

CASE-BASED REPARATIONS AT THE CENTRAL AFRICAN REPUBLIC'S SPECIAL CRIMINAL COURT



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ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
App.	Application
ASF	Avocats sans Frontières
CAE	Chambres africaines extraordinaires au sein des juridictions sénégalaises
CAR	Central African Republic
Comm.	Communication
DRC	Democratic Republic of Congo
EAC	Extraordinary African Chambers in the Courts of Senegal
ECCC	Extraordinary Chambers in the Courts of Cambodia
HRW	Human Rights Watch
ICC	International Criminal Court
ICG	International Crisis Group
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MONUSCO	Mission de l'Organisation des Nations Unies pour la Stabilisation en République démocratique du Congo
OHCHR	UN Office of the High Commissioner for Human Rights
OSJI	Open Society Justice Initiative
RDC	République Démocratique du Congo
RPE	Rules of Procedure and Evidence
SCC	Special Criminal Court
STL	Special Tribunal for Lebanon
TFV	Trust Fund for Victims
UN	United Nations
UNTS	United Nations Treaty Service
USD	U.S. Dollars
WCRO	War Crimes Research Office

EXECUTIVE SUMMARY

In 2015, the Central African Republic (CAR) established the Special Criminal Court (SCC) to investigate and prosecute serious violations of international humanitarian and human rights law. As a key mechanism within CAR's larger transitional justice framework, the SCC is intended to facilitate progress toward a post-conflict future by providing justice to victims and countering impunity for crimes committed during the country's recent conflicts. In addition, it is envisioned that the SCC will help remedy the harms victims have suffered and rebuild their lives through the issuance of reparations orders.

Although reparations for damages inflicted by years of conflict are widely supported within CAR, numerous questions have been raised about the SCC's reparations authority. In trainings and other consultations conducted by the War Crimes Research Office (WCRO), for example, participants raised questions about the basis of the SCC's authority to award reparations, how reparations can be financed and implemented, and the types of reparations that the court can award, among others. This report seeks to answer such questions in the hope that it can be a starting point for discussion about how the SCC can contribute to fair, effective, and adequate reparations in CAR.

Specifically, this report draws on CAR law, as well as reparations examples from both international and domestic contexts, to explore five principal questions:

- Does the SCC have the legal authority to issue reparations orders?
- What types of reparations could the SCC order?
- Should the SCC order individual or collective reparations, and what are the relative advantages and disadvantages of each?
- Are there special issues that the SCC should consider with respect to reparations for sexual and gender-based violence?
- How might the SCC implement and finance reparations orders, particularly if a convicted defendant is indigent?

Some of these questions are inter-related, with the result that a decision on one question, such as which mechanism to use to implement and finance reparations, may affect the range of potential responses to other questions, such as the types of reparations that may be ordered. In addition, establishing and implementing an effective reparations mechanism may require the adoption of new policies, the establishment of additional institutional structures, and coordination with external partners, all of which may require considerable time and resources. Thus although the SCC only recently began operations, it cannot be over-emphasized that early consideration of many of the issues in this report is essential to ensure the effective implementation and enforcement of reparations orders once they are issued.

With regard to these five principal questions, this report concludes that:

- **The SCC has the requisite legal authority to issue reparations orders.**

Although the SCC's Organic Law does not explicitly mention reparations, nor expressly grant the SCC authority to order reparations, Part II of this report finds that CAR's domestic law provides a solid foundation for the issuance of such orders. CAR's civil party system – which is governed by the domestic Penal Code and the Penal Procedure Code, and recognized in the SCC's Organic Law – affords victims, including victims of international crimes, the right to participate in criminal trials and to receive reparations from convicted defendants, and these provisions are applicable to the SCC. In addition, a comparative analysis of reparations authority at similar international and hybrid criminal tribunals underscores that this interpretation of CAR law is consistent with modern international practice.

- **The SCC has authority to order a broad array of reparations.**

International law recognizes five forms of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Although the SCC's RPE does not explicitly mention each of the five international forms of reparations, the examples included in article 129 fall within several of these categories, implicitly endorsing the SCC's ability to award these types of reparations. Part III reviews these forms of reparations in detail, describing their purpose and providing examples.

- **The SCC has authority to order both individual and collective reparations.**

Individual and collective reparations are not mutually exclusive, and are often awarded concurrently in order to address the full range of harms experienced by victims. Part IV considers a number of issues related individual and collective reparations that the SCC may want to consider as it determines which types of reparations awards to make, including the number of victims and the types of harms suffered, the administrative burden of identifying victims and verifying eligibility, victims' preferences, and the risk of exacerbating community tensions.

- **The SCC should take special measures to recognize and redress harms by survivors of sexual and gender-based violence.**

Part V examines a number of issues specific to providing reparations for victims of SGBV. Such violence often entails additional harms unique from other forms of atrocity crimes, including medical harms, psychological trauma, social stigmatization and rejection, and unique financial burdens. In addition, survivors of conflict-related SGBV often are victims of other crimes, and this status as dual victims may cause them to experience the harms of those other crimes in ways that are different from other victims. As a result, consideration must be given to ensuring that the reparations needs of SGBV survivors are fully assessed. In addition, because survivors of SGBV are often women and children, the violence they experienced may intersect with other forms of disadvantage to limit their access to reparations. Unique measures are thus often required throughout the trial and reparations process to identify survivors and ensure that they are heard without suffering additional consequences.

- **Multiple options exist for implementing and financing reparations orders, in addition to orders against convicted defendants, including:**
 - **Issuing reparations orders against a State.**

Discussions of reparations in international criminal law ordinarily do not mention the option of reparations orders against States, no doubt because international criminal tribunals have no authority to issue reparations order against a State. By contrast, domestic courts considering criminal cases against individual perpetrators do have the authority in some countries – including the DRC, Chad, France, and Guatemala – to impose reparations for international crimes against both the perpetrators and the State. Such authority is grounded in domestic, not international, law. Particularly relevant are cases from Chad and the DRC, which explicitly relied on domestic code provisions that are identical, or nearly identical, to that in CAR. Such caselaw suggests that CAR, and the SCC, could potentially apply similar provisions to likewise order reparations against the State in some instances, such as where international crimes are committed by State agents. A determination that the SCC has the authority to order reparations against the State has several potential advantages, such as the ability to order a broader array of reparations that only a State can implement (such as enacting laws or modifying educational curricula). In addition, States generally have significantly greater resources with which to implement reparations than do individual perpetrators. Experience in other countries provides a mixed record of success, but suggests that reparations orders against the State may have the greatest chance of implementation where they require a State’s approval or authorization but not significant resources.

- **Establishing a trust fund.**

Trust funds have been used at both the International Criminal Court and the Extraordinary African Chambers to solicit donations from external sources where a convicted person is indigent or has insufficient funds to cover the reparations ordered. In addition, trust funds may be vested with additional mandates, including identifying victims and verifying their entitlement to reparations, finalizing the modalities of reparations, implementing reparations orders, tracing a convicted defendant’s hidden assets, and assisting victims beyond those participating in specific cases before the court. Each of these mandates, however, requires additional human and financial resources, and the experience of both the ICC and the EAC demonstrates that fundraising for reparations programs is not an easy task. Despite these challenges, establishment of a trust fund and the solicitation of external funds may be essential where defendants have insufficient resources and the State is unable or unwilling to contribute to reparations.

- **Entering into project partnerships.**

A third approach to financing and implementing reparations – which we have termed “project partnerships” – was adopted by the ECCC. In this model, NGOs, civil society actors, and in some cases the government (collectively “partners”) propose, design and implement projects intended to meet some of the reparations needs of survivors, with funding from a mix of individual, corporate, and international donors. There is thus no reparations order against the defendant; instead, the Court endorses projects to be undertaken by different actors. This model has several unique advantages, including the ability to provide reparations more quickly because the projects may be designed and implemented in advance of a final judgment regarding a particular defendant. In addition, the project

partnership model has also had some success in obtaining State participation in reparations awards, particularly those that do not require much or any financing, such as the establishment of a national day of remembrance. Nonetheless, the project partnerships model has several unique challenges. First, it requires additional human resources at the court to coordinate with NGOs and other partners, assist in the development of project ideas, and fundraise for those projects. Second, as with the trust fund model, fundraising can be difficult. And finally, because the projects are designed by NGOs and other actors, rather than the court itself, they may respond more to the interests and expertise of those NGOs rather than victims' needs. The project partnership approach may nonetheless be useful as a means of implementing at least some reparations, either in addition to reparations by the defendant or the State, or where no other reparations are likely.

The SCC faces an enormous challenge ahead to investigate and try alleged perpetrators of international crimes, and where convicted, order reparations for the victims. Because reparations orders come at the end of this process, it is tempting to leave questions about reparations until after trial. As the foregoing summary demonstrates, however, successfully implementing and enforcing reparations orders requires a number of important decisions and institutional structures. The earlier such decisions are made and institutional structures established, the greater the likelihood that victims will actually receive meaningful and effective reparations.

Fortunately, the SCC comes to these questions at a time of intense interest and growth in court-ordered reparations to redress international crimes as part of criminal proceedings against individual perpetrators. The past two decades have seen a remarkable expansion in reparations for individual criminal violations at both the international and domestic levels. Detailed guidelines on reparations have emerged from the UN, as well as regional bodies such as the African Commission on Human and Peoples' Rights. In addition, several courts have experimented with new models for implementing reparations, seeking to overcome some of the recurrent challenges in the field, such as a lack of sufficient financial resources by the accused to cover the costs of reparations. As a hybrid court, the SCC is in a unique position to benefit from the examples and lessons learned at both the domestic and international levels to craft reparations orders that best fit the context and constraints in CAR. To help inform this process, this report explores a broad array of domestic and international models from which the SCC could draw. It is hoped that this report will contribute to timely discussions within CAR about these issues.

I. INTRODUCTION

A. Overview of the Special Criminal Court

In 2015, the Central African Republic (CAR) established the Special Criminal Court (SCC) to investigate and prosecute serious violations of international humanitarian and human rights law committed within the country's territory since January 1, 2003.¹ As a key mechanism within CAR's larger transitional justice framework, the SCC is intended to facilitate progress toward a post-conflict future by providing justice to victims and countering impunity for crimes committed during the country's recent conflicts.² Such impunity is widely viewed as having undermined prior peace processes and contributed to a cycle of violence, including the resumption of conflict in 2012.³

Like many recent courts created to prosecute international crimes, the SCC is a hybrid court, meaning that it includes both domestic and international features.⁴ Although the SCC is officially part of CAR's domestic judiciary,⁵ it is staffed by both national and international judges, prosecutors, and administrators; the applicable law includes a mix of domestic CAR law and international norms; and the resources of the court come from both national and international sources.⁶ The law establishing the SCC specifies that the Court's budget is to come from voluntary contributions,⁷ and to date, several

¹ République Centrafricaine, Loi organique N° 15.003 portant création, organisation et fonctionnement de la Cour Penale Spéciale, arts. 1, 3 (3 juin 2015) [hereinafter SCC Organic Law]. The SCC also has jurisdiction over certain acts to support those crimes that were committed in other countries with which CAR has international judicial cooperation agreements. *Id.* art. 4.

² The creation of the SCC was one of the recommendations included in the Republican Pact for Peace, National Reconciliation and Reconstruction in the Central African Republic, a "blue-print for transitional justice" that was adopted during a 2015 national forum of more than 600 stakeholders, including representatives of government and several armed groups. Republican Pact for Peace, National Reconciliation and Reconstruction in the Central African Republic, *annexed to* Letter from the Chargé d'affaires a.i. of the Permanent Mission of the Central African Republic to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/344 (May 15, 2014) [hereinafter CAR Republican Pact for Peace], <https://peacemaker.un.org/Republican-Pact-CentralAfrica-2011>; GODFREY M. MUSILA, INTERNATIONAL NUREMBERG PRINCIPLES ACADEMY, THE SPECIAL CRIMINAL COURT AND OTHER OPTIONS OF ACCOUNTABILITY IN THE CENTRAL AFRICAN REPUBLIC: LEGAL AND POLICY RECOMMENDATIONS 1-2 (2016), https://www.nurembergacademy.org/fileadmin/media/pdf/publications/car_publication.pdf; UN Security Council, *Report of the Secretary-General on the situation in the Central African Republic*, ¶¶ 2-3, 51 (July 29, 2015), https://www.un.org/ga/search/view_doc.asp?symbol=S/2015/576.

³ AMNESTY INTERNATIONAL, THE LONG WAIT FOR JUSTICE: ACCOUNTABILITY IN CENTRAL AFRICAN REPUBLIC 6, 14, 18 (2017) [hereinafter AI THE LONG WAIT FOR JUSTICE], https://www.amnestyusa.org/wp-content/uploads/2017/04/car_-_the_long_wait_for_justice_en_2.pdf; HUMAN RIGHTS WATCH, KILLING WITHOUT CONSEQUENCE: WAR CRIMES, CRIMES AGAINST HUMANITY AND THE SPECIAL CRIMINAL COURT IN THE CENTRAL AFRICAN REPUBLIC 71 (2017) [hereinafter HRW KILLING WITHOUT CONSEQUENCE], <https://www.hrw.org/report/2017/07/05/killing-without-consequence/war-crimes-crimes-against-humanity-and-special>; TESSA ALLEBLAS, THE HAGUE INSTITUTE FOR GLOBAL JUSTICE, SPECIAL CRIMINAL COURT FOR CAR: A NEW OPPORTUNITY FOR ACCOUNTABILITY? (Nov. 28, 2016), <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/commentary/special-criminal-court-for-car-a-new-opportunity-for-accountability/>; CAR: *Special Criminal Court prosecutor appointed as killing continues*, WORLD WATCH MONITOR (Feb. 21, 2017), <https://www.worldwatchmonitor.org/2017/02/car-special-criminal-court-prosecutor-appointed-as-killing-continues/>.

⁴ For an overview on hybrid tribunals, see Sarah Williams, *Hybrid International Criminal Tribunals*, OXFORD BIBLIOGRAPHIES (2017), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0069.xml>, and AI THE LONG WAIT FOR JUSTICE, *supra* note 3, at 37.

⁵ SCC Organic Law, *supra* note 1, art. 1.

⁶ *Id.* arts. 3, 11-15, 18, 52-53.

⁷ *Id.* art. 53.

countries, including France, the Netherland, and the United States, as well as the European Union, have provided funds to the SCC.⁸

The SCC's jurisdiction is broad, covering not only the core international crimes of genocide, crimes against humanity, and war crimes, but also any grave violation of human rights and international humanitarian law contained in CAR's Penal Code or the international obligations to which the country has acceded.⁹ In addition, the SCC may refer to international substantive norms and rules of procedure if CAR's law does not cover a particular question, there is uncertainty regarding the interpretation or application of CAR law, or there are questions of compatibility between CAR law and international law.¹⁰

The temporal jurisdiction of the SCC, which covers crimes perpetrated since January 1, 2003,¹¹ extends back to the regime of former President Francois Bozizé, who seized power in a coup d'état in March 2003.¹² His ten-year rule was characterized by years of rebellion, violence, and widespread abuses committed by both government and rebel forces, particularly in the years after the 2005 election.¹³ President Bozizé was himself overthrown in March 2013, and the ensuing violence has resulted in massive war crimes and crimes against humanity, including murder, enforced disappearances, torture, rape, sexual slavery, forced displacement, pillage, and the recruitment and use of child soldiers.¹⁴

⁸ *Central African Republic: New Court Should Step Up Effort*, HUMAN RIGHTS WATCH (July 24, 2019) (describing a \$1 million USD funding gap for 2019), <https://www.hrw.org/news/2019/07/24/central-african-republic-new-court-should-step-effort>; AI LONG WAIT FOR JUSTICE, *supra* note 3, at 40 (reporting in 2017 that the SCC had a budget gap of \$2 million USD for the first 14 months of its operations).

⁹ SCC Organic Law, *supra* note 1, art. 3. See also Patryk Labuda, *The Special Criminal Court in the Central African Republic*, 22 ASIL INSIGHTS 3 (2018) [hereinafter Labuda *The Special Criminal Court*] (noting that the broad jurisdiction of the SCC could potentially cover violations of economic, social, and cultural rights, among other offenses), <https://www.asil.org/insights/volume/22/issue/2/special-criminal-court-central-african-republic>.

¹⁰ SCC Organic Law, *supra* note 1, art. 3.

¹¹ *Id.*

¹² INTERNATIONAL CRISIS GROUP, CENTRAL AFRICAN REPUBLIC: ANATOMY OF A PHANTOM STATE 16 (2007) [hereinafter ICG ANATOMY OF A PHANTOM STATE], <https://d2071andvip0wj.cloudfront.net/central-african-republic-anatomy-of-a-phantom-state.pdf>; INTERNATIONAL CRISIS GROUP, CENTRAL AFRICAN REPUBLIC: UNTANGLING THE POLITICAL DIALOGUE 1 (2008) [hereinafter ICG UNTANGLING THE POLITICAL DIALOGUE], <https://d2071andvip0wj.cloudfront.net/b55-central-african-republic-untangling-the-political-dialogue.pdf>; OPEN SOCIETY JUSTICE INITIATIVE, OPTIONS FOR JUSTICE: A HANDBOOK FOR DESIGNING ACCOUNTABILITY MECHANISMS FOR GRAVE CRIMES 152 (2018) [hereinafter OSJI OPTIONS FOR JUSTICE], <https://www.opensocietyfoundations.org/sites/default/files/options-for-justice-20180918.pdf>.

¹³ ICG ANATOMY OF A PHANTOM STATE, *supra* note 12, at 1, 17-18, 21, 23, 27; ICG UNTANGLING THE POLITICAL DIALOGUE, *supra* note 12, at 10, 13; OSJI OPTIONS FOR JUSTICE, *supra* note 12, at 152; AMNESTY INTERNATIONAL, CENTRAL AFRICAN REPUBLIC: ACTION NEEDED TO END DECADES OF ABUSE 7, 9-16, 24 (2011), <https://www.amnesty.org/download/Documents/24000/afr190012011en.pdf>; see generally HUMAN RIGHTS WATCH, STATE OF ANARCHY: REBELLION AND ABUSES AGAINST CIVILIANS (2007), <https://www.hrw.org/report/2007/09/14/state-anarchy/rebellion-and-abuses-against-civilians>.

¹⁴ OSJI OPTIONS FOR JUSTICE, *supra* note 12, at 152; CHILD SOLDIERS INTERNATIONAL, CAR: SPECIAL CRIMINAL COURT OPENS BRINGING HOPE TO VICTIMS OF BRUTAL CONFLICT (2018), <https://reliefweb.int/report/central-african-republic/car-special-criminal-court-opens-bringing-hope-victims-brutal>; AI THE LONG WAIT FOR JUSTICE, *supra* note 3, at 6-7, 11-12, 19; HRW KILLING WITHOUT CONSEQUENCE, *supra* note 3, at 2, 3-5, 11-12, 18-46; *Central African Republic: UN envoy calls for protecting civilians as scores killed in ethnic violence*, UN NEWS (Nov. 25, 2016), <https://news.un.org/en/story/2016/11/546322-central-african-republic-un-envoy-calls-protecting-civilians-scores-killed#>.

B. Reparations at the Special Criminal Court

One of the features of the new court that has sparked particular attention is the SCC's reparations authority.¹⁵ Although the SCC's Organic Law does not explicitly mention reparations,¹⁶ the SCC's Rules of Procedure and Evidence (RPE), which were enacted in July 2018, provide that the Court may order both individual and collective reparations for the benefit of victims who were harmed by individuals convicted before the SCC.¹⁷

Reparations are widely viewed as a key element of CAR's transition to a post-conflict State. In 2015, a report on a series of government-organized public consultations on peace and reconciliation in CAR concluded that "justice and reparation for the damages inflicted" by years of conflict are a "necessary condition" to long-term peace.¹⁸ Over 80% of CAR citizens consulted on the issue of reconciliation in the country stated that reparations must come first.¹⁹

This interest in reparations is consistent with emerging norms of international law, which now widely recognize a right to reparations for victims of gross human rights violations and serious violations of international humanitarian law.²⁰ These emerging norms are part of a broader movement within the international law community toward restorative – as opposed to strictly retributive – justice.²¹ Restorative justice recognizes that justice requires not only punishment of the guilty – or retribution

¹⁵ République Centrafricaine, Loi N° 18.010 portant règlement de procédure et de preuve devant la Cour Pénale Spéciale de la République Centrafricaine, art. 129 (2 juillet 2018) [hereinafter SCC RPE].

¹⁶ See generally SCC Organic Law, *supra* note 1.

¹⁷ SCC RPE, *supra* note 15, art. 129.

¹⁸ République Centrafricaine, Ministère de la Réconciliation Nationale et du Dialogue Politique, Rapport des Consultations Populaires à la Base en République Centrafricaine, page 8 (mars 2015) ("La population adhère du dialogue et de la réconciliation mais posée comme condition première la justice et la réparation des dommages subis et occasionnés par les bourreaux."), .

¹⁹ *Id.* at 47; see also HUMAN RIGHTS WATCH, LOOKING FOR JUSTICE: THE SPECIAL CRIMINAL COURT, A NEW OPPORTUNITY FOR VICTIMS IN THE CENTRAL AFRICAN REPUBLIC (2018) (describing how "[v]ictims want justice to be done and reparation offered so they can rebuild their lives"), <https://www.hrw.org/report/2018/05/17/looking-justice/special-criminal-court-new-opportunity-victims-central-african>.

²⁰ UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶¶ 2(c), 3(d), 11 (Dec. 16, 2005) [hereinafter UN Basic Principles on Reparations], <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>; African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), ¶ 1 (2017) [hereinafter African Commission General Comment No. 4], <https://www.achpr.org/legalinstruments/detailPid=60>; see also Rome Statute of the International Criminal Court, art. 75, 2187 UNTS 3 (1998) [hereinafter Rome Statute of the ICC], <https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf>; Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990, art. 6 [hereinafter EAC Statute], <http://www.chambresafriaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf>; Statute of the Special Tribunal for Lebanon, art. 25 (May 30, 2007), https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute_of_the_Special_Tribunal_for_Lebanon___English.pdf; Co-Prosecutors v. Kaing, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶¶ 645-48 (ECCC Supreme Court Chamber, Feb. 3, 2012) [hereinafter Kaing Appeal Judgment], <https://www.legal-tools.org/doc/681bad/pdf>.

²¹ WCRO, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT 2, 8 (2007), <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-1-victim-participation-before-the-international-criminal-court/>.

