrument of ratification by the RGC.[356] Article 2 of the Addendum specifies the residual functions of the ECCC, which include, among other things, dealing with appeals to the Supreme Court Chamber, review applications and proceedings

[350] Duch Appeal Judgment, para. 663.
[351] *Id.*, para. 664.
[352] *Id.*, para. 665 (citing ECCC Internal Rule 113(1) and the Criminal Procedure Code of the Kingdom of Cambodia, 2007, Art. 496 regarding the enforcement of civil penalties).
[353] Duch Appeal Judgment, para. 668.
[354] *Id.*, para. 668, fn. 1343 (noting that "even though the Internal Rules have been recently amended so as to expand the reparation measures available to the ECCC," under Internal Rule 23*quinquies* (Rev. 8), the proposed projects in the reparations requests are to be financed either by the convicted person or by external donors). *See also* ECCC Internal Rules, Rule 23*quinquies*.
[355] Addendum to the Agreement between the Royal Government of Cambodia and the United Nations concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion Work of the Extraordinary Chambers, 11 and 26 August 2021.
[356] ECCC Website, Addendum to the UN-RGC Agreement Enters into Force, 12 January 2022.

for revision of final judgments, sanctions or referral to competent authorities for offences against the administration of justice, enforcement of sentences and treatment of convicted prisoners, preservation of archives, and responses to requests for access to documents.

102. Concerning victims, Article 2 requires the ECCC to "continue to … provide for the protection of victims," "disseminate information to the public regarding the Extraordinary Chambers," and to "monitor the enforcement of reparations awarded to the Civil Parties." Seemingly, the Addendum goes further than the Internal Rules in providing for the protection of *victims* – as opposed to only those who the ECCC qualified as Civil Parties.[357] As welcoming as this may be, Article 2, regrettably, does not grant authority to revise or expand the mere symbolic reparations awarded by the ECCC Chambers or otherwise provide a basis for implementing meaningful reparations that tangibly address victims' day-to-day needs, such as healthcare initiatives.

103. Prior to the RGC's and UN's signing of the Addendum, on 2 July 2021, the Office of Administration nominated Judges You Ottara and Claudia Fenz as Co-Rapporteurs to review the draft Addendum and provide an advisory report by 1 December 2021 with "explanations for and recommendations on possible undertakings appropriate to and meaningful for victims…."[358] Issuing a call for contributions on 2 September 2021, the Co-Rapporteurs reached out to all stakeholders of the ECCC to submit "ideas for possible victim-related initiatives which could be implemented at the ECCC under Article 2 of the Draft Addendum."[359] In line with Article 2 of the Addendum, the Co-Rapporteurs indicated in

[357] *See supra* Part III, paras. 86-87. To be admitted as a Civil Party at the ECCC, the individual must have been "clearly identified" and demonstrated that he/she had in fact suffered physical, material, or psychological injury which was a direct consequence of one of the crimes alleged against the charged person." ECCC Internal Rules, Rule 23*bis*(1). In Case 002, which concerned events throughout the entirety of Cambodia during the DK period, only 3,866 persons were admitted as Civil Parties, which, when considering the events and those impacted, effectively disenfranchised the vast majority of victims. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 1613.

[358] Advisory Report, Victim-Related Activities of the ECCC During the Residual Phase, 1 December 2021 ("Advisory Report"), p. 10-11. *See also* ECCC Website, Co-Rapporteurs on Residual Functions Related to Victims Deliver Their Report, 1 December 2021; ECCC Website, Call for Contribution of Ideas of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Residual Functions Related to Victims, 2 September 2021.

[359] Advisory Report, p. 11. ECCC Website, Call for Contribution of Ideas of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Residual Functions Related to Victims, 2 September 2021.

their call for contributions that the term "victim" was "not limited to those who participated in legal proceedings before the ECCC."[360]

104. On 2 December 2021, the Co-Rapporteurs submitted their advisory report to the Office of Administration, which published it publicly on 17 March 2022.[361] While the advisory report notes that some contributors recommended mental healthcare initiatives, there is little to no discussion of these proposals, let alone any endorsement.[362] Perhaps this is since, as the Co-Rapporteurs seem to acknowledge, neither the Agreement nor Establishment Law envisaged reparations and the Judge-made ECCC Internal Rules had to "adapt to the procedural realities of trying mass crimes."[363]

105. Having considered the proposals by contributors and having analyzed the residual legal frameworks of other international(ized) criminal courts and tribunals, the Co-Rapporteurs considered that the SCSL's residual projects – such as publication of jurisprudence and best practices, establishment of an SCSL peace museum, archives development, and national capacity building measures such as a national witness protection program, improvement of detention standards, and training of police prosecutors – could inform potential projects at the ECCC.[364]

106. As innovative as the SCSL measures for restorative and sustained transitional justice are, they do not acknowledge the importance of healthcare as an essential need of victims. Moreover, many of the capacity building/transitional justice initiatives that were implemented in Sierra Leone have already been implemented in Cambodia in some form since the 1990s by the UN Transitional Authority in Cambodia.[365] Despite these

[360] ECCC Website, Call for Contribution of Ideas of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Residual Functions Related to Victims, 2 September 2021.
[361] ECCC Website, Advisory Report by Co-Rapporteurs on Residual Functions Related to Victims Is Published, 17 March 2022.
[362] Advisory Report, p. 27.
[363] Advisory Report, p. 22.
[364] Advisory Report, p. 14-19.
[365] For example, the UN Transitional Authority in Cambodia's human rights component trained Cambodian police, prosecutors, defence lawyers, and judges, and monitored court proceedings in Cambodia to promote due process. Dennis McNamara, *UN Human Rights Activities in Cambodia: An Evaluation*, in ALICE H. HENKIN (ED.), HONORING HUMAN RIGHTS 58-60 (2000); TREVOR FINDLAY, CAMBODIA THE LEGACY AND LESSONS OF UNTAC (SIPRI 1995), p. 67; John C. Brown, *Training Defenders of Human Rights*, PHNOM PENH POST, 18 June 1993.

shortcomings, the advisory report is a positive step that reaffirms the need to explore ways of capitalizing on the ECCC's legacy in furthering transitional justice in Cambodia.

