Making Reparations Effective in Case 002: Challenges Facing Civil Parties at the ECCC

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Note

The author served as a legal associate at the Documentation Center of Cambodia between June and August 2013. The information presented and opinions expressed herein are those of the author and do not necessarily represent the views of the Documentation Center of Cambodia or its partners. The paper is a work in progress, and the author intends to update the paper over the course of the following year on any new developments on reparations at the ECCC or ICC. The author maintains all copyrights to the paper. The author can be reached at kristine.beckerle@yale.edu.

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I. Introduction

This memo will explore the possibilities open to the Extraordinary Chambers in the Courts of Cambodia (ECCC) to award meaningful reparations in Case 002. The memo will focus on "effectiveness," or the need for a reparation project to be foreseeably enforceable for the court to issue a binding order. In Case 001, the ECCC repeatedly cited issues with effectiveness, i.e., the lack of identified funding for reparations projects or that projects required complex management and oversight after case resolution, to justify not issuing awards. Effectiveness is of particular concern to the ECCC because it lacks adequate power to enforce awards.

Changes to the ECCC Internal Rules and the International Criminal Court (ICC's) landmark decision on reparations in the *Prosecutor vs. Thomas Lubanga Dyilo* (2012) should provide the ECCC more flexibility and ideas on awarding meaningful reparations in Case 002. However, even if the Court may have a wider range of options, the actual reparation awards will still be contingent on the extent to which a mechanism for accountability can be set up to oversee the reparations process. The mechanism should ensure compliance with court-ordered legal requirements throughout a project's implementation, after the case wraps up and, perhaps, after the ECCC ceases functioning. As a limited mandate, ad hoc Court, ensuring adequate oversight over reparations awards during implementation may be one of the most significant challenges the ECCC faces.

This memo will be divided into three parts. First, the memo will analyze the legal framework for reparations in Case 002. The memo will focus on the unique reparations structure the ECCC has created, the impact of the ICC's first major decision on reparations for the ECCC's findings in Case 002, and the changes made to the ECCC's Internal Rules on reparations, in particular the expansion of the mandate of the Victim Support Section (VSS) and the ability for reparations to be externally funded. The changes made to the ECCC's Internal Rules more closely aligned the ECCC's reparation framework with that of the ICC.[1] Second, the memo will discuss the ECCC's "effectiveness" requirement. This memo will compare the ECCC's approach in Case 001 to that of the ICC in the *Prosecutor vs. Thomas Lubanga Dyilo.* This memo will demonstrate that the ECCC's use of the "effectiveness" requirement is a break from international practice and argue that the availability of funds requirement should not be a determinative factor when deciding whether or not to order collective reparations awards. When appropriate, the memo will draw from jurisprudence from regional human rights courts and the practice of truth and reconciliation commissions. Third, the memo will conclude by exploring possible management mechanisms that the ECCC could construct to oversee reparations in Case 002, and why the construction of such a mechanism will give the ECCC more flexibility and room to adequately fulfill its reparations mandate.

[1] Nadine Kirchenbauer et al., *Victims Participation Before the Extraordinary Chambers in the Courts of Cambodia* 5 (Cambodian Human Rights and Development Association & Harvard Humanitarian Initiative 2013).

II. Background

The reparations awarded by the ECCC in Case 001 were quite limited. In denying requests, the ECCC focused on the defendant's indigence, the lack of specificity of the reparation requests, and the jurisdictional limits of the Court.[2] Throughout the Supreme Court Chamber's (SCC) decision, the Court was primarily concerned with the need to ensure that reparations would be "effective." When the SCC believed a reparation request was sufficiently specific and collective and moral in nature, the Chamber would recognize it as an "appropriate form of reparation" and would encourage national and international donors to help try and implement these awards. The only reparations *ordered* by the Court were – following the Trial Chamber – the compiling and posting of all statements of apology and/or acknowledgement of responsibility made by Kaing Guek Eav (alias, "Duch") on the ECCC website,[3] and including the names of victims and their lost relatives in the judgment.