– but also must serve the interests of the victims by enabling them to participate in the justice process and to seek reparations.²² Reparations are intended to render justice to the victims by publicly acknowledging their suffering, alleviating the damage or harm caused by the wrongful act, and preventing and deterring future violations.²³ Reparations also may contribute to the reintegration of victims, and promote reconciliation between perpetrators and victims and within the society at large.²⁴ To meet these aims, courts have observed that reparations must be appropriate, adequate, prompt, and meaningful to the victims,²⁵ and courts must have flexibility to design reparations that can achieve these goals.²⁶

Despite the widespread acknowledgement of the importance of reparations, numerous questions exist about whether and how the SCC can implement its reparations mandate. During a 2017 training in CAR on sexual and gender-based violence that was conducted by the War Crimes Research Office (WCRO), for example, participants noted a need for clarification on several aspects of the SCC’s reparations authority, including the basis of the SCC’s authority to award reparations; how reparations can be financed and implemented; and the types of reparations that the court can award. Other conversations by the WCRO with members of civil society over the past two years have raised similar questions. This report seeks to answer questions that the WCRO has received about reparations in the hope that it can be a starting point for discussion about how the SCC can contribute to fair, effective, and adequate reparations in CAR.

C. The scope of this report

This report pertains only to court-ordered reparations to redress international crimes as part of a criminal proceeding against a natural person. Such reparations should be distinguished from reparations awarded by other types of courts, such as regional human rights courts, which have jurisdiction over allegations of human rights violations by the State and which are vested with the authority to order reparations against a State.²⁷ Such reparations also must be distinguished from reparations recommended by other types of bodies, such as truth and reconciliation commissions,²⁸

²² *Id.*; Susana SáCouto, *Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?*, 18 MICHIGAN JOURNAL OF GENDER & LAW 297, 314-15 (2012).

²³ *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute, ¶¶ 15, 267 (ICC Trial Chamber II, Mar. 24, 2017) [hereinafter Katanga Trial Reparations Order], <https://www.legal-tools.org/doc/63d36d/pdf/>; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, ¶ 179 (ICC Trial Chamber I, Aug. 7, 2012) [hereinafter Lubanga Trial Decision on Reparations Principles], <https://www.legal-tools.org/doc/a05830/pdf/>; Prosecutor v. al Mahdi, Case No. ICC-01/12-01/15, Reparations Order, ¶¶ 27-28 (ICC Trial Chamber VIII, Aug. 17, 2017) [hereinafter Al Mahdi Trial Reparations Order], <https://www.legal-tools.org/doc/02d1bb/pdf/>.

²⁴ Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 179; Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 28.

²⁵ Katanga Trial Reparations Order, *supra* note 23, ¶¶ 15, 267; Al Mahdi Trial Reparations Order, *supra* note 23, ¶¶ 33.

²⁶ Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 180.

²⁷ *See, e.g.*, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, arts. 3(1), 27(1) (June 10, 1998), <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>.

²⁸ Since the 1980s, more than 40 truth and reconciliation commissions (TRCs) have been established at the national level to address the legacy of past abuses perpetrated during periods of conflict or repression, many of which have issued reports recommending various forms of reparations. However, the number of reparations programs that have been implemented through specific laws, policies and/or mechanisms remains far fewer. Among them are the reparations programs implemented in Peru, Colombia, Peru, Sierra Leone, and, to some extent, in Kenya. For more information on the reparations program in Peru, *see* CRISTIÁN CORREA, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE,

which are generally the responsibility of the relevant government.²⁹ Establishment of a truth and reconciliation commission with a mandate to propose reparations also was recommended as part of CAR's larger transitional justice project.³⁰ Finally, reparations must be distinguished from development and/or humanitarian aid programs, which are programs undertaken by the government, international organizations, or NGOs in order to improve socio-economic opportunities of the wider public or some subset thereof through the provision of services, goods, training, or infrastructure.³¹ Survivors of crimes within the jurisdiction of the SCC may receive benefits from these programs, but they are not the primary target beneficiaries as they are with reparations.³²

In light of this scope, this report primarily relies on CAR law, as well as decisions of other international and domestic courts that have ordered case-based reparations. With respect to the latter, these include the decisions of the International Criminal Court (ICC), the Extraordinary African Chambers in the Courts of Senegal, and the Extraordinary Chambers in the Courts of Cambodia (ECCC), as well as domestic courts in the Democratic Republic of the Congo, Chad, France, and Guatemala. As appropriate, this report also relies on international treaties and other instruments, reports and comments by international and regional human rights bodies, and decisions from regional human rights courts. Although these other documents often relate to reparations for human rights violations, some of the principles expressed therein are relevant to criminal cases as well. In addition, some of the human rights violations addressed in these documents, such as torture and enforced

REPARATIONS IN PERU: FROM RECOMMENDATIONS TO IMPLEMENTATION (2013), https://www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf; PERÚ, COMISIÓN DE LA VERDAD Y RECONCILIACIÓN, INFORME FINAL (2003), <http://www.cverdad.org.pe/ifinal/>. For more information on the reparations program in Colombia, see CRISTIÁN CORREA, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, FROM PRINCIPLES TO PRACTICE: CHALLENGES OF IMPLEMENTING REPARATIONS FOR MASSIVE VIOLATIONS IN COLOMBIA (2015), https://www.ictj.org/sites/default/files/ICTJ_Report_ColombiaReparationsChallenges_2015.pdf; Colombia, Ley 1448: por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones, Diario Oficial 48.096 (10 junio 2011), <https://www.ictj.org/sites/default/files/subsites/colombia-linea-tiempo/docs/Ley1448/ley1448.pdf>. For more information on the reparations program in Sierra Leone, see MOHAMAD SUMA & CRISTIÁN CORREA, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, REPORT AND PROPOSALS FOR THE IMPLEMENTATION OF REPARATIONS IN SIERRA LEONE (2009), <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf>; SIERRA LEONE, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION, VOL. 2, CH. 4: REPARATIONS (2004) [hereinafter Sierra Leone TRC Report Vol. 2], http://www.sierraleonetr.com/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapters-1-5?category_id=12. For more information on the reparations program in Kenya, see CHRISTOPHER GITARI NDUNGÚ, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, LESSONS TO BE LEARNED: AN ANALYSIS OF THE FINAL REPORT OF KENYA'S TRUTH, JUSTICE AND RECONCILIATION COMMISSION (2014), <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf>; KENYA, THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION OF KENYA, THE FINAL REPORT OF THE TJRC (2013), <https://digitalcommons.law.seattleu.edu/tjrc/>; Kenya, Victim Protection Act, Kenya Gazette Supplement No. 143 (Acts No. 17), 19 Sept. 2014, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/VictimProtectionAct17of2014.pdf>.²⁹ See, e.g., Sierra Leone TRC Report Vol. 2, *supra* note 28, ¶ 81 (“Reparations are the primary responsibility of the government.”).

³⁰ CAR Republican Pact for Peace, *supra* note 2, at 5.

³¹ See AVOCATS SANS FRONTIÈRES, PRINCIPLES ON COURT-ORDERED REPARATIONS: A GUIDE FOR THE INTERNATIONAL CRIMES DIVISION OF THE HIGH COURT OF UGANDA 20 (2016) [hereinafter ASF REPARATIONS REPORT], https://www.asf.be/wp-content/uploads/2017/01/ASF_UG_Court-OrderedReparations_201610_PP_Low.pdf.

³² *Id.*

disappearances, may rise to the level of international crimes if certain conditions are fulfilled. It is therefore common for international criminal tribunals to refer to these sources.³³

³³ *E.g.*, Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 24 (“The Court has relied upon the UN Basic Principles of Justice for Victims of Crime and Abuse of Power and the UN Basic Principles on Reparations for Victims.”); Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶¶ 183, 185, 186 (considering treaties and other international instruments, as well as the jurisprudence of regional human rights courts and international mechanisms).

II. THE SCC'S LEGAL AUTHORITY TO ORDER REPARATIONS

The SCC's Rules of Procedure and Evidence (RPE) provide that the Court may order both individual and collective reparations for the benefit of victims of those convicted by the SCC.³⁴ The SCC's Organic Law, however, does not explicitly mention reparations, nor does it expressly grant the SCC authority to order reparations.³⁵ This silence raises questions about the legal foundation for any award of reparations by the SCC, and prompted a request to the WCRO from civil society organizations to analyze the Court's authority to issue reparations awards.

Determining the origin of the SCC's reparations authority is crucial. The SCC was established as a part of the national judiciary, and thus like all domestic courts in CAR it must function within the confines of CAR's Constitution and the boundaries set by CAR's legislature. Beyond this legal question, however, resolving the SCC's authority to grant reparations has numerous practical benefits. A well-defined foundation for reparations awards ensures that all interested parties – judges, victims, defendants, attorneys, the government, and civil society – have a shared understanding of the SCC's capacity to order reparations. Without clearly-established authority, victims may not feel secure participating as civil parties or may have unreasonable expectations as to the prospect of receiving reparations. Likewise, a lack of clear authority casts doubt upon the enforceability of reparations awards and could prompt appeals from convicted persons. Clarification of the SCC's legal authority may not avoid these problems entirely but may nonetheless help to mitigate them.

The following sections examine the domestic foundation within CAR's law for reparations awards by the SCC, followed by a comparative analysis of reparations authority at similar international and special criminal tribunals. It concludes that CAR's civil party participation system – recognized in the SCC's Organic Law, the domestic Penal Code and the Penal Procedure Code – affords victims the right to participate in criminal trials before the SCC as civil claimants and, in so doing, to receive reparations from convicted defendants. In addition, the existence of similar frameworks in other criminal tribunals prosecuting atrocity crimes underscores that this interpretation of CAR law is consistent with modern international practice.

A. The SCC has authority to award reparations under CAR's domestic law

1. CAR's domestic law

As previously noted, the SCC's Organic Law authorizes the Court to investigate and prosecute serious violations of international humanitarian and human rights law under CAR's substantive and procedure laws.³⁶ CAR domestic law recognizes the right of victims to participate as civil parties (“*parties civiles*”) in criminal proceedings brought by the State against a defendant.³⁷ Unlike practice in common law jurisdictions, wherein civil and criminal claims proceed separately, the civil party system allows civil

³⁴ SCC RPE, *supra* note 15, art. 129. Article 47 further authorizes the creation of a victims' office within the Registry tasked, among other things, with developing guidelines for determining appropriate forms of reparation. *Id.* art. 47(A) & (B)(d).

³⁵ *See generally* SCC Organic Law, *supra* note 1.

³⁶ *Id.* arts. 3, 5, 44, 59.

³⁷ République Centrafricaine, Loi N° 10.002 portant code de procédure pénale centrafricain, art. 3 (6 jan. 2010) [hereinafter CAR 2010 Penal Procedure Code] (“L'action civile peut être exercée en même temps que l'action publique et devant la même juridiction.”).

and criminal claims to be brought and tried concurrently before the same court.³⁸ By definition, a civil party claim is a claim for reparations under CAR law.³⁹

While the SCC's Organic Law does not expressly address the issue of reparations or damages, it explicitly establishes the SCC's authority to hear civil party complaints falling within its jurisdiction.⁴⁰ That jurisdiction encompasses serious human rights violations and serious violations of international humanitarian law, including genocide, crimes against humanity, and war crimes.⁴¹ Genocide, war crimes, and crimes against humanity are also recognized as crimes under CAR's Penal Code.⁴² Moreover, civil party actions are explicitly permitted in such cases,⁴³ and parties who personally and

³⁸ SáCouto, *supra* note 22, at 297, 317-18 & n.102; *see also* RDC, Affaire Lamera, RP N° 132, Jugement (RDC Tribunal Militaire de Garnison d'Uvira, 30 oct. 2010) [hereinafter Lamera Trial Judgment], *reprinted in* AVOCATS SANS FRONTIERES, RECUEIL DE JURISPRUDENCE CONGOLAISE EN MATIERE DE CRIMES INTERNATIONAUX: ÉDITION CRITIQUE 65, 78 (2013) [hereinafter ASF 2013 REPORT ON DRC CASELAW], https://asf.be/wp-content/uploads/2013/12/ASF_RDC_JurisprudenceCrimesInternat_201312.pdf; RDC, Auditeur Militaire c. Kyungu Mutanga Gédéon et al., RP N° 0134/07, 0182/09, Jugement (RDC Tribunal Militaire de Garnison de Haut-Katanga, 5 mars 2009) [hereinafter Gédéon Trial Judgment], *reprinted in* AVOCATS SANS FRONTIERES, RECUEIL DE DECISIONS DE JUSTICE ET DE NOTES DE PLAIDOIRIES EN MATIERE DE CRIMES INTERNATIONAUX 9, 62-63 (2010) [HEREINAFTER ASF 2010 REPORT ON DRC CASELAW]; RDC, Auditeur Militaire c. Maniraguha Jean Bosco (alias Kazungu), RP N° 275/09 & 521/10, Jugement (RDC Tribunal Militaire de Garnison de Bukavu, 16 août 2011) [hereinafter Kazungu Trial Judgment], *reprinted in* ASF 2013 REPORT ON DRC CASELAW, *supra* note 38, at 100, 112, 119; RDC, Auditeur Militaire c. Basele Lutula (alias Colonel Thom's), RP N° 167/09, Jugement (RDC Tribunal Militaire de Garnison de Kisangani, 3 juin 2009) [hereinafter Colonel Thom's Trial Judgment], *reprinted in* ASF 2010 REPORT ON DRC CASELAW, *supra* note 38, at 193, 209; RDC, Auditeur Militaire c. Blaise Bongi Massaba, Projustitia RPA n° 030/06, Jugement, pp. 24 (RDC Cour Militaire de la Province Orientale, 4 nov. 2006) [hereinafter Bongi Appeal Judgment], https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=03EF871FAFB5980BC12576630047E69A&action=openDocument&xp_countrySelected=CD&xp_topicSelected=GVAL-992BU6&from=state.

³⁹ CAR 2010 Penal Procedure Code, *supra* note 37, art. 2 (“L'action civile *en reparation* du dommage causé par un crime, un délit, ou une contravention, appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l'infraction.”) (emphasis added). The definition of a civil party claim as a claim for reparations is widely shared in civil law countries. *See* In the Matter of El Sayed, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, ¶ 3 n.5 (STL Appeals Chamber, July 19, 2011) (“The term ‘*partie civile*’ ... refers to a particular procedure in civil law countries (including under Lebanese law) where a private person is involved in a criminal trial *in order to obtain reparations* for a crime committed against him.”) (emphasis added), <https://www.legal-tools.org/doc/985cf2/pdf/>.

⁴⁰ SCC Organic Law, *supra* note 1, art. 40 (“Les Cabinets d'Instruction sont également saisis des faits entrant dans la compétence de la Cour Pénale Spéciale par la plainte, avec constitution de partie civile, de toute personne qui s'estime lésée par l'infraction. Toutefois, dans l'intérêt de la manifestation de la vérité et de la lutte contre l'impunité, les parties civiles ainsi constituées sont dispensées des frais ordinairement générés par ce mode de saisine du juge d'instruction.”).

⁴¹ *Id.* art. 3 (“La Cour Pénale Spéciale est compétente pour enquêter, instruire et juger les violations graves des droits humains et les violations graves du droit international humanitaire ... notamment le crime de génocide, les crimes contre l'humanité et les crimes de guerre objets des enquêtes en cours et à venir.”).

⁴² *See* République Centrafricaine, Loi N° 10.001 portant Code Penal Centrafricain, art. 152-57 (6 jan. 2010) [hereinafter CAR Penal Code]; *see also* CAR 2010 Penal Procedure Code, *supra* note 37, art. 10 (“Toutefois l'imprescriptibilité des crimes de guerre, de génocide et des crimes contre l'humanité s'applique tant à l'action publique qu'à l'action civile pouvant résulter de tels crimes.”).

⁴³ CAR Penal Code Title IV: Sections I, II, and III concern the crimes of genocide, war crimes, and crimes against humanity. Article 162 of the Penal Code establishes that civil actions are specifically permissible in cases of genocide, war crimes, and crimes against humanity. CAR Penal Code, *supra* note 42, arts. 152-57; *id.* art. 162 (“L'action publique relative aux crimes prévus par les sections I, II et III du présent titre ainsi que l'action civile et les peines prononcées sont imprescriptibles. Les crimes ci-dessus cités ne peuvent faire l'objet d'amnistie ou de grâce. Toute immunité relevant du statut national est inopposable.”).

directly suffered harm as a result of these crimes may pursue reparations.⁴⁴ Collectively, CAR's domestic laws provide authority for the SCC to award reparations to victims based upon the civil party system. CAR law expressly permits civil party participation and claims for reparations. Moreover, it establishes that crimes falling within the jurisdiction of the Special Criminal Court – namely genocide, war crimes, and crimes against humanity – are also domestic crimes for which civil party complaints may be filed and reparations sought. The SCC's Organic Law reaffirms this possibility by explicitly permitting the introduction of civil party claims.⁴⁵

2. *Comparative examples of similar reparations authority*

The inference that reparations may be ordered by the SCC because CAR's domestic laws permit civil party claims is not unprecedented. Other criminal tribunals have concluded they have the authority to award reparations on substantially similar grounds. Most analogous among these is the rationale for reparations provided by the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The Law on the Establishment of the ECCC (hereinafter the ECCC Law) makes no mention of civil party participation or reparations to victims.⁴⁶ The ECCC Law does, however, authorize the Chamber to prosecute crimes within its jurisdiction utilizing domestic (Cambodian) penal law, as well as international law⁴⁷ – similar to the SCC's Organic Law. As a civil law jurisdiction, Cambodia's Criminal Procedure Code permits victims to bring civil actions for reparations.⁴⁸ The ECCC's Internal Rules – adopted by the ECCC's judges – thus state that civil parties may participate in criminal proceedings before the Chamber and that they may seek certain forms of reparations from those convicted of the crime.⁴⁹

In reviewing its legal authority to award reparations, the ECCC cited Cambodia's domestic civil party action system.⁵⁰ The ECCC's Trial Chamber stated in *Kaing*, in a section devoted to reparations, that

⁴⁴ CAR 2010 Penal Procedure Code, *supra* note 37, art. 2 (“L'action civile en réparation du dommage causé par un crime, un délit ou une contravention, appartient à tous ceux qui ont personnellement souffert du dommage directement causé par l'infraction.”). Notably, CAR's Constitution also provides that victims of particular crimes, including torture, rape, and cruel, inhumane, degrading or humiliating acts or treatment – crimes which may rise to the level of crimes against humanity, war crimes, or genocide where the other requirements of those crimes are met – have a constitutional right to reparations. See Constitution de la République Centrafricaine, arts. 3, 21 (30 mars 2016); République Centrafricaine, Décret No 04.392 portant promulgation de la Constitution de la République Centrafricaine, arts. 3, 17 (27 déc. 2004). While these are State obligations not applicable to individual criminal defendants, these provisions nonetheless support the notion that CAR domestic law supports the right to reparations for victims of genocide, war crimes, or crimes against humanity.

⁴⁵ SCC Organic Law, *supra* note 1, art. 40.

⁴⁶ See generally Law on the Establishment of the Extraordinary Chambers (2004),

https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

⁴⁷ *Id.* art. 1 (“The purpose of this law is 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 international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”); see also *id.* art. 2.

⁴⁸ Cambodge, Loi portant sur la procedure en matiere penale, arts. 5, 15, 16 (28 jan. 1993), <https://www.legal-tools.org/doc/f5c8b1/pdf/>; Kingdom of Cambodia, Criminal Procedure Code, arts. 2, 13-14 (2007), <https://www.legal-tools.org/doc/ea1611/pdf/>.

⁴⁹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 23(1), (11) (June 12, 2007) [hereinafter ECCC Internal Rules], <https://www.eccc.gov.kh/sites/default/files/legal-documents/IR-Eng.pdf>.

⁵⁰ See Co-Prosecutors v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶ 661 (ECCC Trial Chamber, July 26, 2010) [hereinafter Kaing Trial Judgment], <https://www.legal-tools.org/doc/dbdb62/pdf/>; Kaing Appeal Judgment, *supra* note 20, ¶ 641.

“[c]ivil party participation before the ECCC includes ... a right for victims ... to pursue a related civil action for collective and moral reparations against an Accused” which is “derived from analogous forms of participation recognized before some national jurisdictions, including in the Kingdom of Cambodia.”⁵¹ On appeal, the ECCC’s Supreme Court Chamber confirmed that the basis for reparations at the ECCC is Cambodia’s criminal procedure for civil party claims, along with international human rights law on reparations as implemented in international criminal proceedings.⁵²

Notably, the argument that SCC authority over reparations can be based upon CAR domestic law requires less of an inferential leap than the ECCC made in *Kaing*. In that case, the ECCC held that it had authority to hear civil claims based upon Cambodian domestic law, despite the fact that the ECCC Statute is silent regarding either civil party participation or victim reparations. Here, CAR’s Organic Law specifically discusses civil party participation in SCC proceedings, signaling that such participation is authorized and anticipated. Thus, concluding that the SCC has authority to grant reparations to these civil parties in line with CAR’s domestic laws requires a more modest legal inference than the ECCC made.

Moreover, the ECCC is not the only court that has adopted legal procedures from a national system to justify hearing victim claims and awarding reparations.⁵³ Domestic laws and procedures on civil party claims and reparations also were influential in the establishment of the International Criminal Court (ICC), which was created to prosecute the most serious crimes of concern to the international community.⁵⁴ During negotiations over the ICC’s Statute, States advanced divergent proposals regarding the role of victims and the possibility of reparations before the proposed ICC.⁵⁵ These differences were rooted in the different approaches to victim participation and reparations taken in the common law and civil law systems.⁵⁶ While many civil law countries permit victim participation in criminal trials and claims for reparations before the same court hearing the criminal case, the common law system generally limits victims’ roles to that of a testifying witness and claims for redress are often made in separate civil suits.⁵⁷ Ultimately, the drafters incorporated articles akin to the “*partie*

⁵¹ *Kaing* Trial Judgment, *supra* note 50, ¶¶ 660-61.

⁵² *Kaing* Appeal Judgment, *supra* note 20, ¶ 641; *see also id.* ¶ 644 (“the reparations regime envisaged by the Internal Rules derives from analogous forms of redress found in the 2007 [Cambodia] Code of Criminal Procedure”).

⁵³ For example, in 2005 Iraq established the Iraqi Higher Criminal Court to prosecute international crimes, including genocide, crimes against humanity, and war crimes, committed between 1969 and 2003. Iraq, Law No. 10, Law of the Iraqi Higher Criminal Court, art. 1 (2005), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=62DFA419B75D039CC12576A1005FD6C1&action=openDocument&xp_countrySelected=IQ&xp_topicSelected=GVAL-992BU6&from=state. Under the law establishing the court, victims and families of victims may file a civil suit before the court against criminal defendants for harm they suffered as a result of the defendants’ crimes. *Id.* art. 22. The Statute affirms that the Court’s authority to consider such claims is based upon Iraq’s Criminal Procedure Code. *Id.* Article 10 of that Code states: “A person who has suffered direct material or ethical damage from any offence has the right to bring a civil case against the accused and the person responsible under civil law for the actions of the accused ... The complaint is made ... before the court which is already considering the criminal case.” Iraq, Criminal Procedure Code, art. 10 (1971, *as amended*), <http://hrlibrary.umn.edu/research/Egypt/Criminal%20Procedures.pdf>.