107. In sum, the ECCC framework confers no legal authority to the ECCC Chambers to order the provision of healthcare as a form of reparations. Considering that neither the Agreement nor the Establishment Law provide for reparations, as well as the limited authority given to the ECCC judges in drafting the Internal Rules, it is no surprise that reparations at the ECCC were intended to be symbolic, rather than compensatory. Enforcement of any reparations awards issued by the ECCC would be left to the RGC – which, as noted above in the introduction, lacks the capacity to provide even basic healthcare services to victims of the DK period. Given these limitations, transitional justice principles can provide a more flexible process to provide healthcare services to victims of the DK period.

Part IV: Transitional justice and sustainable health development

108. While international(ized) criminal courts and tribunals seek the prosecution of individuals involved in committing mass atrocities, their capacity to contribute to long-term peace can be limited.[366] A more permanent path to lasting peace in post-conflict societies may be better served through a holistic set of transitional justice measures that also address root economic and social inequalities which prevent societies from truly healing. In particular, as the toll on public health and the lingering health inequalities in post-conflict societies is often as large or larger than that experienced during the conflict – since governments in many instances have diverted resources for corrupt use and/or for military use[367] – scholars and truth and reconciliation commissions have suggested that expanding access to adequate health services and making them more equitable may help address root inequalities that threaten the potential for long-term peace.[368] Part IV first analyzes the principles, goals, and

[366] *See* UN Secretary-General Report, paras. 46-47.
[367] Peter Dixon, *Transitional Justice and Development* in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 159, 169 (Cheryl Lawther et al., eds, 2017).
[368] *Justice and opportunity costs*, 42 THIRD WORLD Q. 1696, 1700 (2021) (arguing that international support for health systems can make a positive contribution not only on individual lives but also towards establishing a more durable peace); *see e.g.*, Margaret E. Kruk et. al., *Rebuilding health systems to improve health and promote statebuilding in post-conflict countries: A theoretical framework and research agenda*, 70 SOC. SCI. MED. 89, 92 (2010) (arguing that the "health system is a face of the state as much as the police and the judiciary and as such can strengthen accountability of state institutions and can contribute to the post-conflict reconstruction process"); Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report - Vol. 5*, 29 October 1998, p. 308.

scope of transitional justice before looking at how transitional justice and sustainable health development can be operationalized in post-conflict societies through case studies on health-based reparation programs and sustainable development projects.

A. The principles, goals, and scope of transitional justice

109. Transitional justice encompasses the "full range of processes and mechanisms" associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation.[369] Transitional justice mechanisms may take the form of trials, truth-seeking by truth commissions or similar processes, reparation awards, institutional reforms, legislative measures that seek reconciliation through other means such as development measures, or a combination of these instruments.[370] Grounded in the goals of accountability, justice, and reconciliation, transitional justice recognizes that in order to adequately deal with legacies of mass atrocities the components of "criminal justice, truth-telling, reparations[,] and vetting," should not serve merely as isolated measures but rather as integrative mechanisms, addressing the root causes of conflict, the cultivation of trust, and recognition of victims.[371]

110. There is no one-size-fits-all transitional justice approach in post-conflict States.[372] For instance, the UN Secretary-General in his report on the rule of law and transitional justice in

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[369] UN Secretary-General Report, para. 8; UN Secretary General, *Guidance Note of the Secretary General: UN Approach to Transitional Justice*, March 2010, p. 2, *see also* Paul Seils, *The Place of Reconciliation in Transitional Justice*, ICTJ, June 2017, p. 1.

[370] Peter Dixon, *Transitional Justice and Development* in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 163 (Cheryl Lawther et al., eds, 2017); *see also* UN 2008 Rule-of-Law Report, p. 2 (observing that there is an "understanding of the need to link ... different justice initiatives."); *see e.g.*, UN Development Programme, *From Justice for the Past to Peace and Inclusion for the Future: A Development Approach to Transitional Justice* (2020), p. 14, 57. *See also e.g.*, Annual Report of the UN High Commissioner for Human Rights and Reports of the Office of the UN High Commissioner and the Secretary-General- Analytical study on human rights and transitional justice, UN Doc. A/HRC/12/18 (6 August 2009), para. 3 (noting that transitional justice should also "seek to more comprehensively address the root causes of conflicts and the related violations of all rights, including civil, political, economic, social[,] and cultural rights"), paras. 8-50 (listing examples of transitional justice efforts through: (1) truth seeking; (2) prosecutions; (3) reparation programs; (4) institutional reforms; and (5) national consultations through meaningful public participation).

[371] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. No. A/HRC/21/46, 9 August 2012, para. 20 (citing the UN Secretary-General Report's definition of transitional justice and the four elements in articulating the normative principles and the goals of transitional justice); *see* UN Secretary-General Report, para. 8; *see e.g.*, The European Union, *The EU's Policy Framework on support to transitional justice*, 16 November 2015 (citing the UN Secretary General's report and the four elements in defining transitional justice and the basis for the EU's framework on transitional justice).

[372] *See* UN Secretary-General Report, p. 1 (summary). *See also*, UN 2008 Rule-of-Law Report, p. 2 (observing that "there is no single [transitional justice] approach that will work everywhere.").

conflict and post-conflict societies, stated in general that unfortunately, the international community did not provide rule of law assistance that is adequate to the national context, finding that sustainable approaches must begin with an analysis of the national context.[373] The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence also opines that transitional justice mechanisms must be victim-centered, since truth-seeking, prosecutions, and reparations can only be considered as successful transitional justice measures if victims can meaningfully participate in their design.[374] While mechanisms such as reparations that provide a direct link between conflict-related harms and victims' needs may help pave the way toward addressing larger social and economic inequalities,[375] development takes a broader approach that seeks the achievement of a "higher quality of life for all people," particularly through economic and social measures.[376]

111. Development measures serve as a distinct transitional justice mechanism by seeking to address root economic and social causes of past mass atrocities that may render post-conflict societies vulnerable to instability.[377] Although development programs may not require the State's acknowledgment of its role in large-scale human rights abuses[378] or necessarily enhance a victim's "sense of recognition" because they provide basic goods to the entire population,[379] development is focused instead on influencing the "interrelated processes of social, political, and economic change."[380] Development initiatives may not only complement reparations and other transitional justice measures but can actually enhance