In November 2011, the ECCC Trial Chamber began Case 002. Case 002 is more complex than Case 001, involving multiple defense teams and crimes that were committed across Cambodia.[4] It has been broken up into a series of mini-trials. Case 002/001 is still in its early stages, and the LCL will face a number of legal obstacles before filing the final reparation request at the end of the Trial Chamber's hearing. Over 4,000 people have applied to participate as Civil Parties.[5] During preliminary hearings in June 2011, the Civil Parties presented an initial outline of their reparations requests.[6] The hearing came before all Civil Parties had been admitted to the case and before the Appeals Judgment in Case 001, which contained important precedent on reparations, was delivered. Based on consultations with Civil Parties, the Civil Party Lead Co-Lawyers Section (LCL) presented four categories of reparations, including: (a) Remembrance and memorialization;[7] (b) Rehabilitation and health services;[8] (c) Documentation and education;[9] and (d) Other projects.[10] In a second hearing in October 2011, the LCL discussed implementation processes and reiterated their desire to

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[2] Human Rights Now, *Policy Arguments and Legal Observations regarding reparations appeal of ECCC Case 001* 5 (2011); *ECCC at a Crossroad: Making Victim Participation Meaningful Ahead of the Second Trial,* Press Release (Cambodian Human Rights Action Committee, Phnom Penh, Cambodia), Sept. 13, 2010, http://www.adhoc-cambodia.org/?p=641.

[3] ECCC Case 001; ECCC Establishment Law (last visited July 5, 2013).

[4] Kirchenbauer, *supra* note 1, at 3-4.

[5] Kirchenbauer, *supra* note 1, at 7.

[6] Christine Evans, *A Day on Limitations and Reparations,* The Cambodia Tribunal Monitor, June 29, 2011, http://www.cambodiatribunal.org/blog/2011/06/day-limitations-and-reparations.

[7] Remembrance and memorialization included commemorating the names of victims, providing spaces for grieving and meditation, creating an annual memorial day, building stupas and/or monuments to pay tribute to victims, and preserving crime sites.

[8] Rehabilitation and Health Services included creating a health center for elderly victims, providing mental health services to victims, providing access to health services for low-income Cambodians and victims, and facilitating of self-help groups.

[9] Documentation and education included preserving Khmer Rouge documents, incorporating the ECCC experience into the current Khmer Rouge history curriculum, and creating museums and libraries dedicated to the history of the Khmer Rouge period in Cambodia which are free and open to the public.

[10] Other projects included creating a trust fund, specific assistance projects for Cham Muslims and Vietnamese-Cambodians who were forcibly deported by the Khmer Rouge, establishing a victims' registry and publishing of the names of Civil Parties in the Case 002 judgment.

have a trust fund created which could manage donations to help finance reparations activities after the ECCC ceased functioning.[11]

III. Legal and procedural framework

a. The ECCC has defined a sui generis reparations structure which departs in significant ways from Cambodian and international practice.

The ECCC is part of the Cambodian court system. As a hybrid court, the ECCC uses Cambodian criminal laws and procedure, which are derived from the French civil law tradition, but also incorporates and supplements Cambodian rules with international law.[12] Under the ECCC Establishment Law, the Court has jurisdiction over "senior leaders of Democratic Kampuchea and those most responsible for crimes and serious violations of the Cambodian Penal Code, international humanitarian law and custom, and international conventions recognized by Cambodia, committed from 17 April 1975 to 6 January 1979."[13] While Article 39 of the Establishment Law allows the ECCC to order the confiscation of property acquired illegally by defendants, this property is to be returned to the State.[14] The right to claim reparations is not incorporated into the ECCC Statute, but was included in the first set of Internal Rules, adopted in June 2007.[15] The rules were amended a number of times, and a number of important changes were made to the reparations framework ahead of Case 002.

The ECCC has some room to design and adjust reparations awards, but the Internal Rules limit potential reparations to those that are "collective and moral."[16] In Case 001, the SCC provided definitions for collective and moral reparations. Collective reparations exclude individual awards, and favor "those measures that benefit as many victims as possible" and are the "most inclusive," including victims who did not participate as Civil Parties in the case.[17] Moral reparations are those with "the aim of repairing moral damages rather than material ones."[18] For example, the SCC held that the reparations requests for constructing memorials and stupas "squarely fall within the meaning of 'collective and moral reparations.'"[19] Both moral and collective reparations may require financing in order to be implemented, and may entail individual benefit for members of the collective, "as long as the

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[11] Kirchenbauer, *supra* note 1, at 6; Randle C. DeFalco, *ECCC Trial Chamber Hearing of 19-20 October 2011: Initial Civil Party Reparation Claims and Fitness of Ieng Thirith to Stand Trial,* Oct. 26, 2011, http://www.cambodiatribunal.org/blog/2011/10/eccc-trial-chamber-hearing-19-20-october-2011-initial-civil-party-reparation-claims-and.

[12] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001), ch. X, art. 33, *amended by* NS/RKM/1004/006 (Oct. 27, 2004) (Cambodia) [hereinafter ECCC Establishment Law].

[13] ECCC Establishment Law, ch. I, art. 1.

[14] ECCC Establishment Law, ch. XI, art. 39.