⁵⁴ Rome Statute of the ICC, *supra* note 20, preamble.

⁵⁵ *See, e.g., Japanese Oppose creation of Voluntary Trust Fund to Assist Victims*, ON THE RECORD ICC, Vol. 1, Issue 10, at 3-4 (June 30, 1998) (describing differences in the positions on reparations of Japan, South Korea, France, and England), <https://www.legal-tools.org/doc/9e827d/pdf/>.

⁵⁶ *Victims of War Crimes to Win Reparations, Participate at ICC Trials*, ON THE RECORD ICC, Vol. 1, Issue 21, at 6 (July 16, 1998), <https://www.legal-tools.org/doc/a65a28/pdf/>.

⁵⁷ *Id.*

civil procedure prevalent in civil-law countries,”⁵⁸ granting victims the right to participate in proceedings before the ICC and to seek reparations against a convicted person.⁵⁹

Thus, the argument that CAR’s domestic law establishes the SCC’s authority to hear civil claims for atrocity crimes is unremarkable. Several courts have based this authority on similar grounds. A careful reading of the laws available to the SCC demonstrates that CAR’s domestic laws provide a sound legal basis for the SCC’s authority to award reparations to victims.

B. The evolving international criminal law norm recognizing a right to reparations supports the SCC’s reparations authority

Although CAR’s domestic law appears to settle the question of the SCC’s authority to award reparations, additional support for such authority may be found in international law. As noted earlier, the SCC’s Organic Law permits the SCC to refer to substantive and procedural international norms where domestic law does not cover a particular issue or where there is uncertainty concerning the interpretation or application of CAR law or procedure.⁶⁰ The recognition of reparations authority in the SCC is consistent with the evolving practice of international courts.

Although the field of international criminal law did not initially include a right to reparations, victim reparations increasingly have been recognized as a vital component of international justice. This understanding grew, in part, out of the deficiencies of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which were the first international criminal tribunals to be established since Nuremberg. Neither tribunal had the authority to award reparations to victims beyond the return of criminally acquired property or proceeds⁶¹ – a lack of authority that quickly became, and remains, a central criticism of both courts. For example, in October 2002, then-President of the ICTR, Judge Navanethem Pillay, urged UN member States to help compensate victims of the Rwandan genocide, observing that “[m]any Rwandans have questioned the ICTR’s value and its role in promoting reconciliation if the issue of claims for compensation is not addressed.”⁶² The former President of the ICTY, Judge Theodor Meron, similarly stated that “it is not right that the United Nations did not create some kind of a fund for reparations, for victims of war crimes in the former Yugoslavia.”⁶³ Calls for both courts to find a way to compensate victims spanned the length of their mandates. Victims of the Yugoslav conflicts expressed dissatisfaction with the ICTY and felt a “sense of justice not done,” in part because of the lack of reparations.⁶⁴ And in 2015, the ICTR’s Chief Prosecutor, Hassan Bubacar Jallow, stated:

⁵⁸ Luke Moffett, *Reparations for victims at the International Criminal Court: a new way forward?*, THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 1204, 1206 (2017).

⁵⁹ Rome Statute of the ICC, *supra* note 20, arts. 68, 75.

⁶⁰ SCC Organic Law, *supra* note 1, art. 3.

⁶¹ Statute of the International Criminal Tribunal for Rwanda, art. 23(3) (1994, *as amended as of 2007*) [hereinafter ICTR Statute], http://legal.un.org/avl/pdf/ha/ictr_EF.pdf; Statute of the International Criminal Tribunal for the former Yugoslavia, art. 24 (1993, *as amended* Sept. 2009) [hereinafter ICTY Statute], http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

⁶² *ICTR President calls for compensation for victims*, UN INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIALS (Oct. 31, 2002), <http://unictr.irmct.org/en/news/ictr-president-calls-compensation-victims>.

⁶³ Boris Pavelic, *UN Urged to Compensate War Crimes Victims*, BALKAN TRANSITIONAL JUSTICE (Nov. 4, 2013), <https://balkaninsight.com/2013/11/04/meron-un-to-create-victims-reparation-fund/>.

⁶⁴ Goran Šimić, *ICTY and the Question of Justice*, HARVARD HUMAN RIGHTS JOURNAL (2016), <https://harvardhrj.com/icty-and-the-question-of-justice/>; PETER VAN DER AUWERAERT, INTERNATIONAL ORGANIZATION FOR MIGRATION, REPARATIONS FOR WARTIME VICTIMS IN THE FORMER YUGOSLAVIA: IN SEARCH OF THE WAY FORWARD 13 (2013),

“Unfortunately, at the time when the tribunal was established, the issue of compensation of victims was not part of that process. But the system of international justice has evolved to the point where the question of compensation to victims is paramount.”⁶⁵

Nowhere was that evolution more evident than in the Rome Statute of the International Criminal Court, which was adopted in 1998 and came into force in 2002.⁶⁶ The Rome Statute conferred groundbreaking authority upon the Court to award reparations to victims of international crimes.⁶⁷ In subsequent years, the ICC has ordered reparations against persons convicted by the Court, including Congolese warlord Germain Katanga,⁶⁸ Congolese militia leader Thomas Lubanga Dyilo,⁶⁹ and Malian morality brigade leader Ahmad al-Faqi al-Mahdi.⁷⁰ In these decisions, the ICC has “underscore[d] the importance of the reparations phase, which marks a critical juncture in the administration of justice,” and observed that “the success of the Court is, to some extent, linked to the success of its reparation system.”⁷¹

Two years after the ICC’s creation, the ECCC was established to try those most responsible for serious violations of Cambodian and international law committed during the Khmer Rouge era in Cambodia.⁷² As discussed above, the ECCC Law contains no reference to reparations.⁷³ Nevertheless, the ECCC established in its Internal Rules that civil parties may seek collective and moral reparations from convicted persons,⁷⁴ and reaffirmed that authority in its judgments.⁷⁵

Finally, the Extraordinary African Chambers in the (EAC) – established in 2012 to prosecute international crimes committed in Chad between 1982 and 1990 – has express authority to order reparations against convicted persons.⁷⁶ Specifically, Article 27 of the EAC’s Statute permits the Court to award reparations, including restitution, compensation, and rehabilitation.⁷⁷ In 2016, the EAC

<https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Reparations-for-Wartime-Victimes-in-the-Former-Yugoslavia-In-Search-of-the-Way-Forward.pdf>.

⁶⁵ Edwin Musoni, *Genocide survivors hopeful of reparations as ICTR winds up*, THE NEW TIMES (Apr. 23, 2015), <https://www.newtimes.co.rw/section/read/188122>.

⁶⁶ Rome Statute of the ICC, *supra* note 20.

⁶⁷ *Id.* art. 75. The ICC itself has recognized that the Rome Statute “reflects a growing recognition in international criminal law that there is a . . . need to provide effective remedies for victims.” Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 177.

⁶⁸ Katanga Trial Reparations Order, *supra* note 23.

⁶⁹ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable” (ICC Trial Chamber II, Dec. 21, 2017), <https://www.legal-tools.org/doc/96a7c5/pdf/>.

⁷⁰ Al Mahdi Trial Reparations Order, *supra* note 23.

⁷¹ Katanga Trial Reparations Order, *supra* note 23, ¶ 14; Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 178.

⁷² ECCC Law, *supra* note 46, art. 1.

⁷³ *See generally id.*

⁷⁴ ECCC Internal Rules, *supra* note 49, Rule 23(1)(b).

⁷⁵ *See supra* notes 50-52 & accompanying text. The Special Tribunal for Lebanon (STL), established in 2006 to try crimes related to the assassination of former Lebanese Prime Minister Rafiq Hariri in 2005, also recognizes the importance of reparations for victims. Article 25(3) of the STL’s Statute affirms the right of victims to bring an action in a national court or other competent body to obtain compensation. While the tribunal is unable to render such awards itself, the Statute makes clear that reparations are a priority of the Tribunal. Statute of the Special Tribunal for Lebanon, *supra* note 20, arts. 1, 25(3).

⁷⁶ EAC Statute, *supra* note 20, art. 27 (2012).

⁷⁷ *Id.*

ordered former Chadian President Hissène Habré to pay reparations to victims of the crimes for which he had been convicted, including crimes against humanity, torture, and war crimes.⁷⁸

Collectively, these examples signal a clear movement toward the recognition of victims' right to reparation under international criminal law. The recognition of reparations authority in the SCC is consistent with the evolving international of international courts.

C. Conclusion

In sum, CAR's domestic laws permit civil parties to bring claims for reparations within criminal proceedings, including proceedings for international crimes. These laws are applicable to cases before the SCC, as indicated by the provisions of the SCC's Organic Law regarding civil parties. This interpretation of CAR law is consistent with modern trends in international criminal law, wherein international and hybrid criminal courts have similarly rooted their reparation authority in national law. Awarding reparations is also consistent with current international norms, particularly at the ICC, ECCC, and EAC, to which the SCC is authorized to refer under its Organic Law. Thus, there is a solid legal foundation for the SCC to award reparations in appropriate cases.

⁷⁸ Ministère Public c. Hisséin Habré, Jugement sur les Reparations, ¶ 82 (CAE d'Assises, 30 mai 2016) [hereinafter Habré Trial Reparations Judgment], http://www.chambresafriaines.org/pdf/Jugement_complet.pdf. Note that the Habré Trial Reparations Judgment appears immediately after the Trial Judgment, on page 574 of the PDF (immediately after page 561 of the Trial Judgment).

III. FORMS OF REPARATIONS

International law recognizes five forms of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁷⁹ The SCC's RPE is consistent with this modern understanding of the broad nature of reparations. Article 129 authorizes the Court to take *any* reparations measure that is appropriate to remedy the nature and gravity of the harms experienced by civil parties.⁸⁰ That article further recognizes a range of reparations the SCC may award, from medical and psychological care to educational programs to the creation of funding mechanisms to develop agriculture or industry.⁸¹ Although the SCC's RPE does not explicitly mention each of the five international forms of reparations, the examples included in article 129 fall within several of these categories, implicitly endorsing the SCC's ability to award these types of reparations.⁸² Interpreting the SCC's authority to encompass all five forms of reparations also is consistent with similar interpretations of judicial authority at other international criminal tribunals.⁸³ Importantly, such broad reparations authority is consistent with CAR's domestic law, which establishes that a civil action may request reparations for "all heads of damage" caused by the crime, including but not limited to bodily injury, moral harm, and property damage.⁸⁴

This section provides an overview of the five forms of reparation recognized under international law.⁸⁵ Particular attention is given to the breadth of reparations that have been recognized by international and hybrid criminal tribunals with the hope that such examples may inspire parties before the SCC to

⁷⁹ See UN Basic Principles on Reparations, *supra* note 20, ¶¶ 18-23; African Commission General Comment No. 4, *supra* note 20, ¶ 10; see also *Konate v. Burkina Faso*, App. No. 004/2013, Judgment on Reparations, ¶ 15 (African Court on Human and Peoples' Rights, June 3, 2016), [http://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Konate%20Judgement%20on%20Reparation%20\(English\).pdf](http://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Konate%20Judgement%20on%20Reparation%20(English).pdf).

⁸⁰ SCC RPE, *supra* note 15, art. 129(B) ("La Section d'assises s'assure de prendre des mesures de réparation qui soient adaptées à la nature et à l'ampleur des préjudices subis par les parties civiles.").

⁸¹ *Id.* ("Elle peut ordonner notamment des indemnisations pécuniaires, des mesures de formation et d'insertion socioprofessionnelle, des mesures de soins médicaux et psychologiques ou des mesures visant à l'institution d'un fonds de développement agricole ou industriel ou à la mise en place de programmes éducatifs.").

⁸² For example, "mesures de soins médicaux et psychologiques" would constitute rehabilitation. See SCC RPE, *supra* note 15, art. 129(B).

⁸³ For example, the Rome Statute generally authorizes the ICC to award reparations, but only expressly mentions restitution, compensation, and rehabilitation. Rome Statute of the ICC, *supra* note 20, art. 75. Nonetheless, the ICC has the authority to award the other forms of reparations, namely measures of satisfaction and guarantees of non-repetition. See *Al Mahdi Trial Reparations Order*, *supra* note 23, ¶¶ 46, 67, 71 (describing the list in article 75 as "non-exhaustive" and ordering measures of satisfaction – namely that Al Mahdi's apology be made available to victims of his crimes – and non-repetition); see also *Lubanga Trial Decision on Reparations Principles*, *supra* note 23, ¶ 222 (observing that the list of reparations in article 75 of the Rome Statute "is not exclusive" and that "[o]ther types of reparations ... may also be appropriate"); *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, Annex A ¶ 34 (ICC Appeals Chamber, Mar. 3, 2015) [hereinafter *Lubanga Appeals Order on Reparations Principles Annex A*] ("Reparations are not limited to restitution, compensation and rehabilitation, as listed in article 75 of the Statute."), <https://www.legal-tools.org/doc/df2804/pdf/>; OCTAVIO AMEZCUA-NORIEGA, TRANSITIONAL JUSTICE NETWORK, REPARATION PRINCIPLES UNDER INTERNATIONAL LAW AND THEIR POSSIBLE APPLICATION BY THE INTERNATIONAL CRIMINAL COURT: SOME REFLECTIONS ¶ 33 (2011), https://www1.essex.ac.uk/tjn/documents/paper_1_general_principles_large.pdf.

⁸⁴ CAR 2010 Penal Procedure Code, *supra* note 37, art. 3 ("L'action civile peut être exercée en même temps que l'action publique et devant la même juridiction. Elle est recevable pour tous chefs de dommages aussi bien matériels que corporels ou moraux, qui découleront des faits, objets de la poursuite.").

⁸⁵ Portions of this section were drawn from a forthcoming joint report by the WCRO and the African Court on Human and Peoples' Rights on reparations.

seek appropriate and creative reparations awards. Which types of reparations are appropriate in a particular case will ultimately depend both on the circumstances of the violation itself, as well as the SCC's determination about which approach(es) to adopt, since some reparations are only capable of being implemented by particular types of actors. For example, reparations requiring government approval or resources – such as the incorporation of specific information into the public curriculum, the designation of an official day of remembrance, or the use of public lands – require the implication of the State in the reparations process. This has most often been achieved through reparations orders against the State or through the project partnerships approach. As appropriate, this section thus also notes where particular approaches may be better suited to certain reparations.

A. Restitution

Restitution aims to restore a victim, to the greatest extent possible, to his or her original situation before the commission of the crime.⁸⁶ Because of its power to undo the effects of a violation, it “is the preferred remedy for breaches of international law.”⁸⁷ It also most often corresponds to the needs and desires of victims, when it is feasible.⁸⁸ Restitution awards may have advantages for courts as well, such as “allow[ing] tribunals to avoid the sometimes difficult and time-consuming assessment of damages, for example in property claims.”⁸⁹

Restitution may consist of a wide variety of measures,⁹⁰ including the:

- restoration of liberty for those in detention or captivity;⁹¹

⁸⁶ Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 223; UN Basic Principles on Reparations, *supra* note 20, ¶ 19; African Commission General Comment No. 4, *supra* note 20, ¶ 36; UN Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, ¶ 55, UN Doc. A/HRC/22/45 (Jan. 28, 2013) [hereinafter 2013 Report of the Working Group on Enforced or Involuntary Disappearances], http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.45_English.pdf; UNIVERSITY OF OXFORD, FACULTY OF LAW, A REPORT ON REPARATIONS AND REMEDIES FOR VICTIMS OF SEXUAL AND GENDER BASED VIOLENCE ¶ 29 (2016) [hereinafter OXFORD REPORT], <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2016/01/REDRESS-Project-on-Reparations-and-Remedies-for-SGB-Victims-FINAL-28-January-2016.pdf>.

⁸⁷ DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 298 (2015); *see also* Mbiankeu v. Cameroon, Comm. No. 389/10, Views ¶ 131 (African Commission on Human and Peoples' Rights, May 6, 2015), <https://www.achpr.org/sessions/descions?id=253>.

⁸⁸ SHELTON, *supra* note 87, at 298. In awarding measures of restitution, however, courts should pay particular attention to issues of gender and discrimination. Restitution usually means restoring the victim, to the greatest extent possible, to his or her original situation before the commission of the human rights violation or international crime. In some cases, however, this could risk returning minorities, women and girls, or other groups that have experienced discrimination to a “state of oppressive laws, policies and customs that discriminate and exclude.” ASF REPARATIONS REPORT, *supra* note 31, at 32; *see also* Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 192 (observing the importance of avoiding the replication of discriminatory practices or structures when awarding reparations). In such instances, other measures of reparations, particularly guarantees of non-repetition (such as structural changes to laws) may be equally necessary. African Commission General Comment No. 4, *supra* note 20, ¶ 36; 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 86, ¶ 55.

⁸⁹ SHELTON, *supra* note 87, at 298.

⁹⁰ Many of these measures cannot be implemented by an individual defendant, and would require reparations orders against the State or in partnership with the State or other entities. *See infra* Section VI for more information.

⁹¹ UN Basic Principles on Reparations, *supra* note 20, ¶ 19; African Commission General Comment No. 4, *supra* note 20, ¶ 36; 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 86, ¶ 55; OHCHR, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, ¶ 1076 (2010) [hereinafter UN Mapping Report on DRC],

- return to one’s family, home, or place of residence;⁹²
- restoration of civil or political rights, including citizenship;⁹³
- restoration of prior employment;⁹⁴
- provision of continuing education;⁹⁵ and
- restoration and maintenance of damaged property;⁹⁶
- return of stolen land or other property.⁹⁷

Unfortunately, given the nature of atrocity crimes, restitution is often impossible.⁹⁸ For example, as the ICC observed in *Lubanga*, restitution is generally “unachievable” for children who were conscripted and forced to participate in hostilities while under the age of 15.⁹⁹ Likewise, no remedy can restore a victim of genocide, murder, torture, or rape to his or her pre-violation situation. Where restitution is impossible, courts award alternative forms of reparations, such as monetary compensation to the victims and/or their relatives.¹⁰⁰

In other cases, restitution, although possible, cannot fully compensate the victim for the harms suffered. For example, return of real property may not account for the loss of income that could have been generated from that property during the years the victim was displaced. In many instances, therefore, a variety of reparations measures, including restitution but also measures of satisfaction, compensation, and non-repetition, may be needed to redress the full panoply of harms experienced by the victim.¹⁰¹ The following sections address these forms of reparations.

https://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf; CHRISTINE EVANS, THE RIGHT TO REPARATIONS IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 44 (2012).

⁹² Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 35; UN Basic Principles on Reparations, *supra* note 20, ¶ 19; African Commission General Comment No. 4, *supra* note 20, ¶ 36; 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 86, ¶ 55; EVANS, *supra* note 91, at 44.

⁹³ African Commission General Comment No. 4, *supra* note 20, ¶ 36; UN Basic Principles on Reparations, *supra* note 20, ¶ 19; UN Mapping Report on DRC, *supra* note 91, ¶ 1076.

⁹⁴ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 35; UN Basic Principles on Reparations, *supra* note 20, ¶ 19; African Commission General Comment No. 4, *supra* note 20, ¶ 36.

⁹⁵ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 35.

⁹⁶ Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 67.

⁹⁷ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 35; Guatemala, Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente, Case No. C-01-76-2012-00021, Sentencia, at 510 (26 feb. 2016) [hereinafter Sepur Zarco Trial Judgment] (requiring the government to process land claims), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=1C57325B4F89A421C12581B00043C3DF&action=openDocument&xp_countrySelected=GT&xp_topicSelected=GVAL-992BU6&from=state; UN Basic Principles on Reparations, *supra* note 20, ¶ 19; African Commission General Comment No. 4, *supra* note 20, ¶ 36; EVANS, *supra* note 91, at 44.

⁹⁸ See Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 223; OXFORD REPORT, *supra* note 86, ¶ 29; 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 86, ¶ 55; EVANS, *supra* note 91, at 44; EVA DWERTMANN, THE REPARATION SYSTEM OF THE INTERNATIONAL CRIMINAL COURT 37, 133-34 (2010).

⁹⁹ Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 223.

¹⁰⁰ See DWERTMANN, *supra* note 98, at 133-34.

¹⁰¹ See DWERTMANN, *supra* note 98, at 133-34.

¹⁰¹ 2013 Report of the Working Group on Enforced or Involuntary Disappearances, *supra* note 86, ¶ 55.

B. Compensation

Compensation, i.e., the award of monetary funds, is the simplest and thus most prevalent form of reparation in most systems.¹⁰² Compensation can replace money lost or expended by victims as a result of a crime – such as lost income, medical costs and legal expenses – as well as other economically assessable damage, such as property damage.¹⁰³ In many cases, however, courts also award compensation for harms which are “essentially unquantifiable in financial terms,” but for which no other remedy exists.¹⁰⁴ For example, no reparation can undo a loss of reproductive capacity or return a family member who was killed, but compensation can acknowledge the grave suffering experienced in such instances, in addition to compensating a victim for the economically assessable costs such harms impose.¹⁰⁵

Compensation awards may be used to address a wide range of harms, including:

- **material damage**, such as lost income; loss of earning potential and/or future earnings; lost savings; and loss of, or damage to, property;¹⁰⁶
- **physical harm**, such as the loss of reproductive capacity, limb, or physical function;¹⁰⁷
- **moral damage**, including physical, mental, and emotional suffering;¹⁰⁸
- **lost opportunities**, including education, social, and employment benefits; loss of status; or interference with an individual’s legal rights;¹⁰⁹
- **costs** of legal, medical, psychological, social and other services.¹¹⁰

C. Rehabilitation

Atrocity crimes often result in significant physical, mental, and social trauma on the part of immediate victims, their family members and their communities.¹¹¹ Rehabilitation attempts to restore their health and well-being to their former condition through the provision of “medical and psychological care as

¹⁰² See SHELTON, *supra* note 87, at 31.

¹⁰³ UN Basic Principles on Reparations, *supra* note 20, ¶ 20; EVANS, *supra* note 91, at 44-45.

¹⁰⁴ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 40; Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 230.

¹⁰⁵ See SHELTON, *supra* note 87, at 315-16.

¹⁰⁶ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 40(c); Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 230(c); Al Mahdi Trial Reparations Order, *supra* note 23, ¶¶ 81, 83; Katanga Trial Reparations Order, *supra* note 23, at ¶¶ 76-101; UN Basic Principles on Reparations, *supra* note 20, ¶ 20(c).

¹⁰⁷ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 40(a); Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 230(a); UN Basic Principles on Reparations, *supra* note 20, ¶ 20(a).

¹⁰⁸ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 40(b); Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 230(b); UN Basic Principles on Reparations, *supra* note 20, ¶ 20(d); SHELTON, *supra* note 87, at 76.

¹⁰⁹ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 40(d); Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 230(d); UN Basic Principles on Reparations, *supra* note 20, ¶ 20(b).

¹¹⁰ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 40(e); Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 230(e); UN Basic Principles on Reparations, *supra* note 20, ¶ 20(e).