[373] UN Secretary-General Report, para. 15.
[374] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. No. A/HRC/21/46, 9 August 2012, para. 54.
[375] Peter Dixon, *Transitional Justice and Development* in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 175 (Cheryl Lawther et al., eds, 2017).
[376] Pablo de Greiff, *Articulating the Links Between Transitional Justice and Development: Justice and Social Integration*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 28, 33 (Pablo de Greiff and Roger Duthie eds., Social Science Research Council 2009) (suggesting that development broadly "refers to questions of economic growth, and perhaps distribution"); Agenda for Development, Adopted by General Assembly Resolution 51/240 of 20 June 1997, para. 1.
[377] *See* UN General Assembly, Review of the UN peacebuilding architecture, UN Doc. No. A/RES/70/262, 12 May 2016, para. 12 (emphasizing that a comprehensive approach to transitional justice that includes poverty reduction and the extension of legitimate State authority is critical to "preventing countries from lapsing or relapsing into conflict"); *see also* UNDP 2020 Report, p. 57; *see also* UN Secretary-General Report, para. 4.
[378] *See* Special Rapporteur 2014 Report on Reparations, para. 61.
[379] *See* UN 2008 Rule-of-Law Report, p. 26; *see e.g.*, Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, *in* THE HANDBOOK ON REPARATIONS 176, 208 (Pablo de Greiff, ed., 2006) (explaining South African apartheid victims' discontent for the government's development oriented goals that largely ignored reparation programs that would have recognized victims' suffering).
[380] *Id.*, p. 159.

those measures towards a more sustainable peace.[381] For example, strengthening a State's capacity through the provision of broad public goods and services such as healthcare can make the State more capable in delivering reparation awards.[382]

112. The provision of healthcare services targeting victims' needs as part of a development measure, as opposed to narrower and/or short-term reparation awards for individual victims, can serve transitional justice goals by helping to establish trust in the government through greater access to services, building accountable institutions, and the inclusion of marginalized groups.[383] Such provision of health services may not only lead to the fulfillment of the right to an effective remedy but may also foster a greater sense of citizenship for victims.[384] The provision of health and educational services may also expose gaps in existing institutions, which may provide an incentive for improving them and the durability of national institutions more generally.[385]

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[381] UN Development Programme, *From Justice for the Past to Peace and Inclusion for the Future: A Development Approach to Transitional Justice*, 2020, p. 15; *see also* Pablo de Greiff, *Articulating the Links Between Transitional Justice and Development: Justice and Social Integration*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 28, 37 (Pablo de Greiff and Roger Duthie eds., Social Science Research Council 2009); *see also* Naomi Roht-Arriaza and Katharine Orlovsky, *A Complementary Relationship: Reparations and Development*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 170, 174, 205 (Pablo de Greiff and Roger Duthie eds., Social Research Council 2009).

[382] *See* UN 2008 Rule-of-Law Report, p. 22; *see also* Naomi Roht-Arriaza and Katharine Orlovsky, *A Complementary Relationship: Reparations and Development*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 170, 174, 205 (Pablo de Greiff and Roger Duthie eds., Social Research Council 2009).

[383] *See e.g.*, Geoffrey Swenson and Johannes Kniess, *International assistance after conflict: health, transitional justice and opportunity costs*, 42 THIRD WORLD Q. 1696, 1700 (2021) (arguing health aid is especially promising as a transitional justice measure because it has proven particularly successful in: (1) addressing urgent needs; (2) generating high levels of legitimacy; and (3) having a distributive effect); Sylvia Servaes and Natascha Zupan, *In Larger Justice: Linking Health Care, Transitional Justice and Peacebuilding*, 8 J. PEACEBUILDING DEV. 64 (2013); Margaret E. Kruk et. al., *Rebuilding health systems to improve health and promote statebuilding in post-conflict countries: A theoretical framework and research agenda*, 70 SOC. SCI. MED. 89, 92 (2010).

[384] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice, UN Doc. No. A/HRC/36/50/Add.1, 7 August 2017, para. 65 (reporting that programs "that have taken a complex approach to their mix of benefits have been more successful in achieving basic transitional justice goals such as recognizing victims and fostering a sense of citizenship ... by providing a mix of both material reparations such as payments and social benefits ... which may in turn include provisions for education, health and housing"); *see also* UN Declaration on Victims' Rights, paras. 14-17 (listing various forms of medical assistance victims should receive for crimes and abuses of power); *see also* Geoff Dancy and Eric Wiebelhaus-Brahm, *Bridge to Human Development or Vehicle of Inequality? Transitional Justice and Economic Structures*, 9 IJTJ 51, 52 (2015) (arguing that if economic and social inequalities such as healthcare are neglected, "we are left with only uncertain guarantees of nonrepetition [sic]").

[385] UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. No. A/68/345, 23 August 2013, para. 50.

B. Post-conflict healthcare reparations and sustainable development projects as a form of transitional justice

113. The various truth and reconciliation commission recommendations on healthcare reparations and sustainable development projects analyzed below begin with those broader in scope and eventually moves to an example of a more targeted, NGO-led project for specific classes of victims and health services before concluding that there is considerable room to incorporate broader transitional justice mechanisms that promote healing and reconciliation for survivors and affected communities.

1. Building a sustainable national healthcare system in post-conflict East Timor

114. Indonesia occupied East Timor from 1975-1999, inflicting decades of violent repression on occupied East Timorese that included the intentional killing of civilians, forced displacement, sexual violence, and enforced disappearances.[386] East Timor's eventual independence led to a Commission for Truth, Reception and Reconciliation ("CAVR"), backed by significant international support.[387] The CAVR developed a number of victim-oriented measures, including the provision of psychosocial support.[388] Although it initially pursued a more urgent and limited reparations mechanism for the most vulnerable victims based on the CAVR's recommendations, East Timor turned to a development focused restorative agenda that included its need to establish an entirely new healthcare system post-independence.[389]

115. Establishing its new healthcare system in the immediate aftermath of the conflict, the government used international NGOs as temporary health service providers while also strengthening the health system's capacity in order to deliver care using more local human resources.[390] NGOs were accepted as temporary health service providers and a "sustainable

[386] Commission for Reception, Truth, and Reconciliation Timor-Leste ("CAVR"), *Chega! The Report of the Commission for Reception, Truth and Reconciliation in East Timor: Executive Summary*, 2005, p. 54, 73, 116.
[387] In particular, international support for peace and reconciliation in East Timor led to the creation of UNTAET, which was given complete administrative and executive authority in the territory under Chapter VII of the UN Charter by the UN Security Council. *See* UN Security Council, Resolution 1272, UN Doc. No. S/RES/1272, 25 October 1999.
[388] CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 185 (Cambridge University Press 2012).
[389] *See id.*, p. 202 (describing the criticism the East Timorese government received by "favoring a 'restorative justice' approach which omits reparations.").
[390] Alvaro Alonso and Ruairí Brugha, *Rehabilitating the health system after conflict in East Timor: a shift from NGO to government leadership*, 21 HEALTH POLICY PLAN, 206, 210-11 (2006).