[15] Cambodian Human Rights Action Committee & Redress, *Considering Reparations for Victims of the Khmer Rouge Regime* 5 (2009).

[16] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 8), *revised on* Aug. 3, 2011 [hereinafter Internal Rules (Rev. 8)], Rule 23 (11) *bis* (6); Christoph Sperfeldt, *Reparations for Victims of the Khmer Rouge* 2 (Oxford Justice Research, Working Paper, 2009).

[17] Prosecutor v. Kaing Guek Eav *alias* 'Duch', Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶ 659 (Feb. 3, 2012) [hereinafter Case 001 Appeal Judgment].

[18] Case 001 Appeal Judgment, *supra* note 17, ¶ 658.

[19] Case 001 Appeal Judgment, *supra* note 17, ¶ 683.

award is available for victims as a collective."[20] For example, the SCC determined that the reparation requests for medical and psychological assistance put forward in Case 001 fell under the term "collective and moral" reparations.[21] According to Rule 23 *quinquies* (1) of the amended Internal Rules, collective and moral reparations "are measures that: a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and; b) provide benefits to the Civil Parties which address this harm." The definitions of collective and moral reparations provided in the amended Internal Rules are binding on the Court in Case 002.

The ECCC rules on reparations deviate significantly from Cambodian criminal procedure.[22] In Cambodian criminal law, the scope for civil action is much wider than it is at the ECCC.[23] In criminal cases, Cambodian courts can offer a wider range of remedies than the ECCC– including compensatory damages, restitution of property, or restoration of property that has been destroyed. [24] Criminal courts normally order the convicted person to pay financial compensation to the victims.[25] The ECCC's moral and collective reparations, however, are meant to serve a symbolic, rather than a traditional compensatory, function.[26] Civil Parties may also claim compensation from a broader group of liable persons in the Cambodian court system, while in the ECCC victims may only bring action against the accused.[27] Under Cambodian law, civil action can continue if the accused dies, with the accused's successor taking over responsibility for reparations.[28] At the ECCC, civil action ends with the death of the accused.[29] Finally, while Civil Parties in a normal Cambodian criminal court could bring a separate claim in civil court, Civil Parties at the ECCC cannot bring a civil action based on the ECCC trials in a Cambodian civil court.[30] However, in some instances, these departures from Cambodian law help victims, as civil actions at the ECCC are not restricted by the statute of limitations in the Civil Code of Cambodia[31] and as eligibility for reparations is decided on an equitable basis.[32]

Article 33 of the Establishment Law provides that the ECCC must operate in accordance with the procedural rules in force under Cambodian law, but that international standards can be looked to for guidance to inform the ECCC's work, regardless of whether or not these standards have been incorporated into Cambodian domestic law.[33] As such, international consensus and jurisprudence on reparation can, has and should continue to inform the Court's work.

The right to a remedy has been established in numerous international legal texts. In

[20] Case 001 Appeal Judgment, *supra* note 17, ¶ 658.
[21] Case 001 Appeal Judgment, *supra* note 17, ¶ 701.
[22] Sperfeldt, *supra* note 16, at 2.
[23] Case 001 Appeal Judgment, *supra* note 17, ¶ 639-644.
[24] *See* Human Rights Now, *Justice for Victims: Fundamental Issues for the ECCC* 11 (2006); Cambodian Human Rights Action Committee, *Considering Reparations*, *supra* note 15, at 4.
[25] Von Silke Studzinsky, *Victim's Participation before the Extraordinary Courts of Cambodia* 3 (2011), *available at* http://www.zis-online.com/dat/artikel/2011_10_627.pdf.; Human Rights Now, *Justice for Victims, supra* note 24, at 8.
[26] Case 001 Appeal Judgment, *supra* note 17, ¶ 644.
[27] Case 001 Appeal Judgment, *supra* note 17, ¶ 643.
[28] Sperfeldt, *supra* note 16, at 2.
[29] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 8), *revised on* Aug. 3, 2011 [hereinafter Internal Rules (Rev. 8)], Rule 23 *bis* (6) ("civil action against a charged person shall end on the death of that person); Sperfeldt, *supra* note 16, at 2.
[30] Case 001 Appeal Judgment, *supra* note 17, ¶ 643.
[31] Case 001 Appeal Judgment, *supra* note 17, ¶ 643.
[32] Case 001 Appeal Judgment, *supra* note 17, ¶ 644.
[33] ECCC Establishment Law, ch. X, art. 33.