¹¹¹ SHELTON, *supra* note 87, at 394.

well as legal and social services.”¹¹² Rehabilitation also may be a means of redressing victims’ lost opportunities and reintegrating them back into society, such as by providing educational services or assisting in the acquisition of new skills required by their changed circumstances.¹¹³ The aim of such rehabilitative services is to afford the victim the maximum possible self-sufficiency and function by restoring, to the extent possible, independence; physical, mental, social, cultural, spiritual and vocational ability; and his or her full inclusion and participation in society.

Rehabilitative services may be required over extended periods of time, as victims and communities confront and process the harm done to them and deal with their feelings of grief, anger, humiliation, fear and depression.¹¹⁴ It is crucial, however, that victims and communities be provided with opportunities for rehabilitation, both to restore as far as possible the situation prior to the violation and to reduce the anger and frustration that might otherwise lead victims, their families and/or their communities to engage in vigilante justice and further cycles of violence and abuse.¹¹⁵

Measures of rehabilitation include:¹¹⁶

- provision of medical and/or psychological services, including by constructing and equipping health centers in affected communities;¹¹⁷
- the provision of educational and vocational programs, including by improving school infrastructure in and establishing scholarships for affected communities;¹¹⁸
- provision of basic services to affected communities;¹¹⁹
- economic development and/or microfinance programs to improve victims’ economic position;¹²⁰
- educational campaigns to reduce the stigmatization and marginalization of victims;¹²¹

¹¹² U.N. Basic Principles on Reparations, *supra* note 20, ¶ 21; EVANS, *supra* note 91, at 45; *see also* Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 48.

¹¹³ Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 234.

¹¹⁴ *See* SHELTON, *supra* note 87, at 394; DWERTMANN, *supra* note 98, at 148-49.

¹¹⁵ SHELTON, *supra* note 87, at 394.

¹¹⁶ Many of these measures cannot be implemented by an individual defendant, and would require reparations orders against the State or in partnership with the State or other entities. *See* DWERTMANN, *supra* note 98, at 149; *see also infra* Section VI.

¹¹⁷ Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 48; Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 42; Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 233; Katanga Trial Reparations Order, *supra* note 23, ¶¶ 302-04; Co-Prosecutors v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, ¶ 1154 (ECCC Trial Chamber, Aug. 7, 2014) [hereinafter Nuon 2014 Trial Judgment], <https://legal-tools.org/doc/4888de/pdf>; Sepur Zarco Trial Judgment, *supra* note 97, at 509; UN Basic Principles on Reparations, *supra* note 20, ¶ 21; African Commission General Comment No. 4, *supra* note 20, ¶ 41; EVANS, *supra* note 91, at 45.

¹¹⁸ Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 234; Sepur Zarco Trial Judgment, *supra* note 97, at 509-10; African Commission General Comment No. 4, *supra* note 20, ¶ 41.

¹¹⁹ Sepur Zarco Trial Judgment, *supra* note 97, at 510.

¹²⁰ Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 48; Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 275.

¹²¹ Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 239.

- issuance of certificates that acknowledge victims’ suffering, thereby fostering improved attitudes toward them;¹²² and
- Legal, social, and other services.¹²³

D. Satisfaction

Satisfaction refers to measures that acknowledge the violation, aim to end any continuing violations, and restore the dignity and reputation of the victim.¹²⁴ These measures may help to “recover[] the memory of the victims, re-establish[] their reputation, consol[e] their next of kin or transmit[] a message of official condemnation” of the violation.¹²⁵

Measures of satisfaction include:¹²⁶

- a judgment in favor of a victim, translation of that judgment into languages spoken by the victims, and public outreach activities to inform the victims and the public about the judgment;¹²⁷
- expressions of regret or apology by the defendant or others responsible, and may include the compilation and/or publication by the court of these statements,¹²⁸
- investigations to identify the whereabouts of victims of enforced disappearance or the remains of deceased victims,¹²⁹

¹²² *Id.* 239. This particular measure was proposed as a means of assisting child soldiers, who also may have perpetrated crimes, remedy their low public reputation and encourage public support for them. *Id.* ¶ 103.

¹²³ Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 48; Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 42; Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 233.

¹²⁴ African Commission General Comment No. 4, *supra* note 20, ¶ 44; UN Basic Principles on Reparations, *supra* note 20, ¶ 22.

¹²⁵ Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala, Judgment (Reparations and Costs), ¶ 84 (Inter-American Court of Human Rights, May 26, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_77_ing.pdf; *see also* Nuon 2014 Trial Judgment, *supra* note 117, ¶ 1152 (these measures may “assist to restore the dignity of victims ... and assist in healing the wounds of all victims”).

¹²⁶ Some of these measures can be implemented by an individual defendant or the court itself, but others would require reparations orders against the State or in partnership with the State or other entities. *See* DWERTMANN, *supra* note 98, at 149; *see also infra* Section VI.

¹²⁷ Kaing Trial Judgment, *supra* note 50, ¶ 668 & n.1153; Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶¶ 238-39; Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 43; Sepur Zarco Trial Judgment, *supra* note 97, at 510; UN Basic Principles on Reparations, *supra* note 20, art. 22(d).

¹²⁸ Kaing Trial Judgment, *supra* note 50, ¶¶ 668 n.1153, 669; Kaing Appeal Judgment, *supra* note 20, at ¶¶ 672, 675-77; ECCC, Compilation of statements of apology made by Kaing Guek Eav alias Duch during the proceedings, Case No. 001, https://www.eccc.gov.kh/sites/default/files/publications/Case001Apology_En_low_res.pdf; Al Mahdi Trial Reparations Order, *supra* note 23, ¶¶ 70-71; Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 241; UN Basic Principles on Reparations, *supra* note 20, art. 22(e); EVANS, *supra* note 91, at 45.

¹²⁹ Sepur Zarco Trial Judgment, *supra* note 97, at 509; UN Basic Principles on Reparations, *supra* note 20, art. 22(c); EVANS, *supra* note 91, at 45.

- verification of the facts and full and public disclosure of the truth about violations, which may include the creation of documentaries and the inclusion of information in trainings and textbooks;¹³⁰ and
- commemorations and tributes to the victims, such as through the construction of monuments or memorials, holding of forgiveness ceremonies, or establishment of a day of remembrance.¹³¹

E. Guarantees of Non-Repetition

Guarantees of non-repetition are measures that aim to prevent the commission of further violations against both individual victims and society as a whole. These measures are rooted in the recognition that international crimes frequently arise from a larger context of abuse that must be systemically changed in order to prevent future harms.¹³² Guarantees of non-repetition are thus forward-looking and transformative, aimed at “break[ing] the structural causes of societal violence.”¹³³

Guarantees of non-repetition may overlap with other forms of reparations, as all reparations may have some effect in deterring future violations.¹³⁴ This is especially true, however, of measures of satisfaction, which often include an acknowledgement and condemnation of the violations committed. For example, the erection of monuments and memorials not only consoles family members by keeping the memory of the victims alive (and is thus a measure of satisfaction), but also may “contribute to raising awareness in order to avoid the repetition of harmful acts.”¹³⁵ Likewise, ordering the incorporation of information about atrocity crimes in educational curricula serves to memorialize victims and restore their honor, while simultaneously educating future generations.

Thus, in addition to the measures discussed above, guarantees of non-repetition include:¹³⁶

- Enactment or amendment of laws criminalizing the relevant conduct;¹³⁷

¹³⁰ Sepur Zarco Trial Judgment, *supra* note 97, at 510; Nuon 2014 Trial Judgment, *supra* note 117, ¶ 1157; UN Basic Principles on Reparations, *supra* note 20, art. 22(b), (h); EVANS, *supra* note 91, at 45.

¹³¹ Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 90; Nuon 2014 Trial Judgment, *supra* note 117, ¶¶ 1152-53; Sepur Zarco Trial Judgment, *supra* note 97, at 510-11; UN Basic Principles on Reparations, *supra* note 20, art. 22(g); EVANS, *supra* note 91, at 45.

¹³² See, e.g., SHELTON, *supra* note 87, at 384 (“ongoing violations may involve social conditions, behavioural patterns and organizational dynamics”); see also African Commission General Comment No. 4, *supra* note 20, ¶ 45.

¹³³ African Commission General Comment No. 4, *supra* note 20, ¶ 45.

¹³⁴ SHELTON, *supra* note 87, at 397.

¹³⁵ Case of the Street Children v. Guatemala, *supra* note 125, at ¶ 103; Myrna Mack Chang v. Guatemala, Judgment (Merits, Reparations and Costs), ¶ 286 (Inter-American Court of Human Rights, Nov. 25, 2003), http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf; Moiwana Community v. Suriname, Judgment (Preliminary Objections, Merits, Reparations and Costs), ¶ 218 (Inter-American Court of Human Rights, June 15, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf; Case of the 19 Merchants v. Colombia, Judgment (Merits, Reparations and Costs), ¶ 273 (Inter-American Court of Human Rights, July 5, 2004), http://www.corteidh.or.cr/docs/casos/articulos/seriec_109_ing.pdf.

¹³⁶ Many of these measures cannot be implemented by an individual defendant, and would require reparations orders against the State or in partnership with the State or other entities. See DWERTMANN, *supra* note 98, at 149; see also *infra* Section VI.

¹³⁷ Sepur Zarco Trial Judgment, *supra* note 97, at 511 (law against enforced disappearances); UN Basic Principles on Reparations, *supra* note 20, at ¶ 23(h).

- Community trainings on conflict prevention and resolution, mediation, and dialogue;¹³⁸
- Trainings on human rights and other relevant subjects for groups that perpetrated crimes, such as the military.¹³⁹

¹³⁸ Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/14, Public redacted version of Corrected version of Draft Implementation Plan for Reparations, ¶ 261 (ICC TFV, May 18, 2018) [hereinafter Al Mahdi Draft Implementation Plan], https://www.icc-cpi.int/CourtRecords/CR2018_02612.PDF.

¹³⁹ Sepur Zarco Trial Judgment, *supra* note 97, at 511; UN Basic Principles on Reparations, *supra* note 20, at ¶ 23(e).

IV. INDIVIDUAL AND COLLECTIVE REPARATIONS¹⁴⁰

Under the SCC's RPE, reparations may be individual or collective in nature.¹⁴¹ Individual reparations, as the name implies, are awards to particular individuals to repair the harms suffered by each individual victim as a consequence of the crimes of which the defendant was convicted.¹⁴² Examples of individual reparations include the return of land to a victim who previously owned it, payment of compensation directly to a victim, or provision of medical or psychological services.¹⁴³ Collective reparations, by contrast, are awarded to a group of victims¹⁴⁴ to address harms experienced by members of the group, which may have been suffered on an individual *or* collective basis.¹⁴⁵ There are thus two separate types of collective reparations: those focused on the individual members of a defined group who have experienced similar harm (such as an award of medical care to a group, which is accessed on an individual basis), and those aimed at benefitting the group as a whole (such as the building of a school or health center, the erection of a memorial, or the issuance of an apology).¹⁴⁶

Individual and collective reparations are not mutually exclusive,¹⁴⁷ and are often awarded concurrently in order to address the full range of harms experienced by victims.¹⁴⁸ There is no one-size-fits-all approach to reparations, rather the “individual circumstances” of each case must be considered.¹⁴⁹ Nonetheless, the following sections consider a number of advantages and challenges of individual and collective reparations that the SCC may want to consider as it makes reparations awards.

¹⁴⁰ Portions of this section were drawn from a forthcoming joint report by the WCRO and the African Court on Human and Peoples' Rights on reparations.

¹⁴¹ SCC RPE, *supra* note 15, art. 129(A) (“Elle peut accorder des mesures de réparation individuelle ou des mesures de réparation collective.”).

¹⁴² Katanga Trial Reparations Order, *supra* note 23, ¶ 271.

¹⁴³ *See id.*

¹⁴⁴ There is no singular, pre-existing definition of what constitutes a group for purposes of collective remedies under international law. Instead, it is widely recognized that the definition is flexible, and should respond to the identity and needs of those harmed by particular violations or crimes. In many cases, collective harms are “perpetrated on structurally disadvantaged, persecuted, marginalised or otherwise discriminated groups.” African Commission General Comment No. 4, *supra* note 20, ¶ 51. In these instances, the victims are part of a pre-existing group, such as those formed around shared ethnic, racial, social, political or religious affiliations. *Id.*; Katanga Trial Reparations Order, *supra* note 23, ¶ 274. In other situations, it may be the shared experience of harm that forms and defines the group. African Commission General Comment No. 4, *supra* note 20, ¶ 51; Katanga Trial Reparations Order, *supra* note 23, ¶ 274. Regardless of how the group comes to be defined, the victims should perceive themselves as part of a group if an award of collective reparations is to be feasible. Katanga Trial Reparations Order, *supra* note 23, ¶ 275.

¹⁴⁵ *See* Katanga Trial Reparations Order, *supra* note 23, ¶ 272; Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 33.

¹⁴⁶ Katanga Trial Reparations Order, *supra* note 23, ¶¶ 278-80; *see also* UN, Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence 7 (2014), <https://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

¹⁴⁷ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 33; Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 45; Katanga Trial Reparations Order, *supra* note 23, ¶ 265; African Commission General Comment No. 4, *supra* note 20, at ¶ 56; RDC, Auditeur Militaire c. Kakado Barnaba Yonga Tshopena, RP N° 071/09, 009/010, & 074/010, Jugement (Tribunal Militaire de Garnison de Bunia, 9 juillet 2010) [hereinafter Kakado Trial Judgment], reprinted in ASF 2010 REPORT ON DRC CASELAW, *supra* note 38, at 135, 171; DWERTMANN, *supra* note 98, at 128.

¹⁴⁸ Katanga Trial Reparations Order, *supra* note 23, ¶¶ 281, 287-88 (awarding reparations on both an individual and collective basis); Al Mahdi Trial Reparations Order, *supra* note 23, ¶¶ 81-82 (same); Sepur Zarco Trial Judgment, *supra* note 97, at 509-11 (same).

¹⁴⁹ UN Basic Principles on Reparations, *supra* note 20, ¶ 18.

A. Benefits and Challenges of Collective Reparations

Due to the nature of the crimes falling within the jurisdiction of the SCC – namely, genocide, war crimes, and crimes against humanity – many of the cases prosecuted before the Court are likely to involve hundreds, and potentially thousands, of victims.¹⁵⁰ These crimes also are more likely than ordinary crimes to cause injuries to communities as a whole. The widespread nature of these harms suggests that victims may benefit from collective awards in many cases.

Collective reparations do “not necessarily pre-suppose the violation of a collective right.”¹⁵¹ Rather collective reparations may also be appropriate to remedy “the violation of the individual rights of a large number of members of the group.”¹⁵² Thus, as noted earlier, collective reparations may be flexibly awarded to benefit the community as a whole, such as the building of a school or a memorial, or they may be focused on individuals within the group, such as healthcare provided to each of the group’s members.¹⁵³

Collective reparations are particularly appropriate where:

- ***victims were targeted because they are members of a specific group.***¹⁵⁴ In these instances, collective reparations may be better able to repair the identity-based harms of these violations and restore trust within the group.¹⁵⁵ For example, where rape was used as a means of repression, collective remedies may help avoid stigmatization of individual victims, restore a sense of dignity, and improve victims’ position in the community.¹⁵⁶
- ***community resources were damaged or destroyed.*** In these contexts, collective reparations could be ordered to repair community infrastructure and rebuild identity and trust.¹⁵⁷ In *Al Mahdi*, for instance, the ICC observed that the protected buildings destroyed by the defendant “belonged to the entire community of Timbuktu and their loss was felt by the community as a whole.”¹⁵⁸ The Court therefore found that “collective reparations are the most appropriate way to address the damage caused.”¹⁵⁹

¹⁵⁰ See Kaing Appeal Judgment, *supra* note 20, ¶ 659.

¹⁵¹ Katanga Trial Reparations Order, *supra* note 23, ¶ 276.

¹⁵² *Id.* See also African Commission General Comment No. 4, *supra* note 20, ¶ 51 (observing that people may “have suffered individually”).

¹⁵³ Katanga Trial Reparations Order, *supra* note 23, ¶¶ 278-80.

¹⁵⁴ WCRO, THE CASE-BASED REPARATIONS SCHEME AT THE INTERNATIONAL CRIMINAL COURT 6, 46 (2010) [hereinafter WCRO REPARATIONS REPORT], <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-12-the-case-based-reparations-scheme-at-the-international-criminal-court/>; LISA MAGARRELL, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, REPARATIONS IN THEORY AND PRACTICE 5 (2007) (describing decisions of the Inter-American Court of Human Rights with respect to the Colombian State’s support of paramilitary groups), <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>; DWERTMANN, *supra* note 98, at 122.

¹⁵⁵ See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 157, 169 (2004) (“harms to community life and trust cannot easily be redressed through individual awards”).

¹⁵⁶ See MAGARRELL, *supra* note 154, at 5.

¹⁵⁷ *Id.*

¹⁵⁸ Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 67.

¹⁵⁹ *Id.*

- ***only a small portion of the affected victims apply for reparations.*** Given the nature of the crimes within the jurisdiction of the SCC, many victims may have difficulty accessing the Court and putting together claims for reparations. As the ECCC acknowledged in a case concerning more than 12,000 direct victims but less than 100 civil parties,¹⁶⁰ many victims, although needing and desiring reparations, may have failed to apply for them because they “were not aware of the proceedings or of the opportunity to participate; were not in a financial, physical, psychological or logistic position to participate; did not possess sufficient evidence to meet the required threshold of admissibility of their application; or did not wish to be engaged for other reasons.”¹⁶¹ Ongoing conflict, security issues, geographical distance and inadequate transportation, and lack of access to or resources to hire an attorney may likewise prevent victims from filing or adequately supporting reparations requests.¹⁶² It therefore cannot be taken for granted that all potential claimants will participate in a case or will file claims for reparations. In these situations, awarding only individual reparations to those victims who filed reparations requests without providing anything for similarly-situated victims would not only be unjust, but could risk exacerbating tensions in the community.¹⁶³
- ***financial resources are limited.*** As the ICC has observed, collective reparations maximize limited resources.¹⁶⁴ In particular, where there are insufficient resources to provide individual reparations to each person harmed, “reparations that take the form of an assistance or rehabilitation program ... may be better suited to address victims’ harm than cash payments, particularly where the amount of payment to a given individual may be nominal.”¹⁶⁵ In addition, collective awards may promote reconciliation and peace better than would individual awards to a small subset of victims,¹⁶⁶ which may appear to privilege certain victims over others, leading to division and tension within the community.¹⁶⁷
- ***victims express a preference for collective reparations.*** Studies have indicated that victims often value reparations that are forward-looking and/or will benefit their children, which may weigh against individual, monetary compensation, particularly if it is nominal.¹⁶⁸ In places where there are few basic services and little opportunity, for instance, reparations measures promoting economic development may be preferred.¹⁶⁹ Such community-based

¹⁶⁰ Kaing Appeal Judgment, *supra* note 20, ¶ 659.

¹⁶¹ *Id.*; see also Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 58 (observing that “customary practices in managing life in Timbuktu ... leads to the creation of relatively fewer official and business records,” making it more difficult for victims to adequately support their claims).

¹⁶² Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 58; Kaing Appeal Judgment, *supra* note 20, ¶ 659; MAGARRELL, *supra* note 154, at 3, 209.

¹⁶³ MAGARRELL, *supra* note 154, at 5.

¹⁶⁴ Katanga Trial Reparations Order, *supra* note 23, ¶ 292.

¹⁶⁵ WCRO REPARATIONS REPORT, *supra* note 154, at 47; CARLA FERSTMAN, MARIANA GOETZ & ALAN STEPHENS, REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 341 (2009) (where funds are limited, individual awards “could result in *de minimis* awards that can lose all practical meaning for beneficiaries”).

¹⁶⁶ DWERTMANN, *supra* note 98, at 127.

¹⁶⁷ *Id.*; WCRO REPARATIONS REPORT, *supra* note 154, at 6; MAGARRELL, *supra* note 154, at 5.

¹⁶⁸ WCRO REPARATIONS REPORT, *supra* note 154, at 6, 49; MAGARRELL, *supra* note 154, at 6.

¹⁶⁹ See DWERTMANN, *supra* note 98, at 127; Katanga Trial Reparations Order, *supra* note 23, ¶ 301.

measures also may help to address “the root and underlying causes of the conflict,” thereby promoting non-repetition.¹⁷⁰

Although there are many benefits to collective reparations, particularly in the contexts mentioned above, collective awards also pose a number of challenges. First, victims may prefer individual awards and/or may reject the idea of collective reparations. In *Katanga*, for example, the victims “specifically rejected” certain collective reparations, “such as commemorative events, broadcasts of the trial, the erection of monuments or the tracing of missing persons” due to concerns that the measures were “unsuitable or pointless, or could cause fresh trauma or exacerbate social unrest.”¹⁷¹ Victims also may perceive collective reparations as inadequate to address the personal violations and suffering they experienced.¹⁷²

Second, it can be difficult to define beneficiary communities, or to justify which communities should benefit, particularly in cases of large-scale atrocities.¹⁷³ Nearly any grouping is likely to exclude some individuals, potentially creating resentment and community tension.¹⁷⁴ One approach to reduce this risk is to implement community-wide reparations measures, even where not every community member was a victim, an approach which also may help to address “the root and underlying causes of the conflict” and thus contribute to non-repetition of the wrongdoing.¹⁷⁵ On the other hand, where entire communities benefit from reparations, perpetrators who reside in those communities also may inadvertently benefit, stoking tensions.¹⁷⁶

Third, there is a risk with collective reparations that States – where they are involved in reparations – may attempt to relabel pre-existing development programs to which the community already is entitled as reparations programs.¹⁷⁷ Likewise, a State might use the presence of community reparations programs by other actors, such as NGOs, to justify re-allocating community development funds elsewhere. And, as with any reparations program, there may be insufficient resources, forcing critical decisions about which victims to prioritize.

As the foregoing analysis demonstrates, collective reparations may be appropriate in many cases of mass atrocities of the type experienced in CAR and thus warrant serious consideration by the SCC. Nonetheless, collective reparations cannot solve all of the challenges inherent in individual reparations, *see infra*, and often raise unique challenges of their own. As other courts have concluded, a mix of individual and collective reparations may therefore be appropriate in many cases, depending on the circumstances of each case.

¹⁷⁰ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, ¶¶ 215 (ICC Appeals Chamber, Mar. 3, 2015) [hereinafter *Lubanga Appeals Order on Reparations Principles*], <https://www.legal-tools.org/doc/c3fc9d/pdf>; Roht-Arriaza, *supra* note 155, at 157, 180-81.

¹⁷¹ *Katanga Trial Reparations Order*, *supra* note 23, ¶ 301.

¹⁷² MAGARRELL, *supra* note 154, at 6.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Lubanga Reparations Order Appeal*, *supra* note 170, at ¶ 215.

¹⁷⁶ MAGARRELL, *supra* note 154, at 7.

¹⁷⁷ *Id.* at 6-7.