consolidation of the emerging health system" with a limited role for NGOs took shape.[391] In 2001, a policy formulation process was initiated with the aim of developing a comprehensive health plan that involved East Timorese in policy and decision-making.[392] The eventual health policy framework "called for NGOs to work in close coordination with government institutions and follow priorities established by the Ministry of Health."[393]

116. Challenges in negotiations between the government, donors, and NGOs included the NGOs' skepticism that the government had the capacity to manage the system without their assistance.[394] The government resisted advice from donors and NGOs and instead implemented the new nationally-led health policy.[395] After the policy's implementation, which included ending the role of NGOs as healthcare service providers, the government then issued a new procedure to assess NGO proposals since the country still relied on NGO assistance in more challenging areas of the country.[396] Close collaboration with the emerging national health authority was key in the initial stages of the reconstruction.[397]

117. Meanwhile, long-term development strategies were planned and eventually fully adopted in order to support a sustainable, local, and publicly driven health system.[398] The Trust Fund for East Timor was established in June 2000 and managed by the World Bank, which paid mostly for the reconstruction of health centers and technical assistance.[399] The Consolidated Trust Fund for East Timor, managed by UNTAET, helped fund national institutions and government salaries.[400] The government's healthcare budget was financed by international aid through the UN Consolidated Fund for East Timor.[401] A number of bilateral actors also contributed through non-military and non-emergency aid.[402]

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[391] *Id.*
[392] *Id.*, p. 211.
[393] *Id.*, p. 212.
[394] *Id.*
[395] *Id.*
[396] *Id.*, p. 213.
[397] *Id.*
[398] *Id.*
[399] *Id.*, p. 209-210.
[400] *Id.*, p. 208.
[401] *Id.*
[402] *Id.*, p. 209 (e.g., Japan, Portugal, European Union, and the United States).

118. After undertaking both a joint donor multi-sector and health-specific needs assessment led by the World Bank and the Interim Health Authority ("IHA"), an authority composed of local East Timorese and international health experts introduced a Health Sector Rehabilitation and Development Programme ("HSRDP") in 2000 that focused on: (a) "restoring access to basic services;" and (b) "developing health policy and systems for the future."[403] Managed by the World Bank, HSRDP pooled money from several donor countries.[404] An HSRDP II followed in 2001, funded through a second phase of the Trust Fund for East Timor.[405] Biannual joint donor missions were held to coordinate negotiations with the government and to monitor progress and limit the "duplication of efforts and facilitated targeting of funding towards priority health sector activities." [406]

119. Based on government data, the new government-led health system led to positive improvements in service utilization, geographic equality in service distribution, and workforce motivation even after the withdrawal of NGOs.[407] Increased capacity and the development of a radio information system also helped to improve utilization, which served particularly useful during a 2002 measles outbreak.[408] The World Bank continues to praise improvements in the healthcare system and its outcomes, including for progress in eradicating malaria in 2013.[409]

120. The successes of the East Timor healthcare rehabilitation projects may not necessarily be transferrable to other similar settings. For instance, Alvaro Alonso of the London School of Hygiene and Tropical Medicine, and Ruairí Brugha of the Royal College of Surgeons in Dublin, Ireland remark that "[f]avourable preconditions existed before the reconstruction, including widespread recognition of the legitimacy of the transitional administration, social cohesion within the state, small size of the country, and coordination facilitated a high level

[403] *Id.*, p. 209-210.
[404] *Id.*, p. 210.
[405] *Id.*
[406] *Id.*
[407] *Id.*, p. 214 (citing unpublished data from 2000-2002 from the East Timor Ministry of Health).
[408] *Id.* 206, 207, 214 (2006).
[409] World Health Organization, *WHO Country Cooperation Strategy: Timor-Leste (2015-2019)*, 2016, p. 9.

of consensus among all actors."[410] Such favorable conditions are often not present in post-conflict situations, as can be seen in the case studies below.

2. Developing a sustainable health-based reparations program in post-conflict Chile

121. In 1990, the President of Chile established a National Truth and Reconciliation Commission after the mass atrocities committed under General Pinochet's dictatorship, which included systemic torture, enforced disappearances, extrajudicial executions, and arbitrary detentions.[411] A National Corporation for Reparations and Reconciliation was established in February 1992 and funded by the national budget and international donors to implement the recommendations of the Truth and Reconciliation Commission ("Chilean TRC").[412]

122. The Chilean TRC stated that the aim of its recommendations in the area of social welfare was to "repair the moral and material harm" victims suffered, including in the area of healthcare.[413] In order to fulfill its obligation to support affected families "to seek a better quality of life," it further recommended that the State encourage the participation of the relatives themselves since it is they who can best determine which of their needs are most urgent and how they may be satisfied.[414]

123. In its recommendations on healthcare, the Chilean TRC highlighted the severe and complex trauma of survivors, which in some cases could extend through the third generation.[415] The Chilean TRC's recommendation that it was primarily the State's responsibility to provide reparations for the victims by facilitating access to health services and developing mental health programs through the Ministry of Health led to the creation of the Programme of Reparations and Comprehensive Health Care for Victims of Human Rights Violations ("PRAIS") as a free healthcare program for the rehabilitation of individuals and families (including through the third generation) affected by human rights violations during

[410] Alvaro Alonso and Ruairí Brugha, *Rehabilitating the health system after conflict in East Timor: a shift from NGO to government leadership*, 21 HEALTH POLICY PLAN 206, 207, 214 (2006).
[411] Chilean National Commission on Truth and Reconciliation, *Report of the Chilean National Commission on Truth and Reconciliation* (Notre Dame, IN: University of Notre Dame Press, 1993) ("Chilean TRC Report") p. 8, 52-53.
[412] National Congress of Chile, Law No. 19.123, Crea la corporación nacional de reparación y reconciliación, establece pensión de reparación y otorga otros beneficios en favor de personas que señala, 8 February 1992; Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, *in* PABLO DE GREIFF (ED), THE HANDBOOK OF REPARATIONS 55, 60 (2006).
[413] Chilean TRC Report, p. 1062.
[414] *Id.* The report does not specify where this State obligation originates.
[415] Chilean TRC Report, p. 1066.