Case 001, the SCC recognized that numerous international sources recognize a victims' right to a remedy. The SCC noted that the right to a remedy was found within international human rights law[34] and international criminal law.[35] The Court cited specifically to Art. 75 of the ICC Statute and Art. 25 of the Statute of the Special Tribunal for Lebanon (STL).[36] The UN Basic Principles on the Right to a Remedy and Reparation ("UN Basic Principles") describe the content and structure of the right to a remedy and reparation in international law.[37] The UN Basic Principles are meant to identify mechanisms for the implementation of existing legal obligations, rather than define new obligations.[38] The UN Basic Principles promise victims equal and effective access to justice, adequate, effective and prompt reparation for harm suffered and access to relevant information concerning violations and reparation mechanisms.[39] The UN Basic Principles go on to define and outline the five central aspects of reparations packages, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[40] The ICC leaned heavily on the UN Basic Principles when establishing its own principles on reparations in *Lubanga.*

The SCC frequently drew from international sources in their decision on reparations, citing international cases ranging from decisions of the Permanent Court of International Justice[41] to decisions made by regional human rights courts, including the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR).

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[34] The Court cited to Article 8 of the Universal Declaration of Human Rights, a number of international human rights treaties, including Article 2(3) of the ICCPR, Article 6 of CERD, Article 14(1) of CAT, and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and to regional human rights conventions, including Articles 13 and 14 of the European Convention of Human Rights and Article 63(1) of the American Convention of Human Rights; Case 001 Appeal Judgment, *supra* note 17, at ¶ 647.

[35] The court cited to the ICTR's holding that the right to an effective remedy forms part of international customary law in Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, Decision on an Appropriate Remedy, ¶ 40 (Jan. 31, 2007); Case 001 Appeal Judgment, *supra* note 17, at ¶ 648.

[36] Case 001 Appeal Judgment, *supra* note 17, at ¶ 657 ("It must be noted here that the legal frameworks of the ICC and STL, both of which address the harm suffered by the victims, differ from the ECCC in that they foresee procedural mechanisms apposite to prevent the delay of the criminal case due to a potentially burdensome and time-intensive process related to reparations. The Trust Fund for Victims created within the ICC system can be tasked with the identification of victims eligible for reparations and to financially administer or implement the awards. Moreover, reparation proceedings can be instituted at a later phase, subsequent to the conviction. The STL Statute, which foresees identification of the victims during the criminal proceedings, leaves compensation to victims to be addressed by national courts or other competent bodies. Such diversion of the reparation claim is not available under the ECCC legal framework, whereupon ECCC jurisdiction had to be limited by narrowing the content of the admissible claim.").

[37] *United Nations 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,* G.A. Res. 60/147*, U.N. Doc.* A/RES/60/147 (Dec. 16, 2005) [hereinafter *UN Basic Principles*].

[38] *UN Basic Principles*, *supra* note 37, at preamble.

[39] *UN Basic Principles*, *supra* note 37, at ¶ 11.

[40] *UN Basic Principles*, *supra* note 37, at ¶ 7-9.

[41] See, e.g. Case 001 Appeal Judgment, *supra* note 17, at ¶ 645-646, citing to *Case Concerning Factory at Chorzow* (Germany v. Poland), 1928 P.C.I.J (ser. A) No. 17, at ¶ 73 (Sept. 13) (judgment on the merits regarding the claim for indemnity); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Op.), 2004 I.C.J. Reports, at ¶152-153 (July 9) (holding that Israel is under an obligation to make reparation for the damage caused to all natural or legal persons by returning the property that had been seized or, if materially impossible, by compensating the person in question for the damage suffered).

However, the SCC in Case 001 noted that the relevance of international sources was limited because "the Internal Rules delineate[d] a specific reparation regime that has been tailored to the ECCC's *sui generis* mechanism and mandate."[42] For example, the Court was careful to distinguish its reparation mandate from that of the IACHR and other regional human rights bodies, noting that they may serve as persuasive authority only. The SCC proceeded "with caution" in reference to jurisprudence from international non-criminal courts, as these bodies are focused on the breach on the duty of a respondent state, rather than an individual, to uphold human rights. As such, the regional human rights bodies differ in terms of policy and technical legal framework than the ECCC.[43] The court cautioned the same need to distinguish for administrative reparation claims programs.

b. The ICC's first major decision on reparations should serve as persuasive authority for the ECCC in later reparations decisions, particularly as the Lubanga case has important parallels to the ECCC's current Case 002.