B. Benefits and challenges of individual reparations

Despite the benefits of collective reparations in situations of mass atrocities, individual reparations are still often appropriate in many instances. “Reparation to individuals . . . underscore the value of each human being and their place as rights-holders,”¹⁷⁸ by “afford[ing] personal and symbolic acknowledgment of the harm suffered.”¹⁷⁹ Such reparations thereby minimize the risk that a victim feels “excluded, marginalized, or further stigmatized.”¹⁸⁰ In addition, individual reparations may more quickly “allow victims to regain their self-sufficiency and to make decisions for themselves on the basis of their needs.”¹⁸¹ Finally, many victims request and prefer individual reparations,¹⁸² and it is important “to heed the expectations and needs voiced by victims,”¹⁸³ even if collective reparations are also ordered.

Individual reparations may be especially appropriate where:

- ***there are a limited and identifiable number of victims.***¹⁸⁴ There is no precise number of victims for which individual reparations are to be preferred, or beyond for which collective reparations would be best. In *Katanga*, for example, the court analyzed 341 applications for reparations, ultimately granting individual reparations to 297 victims in addition to collective remedies.¹⁸⁵ Nonetheless, a more limited number of victims plainly presents fewer challenges for individual awards, including the judicial or administrative burden of verifying the identity of each victim, assessing and quantifying the extent of harm suffered, and determining appropriate reparations.
- ***the harms suffered were personal to the victim.*** In some instances, although victims may have experienced similar harms, the particular harm may be of a nature personal to each victim. For example, a victim who suffered the loss of a limb may have specific medical needs. Although it could be possible to create a collective award in such instances – for example, the provision of medical care to a community – individual awards are also appropriate in such instances.
- ***some victims experienced disproportionate harm.*** Victims of a crime or conflict do not all suffer equally, and it may therefore be appropriate to award individual reparations to those who were most severely harmed by the convicted person’s crime.¹⁸⁶ For example, in *Al Mahdi*, the ICC found that although the entire community of Timbuktu had suffered economic losses due to the destruction of protected buildings, certain victims – namely those whose livelihoods exclusively depended on the buildings destroyed by the defendant

¹⁷⁸ MAGARRELL, *supra* note 154, at 5.

¹⁷⁹ Katanga Trial Reparations Order, *supra* note 23, ¶ 285; *see also* DWERTMANN, *supra* note 98, at 128.

¹⁸⁰ Katanga Trial Reparations Order, *supra* note 23, ¶ 285.

¹⁸¹ *Id.*

¹⁸² *See, e.g., id.* ¶ 339 (noting the “almost unanimous preference” of the victims in the case for individual reparations).

¹⁸³ *Id.* ¶ 266.

¹⁸⁴ MARIEKE WIERDA & PABLO DE GRIEFF, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, REPARATIONS AND THE INTERNATIONAL CRIMINAL COURT: A PROSPECTIVE ROLE FOR THE TRUST FUND FOR VICTIMS 10 (2004), <https://www.ictj.org/sites/default/files/ICTJ-Global-ICC-TrustFund-2004-English.pdf>.

¹⁸⁵ Katanga Trial Reparations Order, *supra* note 23, ¶¶ 32-33, 168, 281, 287, 300.

¹⁸⁶ DWERTMANN, *supra* note 98, at 128.

– suffered harm of a “more acute” and “exceptional” nature.¹⁸⁷ Thus while the majority of reparations ordered were collective, the ICC awarded individual reparations to this smaller group of individuals.

- *some victims no longer live in the same community or are geographically dispersed.*¹⁸⁸ In these instances, the victims almost certainly will not benefit from a collective award.

Like collective awards, however, individual reparations pose specific challenges. The process of proving individual claims – which generally requires victims to establish that they were harmed and that the harm was caused by the convicted person – may re-traumatize victims.¹⁸⁹ The requirement of individualized evidence also may inadvertently discriminate against rural, poor, and/or illiterate victims, who are less likely to have and maintain written records.¹⁹⁰ Individual reparations may create or exacerbate tensions and conflict within the community,¹⁹¹ particularly if only some victims receive awards. Finally, the identification of and valuation of damages for each individual victim is often time consuming and may create an administrative burden on the court.¹⁹²

¹⁸⁷ Al Mahdi Trial Reparations Order, *supra* note 23, ¶¶ 73, 81, 83.

¹⁸⁸ Katanga Trial Reparations Order, *supra* note 23, ¶ 286; WCRO REPARATIONS REPORT, *supra* note 154, at 50.

¹⁸⁹ DWERTMANN, *supra* note 98, at 179; WCRO REPARATIONS REPORT, *supra* note 154, at 26.

¹⁹⁰ DWERTMANN, *supra* note 98, at 179.

¹⁹¹ Lubanga Appeals Order on Reparations Principles Annex A, *supra* note 83, ¶ 33; WCRO REPARATIONS REPORT, *supra* note 154, at 6, 49.

¹⁹² DWERTMANN, *supra* note 98, at 179.

V. REPARATIONS FOR SEXUAL AND GENDER-BASED VIOLENCE

Sexual and gender-based violence (SGBV) was systematically committed as part of the CAR civil conflict by nearly all parties to conflict.¹⁹³ Although the victims were primarily women and girls, men and boys also were targeted.¹⁹⁴ These acts of sexual violence in CAR have been insufficiently documented, but reports indicate they have been recurrent and widespread and include rape (including gang rape), enforced prostitution, forced marriage, forced pregnancy, and sexual slavery.¹⁹⁵ In many instances, these crimes occurred in public or in front of family members, augmenting the psychological harm to victims and often resulting in their subsequent ostracization or rejection by their families and communities.¹⁹⁶

A. *Recognizing and redressing the harms suffered by survivors of SGBV*

SGBV often entails additional harms unique from other forms of atrocity crimes. These harms may include additional medical harms, such as sexually transmitted diseases, damage to sexual organs, or loss of reproductive capacity; additional psychological trauma, including from the public nature of some crimes; social stigmatization and rejection, sometimes by their spouses and families; undesired pregnancies; and unique financial burdens, including the costs of medical care, raising children resulting from rape, and supporting themselves and their children after abandonment by spouses and other family members.¹⁹⁷ The SCC should attempt to redress the unique harms experienced by SGBV survivors when ordering reparations in cases involving SGBV crimes.

It is also important to recognize that survivors of conflict-related SGBV often are victims of other crimes, such as pillage or the killing of one or more family members. Because of their status as dual victims, however, they may experience the harms of those other crimes in ways that are different from other victims. For example, a man whose wife is killed may have an easier time remarrying than a female survivor of SGBV whose husband was killed.¹⁹⁸ In addition, the female widow may have greater difficulty earning income to support her family than would the similarly situated widower due to legal, structural and cultural barriers women sometimes face in accessing credit, land, capital, and other services.¹⁹⁹ As a result, she may need more and longer-term assistance to replace the lost income of her spouse than would the male victim. Examining gendered cultural differences and how those

¹⁹³ OHCHR et al., Report of the Mapping Project documenting serious violations of international human rights law and international humanitarian law committed within the territory of the Central African Republic between January 2003 and December 2015, at 206, 214-230 (2017) [hereinafter UN CAR Mapping Report], <https://www.ohchr.org/EN/Countries/AfricaRegion/Pages/CARProjetMapping2003-2015.aspx>; AI ACTION NEEDED TO END DECADES OF ABUSE, *supra* note 13, at 11.

¹⁹⁴ UN CAR Mapping Report, *supra* note 193, at 17, 206, 207.

¹⁹⁵ *Id.* at 16, 206-07, 214; AI ACTION NEEDED TO END DECADES OF ABUSE, *supra* note 13, at 11.

¹⁹⁶ UN CAR Mapping Report, *supra* note 193, at 206, 232.

¹⁹⁷ *Id.* at 206, 208, 232; *see also* Margaret Urban Walker, *Gender and Violence in Focus: A Background for Gender Justice in Reparations*, in RUTH RUBIO-MARÍN, THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 18, 19-20, 37, 38, 39, 43 (2009); Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in RUTH RUBIO-MARÍN, THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 63, 99-100, 108 (2009); JUDITH G. GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 39 (2001); Kazungu Trial Judgment, *supra* note 38, at 120 (observing that some of the women who were raped were abandoned by their spouses or lost opportunities to marry).

¹⁹⁸ *See supra* notes 196-97 & accompanying text on social ostracization of SGBV survivors.

¹⁹⁹ GARDAM & JARVIS, *supra* note 197, at 41.

differences interact with harms suffered due to other crimes is an important step in accurately valuing the harm of atrocity crimes to women and particularly to survivors of SGBV.²⁰⁰

B. Recognizing the unique constraints SGBV survivors face in requesting, accessing, and benefitting from reparations

Because survivors of SGBV are often women and children, the violence they experienced may intersect with other forms of disadvantage to limit their access to reparations. Victims of SGBV are less likely to report the violence they suffered due to the stigma and rejection that many victims face.²⁰¹ In the absence of adequate reporting, prosecutors may not be aware of the need to prosecute SGBV. Even where perpetrators of SGBV crimes are prosecuted, the prosecutors may use their discretion to indict other crimes. In both instances, the failure to prosecute SGBV crimes effectively denies reparations for harms attributable to SGBV because an accused may be held responsible for reparations only for harms resulting from the crimes of which he or she is convicted.²⁰² For example, in *Lubanga*, the ICC Appeals Chamber held that reparations could not be ordered on behalf of SGBV survivors because the defendant had not been convicted of those crimes, nor were they included as an aggravating factor in the Court's decision sentencing Lubanga.²⁰³ In addition, women – who are most often the victims of SGBV – are overrepresented among the poor and illiterate, are more likely to face language barriers, and have greater family and child-rearing responsibilities, all of which may make it more difficult for women to access the justice system and participate in reparations schemes.²⁰⁴ Moreover, even when female SGBV survivors obtain reparations, women may face strong familial and cultural pressure to turn cash reparations over to male family members, thus undermining the purpose of reparations programs by taking the benefit out of the hands of the direct victims.²⁰⁵

Recognition of these unique constraints is vital in order for courts like the SCC to adequately redress the needs of SGBV victims. For example, given survivors' fear of stigmatization and social rejection, it is essential for courts to guarantee the confidentiality of SGBV victims throughout the trial and reparations process so that they can come forward without suffering additional consequences.²⁰⁶ Special measures also may be necessary to identify SGBV survivors, such as working through health centers, women's NGOs and other groups to inform survivors about the proceedings and the option to request reparations.²⁰⁷ In addition, creative mechanisms may be necessary to deliver reparations to

²⁰⁰ See Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 197, at 97-101; UN Guidance Note on Reparations for Conflict-Related Sexual Violence, *supra* note 146, at 5.

²⁰¹ UN CAR Mapping Report, *supra* note 193, at 208; Walker, *supra* note 197, at 45; GARDAM & JARVIS, *supra* note 197, at 46; *see also* UN Guidance Note on Reparations for Conflict-Related Sexual Violence, *supra* note 146.

²⁰² Habré Trial Reparations Judgment, *supra* note 78, ¶ 40; Katanga Trial Reparations Order, *supra* note 23, ¶ 31(2)-(3); Lubanga Appeals Order on Reparations Principles, *supra* note 170, ¶ 32.

²⁰³ Lubanga Appeals Order on Reparations, *supra* note 170, ¶¶ 196-98. The *Lubanga* case was heavily criticized for failing to include charges of sexual violence in the indictment, despite evidence of these crimes. *See, e.g.*, LOUISE CHAPPELL, *THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: LEGACIES AND LEGITIMACY* 145, 149 (2016).

²⁰⁴ Ruth Rubio-Marín, *Introduction: A Gender and Reparations Taxonomy*, in RUTH RUBIO-MARÍN, *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 5 (2009); Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 197, at 106; GARDAM & JARVIS, *supra* note 197, at 181.

²⁰⁵ Colleen Duggan and Ruth Jacobson, *Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation*, in RUTH RUBIO-MARÍN, *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 121, 143 (2009).

²⁰⁶ Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 197, at 80.

²⁰⁷ *See id.* at 106.

SGBV survivors that avoid identifying them as such to the community.²⁰⁸ For example, although not all SGBV survivors are mothers, making sure that some reparations measures – such as rehabilitation services or compensation payments – can be obtained in the same places that mothers take their children, such as health clinics, makes it more likely that those survivors can access reparations as part of their daily lives, without identifying themselves to the broader public as SGBV survivors.²⁰⁹ Cultural norms should also be taken into account in designing reparations; for example, where there is significant family or cultural pressure to turn over large cash payments to male family members, it may be worth considering smaller, regular payments, such as pensions; rehabilitation programs; the provision of basic services; and other reparations.²¹⁰ As these examples demonstrate, a gender-sensitive approach is essential to ensuring that SGBV survivors entitled to reparations will be able to access and obtain them.

C. The need for transformative rather than restorative reparations

Reparations are traditionally defined as measures intended to restore a victim to the position he or she was in prior to the violation.²¹¹ Where the pre-existing social, cultural, and institutional structures or norms excluded or discriminated against particular groups, however, a return to the *status quo ante* cannot be viewed as a just result.²¹² Moreover, “[s]exual violence often results from and perpetuates patterns of pre-existing structural subordination and discrimination for both men and women.”²¹³ In such instances, reparations measures should strive not only to repair the specific harms caused by SGBV, but also to support the transformation of pre-existing structures of inequality and discrimination.²¹⁴

Transformative reparations may take on a variety of forms. Economic projects, for instance, may both restore lost income as well as enhance women’s economic empowerment and autonomy, thereby transforming their position within their family or community.²¹⁵ Likewise, guarantees of non-repetition often have transformative potential, as they are aimed at changing laws and structures in order to prevent future crimes.²¹⁶ An historic example of a transformative reparations order for victims of SGBV can be found in the *Sepur Zarco* decision from a Guatemalan court. In addition to compensation for each woman, the Court ordered the government to establish a day of remembrance for victims of sexual violence, sexual slavery, and domestic slavery; enact laws criminalizing such conduct; provide training courses on human rights to members of the military, which was responsible

²⁰⁸ Duggan & Jacobson, *supra* note 205, at 144.

²⁰⁹ *Id.* at 140; Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 197, at 112.

²¹⁰ Duggan & Jacobson, *supra* note 205, at 143.

²¹¹ ASF REPARATIONS REPORT, *supra* note 31, at 32; UN Basic Principles on Reparations, *supra* note 20, ¶ 18; Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 197, at 70.

²¹² Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 197, at 70, 102; CHAPPELL, *supra* note 203, at 134.

²¹³ UN Guidance Note on Reparations for Conflict-Related Sexual Violence, *supra* note 146, at 4, 6; *see also* UN CAR Mapping Report, *supra* note 193, at 207.

²¹⁴ UN Guidance Note on Reparations for Conflict-Related Sexual Violence, *supra* note 146, at 4, 6, 8-9; UN CAR Mapping Report, *supra* note 193, at 233; Rashida Manjoo, *Introduction: reflections on the concept and implementation of transformative reparations*, 21 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 1193, 1195, 1198 (2017); Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 197, at 102.

²¹⁵ UN Guidance Note on Reparations for Conflict-Related Sexual Violence, *supra* note 146, at 9.

²¹⁶ *Id.*; Andrea Durbach & Louise Chappell, *Leaving Behind the Age of Impunity*, 16 INTERNATIONAL FEMINIST JOURNAL OF POLITICS 543, 546 (2014).

for the crimes; and incorporate information about the case in the public education curriculum.²¹⁷ These reparations aim to educate the public about sexual violence and human rights, thereby transforming the beliefs that allow for the perpetuation of SGBV.

Effectuating transformative reparations for SGBV crimes – and for atrocity crimes generally – is a formidable challenge. Criminal proceedings generally address individual responsibility for atrocity crimes. This makes transformative reparations difficult to effectuate, as most programs or services capable of transforming society will require resources far beyond those in the possession of most criminal defendants, as well as some level of State support or cooperation. A decision about which reparation approach(es) to adopt may therefore affect the extent to which transformative reparations are possible.

²¹⁷ Sepur Zarco Trial Judgment, *supra* note 97, at 510-11.

VI. APPROACHES TO REPARATIONS

Reparations awards in cases of atrocity crimes raise unique challenges. By their nature, atrocity crimes are generally mass crimes with hundreds or even thousands of victims, most of whom have suffered devastating losses.²¹⁸ As a result, the resources available for reparations – which traditionally are borne by the convicted defendant – are almost certain to be inadequate to repair the harms caused, even if the defendant is not indigent. In addition, many of the types of harms suffered – such as the denial of civil or political rights or forced deportations – cannot be remedied through reparations orders against convicted individuals because they require changes to State policies.

The SCC’s Rules of Procedure and Evidence acknowledge and address these difficulties. These rules explicitly anticipate that some defendants will be indigent or unable to completely cover the cost of reparations ordered, and permit the court’s victims’ service to solicit external funding in such instances.²¹⁹ In addition, the rules permit the court to order a wide variety of reparations measures adapted to the needs of the victims, including measures typically undertaken by States or NGOs rather than individuals.²²⁰

In deciding how to implement these rules, the SCC may find helpful examples of creative approaches implemented by other international, hybrid and domestic criminal courts. Although no two approaches are identical, they generally can be grouped into one of three categories:

- reparations orders against the State,
- trust funds, and
- project partnerships.

The following sections describe in detail how each of these approaches has been applied in practice. These sections also consider specific issues related to the SCC’s likely competence to adopt such approaches, as well as the particular advantages and disadvantages of each approach.

A. *Reparations orders against the State*

By their nature, international crimes generally “do not result from the criminal propensity of single individuals, but [rather] constitute manifestations of collective criminality.”²²¹ These collectives often

²¹⁸ See, e.g., Al Mahdi Trial Reparations Order, *supra* note 23, ¶¶ 51, 53 (recognizing that the crimes affected “people throughout Mali and the international community”); Katanga Trial Reparations Order, *supra* note 23, ¶¶ 32, 43, 168 (considering applications from 341 alleged victims); Le Procureur Général c. Habré, Arrêt, ¶ 605 (CAE d’Assises d’Appel, 27 avr. 2017) [hereinafter Habré Appeal Judgment] (observing that more than 8500 victims had participated in the trial through victims associations), http://www.chambresafricaines.org/pdf/Arr%C3%AAt_int%C3%A9gral.pdf; Kazungu Trial Judgment, *supra* note 38, at 119 (observing that there were 400 civil parties).

²¹⁹ SCC RPE, *supra* note 15, arts. 47(B)(d), 129(D).

²²⁰ *Id.* art. 129(B).

²²¹ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 191 (ICTY Appeals Chamber, July 15, 1999) [hereinafter Tadić Appeals Judgment], <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>; see also Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 501 (ICC Pre-Trial Chamber I, Sept. 30, 2008) (international crimes “almost inevitably concern collective or mass criminality”), <https://www.legal-tools.org/doc/67a9ec/pdf/>; Prosecutor v. Martić, Case No. IT-95-11-A, Judgement, ¶ 82 (ICTY Appeals Chamber, Oct. 8, 2008) (“collective criminality”), <https://www.legal-tools.org/doc/ca5eff/pdf/>.

– though not always – are composed of State agents, who commit the conduct with the resources of the State, for the State’s benefit, and sometimes pursuant to State policy.²²² It is thus undeniable that, at least in many cases, the conduct giving rise to individual criminal liability also may give rise to State responsibility and a corresponding State duty to provide reparations.²²³

Discussions of reparations in international criminal law ordinarily do not mention the option of reparations orders against States, no doubt because international criminal tribunals have no authority to issue reparations order against a State. Treaty-based tribunals like the ICC may apply only the provisions in the treaty establishing the court, to which States consented through ratification, and no provision on State reparations exists in the Rome Statute.²²⁴ Similarly, neither of the *ad hoc* tribunals established by the United Nations – which had only the authority vested in them by their Statutes – had the ability to order reparations against States.²²⁵ Even some hybrid tribunals like the ECCC, which contains both international and domestic characteristics, have held that they do not have jurisdiction to order reparations against a State because they have not been empowered with such authority and because there was no mechanism for the courts to hear from the State on the issue of reparations.²²⁶

By contrast, domestic courts considering criminal cases against individual perpetrators have the authority in some countries to impose reparations not only against the perpetrators themselves, but also against the State.²²⁷ Examples of such decisions can be found, among others, in:

²²² See generally *Ministère Public c. Hisssein Habré, Jugement* (CAE Chambre d’Assises, 30 mai 2016), http://www.chambresafricaines.org/pdf/Jugement_complet.pdf; Kaing Trial Judgment, *supra* note 50, ¶¶ 78, 82, 99-100, 117, 206, 328; Nuon 2014 Trial Judgment, *supra* note 117, ¶¶ 117-18; see also Micaela Frulli, *Jurisdiction Ratione Personae*, in *THE ROME STATUTE OF THE INTERNATIONAL COURT: VOL. I*, at 527, 533 (Cassese et al., eds., 2002) (“It may happen—and it is very likely in some situations—that individuals brought to trial before the ICC are organs of a State, or de facto agents of State or acted ‘in the name of the State’”). One international crime, that of aggression, explicitly requires the participation of State agents. Rome Statute of the ICC, *supra* note 20, art. 8 *bis*(1); Pierre-Marie Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in *THE ROME STATUTE OF THE INTERNATIONAL COURT: VOL. II*, at 1085, 1088 (Cassese et al., eds., 2002); DWERTMANN, *supra* note 98, at 98.

²²³ DWERTMANN, *supra* note 98, at 51; UN Basic Principles on Reparations, *supra* note 20, ¶ 15 (“In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.”); UN, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, ¶ 11 (Nov. 29, 1985) (“Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted.”), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/VictimsOfCrimeAndAbuseOfPower.aspx>.

²²⁴ See generally Rome Statute of the ICC, *supra* note 20; see also *id.* art. 25(1). To the contrary, delegates to the Rome Conference at which the ICC’s Statute was drafted deliberately declined to give the Court such authority. See DWERTMANN, *supra* note 98, at 51; CHAPPELL, *supra* note 203, at 139. Nonetheless, the Rome Statute recognizes that States may incur responsibility for the same acts for which individuals are convicted. See Rome Statute of the ICC, *supra* note 20, art. 25(4) (“No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.”).

²²⁵ See generally ICTY Statute, *supra* note 61; ICTR Statute, *supra* note 61.

²²⁶ Kaing Trial Judgment, *supra* note 50, ¶ 663; Kaing Appeal Judgment, *supra* note 20, ¶ 656. By contrast, the EAC, when faced with a similar request for reparations from the State, suggested that such reparations were possible but that the State had not been properly named in this capacity nor provided an opportunity to participate in the proceedings. See *infra* note 254 & accompanying text.

²²⁷ See REDRESS & INSTITUTE FOR SECURITY STUDIES, VICTIM PARTICIPATION IN CRIMINAL LAW PROCEEDINGS: SURVEY OF DOMESTIC PRACTICE FOR APPLICATION TO INTERNATIONAL CRIMES PROSECUTIONS 91 (2017) (describing reparations practice in Australia, England, Ireland, Denmark and Norway), <https://redress.org/wp-content/uploads/2017/11/Englishvictim-rights-report.pdf>.