Pinochet's dictatorship.[416] In 2004, Chilean Law 19980 modified existing reparations law to expand healthcare benefits, "including medical and dental care, medical tests, access to specialists, hospitalisation, therapeutic and diagnostic procedures, and accident and emergency services," to additional beneficiaries such as grandchildren of victims.[417]

124. PRAIS recognized as beneficiaries: "relatives of forced disappearances and those executed for political reasons, exiles that returned to the country, the former political prisoners and victims of torture, and people dismissed for political reasons and their families."[418] PRAIS beneficiaries had to be registered through identification cards.[419] A central team of PRAIS within the Ministry of Health "had a decisive role in the orientation and direction of the programme" by developing "training programmes, supervision measures, and evaluation methods."[420] USAID provided most of the funds during the initial phase of the program.[421] Chile's Ministry of Health has since fully funded and operated the program, providing free access to all health services (including mental health), effectively making PRAIS part of the national healthcare system.[422]

125. The number of PRAIS beneficiaries has increased every year, reaching over 784,000 beneficiaries by 2015.[423] Regional medical services were established through a professional network in different hospitals throughout the country as part of the program to help connect beneficiaries in rural areas and cities with PRAIS teams.[424] Elizabeth Lira, Dean of the Universidad Alberto Hurtado's faculty of psychology in Chile and widely published

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[416] Elizabeth Lira, *Reflections on Rehabilitation as a form of Reparation in Chile after Pinochet's Dictatorship*, 5 INT. HUM. RIGHTS L. REV. 194, 207-208 (2008); Chilean TRC Report, p. 1067.
[417] National Congress of Chile, Law No. 19.980, Modifica la ley 19.123, ley de reparación, ampliando o estableciendo beneficios en favor de las personas que indica, 29 October 2004, Art. 7; *see also* Elizabeth Lira, *Reflections on Rehabilitation as a form of Reparation in Chile after Pinochet's Dictatorship*, 5 INT. HUM. RIGHTS L. REV. 194, 207-08 (2008).
[418] Government of Chile, Ministry of Health, Norma Tecnica No. 88 Para La Atención En Salud De Personas Afectadas Por La Represión Politica Ejercida Por El Estado En El Período, 1973-1990, 1993, para. 3.14.1. *See also* Elizabeth Lira, *Reflections on Rehabilitation as a form of Reparation in Chile after Pinochet's Dictatorship*, 5 INT. HUM. RIGHTS L. REV. 194, 208 (2008).
[419] Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, *in* PABLO DE GREIFF (ED.), THE HANDBOOK OF REPARATIONS 55, 69 (2006).
[420] Elizabeth Lira, *Reflections on Rehabilitation as a form of Reparation in Chile after Pinochet's Dictatorship*, 5 INT. HUM. RIGHTS L. REV. 194, 207 (2008).
[421] *Id*., p. 207-208.
[422] *Id*., p. 208, 211-212. *See also* UN 2008 Rule-of-Law Report, p. 20.
[423] Elizabeth Lira, *Reflections on Rehabilitation as a form of Reparation in Chile after Pinochet's Dictatorship*, 5 INT. HUM. RIGHTS L. REV. 194, 210 (2008) (internal citation omitted).
[424] *Id*.

researcher on PRAIS,[425] notes, however, that since there are no official publications on the demographic of (or epidemiological information about) PRAIS beneficiaries, it is difficult to identify changes in needs due to aging of beneficiaries and the pathology of victims (which may or may not be linked with repressive experiences).[426]

126. Despite receiving praise and satisfactions from beneficiaries, Lira notes that the program's success "depended greatly on the individual motivation of the professionals who formed its teams, rather than on institutional compliance with its objectives."[427] The first evaluation of the program in 1994 showed that the team possessed high professional standards and technical qualifications, while in later years there was no follow up training of personnel and teams ceased to provide exclusive care to victims of human rights abuses.[428] After 10 years of operations, Lira notes that changes in the demand for mental healthcare services was not examined, there was no clear profile of a PRAIS "beneficiary" and psychological treatments for patients and their families had not been evaluated.[429]

3. Developing a sustainable health-based reparations program in post-conflict Peru

127. In 2001, the Peruvian President established a Truth and Reconciliation Commission ("Peruvian TRC") after the country endured violent internal armed conflict between the State and armed opposition groups from 1980-2000.[430] During the two decades of conflict, nearly 70,000 people died, with peasant and rural populations suffering disproportionately.[431] Responding to the Peruvian TRC's recommendations on physical and mental health effects of the conflict, the Peruvian legislature passed reparations legislation in July 2005.[432] Beyond recommending free mental and physical healthcare for victims,[433] the reparation

[425] Universidad Alberto Hurtado, *Elizabeth Lira* (faculty profile of Elizabeth Lira).
[426] Elizabeth Lira, *Reflections on Rehabilitation as a form of Reparation in Chile after Pinochet's Dictatorship*, 5 INT. HUM. RIGHTS L. REV. 194, 210 (2008).
[427] Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, *in* PABLO DE GREIFF (ED.), THE HANDBOOK OF REPARATIONS 55, 71 (2006).
[428] *Id*., p. 70.
[429] *Id*., p. 71.
[430] United States Institute of Peace, *Truth Commission: Peru 01*, 13 July 2001; Amnesty International, *Peru: The Truth and Reconciliation Commission – a first step towards a country without injustice*, 25 August 2004, p. 1.
[431] Comisión de la Verdad y Reconciliación, *Final Report- General Conclusions*, 28 August 2003, paras. 2, 5.
[432] Congress of the Republic of Peru, Law No. 28592, Ley que crea el Plan Integral de Reparaciones, 20 July 2005; *see also* Christián Correa, *Reparations in Peru: From Recommendations to Implementation*, ICTJ, June 2013, p. 5.
[433] Amnesty International, *Peru: The Truth and Reconciliation Commission – a first step towards a country without injustice*, 25 August 2004, p. 24.

recommendations also had a broader social and economic development focus by offering collective compensation to rebuild and consolidate institutions in peasant and indigenous communities.[434]

128. The Reparations Council, established in October 2006, began the implementation of reparations through the Comprehensive Reparations Plan (Plan Integral de Reparaciones or "PIR"), which was recommended by the Peruvian TRC.[435] To fund the PIR, Peru complemented its own funding with foreign funds from the international community through mechanisms such as the exchange of foreign debt for reparations.[436] More targeted efforts were eventually implemented in the area of mental healthcare, with the Peruvian Ministry of Health's creation of the Comprehensive Reparations Program on Mental Health, which targeted the 10 areas most affected by violent conflict.[437]