The SCC's decision came before the ICC's first decision on reparations. The ICC has a similar framework to that of the ECCC. On March 14, 2012, the ICC Trial Chamber issued its first conviction in the *Prosecutor vs. Thomas Dyilo Lubanga,* finding Lubanga guilty of war crimes in the Democratic Republic of the Congo (DRC).[44] In its second decision in the case, the Trial Chamber sentenced Lubanga to fourteen years in prison.[45] The ICC's third decision in *Lubanga*, issued in August 2012, was the Court's first major decision on reparations.[46]

The ICC's reparations decision in *Lubanga* has important similarities with the ECCC's Case 002. As an international criminal court, the ICC – like the ECCC – does not have jurisdiction over states and cannot issue reparation orders against them. Like the ECCC's Internal Rules, the ICC's Rome Statute is relatively sparse on how reparations will be awarded, only noting that reparations—including restitution, compensation and rehabilitation—may either be awarded against the convicted person or through the Trust Fund for Victims (TFV).[47] Lubanga, like the defendants in Case 002, is indigent. The TFV, while distinct from the ECCC's Victim Support Section in important ways, is a mechanism for externally funding awards, and—like VSS—happens to be underfunded.[48] While the ECCC will dissolve upon the conclusion of proceedings, the ICC has a permanent mandate. *Lubanga* does not provide binding authority for the ECCC, but it should provide important international guidance for the ECCC in regards to reparations in Case 002.

The ICC's decision in *Lubanga* did not constitute a "reparation order." The Rome Statute does not contain much detail on how reparations are to be designed, implemented and overseen. Instead, the ICC Trial Chamber, using its Authority under Article 75(1), outlined the principles and procedures to be used in awarding victim reparations under the Rome Statute, providing guidance beyond the parameters of the Rome Statute as to how the Court

[42] Case 001 Appeal Judgment, *supra* note 17, at ¶ 641.
[43] Case 001 Appeal Judgment, *supra* note 17, at ¶ 652.
[44] Diane Marie Amann, *Prosecutor v. Lubanga,* 106 The Am. J. Int'l L. 809, 809-817 (2012), *available at* http://www.jstor.org/stable/10.5305/amerjintelaw.106.4.080. .
[45] Amann, *supra* note 44, at 809.
[46] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations (Aug. 7, 2012) [hereinafter Lubanga Decision on Reparations].
[47] Amann, *supra* note 44, at 814.
[48] *See* Section 5 of this paper for a deeper discussion of the ICC's TFV.

would issue reparations.[49] Understanding the landmark nature of the case, the Trial Chamber devoted two-thirds of the ninety-four-page decision on reparations to a description of the submissions from the defense, the prosecution, the victims' lawyers, UN agencies, and non-governmental organizations (NGOs).[50] With a unanimous ruling, the Trial Chamber found that reparations should be applied in a broad and flexible manner, and that the widest possible remedies should be approved.[51]

In *Lubanga*, the Trial Chamber recognized the right to a remedy as a "well-established and basic human right." [52] The Trial Chamber cited to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and regional human rights charters, and conventions.[53] The Court also noted that it drew from the UN Basic Principles, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and other relevant, non-binding international instruments on reparations in developing the reparations principles determined in *Lubanga.*[54] In addition, unlike the ECCC, the ICC took note of the "substantial contribution by regional human rights bodies in furthering the right of individuals to an effective remedy and to reparations." As such, rather than taking pains to distinguish itself from these bodies, the ICC noted that it took "into account the jurisprudence of the regional human rights courts and international mechanisms and practices" on reparations.[55] The ICC relied upon regional human rights courts jurisprudence to help it determine the range of direct and indirect victims to be included in reparations, as well as developing the range of possible forms of reparations, including collective awards, which go beyond those listed in the Rome Statute.[56] The ICC also had to develop new substantive and procedural rules on a number of reparations issues for which there is no precedent, particularly in regards how the reparations process is to be monitored and supervised. While reparations proceedings continued to be the responsibility of the Court, the Trial Chamber delegated much of the responsibilities for designing and implementing reparations to the TFV. Notwithstanding this delegation, the process was still to be monitored by a judicial Chamber.[57]

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[49] *Rome Statute of the International Criminal Court,* art. 75(1), U.N. Doc A/CONF.183/9 (17 July 1998) (last amended 2010) ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting") [hereinafter Rome Statute]; Amann, *supra* note 44, at 814.

[50] Amann, *supra* note 44, at 809.

[51] Lubanga Decision on Reparations, supra note 46, at ¶ 180; Dinah Shelton, *Introductory Note to the International Criminal Court: Situation in the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga Dyilo, Decision Establishing the Principles and Procedures to be Applied to Reparations*, 51 Int'l Legal Materials 971, 971-1017 (2012), *available at* http://www.jstor.org/stable/10.5305/intelegamate.51.5.0971.

[52] In coming to its decision on reparations, the ICC accepted submissions from the UN, NGOs and parties to the case. Two thirds of the opinion was devoted to their concerns; Lubanga Decision on Reparations, *supra* note 46, at ¶ 185.