- **Chad**, where the Cour d'Appel of N'Djamena convicted 20 former secret police agents of widespread murder, torture, illegal detention, and other crimes, and ordered both the convicted defendants and the government to pay reparations to the victims;²²⁸
- **the DRC**, where military tribunals considering cases of crimes against humanity and war crimes have repeatedly imposed reparations against both the individual perpetrators and the government;²²⁹
- **France**, where the Conseil d'État held that the French government was partially responsible for reparations ordered against a Nazi-era government official who was complicit in crimes against humanity;²³⁰
- **Guatemala**, where a domestic criminal court convicted two former military officers of the crimes against humanity²³¹ of rape, sexual and domestic slavery, and humiliating and degrading treatment, and ordered both the defendants and the government to make reparations.²³²

With the exception of the Chad case, in which the conduct was prosecuted as ordinary crimes,²³³ all of these cases concerned convictions for international crimes. These cases confirm that, in some countries and in certain circumstances, domestic courts that convict individuals of international crimes have the ability to order reparations against the State.

²²⁸ République du Tchad, Répertoire N° 01/15, Arrêt Criminel, 4-6, 8-10 (Cour d'appel de N'Djamena, 25 mars 2015) [hereinafter Chad Judgment against Habré-era State agents],

https://www.hrw.org/sites/default/files/supporting_resources/arretcriminel_tchad_complet.pdf.

²²⁹ E.g., RDC, Affaire Mupoke, RP N° 708/12, Jugement (Tribunal Militaire de Garnison de Bukavu, 15 oct. 2012) [hereinafter Mupoke Trial Judgment], reprinted in ASF 2013 REPORT ON DRC CASELAW, *supra* note 38, at 197, 223-24, 228; Lemera Trial Judgment, *supra* note 38, at 80-81, 82, affirmed by RDC, Affaire Lemera, RPA N° 0180, RMP N° 0802/BMN/10, Jugement d'Appel (RDC Cour Militaire de Bukavu, 17 nov. 2011), reprinted in ASF 2013 REPORT ON DRC CASELAW, *supra* note 38, at 91, 95-96; Colonel Thom's Trial Judgment, *supra* note 38, at 210-11, 215; Gédéon Trial Judgment, *supra* note 38, at 63-64, 72-73; RDC, Auditeur Militaire c. Blaise Bongis Massaba, RP N° 018/2006, Jugement, ¶ 124 (Tribunal Militaire de Garnison de l'Ituri, 24 mars 2006) [hereinafter Bongis Trial Judgment], affirmed Bongis Appeal Judgment, *supra* note 38, at 27-31; RDC, Auditeur Militaire c. Eliwo Ngoy, RP N° 084/2005, Jugement, p. 38 (Tribunal Militaire de Garnison de Mbandaka, 4 avr. 2006), <https://www.legal-tools.org/doc/166854/pdf/>. In some instances, the courts imposed reparations only against the government. E.g., Kazungu Trial Judgment, *supra* note 38, at 124.

²³⁰ France, Arrêt N° 23869, Jugement (Conseil d'État, 12 avr. 2002),

<https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008087555>.

²³¹ The Guatemalan domestic provision under which the officers were convicted criminalizes “crimes against the duties of humanity.” Guatemala, Código Penal, art. 378 (1973), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=0B3830777CE3E8F7C125704D00258E33&action=openDocument&xp_countrySelected=GT&xp_topicSelected=GVAL-992BU6&from=state. Although not identical to the concept of crimes against humanity, the provision permits the incorporation of international crimes and the *Sepur Zarco* court considered international law in determining that the crimes had been committed. *Sepur Zarco* Trial Judgment, *supra* note 97, at 1, 492-93, 507-08.

²³² *Sepur Zarco* Trial Judgment, *supra* note 97, at 1, 492-93, 507-08 (convicting the officers of crimes against the duties of humanity). The men also were convicted of other, non-international crimes, such as murder and enforced disappearances. *Id.* at 498, 502, 508.

²³³ At the time, Chad's penal code did not proscribe international crimes, such as crimes against humanity. *See generally* Tchad, Code pénal (1967). In 2017, Chad adopted a new penal code covering international crimes. Tchad, Code pénal, art. 11, 292-301 (2017), <http://www.droit-afrique.com/uploads/Tchad-Code-penal-2017.pdf>.

In deciding to award reparations against the State, all of the above-mentioned courts based their judgments on domestic – not international – law.²³⁴ Particularly relevant are the judgments of the Chad and DRC courts, which explicitly relied on domestic civil code provisions²³⁵ that are identical, or nearly identical, to that in CAR.²³⁶ All of these civil codes impose responsibility to repair the damage caused by the conduct of one’s agents or a person otherwise under one’s control.²³⁷ Although the cited provisions do not explicitly mention the State’s responsibility to repair harms

²³⁴ See, e.g., Chad Judgment against Habré-era State agents, *supra* note 228, at 9 (citing domestic civil code provision); Sepur Zarco Trial Judgment, *supra* note 97, at 507 (principally citing the Guatemalan Constitution and domestic codes); France, Arrêt N° 315499 (Conseil d’État, 16 fév. 2009) (citing various French codes, as well as French laws related to reparations for war victims), <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000020288753>; France, Arrêt No 23869, *supra* note 230 (citing French laws); Colonel Thom’s Trial Judgment, *supra* note 38, at 210 (citing DRC’s Civil Code); Bongli Trial Judgment, *supra* note 229, ¶ 106 (citing DRC’s Civil Code); Bongli Appeal Judgment, *supra* note 38, at 29; Kazungu Trial Judgment, *supra* note 38, at 121 (citing DRC’s Civil Code); Mupoke Trial Judgment, *supra* note 229, at 223 (citing DRC’s Civil Code).

²³⁵ As described earlier, civil law systems generally allow civil and criminal claims to be brought and tried concurrently before the same court. See *supra* note 38 & accompanying text. The court may therefore reference civil codes in ruling on the civil claim.

²³⁶ Chad and CAR, which are both former French colonies, appear to still apply the 1958 French civil code as their domestic civil codes. They thus have identical civil code provisions. The DRC has its own civil code, which, although based on Belgian law in the first instance, also can be traced back to Napoleonic French law. As a result, the relevant provision of this code is also nearly identical. The exact language of these codes can be found in note 237, *infra*. Caselaw of Chad and the DRC is more relevant than that of France, even though both Chad and CAR apply French law, because French decisions have tended to rely on other, more specific laws regarding the State’s responsibility for crimes committed during war – laws that are not in force in Chad or CAR. Nations Unies, Comité pour l’élimination de la discrimination à l’égard des femmes, Examen des rapports soumis par les Etats parties en application de l’article 18 de la Convention sur l’élimination de toutes les formes de discrimination à l’égard des femmes, Rapports périodiques initiaux à cinquièmes des États parties, République centrafricaine, ¶ 424 UN Doc. CEDAW/C/CAF/1-5 (21 fév. 2013) (official report by CAR’s government indicating that CAR continues to apply the French Civil Code), <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=53c7c9474>; UN Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Second periodic reports of States parties, Chad, ¶ 400, UN Doc. CCPR/C/TCD/2 (28 Jan. 2013) (confirming that the French Civil Code of 1958 is still in force in Chad), [²³⁷ The Chad judgment against Habré-era State agents cited article 1384 of the civil code, which provides that “On est responsable non seulement du dommage que l’on a causé par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on a la charge, ou des choses que l’on a sous sa garde.” Chad Judgment against Habré-era State agents, *supra* note 228, at 9. With minor variations, this is the language of article 1384 of the French civil code, which also is in force in CAR. See *supra* note 236 & accompanying text ; see also France, Code civil, art. 1384 \(“On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait de personnes dont on doit répondre ou des choses que l’on a sous sa garde.”\), \[https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=D69DD8035D82A1C21FFBBC5934ECF4EC.tplgfr42_s_2?idArticle=LEGIARTI000006438839&cidTexte=LEGITEXT000006070721&dateTexte=20001017\]\(https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=D69DD8035D82A1C21FFBBC5934ECF4EC.tplgfr42_s_2?idArticle=LEGIARTI000006438839&cidTexte=LEGITEXT000006070721&dateTexte=20001017\). A nearly identical provision in the DRC’s civil code was cited in DRC military tribunal decisions considering reparations against the State for crimes against humanity and war crimes: “On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait de personnes dont on doit répondre ou des chose que l’on a sous sa garde; les pères du dommage cause par leurs enfants habitants avec eux, les Maîtres et les commettant du dommage cause par leur domestiques et préposés...” Colonel Thom’s Trial Judgment, *supra* note 38, at 210; see also Bongli Trial Judgment, *supra* note 229, ¶ 106; Bongli Appeal Judgment, *supra* note 38, at 29; Kazungu Trial Judgment, *supra* note 38, at 121; Mupoke Trial Judgment, *supra* note 229, at 223.](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FTCD%2F2&Lang=en; Lemera Trial Judgment, supra note 38, at 80 (noting that the applicable provisions of the Congolese civil code are reproductions of portions of the Belgian civil code); AVOCATS SANS FRONTIÈRES, CASE STUDY: THE APPLICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT BY THE COURTS OF THE DEMOCRATIC REPUBLIC OF CONGO 85 (2009) [hereinafter ASF DRC CASE STUDY] (citing the relevant provisions of DRC’s civil code), https://asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf; France, Arrêt N° 315499, supra note 234 (citing various French laws related to reparations for war victims).</p></div><div data-bbox=)

caused by the conduct of State agents, courts in both Chad and the DRC concluded that they apply to State-agent relationships.²³⁸

In deciding to apply the aforementioned provisions of their domestic civil codes and order reparations against the State, the Chad and DRC judgments generally considered whether the crimes had been committed during the course of the States' agents' work. For example, in the judgment against Habré-era State agents, the Chad court observed that at the time the crimes were committed the convicted persons all worked for the Chadian government, had been working within the framework of the powers granted to them by the State, and had used the means placed at their disposal by the State to commit the crimes.²³⁹ Similarly, DRC military tribunals underscored that the convicted individuals committed the crimes during the course of their employment as soldiers.²⁴⁰ As one DRC military tribunal stated in *Affaire Lemera*, the State has a responsibility to ensure that citizens are not harmed by those who are acting in the State's name and on its behalf, and it can be held responsible for reparations where it fails to meet that obligation.²⁴¹ Several tribunals further explained that the commission of crimes by the country's armed forces is evidence of the State's failure to properly choose and supervise its agents, including the failure to take the measures necessary to prevent the occurrence of these crimes, and thus that the State should be responsible for reparations.²⁴²

Importantly, courts in the DRC and Chad have not required evidence that the State ordered or authorized the crimes in order to impose reparations against the State. To the contrary, DRC military tribunals have ordered reparations against the State even where the agents had been instructed not to commit the crimes at issue. For example, in the *Bongi* case, a DRC military tribunal court ordered reparations against the State for the deaths of five civilians by a soldier, even though the court noted that the State had instructed its soldiers not to kill civilians.²⁴³ Nor is there any requirement that the crime be attributable exclusively to the performance of the agents' duties on behalf of the State or that the crime was committed solely for the benefit of the State. In the judgment against Habré-era State agents, for instance, the Chad court ordered reparations against the State even though the crimes had been committed both within and outside of the scope of

²³⁸ Chad Judgment against Habré-era State agents, *supra* note 228, at 9 (citing Civil Code art. 1384); Colonel Thom's Trial Judgment, *supra* note 38, at 210-11; Bongi Trial Judgment, *supra* note 229, ¶¶ 106-10; Lemera Trial Judgment, *supra* note 38, at 80; ANTOINE SOHIER, DROIT CIVIL DU CONGO BELGE, TOME III, 470 (1956) (observing that article 1382 of the Belgian Congo's – now DRC's – civil code has been held applicable to the government since 1920 and that reparations may be imposed against the State).

²³⁹ Chad Judgment against Habré-era State agents, *supra* note 228, at 9.

²⁴⁰ Bongi Trial Judgment, *supra* note 229, ¶¶ 108-09; Colonel Thom's Trial Judgment, *supra* note 38, at 211; *Affaire Lemera*, *supra* note 38, at 80; *see also* ASF DRC CASE STUDY, *supra* note 236, at 86 (describing a similar judgment in the case of *Ankoro*).

²⁴¹ Lemera Trial Judgment, *supra* note 38, at 80; *see also* Mupoke Trial Judgment, *supra* note 229, at 223; Bongi Appeal Judgment, *supra* note 38, at 28; *see also* ASF DRC Case Study, *supra* note 236, at 86 (describing the *Mutins de Mbandaka* case, in which the military tribunal held the State responsible for reparations because the crimes were committed by "soldiers working full time for and on its behalf"); *id.* at 87 (quoting the *Songo Mboyo* case: "As the beneficiary of activities undertaken by its agents and on its behalf, it is only logical and in accord with the principle of basic fairness that the public administration is required to compensate the damage resulting from the service from which it benefits as a principal.").

²⁴² Lemera Trial Judgment, *supra* note 38, at 80; Mupoke Trial Judgment, *supra* note 229, at 223, 224; Bongi Appeal Judgment, *supra* note 38, at 27; ASF DRC Case Study, *supra* note 236, at 87 (describing the *Songo Mboyo* Appeal Judgment); *id.* at 89-90 (describing the judgment in *Mutins de Bunia*).

²⁴³ Bongi Trial Judgment, *supra* note 229, ¶ 108, *aff'd* Bongi Appeal Judgment, *supra* note 38, at 28 ("l'abus de la fonction n'est pas un obstacle à la responsabilité du maître").

employment, and even though the Court recognized that the State had been unable to control its personnel.²⁴⁴

Finally, although most of the foregoing domestic decisions ordering reparations against a State concerned crimes committed by State agents, there is some precedent in the DRC that reparations can be ordered even where non-State actors – such as rebel or militia groups – committed the crimes. In some instances, the State had assisted in forming and arming the groups, and therefore the courts held that the combatants should be treated like agents of the State.²⁴⁵ For example, in the *Ankoro* case, the Court determined that the State should bear civil responsibility for the acts of militias that fought alongside the DRC military:

Given that the Mai-Mai combatants who were at Ankoro at the material time constituted an entity formed by the Congolese State which provided them with arms and munitions of war and used them..., they must be regarded as being agents of the Congolese State who benefited from their services[.] Given the Hutu refugees from Rwanda, like the Mai-Mai combatants, also constituted an armed entity supporting the FAC [the Congolese Armed Forces] in their actions against the rebel forces of the RCD...[, they] are also regarded as agents of the Congolese State.²⁴⁶

In other instances, however, DRC military tribunals have held the State civilly responsible for the actions of rebels groups that fought against the State and thus plainly could not be considered the State's agents. For example, in *Kazungu*, a DRC military tribunal ordered reparations against the State for crimes committed by Rwandan citizens who were members of the Democratic Forces for the Liberation of Rwanda (FDLR in French),²⁴⁷ a rebel group that the DRC and Rwandan States have been fighting.²⁴⁸ The Court reasoned that even though the Rwandan FDLR forces were not State agents, the State should nonetheless be responsible for their crimes because it had failed its obligation to protect and ensure the security of its citizens:²⁴⁹

[L]es paysans de KALONGE et de BUNYAKIRI ont été abandonnés entre les mains de leurs assaillants, les éléments FDLR RASTA qui les ont assujettis. L'Etat congolais aurait dû et devrait constamment y veiller; mais hélas! L'Etat n'a rien fait pour mettre fin aux agissements combien criminels et nuisibles de ce groupe rebelle, posant des actes sans état d'âme, vis-à-vis desquels l'Etat a perdu tout moyen de contrôle, manquant ainsi à sa mission de puissance publique.

²⁴⁴ Chad Judgment against Habré-era State agents, *supra* note 228, at 9.

²⁴⁵ ASF DRC Case Study, *supra* note 236, at 86 (describing and quoting from the *Ankoro* judgment). Human rights courts have similarly ordered reparations against States when they create and support armed groups that go on to commit human rights abuses. MAGARRELL, *supra* note 154, at 10 (describing decisions of the Inter-American Court of Human Rights with respect to the Colombian State's support of paramilitary groups).

²⁴⁶ ASF DRC Case Study, *supra* note 236, at 86 (quoting the Military Court of Katanga).

²⁴⁷ Kazungu Trial Judgment, *supra* note 38, at 100, 121, 124-25.

²⁴⁸ François Grignon, *Time for a New Approach to Disarm the FDLR*, INTERNATIONAL CRISIS GROUP (Aug. 7, 2009), <https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/time-new-approach-disarm-fdlr>.

²⁴⁹ The court described the State's duty to protect its citizens as the *raison d'être* of the State. Kazungu Trial Judgment, *supra* note 38, at 121 ("la sécurité des individus 'est la raison même de la vie juridique des peuples et de l'organisation des sociétés, et que l'Etat doit y veiller constamment.").

... Somme toute, le Tribunal de céans au regard des espèces de la cause relève avec pertinence que l'Etat congolais, en laissant les populations de KALONGE et de BUNYAKIRI à la merci de leur bourreaux, a failli à sa mission de puissance publique : de sécurisation de personnes et de leurs biens.²⁵⁰

In so holding, the *Kazungu* court noted that one purpose of the law is to ensure that all victims have access to a remedy, regardless of how the harm originated.²⁵¹ Some scholars have supported the principle of State reparations for crimes by rebel groups, observing that such reparations may be appropriate as a matter of law, such as due to a failure to guarantee certain rights, or “out of basic fairness to victims, who should be treated similarly regardless of who the perpetrator is, since this is out of their control.”²⁵²

As a hybrid court sitting within CAR's domestic judicial system, the SCC may have the ability to order reparations against the State similar to that of the domestic courts described above. The SCC functions like a domestic court in a number of critical ways, including, most importantly, its ability to hear civil party claims for reparations and its ability to apply domestic law.²⁵³ In this sense, the SCC appears to be most like the Extraordinary African Chambers, which acknowledged the propriety of civil party claims but held that the specific claim against the Chadian State had been made too late in the proceedings.²⁵⁴ In addition, although neither the SCC's Organic Law nor the RPE speak to the issue of reparations orders against the State, the RPE provide examples of reparations measures that are almost certain to require resources well beyond those of individual defendants, such as the institution of a fund for agricultural development or the implementation of educational programs. Indeed, the RPE acknowledges that additional funds are likely to be required, and explicitly authorizes the Court to solicit external funds for those purposes.²⁵⁵ Ultimately, the question of whether CAR – like Chad and the DRC, among others – can order reparations against the State will be a question for the SCC to decide consistent with CAR law.

²⁵⁰ Kazungu Trial Judgment, *supra* note 38, at 121-22; *see also* Mupoke Trial Judgment, *supra* note 229, at 223-24.

²⁵¹ Kazungu Trial Judgment, *supra* note 38, at 121; *see also* Mupoke Trial Judgment, *supra* note 229, at 223. Some other countries likewise have imposed responsibility on the government for crimes committed by non-governmental armed groups. For example, in Mali, the State enacted a law providing that local authorities may be held civilly liable for crimes committed in their jurisdiction by armed or unarmed groups. Mali, Loi N° 93-008, art. 16 (29 jan. 1993) (“les collectivités territoriales sont civilement responsables des crimes délits commis à force ouverte ou par violences collectives sur leurs territoires ou par des attroupements armés ou non soit envers les personnes, soit contre les bien public ou privés”), *cited and quoted in* Mali, Arrêt N° 96 (Cour Supreme du Mali, 28 juin 2004), <https://juricaf.org/arret/MALI-COURSUPREME-20040628-96>.

²⁵² MAGARRELL, *supra* note 154, at 10-11. This principle also is consistent with the UN Basic Principles on the Right to Reparation, which encourages States to provide reparations where the parties liable for the harm are unable or unwilling to provide reparations. UN Basic Principles on Reparations, *supra* note 20, ¶ 16.

²⁵³ *See supra* Section II.A.1.

²⁵⁴ Habré Trial Reparations Judgment, *supra* note 78, ¶ 76. By contrast, the ECCC held that the Court could hear civil party claims only against an accused because the Internal Rules provided that reparations “shall be awarded against, and be borne by convicted persons.” Kaing Appeal Judgment, *supra* note 20, ¶ 656. Unlike the SCC, however, the ECCC did not have any authority in its founding document to impose reparations. *See supra* note 46 & accompanying text. In addition, the ECCC observed that cited provision of the Cambodian Code likely did not apply to the State and thus, absent a specific provision within Cambodian domestic law that could assign such responsibility for reparations to the State, the question of reparations orders against the State was moot. Kaing Appeal Judgment, *supra* note 20, ¶ 656 n.1313. CAR, on the other hand, has a domestic provision that permits reparations orders against the State, similar to Chad and the DRC. *See supra* notes 235-38 & accompanying text.

²⁵⁵ SCC RPE, *supra* note 15, art. 129(D).

A determination that the SCC can order reparations against the State would have several potential benefits. Perhaps most important among these is the capacity to order a broader array of reparations because States are capable of implementing reparations measures that cannot be implemented by any other actor.²⁵⁶ For example, one form of reparations – guarantees of non-repetition – aims to prevent the commission of further violations by transforming the legal and societal context that enabled such violations to occur.²⁵⁷ Because such guarantees are focused on changes to the society as a whole, they often involve measures – such as enactment of laws criminalizing the relevant conduct or ratification of a treaty prohibiting the conduct – that by definition only a State can perform. Other forms of reparation also include measures that can be performed only by States, such as renaming public buildings or streets after victims (a form of satisfaction), inclusion of information about the violations in educational curricula and textbooks (a form of satisfaction), or restoration of civil and political rights (a form of restitution).²⁵⁸ For example, in the Chadian case regarding crimes by the secret police during the Habré era, the court ordered the former headquarters of the secret police be transformed into a museum and the erection of a monument in the memory of the victims.²⁵⁹ And in the Guatemala case of *Sepur Zarco*, in which members of the Guatemalan military were convicted of sexual and domestic slavery, among other crimes, the Court ordered the:

- Ministry of Justice to conduct an investigation to locate community members who had been forcibly disappeared;
- Ministry of Health to construct and equip a health center;
- Ministry of Education to improve school infrastructure in and provide scholarships to affected communities, include information about the *Sepur Zarco* case in textbooks, and, in collaboration with the Ministry of Culture, create a documentary on the case and translate the judgement into various Mayan languages;
- The Ministry of National Defense to include information on human rights and violence against women in its trainings;
- Provision of basic services to the affected communities;
- Processing of requests to legalize title to ancestral lands that had been submitted by persons who had been forcibly disappeared;
- Enactment of a law against enforced disappearances;
- Construction of a monument representing the search for justice in the case;

²⁵⁶ See DWERTMANN, *supra* note 98, at 52.

²⁵⁷ For a more complete description of all of the forms of reparations, including guarantees of non-repetition, *see* Section III, *supra*.