129. Despite more targeted mental health efforts through the PIR and some improvements in affected communities, the International Center for Transitional Justice ("ICTJ") reports that it remains "difficult to imagine how the specific needs of massive numbers of victims can be addressed if the ability of the state to comply with its obligations is limited and there is a systemic lack of services for all citizens."[438] The implementation of healthcare reparations limited guaranteed access to healthcare under the national insurance scheme, which low-income citizens were already entitled to and did not cover certain rehabilitative treatments that were required under the PIR.[439] Victims also did not receive individualized health services or any health programs targeting their unique needs, and there has been no progress in building the community healthcare networks or specialized services delivered to victims that were established in the PIR.[440]

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[434] Christián Correa, *Reparations in Peru: From Recommendations to Implementation*, ICTJ, June 2013, p. 5.
[435] *Id*., p. 1, 5-6, 9.
[436] Alexander Segovia, *Financing Reparations Programs: Reflections from International Experience*, *in* PABLO DE GREIFF (ED.), THE HANDBOOK ON REPARATIONS 664 (2006).
[437] *Id*.
[438] Christián Correa, *Reparations in Peru: From Recommendations to Implementation*, ICTJ, June 2013, p. 23.
[439] *Id.*; *see also* UN 2008 Rule-of-Law Report, p. 11 (citing Peru as an example of countries that only partially implemented reparation recommendations from national truth and reconciliation commissions).
[440] Christián Correa, *Reparations in Peru: From Recommendations to Implementation*, ICTJ, June 2013, p. 23.

130. The ICTJ notes that while the Peruvian TRC report is broadly seen as legitimate, politicians at the extreme ends of the political spectrum tend to question its findings.[441] Under the Ollanta Humala administration, the pace of reparations slowed, with just 23 communities receiving collective reparations in 2012 in addition to five communities that received funding for projects during ceremonies attended by the President.[442] The Peruvian Government adopted a restrictive approach, appearing to make efforts to diminish its financial commitment to reparations, including a veto to a law to include other categories of victims in the reparations program.[443] The ICTJ concludes that the Humala administration's abrupt change "from an effort to listen, expand, and implement reparations in a comprehensive form" to one reversing those effects and inserting new limitations "is a negative signal, at least for the short term."[444]

4. Sierra Leone's health reparations for victims

131. After a decade-long civil war in Sierra Leone through the 1990s, the warring parties signed a peace agreement that included a provision for the creation of a Special Fund for War Victims with the assistance of the international community and UN agencies[445] and a Truth and Reconciliation Commission ("Sierra Leone TRC"), formally established through the Truth and Reconciliation Act (2000) passed by the national parliament.[446] In 2004, the parliament enacted the National Human Rights Commission Act to monitor the Government's implementation of the Sierra Leone TRC's recommendations,[447] which were legally binding.[448] The Sierra Leone TRC grounded its recommendations on reparations in the right to seek redress through Sierra Leone's domestic law and in international law,

[441] *Id*., p. 30.
[442] *Id*., p. 12.
[443] *Id*., p. 19.
[444] *Id*., p. 29.
[445] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999, Arts. VI(2)(ix), XXIX.
[446] The Truth and Reconciliation Commission Act 2000, Supplement to the Sierra Leone Gazette, Vol. CXXXI, No. 9, 10 February 2000.
[447] *Id*., Art. 17: "The Government shall faithfully and timeously implement the recommendations of the report that are directed at state bodies and encourage or facilitate the implementation of any recommendations that may be directed to others."
[448] *Id*., Art. 8.

specifically the obligation of the State to provide reparations to victims of human rights abuses.[449]

132. The Sierra Leone TRC recommended the provision of free physical and mental healthcare for individual victims, with the National Commission for Social Action as the implementing body for the reparations program and the Ministry of Health and Sanitation primarily in charge of overseeing healthcare reparations.[450] It further recommended that government agencies assist NGOs and other international agencies in providing mental and physical healthcare services such as: "(a) the government continuing a service where an organization or body does not have the capacity or the mandate to maintain its activities; and/or (b) the government seeking outside financial or donor support for any given measure mentioned in the programme."[451] In crafting its healthcare reparation recommendations, the Sierra Leone TRC also maintained a development perspective, recognizing that the State would have to take over the provision of healthcare "when the donor community no longer provides the service."[452]

133. The Sierra Leone TRC focused on rehabilitation in determining the beneficiaries of the reparations program, "considering victims that were particularly vulnerable to suffering human rights violations," such as "amputees, war wounded, women who suffered sexual abuse, children and war widows would constitute special categories of victims who are in dire need of urgent care."[453] The Commission also "considered those victims who are in urgent need of a particular type of assistance to address their current needs."[454] After the Sierra Leone's TRC report, the government sought technical and financial assistance from the UN Peacebuilding Fund and the International Organization for Migration aimed at building the State's capacity to implement the report's recommendations.[455] Since 2012, the

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[449] Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Final Report of the Truth and Reconciliation Commission* Volume 2, Chapter 4, 12 November 2005 ("Sierra Leone TRC Report"), paras. 12, 83 (also recognizing that "because government participation is crucial to any reparations programme, the government is obliged to assist" existing institutions and international aid organizations and agencies in faithfully executing the recommendations made"); *see also* The Constitution of Sierra Leone, Act No. 6, 1991, Section 28(1).
[450] Sierra Leone TRC Report, paras. 104, 211.
[451] *Id.*, paras. 101-102, 106, 155, 159.
[452] *Id.*, para. 102.
[453] *Id.*, para. 57.
[454] *Id.*
[455] Christián Correa and Mohamad Suma, *Report and Proposals for the Implementation of Reparations in Sierra Leone*, ICTJ, December 2009, p. 1.

Special Fund for War Victims has provided reparations in the form of medical assistance and a minor grant of US $100 each to 20,000 victims.