[53] Lubanga Decision on Reparations, *supra* note 46, at ¶ 185.

[54] Lubanga Decision on Reparations, *supra* note 46, at ¶ 185; Christine Evans*, Reparations for Victims in International Criminal Law* 10 (Raoul Wallenberg Institute, 2011), *available at*: http://rwi.lu.se/wp-content/uploads/2012/04/Reparations-for-Victims-Evans.pdf.

[55] Lubanga Decision on Reparations, *supra* note 46, at ¶ 186.

[56] Shelton, *supra* note 51, at 971-972.

[57] Amann, *supra* note 44, at 815.

Important aspects of the *Lubanga* decision on reparations are on appeal.[58] Most relevant to this memo, the defense and victims objected to the delegation of certain judicial functions to the Trust Fund for Victims, arguing that this was in breach of the Rome Statute.[59] The defense and victims also objected to the delegation of supervision of reparations proceedings to a new Chamber, arguing this was in breach of Article 74(1) of the Rome Statute.[60] The ICC's Appeal Chamber will also consider the standard of proof determined for establishing facts relevant to a reparations award, which the defense argued were too vague to be applied by the TFV, a non-judicial organ, and did not allow the defense to respond to victim's allegations. The ICC's Appeals Chamber has not yet handed down its decision. Still, the difficulties the ICC's principles raise should be illuminating for the ECCC and inform their decision on reparations. In particular, the ECCC should take note of the ICC's flexibility with regards to when and how funding must be identified for reparations projects, as well as the ICC's opinion that judicial oversight must be provided throughout the reparations process.

c. Changes made to the ECCC's Internal Rules on reparations brought the Court's legal framework for reparations more in line with that of the ICC.

Many Civil Parties were unhappy with the limited reparations awarded in Case 001. The reaction provided impetus to the ECCC to make changes to the Internal Rules on reparations.[61] The ECCC amended the Internal Rules to open another avenue for funding Civil Party reparations claims and to strengthen the Victims Support Section (VSS). The new rules provide for two distinct avenues for reparations, and for the implementation of projects for victims' benefit outside the context of the trial. These three victim relief channels include: (i) court-ordered reparations funded by the defendant, or civil claims against the accused; (ii) court-ordered reparations funded through external donations, or "reparations initiatives," and (iii) "non-judicial measures" that may be designed and implemented by VSS before the ECCC delivers a conviction. There is some terminology confusion in the literature, with court-ordered reparations often confused with reparations projects conducted outside the context of a court, and sometimes with general developmental assistance. This paper will focus on court-ordered reparations, with primary attention devoted to reparation initiatives. Court-ordered reparations have an added importance, as they are endowed with the symbolism (and imprimatur) of law— tying assistance to broader condemnation of the crime—and set precedent. As the first international criminal court to order reparations, the precedent that the ECCC sets in terms of breadth and width of reparations projects will likely have far-reaching repercussions in the international legal sphere.

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[58] The defense also critiqued and appealed the proximate cause criteria established by the Court, which is related to the nexus requirement, as overly vague; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Defence Request for Leave to Appeal the Decision Establishing the Principles and Procedures to be Applied to Reparations, ¶ 17 (Aug. 29, 2012) [hereinafter Lubanga Reparations Appeal].

[59] Lubanga Reparations Appeal, *supra* note 51, at ¶ 10.

[60] Lubanga Reparations Appeal, *supra* note 51, at 10, 36 (Article 74(1) requires that all the judges of the Trial Chamber be present at each stage of the trial and throughout deliberations).

[61] Kirchenbauer, *supra* note 1, at 5-6; Recent Developments at the ECCC – September 2010 Update, Open Society Justice Initiative, *available at*: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/sub_listing.

IV. Legal discussion of the "effectiveness" requirement and the need for a "tangible availability of funds."

a. *In Case 001, the ECCC established an "effectiveness" requirement – breaking from international standards and practice – for reparations awards.*

In Case 001, the Supreme Court Chamber (SCC) recognized the victims' "right to obtain effective forms of reparation under internationally established standards."[62] The Court interpreted an "effective" remedy to be an award (i) that had available funds already identified, (ii) that would not require complex oversight and management beyond the ECCC's mandate, and (iii) that did not delegate responsibility to the RGC for administration or oversight. The "effectiveness" requirement established by the Court poses a significant challenge to Civil Parties in Case 002, particularly as (i) the defendants have been declared indigent, (ii) VSS is underfunded, and (iii) most reparation requests will require administration and oversight after Case 002 concludes, perhaps with RGC involvement in overseeing and enforcing the reparation awards. The effectiveness requirement established by the ECCC breaks from international standards and practice. In Case 002, the Court should align its reparation jurisprudence more closely with that of international courts, particularly that of the ICC.