²⁵⁸ Information about forms and measures of reparations can be found in Section III, *supra*.

²⁵⁹ Chad Judgment against Habré-era State agents, *supra* note 228, at 13.

- Recognition of a day of remembrance for victims of sexual violence and sexual and domestic slavery.²⁶⁰

Thus, if the SCC were to determine that it has the authority to issue reparations orders against the State, it could order a wider array of reparations to repair the harms to victims than could be ordered against an individual defendant.

Another potential benefit of reparations orders against States is that States have more financial resources to fund reparations than do individual defendants.²⁶¹ In practice, however, States frequently do not satisfy reparations orders. Four years after an appellate court ordered the government of Chad to pay reparations for Habré-era abuses by agents of a secret police force, for instance, the government has yet to begin payment.²⁶² Similarly, victims in the DRC have not received reparations ordered against the State, purportedly because the DRC has not created a fund for this purpose.²⁶³ It cannot be denied that both States face numerous challenges in paying reparations, including long histories of conflict, low GDP, and significant competing needs – all of which are likely to confront CAR as well. As a result, even if the SCC determines that it has authority to order reparations against the State, it would be prudent to include a variety of reparations measures in such orders, and not simply monetary compensation.

B. Trust Funds

A second approach to financing and implementing reparations orders is to establish a trust fund. Trust funds were established at both the EAC and the ICC to implement the courts' reparations mandates, and this section draws on these two examples to describe how trust funds operate and the opportunities and challenges of such funds. This also section highlights some of the differences in the mandates of these two trust funds, which underscores that such funds may be vested with a diverse set of responsibilities depending on the needs of a particular jurisdiction. Although no trust fund currently exists for the Special Criminal Court,²⁶⁴ the SCC is authorized to solicit donations where a convicted person is indigent or has insufficient funds to cover the reparations ordered.²⁶⁵ The SCC will need a structure to solicit, manage, and use such funds, and a trust fund could be established

²⁶⁰ Sepur Zarco Trial Judgment, *supra* note 97, at 140-41, 143, 509-11. CAR has already established a national day of remembrance. UN CAR Mapping Report, *supra* note 193, at 304.

²⁶¹ See SYLVAIN AUBRY & MARÍA ISABEL HENAO-TRIP, TRANSITIONAL JUSTICE NETWORK, COLLECTIVE REPARATIONS AND THE INTERNATIONAL CRIMINAL COURT ¶ 32 (2011), https://www1.essex.ac.uk/tjn/documents/Paper_2_Collective_Reparations_Large.pdf.

²⁶² Ruth Maclean, *Hissène Habré ordered to pay millions for crimes against humanity in Chad*, THE GUARDIAN (July 29, 2016), <https://www.theguardian.com/global-development/2016/jul/29/hissene-habre-compensation-90m-crimes-against-humanity-chad>; *Tchad: des victimes du bourreau Hissene Habré attendant toujours réparation*, AFRICANEWS (14 juin 2019), <https://fr.africanews.com/2019/06/14/tchad-des-victimes-du-bourreau-hissene-habre-attendent-toujours-reparation/>.

²⁶³ MONUSCO & OHCHR, PROGRESS AND OBSTACLES IN THE FIGHT AGAINST IMPUNITY FOR SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF THE CONGO ¶¶ 5, 42, 57 (2014), <https://monusco.unmissions.org/sites/default/files/UNJHRO%20-%20Report%20on%20Fight%20against%20Impunity%20Sexual%20Violence%20-%20April%202014%20-%20ORIGINAL%20VERSION.pdf>; see also MIRNA ADJAMI & GUY MUSHIATA, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, DEMOCRATIC REPUBLIC OF CONGO: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT 3 (2010), <https://www.ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf>; see also ASF DRC CASE STUDY, *supra* note 236, at 91.

²⁶⁴ See generally SCC Organic Law, *supra* note 1; SCC RPE, *supra* note 15.

²⁶⁵ SCC RPE, *supra* note 15, art. 129(D). In the absence of a similar mandate, the ECCC held that it could not order the establishment of a trust fund for victims. Kaing Trial Judgment, *supra* note 50, ¶ 670.

within its existing structures, such as within the “Service d’aide aux victimes,” for this purpose.²⁶⁶ Even if the SCC chooses not to create a formal fund, information about lessons learned from trust funds may be useful as the SCC thinks about how to solicit and manage external funding for reparations.

Perhaps the most recognized purpose of a trust fund is to cover the cost of a reparations order when a convicted defendant is unable to pay for some or all of the award.²⁶⁷ This purpose may be mandatory or discretionary, however, depending on how the trust fund is established. The EAC’s trust fund, for instance, is required by its statute to use its financial resources to implement and cover the cost of the reparations ordered by the Court against Hissène Habré.²⁶⁸ In 2016, the EAC’s Trial Chamber ordered Habré to pay billions of francs CFA – the local currency, which was estimated to be about \$150 million dollars or 125 million Euro – in reparations to victims of sexual slavery, arbitrary detention, torture, and other crimes.²⁶⁹ This amount was far beyond the amount obtained from the defendant’s assets.²⁷⁰ The EAC’s Trust Fund has therefore been seeking voluntary contributions to cover the difference, such as a \$5 million dollar commitment that it received from the African Union in 2018.²⁷¹ By contrast, the ICC’s Trust Fund for Victims (TFV) must use money and other property collected through fines or forfeiture toward the payment of reparations when so ordered by the ICC,²⁷² but the TFV has discretion over whether to use the voluntary contributions it receives to contribute toward reparations orders that a defendant is unable to satisfy.²⁷³ Although the ICC’s TFV is not required to use its voluntary contributions to satisfy reparations orders against defendants, it often does. For instance, in *Katanga*, the defendant was indigent and unable to satisfy any of the \$1 million USD in reparations ordered by the Court.²⁷⁴ The Trial Chamber therefore asked the ICC’s TFV to consider complementing the defendant’s financial resources.²⁷⁵ Ultimately, the TFV provided \$1 million USD

²⁶⁶ SCC RPE, *supra* note 15, art. 129(D) (the “service d’aide aux victimes” is charged with soliciting external funds).

²⁶⁷ See, e.g., African Union, Statute of the Trust Fund for Victims of Hissène Habré’s Crimes, art. 3(2), Doc. EX.CL/1040(XXXI), Annex (2018) [hereinafter EAC Trust Fund Statute] (the “purpose” of the Trust Fund is “to mobilize the necessary funds and pay the said reparations to the victims of Hissène Habré’s crimes”), https://www.hrw.org/sites/default/files/supporting_resources/statute_trust_fund_victims_english.pdf. Despite this purpose, not all courts with trust funds are vested with the authority to order the trust fund to cover a reparations award against a convicted defendant. For example, at the ICC, the Court may request, but not order, the Trust Fund for Victims to pay part or all of an award. ICC, Regulations of the Trust Fund for Victims, art. 56 (2005) [hereinafter ICC TFV Regulations], https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf.

²⁶⁸ EAC Trust Fund Statute, *supra* note 267, art. 3(2).

²⁶⁹ Habré Trial Reparations Judgment, *supra* note 78, ¶ 82; see also Maclean, *Hissène Habré ordered to pay millions for crimes against humanity in Chad*, *supra* note 262; *Chad: Hissène Habré appeal ruling closes dark chapter for victims*, AMNESTY INTERNATIONAL (Apr. 28, 2017), <https://www.amnesty.nl/actueel/chad-hissene-habre-appeal-ruling-closes-dark-chapter-for-victims>; Ruth Maclean, *After 25 years, a breakthrough for victims of Chad dictator Hissène Habré*, THE GUARDIAN (Feb. 9, 2018), <https://www.theguardian.com/global-development/2018/feb/09/trust-fund-established-for-victims-of-former-chad-dictator-hissene-habre>.

²⁷⁰ Habré Trial Reparations Judgment, *supra* note 78, ¶ 78 (describing the seizure of a house and funds in two bank accounts); Maclean, *Hissène Habré ordered to pay millions for crimes against humanity in Chad*, *supra* note 262.

²⁷¹ Celeste Hicks, *The Trial of Hissène Habré and What it Could Mean for Justice in Africa*, JUSTICE IN CONFLICT (Mar. 27, 2018), <https://justiceinconflict.org/2018/03/27/the-trial-of-hissene-habre-and-what-it-could-mean-for-justice-in-africa/>.

²⁷² Rome Statute of the ICC, *supra* note 20, art. 79(2); ICC TFV Regulations, *supra* note 267, art. 43.

²⁷³ ICC TFV Regulations, *supra* note 267, art. 56; see also *Katanga* Trial Reparations Order, *supra* note 23, ¶ 336; Lubanga Appeals Order on Reparations Principles, *supra* note 170, ¶¶ 106, 109-11, 114, 116; WCRO REPARATIONS REPORT, *supra* note 154, at 2. Alternatively, the ICC’s TFV may use voluntary contributions towards its assistance mandate, which is described later in this section.

²⁷⁴ *Katanga* Trial Reparations Order, *supra* note 23, ¶¶ 264, 326-28.

²⁷⁵ *Id.* ¶ 342.

to cover the reparations ordered against the accused, fully satisfying the reparations order.²⁷⁶ In other instances, the ICC’s TFV has covered only a portion of the reparations order against the defendant, and indicated that it will continue to seek contributions for the rest.²⁷⁷

Trust funds may serve other roles in addition to supplementing the financial resources of those convicted to satisfy a reparations award, including:

- **Identifying victims and verifying their entitlement to reparations.** Reparations orders may identify each victim entitled to benefit from the award, or may set out criteria to be applied in identifying victims.²⁷⁸ The latter option may be preferable where there is a large number of victims and it would be too time-consuming for the court to verify their identity,²⁷⁹ or where only a subset of victims apply for reparations and “it would be impracticable for the [Court] to attempt to identify and assess” additional victims.²⁸⁰ In such instances, some entity must be vested with the administrative authority to receive and screen applications for reparations. At the ICC, this authority has been vested in the TFV under guidelines set by the Court.²⁸¹
- **Finalizing the modalities of reparations.** Reparations orders should define the harm victims suffered as a result of the defendant’s crimes and specify the types and modalities of reparations that the court considers appropriate to remedy that harm.²⁸² Nonetheless, the court may designate appropriate categories of reparations, with a final determination to be made upon consultation with the victims. For example, in *Katanga*, the ICC’s Trial Chamber held that victims should receive an individual award of \$250 USD, as well as collective reparations including “housing support, support for an income-generating activity, support for education and psychological support.”²⁸³ Based on this guidance, the TFV proposed several types of awards packages detailing the specific type of assistance to be provided in each category, such as payment of school fees and provision of school kits; vocational training in small business enterprises, animal husbandry, agriculture, or fishing; formation of village savings and loan associations; and the construction, expansion, or

²⁷⁶ Prosecutor v. Katanga, Case No. ICC-01/04 01/07, Public Redacted Document Draft Implementation Plan relevant to Trial Chamber II’s order for reparations, ¶ 46 (ICC TFV, July 25, 2017) [hereinafter *Katanga Draft Implementation Plan*], https://www.icc-cpi.int/CourtRecords/CR2017_04789.pdf.

²⁷⁷ Al Mahdi Draft Implementation Plan, *supra* note 138, ¶ 34 (expressing the intent of the TFV “to raise the requisite financial resources to ensure a full complement to the payment of the reparations awards in the *Al Mahdi* case”); ICC TFV, Report to the Assembly of State Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018, at ¶¶ 51, 54 (July 23, 2018) [hereinafter *ICC TFV 2018 Report*] (as of July 2018, the TFV had committed 800,000 Euros toward the ICC’s 2.7 million Euro reparations order against Al Mahdi), <https://www.trustfundforvictims.org/sites/default/files/reports/ICC-ASP-17-14-ENG.pdf>; *id.* at ¶¶ 41-47 (as of July 2018, the TFV had committed 3 million Euros toward the ICC’s \$10 million dollar reparations order against Thomas Lubanga).

²⁷⁸ Al Mahdi Trial Reparations Order, *supra* note 23, ¶¶ 38, 143; Katanga Trial Reparations Order, *supra* note 23, ¶ 31(2).

²⁷⁹ There is, however, no specific number of victims that is too large for consideration by the court. In the *Katanga* case, for example, the ICC’s Trial Chamber undertook an individual analysis of 341 applications. Katanga Trial Reparations Order, *supra* note 23, ¶ 43.

²⁸⁰ See Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 141; see also *id.* ¶ 80.

²⁸¹ *Id.* ¶¶ 142-46; Al Mahdi Draft Implementation Plan, *supra* note 138, at ¶¶ 73-76; ICC TFV Regulations, *supra* note 267, arts. 60-62.

²⁸² Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 38; Katanga Trial Reparations Order, *supra* note 23, ¶ 31(5).

²⁸³ Katanga Trial Reparations Order, *supra* note 23, ¶¶ 304, 306.

improvement of a home, among others.²⁸⁴ Likewise, in *Al Mahdi*, the ICC’s Trial Chamber ordered collective reparations to repair the economic harm caused by the defendant’s destruction of protected buildings, and suggested that a variety of measures might be appropriate, including community-based educational programs, resettlement programs, microcredit initiatives, and cash assistance.²⁸⁵ After consulting with victims, the TFV proposed trainings in accounting and conflict mediation, increasing access to savings and loan mechanisms, and rehabilitation of four economic sectors, namely agriculture, trade, small industry, and handicrafts.²⁸⁶

- **Implementation of reparations awards.** All reparations orders require some implementation. For example, awards of cash compensation must be disbursed to the appropriate beneficiaries, houses must be constructed, trainings must be conducted, and/or ceremonies must be held, to take but a few examples. At both the EAC and ICC, the trust fund is tasked with implementing reparations ordered by the court.²⁸⁷ Because the ICC has had more time to implement reparations orders, this section focuses on its processes. After the reparations order is issued, the TFV prepares a draft implementation plan for approval by the court.²⁸⁸ Once approved, the TFV then solicits applications from NGOs and other entities to implement the specific reparations components, as needed.²⁸⁹ The TFV then coordinates with the government on particular implementation issues, such as requesting that the government provide security, waive school fees, or donate land for project activities (such as the construction of housing).²⁹⁰ Finally, the trust fund monitors implementation of the reparations programs, conducts site visits, evaluates the program’s impact, and reports back to the court.²⁹¹
- **Assisting victims of crimes related to the investigations before the court.** The ICC’s TFV has a second mandate to benefit victims by providing assistance – including rehabilitation and material support to victims and their families – unrelated to specific cases against defendants.²⁹² For example, the ICC’s TFV has provided reconstructive surgery, provision of prosthetic limbs, counselling, educational support, and support for income-generating activities to victims of crimes against humanity and war crimes in Uganda and the DRC.²⁹³ Permitting a trust fund to engage in victim assistance may enable a wider range of victims to benefit, because this assistance is not limited to victims harmed by a particular defendant or to crimes that are successfully prosecuted.²⁹⁴ For example, in *Katanga*, the ICC held that it could not order reparations in favor of victims of rape or sexual slavery because, although the court did not doubt that these crimes had been

²⁸⁴ Katanga Draft Implementation Plan, *supra* note 276, ¶¶ 81-108, 124-131.

²⁸⁵ Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 83.

²⁸⁶ Al Mahdi Draft Implementation Plan, *supra* note 138, at ¶¶ 244-51.

²⁸⁷ EAC Trust Fund Statute, *supra* note 267, arts. 3, 13(2)(b); ICC TFV Regulations, *supra* note 267, art. 54.

²⁸⁸ Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 136.

²⁸⁹ ICC TFV Regulations, *supra* note 267, at ¶ 71; Al Mahdi Trial Reparations Order, *supra* note 23, ¶ 136; Katanga Draft Implementation Plan, *supra* note 276, ¶ 109.

²⁹⁰ *See, e.g.*, Katanga Draft Implementation Plan, *supra* note 276, ¶¶ 69-70.

²⁹¹ *See, e.g., id.* ¶¶ 136-45.

²⁹² ICC TFV Regulations, *supra* note 267, art. 50(A)(i); ICC TFV 2018 Report, *supra* note 277, at 1; Al Mahdi Draft Implementation Plan, *supra* note 138, ¶ 277; WCRO REPARATIONS REPORT, *supra* note 154, at 2, 23-24.

²⁹³ ICC TFV 2018 Report, *supra* note 277, at 3.

²⁹⁴ CONOR MCCARTHY, REPARATIONS AND VICTIM SUPPORT IN THE INTERNATIONAL CRIMINAL COURT 65 (2012). As noted above, this may be particularly important in the context of sexual and gender-based violence.

committed, there had been insufficient evidence to prove that Katanga shared responsibility for them.²⁹⁵ The Court therefore asked the TFV to consider including these victims in its assistance mandate.²⁹⁶ In addition, since only a small percentage of offenders will ever be prosecuted, an assistance mandate can provide some measure of justice to those whose perpetrators go unpunished.²⁹⁷ For example, the ICC's TFV has assisted over 104,000 individuals in the DRC and Uganda under its assistance mandate,²⁹⁸ far more than those who have received case-based reparations. Finally, assistance often can be provided to victims more quickly than case-based reparations because the former are not linked to a conviction, which may take many years of pre-trial investigation and trial proceedings.

Trust funds may be financed through several mechanisms. First and foremost, any court-ordered fines against a defendant or assets seized from a defendant may be deposited in a trust fund for use toward reparations.²⁹⁹ Although many defendants are indigent,³⁰⁰ some defendants may have substantial assets. For example, in the case against former Chadian President Hissène Habré, the EAC ordered the seizure of several of Habré's assets, including a house and the amounts in two bank accounts.³⁰¹ In its reparations order, the EAC's Trial Chamber ordered the application of these assets toward the payment of reparations.³⁰² The EAC Trust Fund also was explicitly authorized to locate and recover additional assets from Habré,³⁰³ which are estimated to be in the millions of dollars,³⁰⁴ and thus trust funds may serve a role in asset tracing and recovery. In addition, courts may instruct their trust funds to monitor the financial situation of convicted defendants so that they may seize any assets that the convicted person obtains in the future.³⁰⁵

In addition to funds from a convicted defendant, if any, trust funds may be authorized to solicit voluntary contributions from governments, international organizations, non-governmental organizations, private individuals, corporations, and other entities to cover reparations orders.³⁰⁶ It can be difficult, however, to raise sufficient contributions to cover reparations awards. In *Lubanga*, for example, the ICC's Trust Fund for Victims has been able to allocate only 3 million Euros toward

²⁹⁵ Katanga Trial Reparations Order, *supra* note 23, ¶¶ 24, 28, 146-153.

²⁹⁶ *Id.* ¶¶ 154, 343-44.

²⁹⁷ MCCARTHY, *supra* note 294, at 65, 72-73.

²⁹⁸ ICC TFV 2018 Report, *supra* note 277, at 3.

²⁹⁹ Rome Statute of the ICC, *supra* note 20, art. 79(2) ("The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund."); EAC Trust Fund Statute, *supra* note 267, art. 15(1) (providing that the Trust Fund "shall be financed," in part, "from the recovering of the assets of persons sentenced in accordance with the verdict of the Extraordinary Chambers of Africa"), https://www.hrw.org/sites/default/files/supporting_resources/statute_trust_fund_victims_english.pdf.

³⁰⁰ See *supra* note 274 & accompanying text; see also Lubanga Trial Decision on Reparations Principles, *supra* note 23, ¶ 269.

³⁰¹ Habré Trial Reparations Judgment, *supra* note 78, ¶ 78; Maclean, *Hissène Habré ordered to pay millions for crimes against humanity in Chad*, *supra* note 262. Habré is believed to have millions of dollars more that could be seized and applied toward reparations, if those funds can be traced. *Id.*

³⁰² Habré Trial Reparations Judgment, *supra* note 78, ¶¶ 78-80.

³⁰³ EAC Trust Fund Statute, *supra* note 267, art. 13(2)(d).

³⁰⁴ Maclean, *After 25 years, a breakthrough for victims of Chad dictator Hissène Habré*, *supra* note 269 (Habré stole about \$150 million US dollars from Chad's treasury when he fled the country).

³⁰⁵ E.g., Habré Appeal Judgment, *supra* note 218, ¶ 613.

³⁰⁶ EAC Statute, *supra* note 20, art. 28; EAC Trust Fund Statute, *supra* note 267, art. 15(1); Assembly of State Parties, Resolution ICC-ASP/1/Res.6 (Sept. 9, 2002), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-06-ENG.pdf; see also Katanga Draft Implementation Plan, *supra* note 276, ¶¶ 47-48 (describing donations from the Government of The Netherlands).

reparations in the *Lubanga* case, much less than the total \$10 million ordered against the defendant.³⁰⁷ In light of its fundraising challenges, the ICC’s Trust Fund for Victims has begun considering alternative funding streams, such as generating income through stock market investments.³⁰⁸

C. Project Partnerships

A third approach to financing and implementing reparations – which we have termed “project partnerships” – was adopted by the ECCC. Recognizing that victims were unlikely to receive reparations through “traditional” awards against Khmer Rouge defendants, all of whom appeared to be indigent,³⁰⁹ the ECCC amended its internal rules to create “a new and independent avenue for reparations.”³¹⁰ In this model, NGOs, civil society actors, and in some cases the government (collectively “partners”) propose, design and implement projects intended to meet some of the reparations needs of survivors, with funding from a mix of individual, corporate, and international donors.³¹¹ There is thus no reparations order against the defendant; instead, the Court endorses projects to be undertaken by different actors.³¹²

A review of the ECCC’s process may be instructive in understanding how this approach works:

- **Application.** As part of their initial applications to become civil parties, individuals submit victim information forms that include space to indicate the types of reparations they would like to request.³¹³ This information helps to guide attorneys for the civil parties during later stages of the process.
- **Consultations with civil parties.** The ECCC’s Victims Support Section (VSS), along with attorneys for the civil parties, undertake a series of consultations with civil parties to

³⁰⁷ ICC TFV 2018 Report, *supra* note 277, ¶ 13.

³⁰⁸ *Id.* ¶ 10.

³⁰⁹ Kaing Trial Judgment, *supra* note 50, ¶ 666; Kaing Appeal Judgment, *supra* note 20, ¶ 666 & n.1334; Nuon 2014 Trial Judgment, *supra* note 117, ¶ 666.