134. Nonetheless, the State's fragile institutions have been unable to implement the Sierra Leone TRC's recommended healthcare reparations program for individual victims and the reparation programs currently in place still requires greater international assistance and national will in order for the programs to survive.[456] While the number of victims who benefited from the emergency healthcare law did not match actual needs, the Ministry of Health stated that it was not able to participate in reparations effort during 2009, and it remained unclear whether it would continue providing services.[457]

5. NGO-led sustainable healthcare and transitional justice project in Burundi

135. Burundi experienced political violence and ethnic conflict since its independence in 1972.[458] Legislation for a truth and reconciliation commission was adopted in December 2004, but it was not implemented, and negotiations between the UN and Burundi to establish a judicial mechanism floundered due to fundamental disagreements.[459] Ten years later, a domestic law to establish a truth and reconciliation commission was finally adopted, and at the same time, the UN continued to include a mandate to support transitional justice in its political missions in Burundi.[460] The UN and other human rights organizations criticized this law as inadequate since it did not reflect findings gleaned from national consultations, included amnesties, and gave the Burundian government sole authority to nominate and select commissioners.[461] Additionally, despite the involvement of the UN in peacekeeping and peacebuilding, the focus on political and economic development failed to address the psychological impacts of genocide and trauma on the Burundian population.[462]

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[456] *See id.*, p. 10-1 *see also* CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 197-98 (Cambridge University Press 2012).
[457] Christián Correa and Mohamad Suma, *Report and Proposals for the Implementation of Reparations in Sierra Leone*, ICTJ, December 2009, p. 10.
[458] British Broadcasting Corporation, *Burundi profile – Timeline*, 3 December 2018, https://www.bbc.com/news/world-africa-13087604.
[459] Wendy Lambourne and David Niyonzima, *Breaking Cycles of Trauma and Violence: Psychosocial Approaches to Healing and Reconciliation in Burundi*, *in* PUMLA GOBODO-MADIKIZELA (ED.), BREAKING INTERGENERATIONAL CYCLES OF REPETITION 293 (Verlag Barbara Budrich 2016).
[460] *Id*., p. 294.
[461] *Id*., p. 293.
[462] *Id*., p. 295.

136. To fill this void of any State-led transitional justice institutions or reconciliation processes, Burundi-based NGOs led by the Trauma Healing and Reconciliation Services ("THARS") developed programs addressing the legacy of psychological trauma in Burundians due to decades of violent conflict and repression.[463] Initially, THARS investigated the level of trauma in Burundians to develop a baseline for sensitization and psychological support during the process of transitional justice and to prepare for the truth and reconciliation commission.[464] In its initial assessment,[465] THARS found that 25% of the population had psychological symptoms that met the clinical definition of PTSD.[466]

137. To respond to the significant needs gap in mental health, THARS offered mental health programs and projects in Burundi including "trauma healing training workshops; alternatives to violence workshops; building 'listening rooms'; support groups for women who were once victims of war-related atrocities; self-help groups to empower the poorest women; healing of memories workshops; conflict mitigation and reconciliation; and the rescuing and reintegration of children."[467] THARS also included a transitional justice education component to their mental health services through a "brochure and a training program on transitional justice that included an emphasis on healing, forgiveness and reconciliation."[468] This model was intended to develop a Burundi-tailored model of transitional justice rooted in the UN's four transitional justice pillars, while also linking these pillars to the goals of mental health services.[469]

138. The experience in Burundi shows that, while government manipulation in the truth and reconciliation process led to a perceived lack of legitimacy from both domestic and international observers, NGO-led transitional justice initiatives, which presumably had the blessings of the national government, can make significant headway in addressing the needs and desires of victims. Considering the lack of trust among the local population and international organizations in a truth and reconciliation commission and public services

[463] *Id*., p. 299.
[464] *Id*., p. 296.
[465] *Id*.
[466] *Id*.
[467] *Id*., p. 301.
[468] *Id*., p. 299.
[469] *Id*.

generally, THARS' work has helped to reduce a significant needs gap in mental healthcare in Burundi.[470] While the project's funding sources are unclear, authors comment that THARS established a sustainable, inclusive, and holistic project that "focus[ed] on relationship-building and empowerment to help build both individual and community resilience."[471]

139. In sum, the experience of truth and reconciliation commissions in post-conflict societies reflects the need for State cooperation and will in order to actually implement transitional justice-based recommendations, particularly when they include reparations and sustainable health initiatives that require significant State involvement. Nonetheless, State cooperation and involvement is often not sufficient. This finding is evident through examples such as Peru and Sierra Leone where sustainable health programs failed due to weak institutions and/or a lack of domestic legitimacy, such as in Burundi. Local NGOs can also play a pivotal role in transitional justice as advocates for victims by either pressuring the State to fulfill its human right obligations if it is unwilling or by filling important gaps if a State is unable.[472] NGOs are particularly important where large segments of the population lack trust in State institutions and services, as in Burundi, and can help facilitate transitional justice processes through their engagement.[473]

Part V: Findings and Recommendations

140. Drawing on the legal principles, jurisprudence, and case studies above in Parts I to IV, Part V presents summary findings, recommendations, and areas for further exploration in designing a sustainable healthcare initiative as part of a transitional justice project.

A. Summary of findings

141. ***Victims of mass atrocities have a right to an effective remedy***.[474] Reparations can be distributed individually or collectively and can range from the material such as healthcare to

[470] *Id.*, p. 298.
[471] *Id.*, p. 303.
[472] Hugo van der Merwe and Maya Schkolne, *The role of civil society in transitional justice, in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 221, 224 (Cheryl Lawther et. al. eds., 2017).
[473] *See id.*
[474] International Covenant on Civil and Political Rights, Adopted by General Assembly Resolution 2200 A(XXI) of 16 December 1966, Art. 2(3).

the symbolic such as the building of memorials.[475] To reach a wider range of victims who have suffered different types of harm, the Office of the UN High Commissioner for Human Rights recommends a combination of symbolic, material, individual, and collective reparations as part of a complex program that distributes distinct benefits in distinct ways.[476]

142. ***International(ized) criminal courts and tribunals cannot order the provision of healthcare as a reparations measure***. While some international(ized) criminal courts and tribunals have the legal authority to issue reparations orders against individual convicted, they do not have legal authority to issue binding orders against a State – as some human rights courts and the International Court of Justice are entitled to do. The State is only bound to give effect to reparation orders issued by international(ized) criminal courts and tribunals that are directed against a convicted person. Since healthcare is a measure that falls within government prerogatives, providing healthcare to a large number of victims simply falls outside the statutory authority accorded to these courts and tribunals. Even if these courts and tribunals could order States to provide healthcare, the inadequacies of the existing healthcare structure and government corruption in post-conflict States often make healthcare-based reparations unrealistic in implementation.