The ECCC used the effectiveness requirement when determining reparations awards. The Court's use of the effectiveness requirement departs from international practice. The only case cited to support and justify the ECCC's "effectiveness" requirement was the ECHR's *B and L v. United Kingdom*.[63] The Court erred in its understanding of the case. In *B and L v. United Kingdom,* the ECHR discussed effectiveness in the context of exhaustion of domestic remedies, or the legal principle that applicants must first use remedies within their domestic legal system before having access to regional courts. The ECHR did not use "effectiveness" to justify not awarding a remedy. In fact, "effectiveness" was not even part of a damages analysis. In ECHR Convention case law, "effectiveness" refers to the analysis the Court makes as to whether remedies *already awarded by domestic courts* provide applicants with sufficient redress. If the remedies do not, the applicants may have standing to seek further redress before the ECHR. In ECHR case law, the effectiveness requirement serves to ensure that victims have a forum with which to bring claims for adequate, i.e., effective, reparation. International human rights bodies become the forum of last resort—like the ECCC will be for civil party claimants—responsible for restoring individuals to the extent possible from the damage caused by the defendant.[64] In short, the "effectiveness" requirement is used to analyze the impact of awards already issued, rather than a test to be applied by courts before granting awards.[65] If anything, the effectiveness requirement is used to expand the power of the court—either by providing standing, giving the Court power to hear the case, or by providing the Court with an obligation to think creatively in determining how it can provide reparations that will be effective. The ECCC erred in its interpretation of the requirement.

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[62] Case 001 Appeal Judgment, *supra* note 17, at ¶ 717.

[63] Case 001 Appeal Judgment, *supra* note 17, at ¶ 663 citing to *B and L v. United Kingdom*, Eur. Ct. H.R., Section Decision as to Admissibility, App. No. 36536/02, 9 (June 29, 2004); *available at* http://echr.ketse.com/doc/36536.02-en-20040629/view/.

[64] Ingrid Nifosi-Sutton, *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective,* 23 Harv. Hum. Rts. J. 69 (2010).

[65] *B and L v. United Kingdom*, *supra* note 63, at sec. A (2).

The "effectiveness" requirement was used in other contexts to expand the power of courts to provide victims with remedies, rather than to curb a court's ability to issue reparation orders. In the Corfu Channel case, the International Court of Justice (ICJ) used the principle of "effectiveness" to expand the scope of the question brought before it.[66] In addition, the ICTR used the concept of an effective remedy to depart from a strict reading of its statute. In Rwamakuba (Decision on Appropriate Remedy), the ICTR awarded compensation for the Registrar's violations of the accused's right to legal assistance, despite the fact that the ICTR's statute did not expressly confer on the Tribunal the right to award compensation. The Tribunal cited its obligation to act consistently with international human rights norms to justify the departure from the strict interpretation of the ICTR statute. The Tribunal specifically cited to ICCPR Article 2(3)(a), which guarantees the right to an effective remedy. The Tribunal held the ICCPR as persuasive authority.[67] According to the Tribunal, issuing an effective remedy was "essential for the carrying out of its judicial functions, including the fair and proper administration of justice."[68] Again, the need to provide an effective remedy was not used as it was at the ECCC—during the damages calculation to justify *not* awarding remedies which would be difficult to enforce—but rather to expand the Court's ability to provide adequate reparations it did not necessarily have explicit statutory approval to award.[69]

Two factors the ECCC included within its effectiveness requirement break from international practice, specifically the requirement for an availability of funds and the inability for the Court to issue reparation orders that require management and oversight after the case wraps up.

b. "Availability of funds" should not be a determinative factor when deciding whether or not to issue collective reparation awards.

Under the "effectiveness requirement" developed in Case 001, the SCC noted there must be a "tangible availability of funds" for binding reparation orders to be issued.[70] The ECCC issued the statement in relation to Duch's indigence, refusing to grant a number of reparations requests because Duch did not have the financial capacity to pay for them. The SCC was particularly concerned with the enforceability of its reparation orders. The Court wrote that it was of "primary importance to limit the remedy afforded to such awards that can realistically be implemented."**[71]** According to the SCC, any awards issued against Duch could "in all probability" never be enforced, i.e. were "de facto fictitious." The SCC found the

[66] Specifically, the ICJ had been asked to determine whether Albania had a duty to pay compensation to the UK. The ICJ noted that it would also be required to set the amount, stating, "If… the Court should limit itself to saying that there is a duty to pay compensation without deciding what amount of compensation is due, the dispute would not be finally decided. An important part of it would remain unsettled." The ICJ did not use the principle of effectiveness to limit its award of damages, but to expand its jurisdiction, order further proceedings, and calculate damages. Corfu Channel Case (UK v. Alb.), Merits, 1949 I.C.J. REP. 4, 23–24, 26 (Apr. 9).