³¹⁰ Co-Prosecutors v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Memorandum: Initial specification of the substance of reparations awards sought by the Civil Party Lead Co-Lawyers pursuant to Internal Rule 23*quinquies*(3), at 2 (ECCC Trial Chamber President, Sept. 23, 2011) [hereinafter Nuon 2011 Memorandum on Reparations], https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E125_EN.PDF; Co-Prosecutors v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Case 002/02 Judgement, ¶ 4405 (ECCC Trial Chamber, Nov. 16, 2018) [hereinafter Nuon 2018 Trial Judgment], <https://drive.google.com/file/d/1LA9ttO7C4fgC1aSb1cAoe9ofzwDuERx5/view?ts=5c9c9bb0>. The ECCC’s Internal Rules were amended during the course of trial in its first case. Kaing Trial Judgment, *supra* note 50, ¶ 635. The ECCC declined to apply the revised rules to that case in light of its advanced stage of proceedings, *id.*, and instead first used the new avenue for reparations in the *Nuon* case, *id.* ¶ 662 n.1149; Nuon 2014 Trial Judgment, *supra* note 117, ¶¶ 1109, 1112-13. As a result, the only reparations approved in the first case related to the inclusion in the final judgment of the names of the civil parties and victims, as well as the compilation and publication of statements of apology by the defendant. Kaing Trial Judgment, *supra* note 50, ¶¶ 667-68.

³¹¹ ECCC Internal Rules, *supra* note 49, Rule 23 *quinquies* (3) (“In deciding the modes of implementation of the awards, the Chamber may, in respect of each award, either: (a) ...; or (b) recognize that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.”); Nuon 2014 Trial Judgment, *supra* note 117, ¶ 1113; Nuon 2018 Trial Judgment, *supra* note 310, at ¶ 4405.

³¹² Nuon 2011 Memorandum on Reparations, *supra* note 310, at 2.

³¹³ Prosecutor v. Nuon, Case No. 002/19-09-2007-ECCC/TC, Civil Party Lead Co-Lawyers’ Interim Report on Reparations in Case 002/02 and Related Request, ¶ 5 (ECCC Civil Party Lead Co-Lawyers, June 17, 2015) [hereinafter Nuon Civil Party Lawyers’ 2015 Interim Report on Reparations], https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2015-07-17%2016%3A57/E352_EN.PDF.

identify the types of reparations they prefer and consider meaningful.³¹⁴ The results of these consultations guide the development of specific projects.³¹⁵ Additional consultations are held throughout the case to update the civil parties on the reparations process and solicit feedback on specific project proposals.³¹⁶

- **Consultations with all stakeholders.** The VSS and attorneys for the civil parties also undertake a series of consultations with a wider set of stakeholders – including civil parties, survivor organizations, NGOs, government officials, donors, and others – to explain how they can contribute to and participate in the reparations process.³¹⁷ During these consultations, the reparations preferences of the civil parties also are shared with other stakeholders.
- **Solicitation of project proposals from potential partners.** The VSS and attorneys for the civil parties accept proposals from potential partners for projects that could be developed as judicial reparations.³¹⁸ Each proposal is then assessed for its viability and appropriateness as judicial reparations, and presented to the civil parties for comment.³¹⁹
- **Refinement and prioritization of project proposals.** The VSS and civil party lawyers meet with each potential project partner to discuss questions, clarify the project, and provide guidance regarding the legal requirements for judicial reparations.³²⁰ In light of limited funding, projects also are prioritized, with priority given to projects that meet the expressed wishes of and provide benefits to the civil parties, are linked to the crimes for

³¹⁴ *Id.* ¶ 4; ECCC, GUIDEBOOK ON JUDICIAL REPARATIONS IN CASE 002/02 BEFORE THE ECCC 3-4 (ECCC Civil Party Lead Co-Lawyers’ Section, Nov. 13, 2014) [hereinafter ECCC Guidebook on Judicial Reparations], https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2015-07-17%2017%3A01/E352.3_EN.PDF; Co-Prosecutors v. Nuon, Case No. 002/19-09-2007-ECCC/TC, Civil Party Lead Co-Lawyers’ Submission Relating to Reparation Projects for Implementation in Case 002/02, ¶ 9 (ECCC Civil Party Lead Co-Lawyers, July 15, 2016) [hereinafter Nuon 2016 Civil Party Lead Co-Lawyers’ Submission Relating to Reparation Projects for Implementation], https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2016-08-09%2020%3A36/E352_2_1_EN.PDF; Co-Prosecutors v. Nuon, Case No. 002/19-09-2007-ECCC/TC, Civil Party Lead Co-Lawyers’ Final Claim for Reparation in Case 002/02, ¶ 6 (ECCC Civil Party Lead Co-Lawyers, May 30, 2017) [hereinafter Nuon Civil Party Lead Co-Lawyers’ Final Claim for Reparation], https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E457_6_2_1_EN.pdf.

³¹⁵ Nuon Civil Party Lawyers’ 2015 Interim Report on Reparations, *supra* note 313, ¶ 6.

³¹⁶ *Id.* ¶¶ 8, 10, 12, 15; Nuon 2016 Civil Party Lead Co-Lawyers’ Submission Relating to Reparation Projects for Implementation, *supra* note 314, ¶¶ 9-11, 10.

³¹⁷ Nuon Civil Party Lawyers’ 2015 Interim Report on Reparations, *supra* note 313, ¶¶ 4, 7, 9; ECCC Guidebook on Judicial Reparations, *supra* note 314, at 3-4.

³¹⁸ ECCC Guidebook on Judicial Reparations, *supra* note 314, at 4; Nuon Civil Party Lawyers’ 2015 Interim Report on Reparations, *supra* note 313, ¶ 11.

³¹⁹ ECCC Guidebook on Judicial Reparations, *supra* note 314, at 4; Nuon Civil Party Lawyers’ 2015 Interim Report on Reparations, *supra* note 313, ¶ 12.

³²⁰ Nuon Civil Party Lawyers’ 2015 Interim Report on Reparations, *supra* note 313, ¶ 13; *see also* Co-Prosecutors v. Nuon, Case No. 002/19-09-2007-ECCC/TC, Lead Co-Lawyers’ Indication to the Trial Chamber of the Priority Projects for Implementation as Reparations, ¶ 2 (ECCC Lead Co-Lawyers’, Feb. 12, 2013) [hereinafter Nuon 2013 Lead Co-Lawyers’ Indication of the Priority Projects for Implementation as Reparations], https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-02-25%2013%3A53/E218_7_1_EN%281%29.PDF.

which the accused is being tried, are feasible, have a high likelihood of realization, and already have secured some funding.³²¹

- **Review of potential projects by the Court.** Information about potential projects is submitted to the court for review.³²² Such review enables the Trial Chamber to examine the appropriateness of the proposed projects and “raise concerns at an early stage, when changes to project development are still feasible.”³²³ Such review also “avoid[s] potentially costly, time-consuming or misguided project development – which may eventually not be recognized by the Trial Chamber.”³²⁴
- **Fundraising.** Because many of the project partners are NGOs, they often do not have the requisite financial means to implement the projects. As a result, the project partners and the VSS, with the assistance of civil party lawyers, must engage in fundraising for proposed projects.³²⁵
- **Implementation.** Implementation of individual reparations projects can begin as soon as funding has been secured, even if a verdict has not yet issued.³²⁶ As the ECCC’s Trial Chamber has explained, pre-verdict implementation was adopted in order to ensure “the realization of meaningful reparations within a reasonable time.”³²⁷
- **Endorsement by the Court.** At the end of trial, the civil party lawyers present projects that meet the requisite criteria and have secured funding to the court for its endorsement

³²¹ Co-Prosecutors v. Nuon, Case No. 002, Memorandum: Indication of Reparation Projects for Implementation in Case 002/02, ¶ 2 (ECCC President of the Trial Chamber, June 10, 2016) [hereinafter Nuon 2106 Memorandum on Reparations], https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2016-06-13%2021%3A41/E352_2_EN.PDF; Nuon 2013 Lead Co-Lawyers’ Indication of the Priority Projects for Implementation as Reparations, *supra* note 320, ¶ 2; Nuon 2016 Civil Party Lead Co-Lawyers’ Submission Relating to Reparation Projects for Implementation, *supra* note 314, ¶¶ 13-14; Nuon Civil Party Lead Co-Lawyers’ Final Claim for Reparation, *supra* note 314, ¶¶ 7, 11.

³²² ECCC Internal Rules, *supra* note 49, Rule 80 *bis* (4); Nuon 2014 Trial Judgment, *supra* note 117, ¶ 1121; *see generally* Nuon 2013 Lead Co-Lawyers’ Indication of the Priority Projects for Implementation as Reparations, *supra* note 320.

³²³ Nuon 2011 Memorandum on reparations awards, *supra* note 310, at 2; *see generally* Co-Prosecutors v. Nuon, Case No. 002, Memorandum: Trial Chamber’s Response to the Lead Co-Lawyers’ Initial Specification of Civil Party Priority Projects as Reparations pursuant to Rule 80 *bis* (ECCC Trial Chamber, Aug. 1, 2013), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2013-08-02%2011%3A42/E218_7_2_EN-1.PDF.

³²⁴ Nuon 2011 Memorandum on reparations awards, *supra* note 310, at 2.

³²⁵ *See* Nuon 2013 Lead Co-Lawyers’ Indication of the Priority Projects for Implementation as Reparations, *supra* note 320, ¶¶ 2, 30-31; ECCC Guidebook on Judicial Reparations, *supra* note 314, at 4; ECCC Victims Support Section & Civil Party Lead Co-Lawyers, ECCC Reparation Program 2013-2017, at 18 (2013), <http://vss.eccc.gov.kh/images/stories/2014/Reparation.pdf>.

³²⁶ Co-Prosecutors v. Nuon, Case No. 002, Memorandum: Indication of priority projects for implementation as reparation (ECCC Trial Chamber President, Dec. 3, 2012), https://eccc.gov.kh/sites/default/files/documents/courtdoc/2012-12-04%2013%3A57/E218_7_EN.pdf; Nuon 2018 Trial Judgment, *supra* note 310, ¶ 4418 (acknowledging that the ECCC “permit[ed] the implementation of projects to begin prior to the verdict in order to ensure the realisation of meaningful reparations within a reasonable time”).

³²⁷ *Id.*

as “judicial reparation awards.”³²⁸ The court then reviews those projects to ensure that they meet the court’s criteria, and, if so, endorses them.³²⁹

One of the key advantages of the project partnership approach is that reparations may be made available to civil parties more quickly than in other approaches, since the projects are designed and often implemented in advance of a final judgment regarding a particular defendant.³³⁰ For instance, several projects in the *Nuon* case – including a book of statements by civil parties, a songwriting competition, a public exhibition of sketches based on survivors’ accounts, and legal education for ethnic minorities – were completed in 2016, two years before the judgment against the defendants was issued.³³¹ Although the court eventually may find a particular defendant not guilty of one or more crimes – and thus not endorse some or all of the proposed projects – in many instances, such a judgment would have little or no effect on the receipt of reparations by civil parties. Where projects already had been implemented, the civil parties already would have received their benefit, regardless of whether the projects ultimately received the court’s endorsement. Even where some or all of a project remained to be implemented, there is no reason to believe that donors would pull their funding if the court failed to endorse the project.³³² As such, the primary effect of a not guilty verdict would be to prevent the endorsement of these projects as “judicial” reparations.³³³

Interestingly, the project partnership model has also had some success in obtaining State participation in reparations awards. Although the ECCC held that it had no jurisdiction to order reparations against

³²⁸ Nuon Civil Party Lead Co-Lawyers’ Final Claim for Reparation, *supra* note 314, ¶ 1; *see id.* ¶ 11; Nuon 2014 Trial Judgment, *supra* note 117, ¶ 1125.

³²⁹ Nuon 2018 Trial Judgment, *supra* note 310, ¶¶ 4454-67.

³³⁰ Nuon 2011 Memorandum on Reparations, *supra* note 310, at 2 (stating that “[t]he idea [of this new reparations model] was to ensure that tangible, externally funded awards acknowledging the suffering of Civil Parties could be realized soon after a verdict becomes final” because awards are developed “in parallel with the ongoing trial”); Nuon 2016 Memorandum on Reparations, *supra* note 321, ¶ 3 (the new rule was adopted “to enable, with donor assistance and that of external collaborators, the realization of meaningful reparation projects, within a reasonable time”); Nuon 2018 Trial Judgment, *supra* note 310, ¶ 4418 (acknowledging “that the majority of these projects have already been partially or fully implemented”).

³³¹ Nuon 2018 Trial Judgment, *supra* note 310, ¶¶ 4426-28, 4431. Several others, including teacher trainings on Khmer Rouge history, performances in high schools about the civil party experience before the ECCC, and the creation of films and other public education materials on the harms suffered by the Cham people, were completed in 2017. Nuon 2018 Trial Judgment, *supra* note 310, ¶¶ 4421-23, 4425.

³³² *See* Nuon 2018 Trial Judgment, *supra* note 310, ¶¶ 4466-67 (declining to endorse one project because it was not related to the specific charges in the case, but reminding donors that they may support measures not endorsed by the court).

³³³ Concerns also have been raised about whether designing and implementing reparations prior to a guilty verdict violates the presumption of innocence to which all defendants are entitled. *See, e.g.,* Juan-Pablo Perez-Leon-Acevedo, *International Human Rights Law in the Reparation Practice of the Extraordinary Chambers in the Courts of Cambodia*, in *THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2017*, 213, 241 (GUILIANA ZICCARDI CAPALDO ED., 2018) (“Under the current ECCC reparation implementation regime, some Case 002/01 and Case 002/02 reparations have been developed and even (partially) implemented before conviction. ... Granting reparations before conviction may threaten the accused’s rights, particularly the presumption of innocence.”). In order to ensure respect for defendants’ rights, the ECCC’s Trial Chamber observed that it “is unable to endorse any [reparations project] on facts that are currently under judicial consideration and need to be finally adjudicated” and required reparations that discussed historical events, such as a book chapter and a web-based learning application, to include a disclaimer stating that they were “based upon civil party and witness testimony before the ECCC” and that the “determination of the guilt or innocence of the Accused ... as reflected in the Trial Chamber Judgment and, if appropriate, confirmed or amended by the Supreme Court Chamber, is the sole legally binding account of the events relayed in this” chapter or application. Nuon 2014 Trial Judgment, *supra* note 117, ¶ 1157 & n. 3296; Nuon 2018 Trial Judgment, *supra* note 310, ¶ 4455 (similar disclaimer required).

the State,³³⁴ it endorsed projects that required State participation, provided that the State indicated in advance that it had agreed to the project. For example, in the *Nuon* case, the court endorsed several educational projects to educate Cambodian youth and teachers about Khmer Rouge history that, with the approval of the Ministry of Education, were to be incorporated into schools throughout Cambodia.³³⁵ In addition, the Cambodian government agreed to establish a National Remembrance Day³³⁶ and funded a project to provide access to records relating to the ECCC.³³⁷ While States have often failed to implement reparations orders against them,³³⁸ it is possible that the requirement of liaising with and receiving approval from the government prior to the award of reparations, as well as the development of a number of reparations that required government approval but not funding, increased the amenability of the Cambodian government to participate in the reparations process.

Nonetheless, the project partnerships model has several unique challenges. First, it requires additional human resources at the court to coordinate with NGOs and other partners, assist in the development of project ideas, and fundraise for those projects. At the ECCC, for example, two program managers dedicated to these tasks were installed in the Victims Support Section.³³⁹ Second, as with the trust fund model described earlier,³⁴⁰ fundraising is often difficult.³⁴¹ In one case before the ECCC, the civil party lawyers had to withdraw over 20% of the proposed reparations projects included in their final request because they were unable to secure funding for them.³⁴² Third, because the projects are designed by NGOs and other actors, rather than the court itself, they may respond more to the interests and expertise of those NGOs rather than civil party needs. In the second *Nuon* case, for example, the most requested reparation by civil parties was access to medical services,³⁴³ including both physical and mental health services.³⁴⁴ Only two of the proposed projects provided physical or mental health services, however, while many more were art or public education projects aimed at

³³⁴ Kaing Trial Judgment, *supra* note 50, ¶ 663; Nuon 2014 Trial Judgment, *supra* note 117, ¶ 1116.

³³⁵ Nuon 2018 Trial Judgment, *supra* note 310, ¶¶ 4420-22; Nuon 2016 Civil Party Lead Co-Lawyers' Submission Relating to Reparation Projects for Implementation, *supra* note 314, ¶¶ 16-25.

³³⁶ Nuon 2014 Trial Judgment, *supra* note 117, ¶¶ 1126, 1152-53.

³³⁷ Nuon 2018 Trial Judgment, *supra* note 310, ¶ 4429.

³³⁸ See *supra* notes 262-63 & accompanying text.

³³⁹ Nuon 2011 Memorandum on Reparations, *supra* note 310, at 2 (early report indicating the installation of one program manager); Nuon 2013 Lead Co-Lawyers' Indication of the Priority Projects for Implementation as Reparations, *supra* note 320, ¶ 31 (later submission indicating that two staff members were dedicated solely to these functions). The German government provided repeated financial support to the Victims Support Service to support these tasks. *Germany Provides 1.2 Million to the Victims Support Section of the Extraordinary Chambers in the Courts of Cambodia*, ECCC (2011), <https://www.eccc.gov.kh/en/node/16657>; *Germany pledges more financial support to maximise victims' participation in KR trials*, ECCC (2010), <https://www.eccc.gov.kh/en/articles/germany-pledges-more-financial-support-maximise-victims-participation-kr-trials>.

³⁴⁰ See *supra* Section VI.B.

³⁴¹ See Open Society Justice Initiative, Position Paper: Reparations for Khmer Rouge Crimes, at 2 (2013), <https://www.justiceinitiative.org/uploads/a6f4a426-e628-410c-9fb2-20ef43562800/PositionPaper-ECCC-reparations-09-10-2013.pdf>.

³⁴² Nuon 2018 Trial Judgment, *supra* note 310, ¶¶ 4417-18 (four of 18 projects were withdrawn).

³⁴³ Nuon Civil Party Lawyers' 2015 Interim Report on Reparations, *supra* note 313, ¶ 5. Similarly high numbers of civil parties requested medical care in the ECCC's first case. *Co-Prosecutors v. Nuon*, Case No. 001/18-07-2007-ECCC/TC, Civil Parties' Co-Lawyers' Joint Submission on Reparations, ¶ 17 (ECCC Co-Lawyers for the Civil Parties, Sept. 14, 2009) [hereinafter *Nuon 2009 Civil Parties' Co-Lawyers' Joint Submission on Reparations*], https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E159_3_EN.pdf.

³⁴⁴ Nuon Civil Party Lawyers' 2015 Interim Report on Reparations, *supra* note 313, ¶ 19; see also Nuon 2016 Civil Party Lead Co-Lawyers' Submission Relating to Reparation Projects for Implementation, *supra* note 314, ¶¶ 44-47; Nuon 2009 Civil Parties' Co-Lawyers' Joint Submission on Reparations, *supra* note 343, ¶¶ 18-22 (same in the *Kaing* case).

guaranteeing non-repetition.³⁴⁵ Although these other reparations are unquestionably helpful, placing the design and fundraising process in the hands of partners – rather than the court – inevitably means that the project prioritization process will be influenced by the partners’ and funders’ priorities as well.

D. Conclusion

As a hybrid court established to try international crimes in a country still experiencing ongoing conflict, the SCC will undoubtedly face extraordinary challenges not only with respect to investigations and trials, but also with respect to reparations awards. As the SCC’s RPE acknowledge, victims in these cases are likely to have significant and wide-ranging needs for reparations that go well beyond the assets of defendants. The RPE therefore grant the SCC flexibility to award such reparations and consider alternative financing, although the RPE do not specify exactly how this is to be done. This section described three approaches other courts have implemented to address similar challenges – reparations orders against the State, trust funds, and project partnerships – with the hope that these examples may assist the SCC as it considers how best to implement its reparations mandate. Although these approaches have been applied by different courts, there is nothing that would prohibit a court from adopting more than one approach – either in the same case or in different cases – provided that it determines it has the authority to do so. For example, a judgment against a State agent might include some reparations against the State while simultaneously requesting that the victims’ service seek foreign financing for other reparations through a trust fund or project partnerships. Ultimately, it will be up to the SCC to determine which approach(es) conform with CAR law and are best suited to the country’s context.

Regardless of which approach(es) the SCC adopts, it would be prudent for the court to establish the requisite infrastructure for reparations well before reparations judgments are issued. Approaches like trust funds and project partnerships, for example, require additional staff dedicated to liaising, fundraising, and project planning, as well as institutional mechanisms for accepting and securely holding donations. Reparations orders against the State likewise require additional human and financial resources to monitor compliance. Beginning the process of reparations planning now will help to ensure that victims receive a meaningful remedy for the harms they have suffered.

³⁴⁵ Nuon 2018 Trial Judgment, *supra* note 310, ¶¶ 4454-65. Although there were fewer art and public education projects in the first *Nuon* case, only two reparations projects dealt with mental health and none provided medical services. Nuon 2014 Trial Judgment, *supra* note 117, ¶¶ 1126-40.

VII. CONCLUSION

The SCC will be faced in the coming years with the considerable challenge of developing reparations orders in an extraordinarily difficult environment. Years of conflict have created hundreds of thousands of victims of serious violations of human rights law and international humanitarian law, and convicted defendants are unlikely to have adequate resources to repair the harms they have caused. Further, the ability to implement and enforce reparations is likely to be affected by a wide range of issues impacting the country more generally, including ongoing violence, the continued displacement of large numbers of civilian victims, low GDP, competing governmental priorities, and the country's large size and minimal infrastructure.

Although these challenges should not be underestimated, the SCC has a unique opportunity to develop a comprehensive case-based reparations approach that is sensitive to both the needs of victims and the considerable constraints in CAR. Nearly two decades of experimentation with case-based reparations in criminal trials for international crimes has led to a dramatic expansion in the approaches that courts apply to design, implement, and enforce reparations. These approaches enable courts to provide reparations to victims even where the convicted defendant has insufficient resources to cover reparations.

To date, three distinct approaches have emerged for providing case-based reparations in criminal trials for international crimes. At the domestic level, courts in several States have held that they have the authority to order reparations directly against the State, particularly, though not exclusively, where the perpetrators were State agents. At the international level, where courts have no authority to order State reparations, courts have either used trust funds (such as at the ICC and EAC) or the project partnership approach (such as at the ECCC).

As a hybrid court authorized to apply both domestic and international law, the SCC appears to have a unique ability to draw from any or all of these models. As a domestic court in a civil law country, the SCC appears to have the same ability as domestic courts in some other civil law countries – such as the DRC, Chad, and France – not only to hear civil party claims for reparations, but also to order reparations against the State in appropriate cases. In addition, the SCC is authorized to raise external funds for reparations, authority that it could implement by establishing a trust fund or engaging in project partnerships. While other courts have generally applied only one of these approaches, there is nothing that would prevent the SCC from choosing different approaches in different cases based on the particular circumstances of each case, or from combining approaches in a single case as appropriate.

Regardless of the approach or approaches the SCC chooses to take, work on reparations should begin now. Establishing and implementing an effective reparations mechanism will almost certainly require the adoption of new policies, the establishment of additional institutional structures, and coordination with external partners, all of which may require considerable time and resources. Early preparation for reparations is essential to ensure the effective implementation and enforcement of reparations orders once they are issued. It is our sincere hope that this report will help inform the SCC, as well as civil society organizations and survivors, as the Court and those that work with it begin to work through these issues.