143. ***Healthcare for victims in Cambodia is more realistic as a transitional justice measure***. As noted above, international(ized) criminal courts and tribunals have limited authority to issue reparations orders against a convicted person and lack authority to issue awards directly against a State. Conversely, transitional justice is a more flexible process that may include reparations as part of its underlying aims. However, to fit within transitional justice principles, initiatives aimed at sustainable healthcare must be tailored to the *special needs of the victim population* rather than simply developing the existing healthcare system.[477] While one could argue that developing the healthcare system *is* aimed at restoring the victims, any collective program that is non-excludable (such as the provision of basic healthcare or building of a hospital) could be seen by victims and observers as benefits they should receive

[475] UN 2008 Rule-of-Law Report, p. 22.
[476] *Id*., p. 22-23.
[477] *Id*., p. 24.

as citizens and not as victims.[478] In other words, any transitional justice measures implemented should not be conflated with development measures.

144. ***Challenges in providing sustainable healthcare as a transitional justice measure***. Victims of atrocities have special needs, some of which existing medical services may be unable to satisfy. The trauma the victims experienced due to the infliction of violence is unlike the types of traumas normally encountered by healthcare officials.[479] Not only is there often insufficient training to provide such specialized care in post-conflict States, but insufficient human resources and facilities. Essentially, the quality of any healthcare services provided will depend on the quality of existing healthcare institutions and trained medical personnel.[480] For example, in Peru and Sierra Leone ambitious healthcare-based reparation programs were unsustainable because government institutions and facilities did not have the capacity to sustain them.[481]

145. ***A sustainable healthcare initiative need not be State-led but requires State assistance***. To have any long-lasting and sustainable impact, any healthcare-based transitional justice measure would require cooperation from State authorities in order to mobilize resources, have access to facilities and personnel, and ultimately, make upgrades. While certain specialized care functions can certainly be carried out by NGOs, any measure that is aimed at *sustainable* changes must also increase the capacities of the State in providing for healthcare, for instance, in the form of education and training.

146. ***NGOs can also play a role***. In the Cambodian context, there is no shortage of NGOs and international organizations working on healthcare. Their institutional knowledge of healthcare issues in Cambodia, facilities, and personnel can be used in delivering care that is distinguishable from general healthcare benefits, and in tailoring this care to the specific needs of the victims.

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[478] *See id.*, p. 26.
[479] *See id.*, p. 24.
[480] *Id.*
[481] *See* Christián Correa and Mohamad Suma, *Report and Proposals for the Implementation of Reparations in Sierra Leone*, ICTJ, December 2009, p. 1; Christián Correa, *Reparations in Peru: From Recommendations to Implementation*, ICTJ, June 2013, p. 23.

B. Recommendations and further questions for consideration

147. Considering that healthcare as a form of court-ordered reparations is effectively unavailable in Cambodia, healthcare services should be considered as part of a transitional justice package designed to help Cambodian society sustainably deal with the legacy of the DK period. Reparations principles developed through the jurisprudence of international(ized) criminal courts and tribunals – and in particular, the ICC – can guide the process. Specifically, the *Ntaganda* Trial Chamber's elaboration of measures such as rehabilitation provides that any healthcare measures offered should be tailored to the specific circumstances of the victims[482] and thus should also take into consideration the cultural context. Considering these principles, the following concrete recommendations are offered based on the Cambodian context.

148. ***Conduct an assessment of needs***. At the outset, designing any successful program requires an assessment of the actual healthcare needs of victims, facilities, and existing services. Victims and their families should be surveyed using simple, culturally understandable language so that they can identify and describe the services they need.[483] Doctors and other medical professionals should also be consulted in determining what existing facilities are available and what should be supplemented. NGOs working with victims and specifically in the field of healthcare should also be included in the survey so that work already being performed is not duplicated.

149. ***Partnerships should be explored and formed***. Partnerships should be explored with organizations with experience delivering mental health services in Cambodia such as the Transcultural Psychological Organization that have developed mental health projects and training programs throughout the country's rural provinces and have a sophisticated understanding of mental health perspectives in those communities.[484] Partnerships should also be explored with local leaders such as monks, imams, traditional healers, and village

[482] *See* *Ntaganda* Reparations Order, paras. 83-88, 199-208.
[483] *See* Inger Agger, *Calming the mind: Healing after mass atrocity in Cambodia*, 52 TRANSCULT. PSYCHIATRY 454 (2015).
[484] Lor Vann Thary, *A Review of the Transcultural Psychosocial Organization (TPO) the Community Mental Health Program in Rural Cambodia*, 25 RCAPS 107, 111 (2009).

chiefs to ensure the widest participation and effective dissemination of information and education.

150. ***Consider how Cambodians already seek help for themselves***. It is important to incorporate traditional/spiritual ways of addressing psychological trauma that Cambodians can relate to so that the services are adaptable to Cambodians' understanding of health. One way of adapting to the ways in which Cambodians already seek assistance with physical and mental health is to incorporate local traditional leaders in the process, educating them about the special needs of victims of atrocity crimes, and using them to disseminate information to victims and liaise between victims' communities and other healthcare providers.

151. ***Consider establishing DK-specific mental health training programs***. One way of developing a more sustainable health initiative is by providing adequate and culturally adaptable mental health training programs. For instance, free workshops/classes on basic mental health aid could be offered in Phnom Penh and the provinces with specialized training courses, especially on mental health issues associated with and resulting from the DK period. This can help expand more formal and local mental healthcare services in Cambodia while also increasing awareness on the continuing mental health needs resulting from the DK period.

152. ***Consider incorporating an education component***. To distinguish from general healthcare services that are open to all, an education component should be incorporated to inform victims of their rights to benefits, of the trauma faced by other victims, and value of expressing their needs to healthcare officials. Traditional and local leaders can play an important part in this process by informing Cambodians of healthcare benefits and convincing them of their efficacy.[485]

153. ***Areas for further exploration***. Lastly, the international community and proponents of transitional justice measures in Cambodia should consider the following questions:

    (1) Who or what entity would have the ultimate authority in deciding the appropriate reparations and/or transitional justice measure and how it should be implemented?

[485] *See Id.*

(2) What would be the scope of the initiative?

(3) Who are the target population(s)?

(4) What geographical areas would be covered?

(5) What number of health professionals would be required, how many are currently available, and how qualified are they?

(6) What political constraints may be involved in the initiative's implementation?

(7) What entities may serve as the funding sources for the initiative?

(8) How can it be ensured that funding goes to the right places?

(9) What will it take to make the initiatives to greater access to healthcare sustainable?