[67] Prosecutor v. André Rwamakuba, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy ¶ 25 (Sep. 13, 2007) [hereinafter Rwamakuba Appeal].

[68] Prosecutor v. André Rwamakuba, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy ¶ 47 (Jan. 31, 2007) [hereinafter Rwamakuba].

[69] Jessica Liang, *The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application*, 15 New Crim. L. Rev.: An Int'l and Interdisc. J. 375, 375-413 (2012).

[70] Case 001 Appeal Judgment, *supra* note 17, ¶ 667.

[71] Case 001 Appeal Judgment, *supra* note 17, ¶ 668.

possibility that Duch would acquire income in the future, or that third parties would step in to provide funding for reparations, too remote a possibility to form the basis for issuing binding reparation orders.[72] Issuing such an order "would belie the objective of *effective reparation* and would be confusing and frustrating for the victims" (emphasis added). The Court did not provide a number of reparations requests because they did not meet the availability of funds requirement.[73]

The ECCC will likely interpret externally funded reparations initiatives to also require a "tangible availability of funds" in Case 002. The SCC appeared to define this requirement in a Case 001 footnote, writing, "Even though the Internal Rules have been recently amended so as to expand the reparation measures available to the ECCC [including external funding for reparations], they still confirm the same rationale that takes into consideration the availability of funds."[74] This coincides with Rule 23 of the amended rules, which states that reparation initiatives must "have secured sufficient external funding."[75] In Case 002, the ECCC will have to define "sufficient funding" as written in Rule 23, and decide what funding threshold—if any—VSS must reach before issuing a binding order.

But certain questions still remain. Must projects be fully funded before the Court recognizes them as reparations? If already fully funded, what impact does court recognition of the reparation request have? Also how will the Court ensure that reparations projects are determined by victims' needs, as opposed to donor interests and agendas? While the reparations mandate of the ECCC is *sui generis*, the Court's availability of funds requirement departs from Cambodian law, international practice, and traditional damages frameworks. In Case 002, the ECCC should more closely align its reparations calculations with international precedent.

The ECCC's interpretation of the impact of Duch's indigence broke from Cambodian domestic law. Under the 2007 Cambodian Code of Criminal Procedure, Duch's indigence would not bar the Court from granting compensation.[76] The Code "presupposes that even where the civil defendant is indigent, he may receive income in the future or third parties may pay in his/her stead."[77] The SCC held, however, that Duch's indigence presented an insurmountable barrier to awarding reparations that required financing.

The SCC's availability of funds requirement broke from international practice. Damages at the ECHR are assessed on an "equitable basis." Factors that are decisive in the award are the extent of the harm to the victim, the seriousness of the violation, the conduct of the state and the applicant and the accuracy of the victim's claim. The financial capacity of the State—i.e., the defendant—is *not* a factor.[78] Similarly, at the IACHR, indemnification is based upon the principles of equity.[79] In applying the principles of equity to compensate or calculate reparations for victims, the Court evaluates a number of different factors, including

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[72] Case 001 Appeal Judgment, *supra* note 17, ¶ 668.
[73] Case 001 Appeal Judgment, *supra* note 17, ¶ 667.
[74] Case 001 Appeal Judgment, *supra* note 17, ¶ 668, footnote 1343.
[75] Internal Rules (Rev. 8), Rule 23 *quinquies*(3)(a)-(b).
[76] Studzinsky, *supra* note 25, at 3; Case 001 Appeal Judgment, *supra* note 17, ¶ 666. In addition, under Article 29 of the ECCC Establishment Law, property of convicted persons is to be returned to the State if the Court does eventually order confiscation of assets or property. According to Sperfeldt, Article 29 indicates that the State is meant to and will necessarily play a role in implementing or administering any Court-ordered reparations. Sperfeldt, *supra* note 16, at 5.
[77] Case 001 Appeal Judgment, *supra* note 17, ¶ 666.
[78] Ingrid Nifosi-Sutton, *supra* note 64, at 54-55.
[79] Bridget Mayeux & Justin Mirabal, Collective and Moral Reparations in the Inter-American Court of Human Rights 2 (Prof. Ariel Dulitzky, ed., University of Texas School of Law Human Rights Clinic 2009).

the economic and social position of the beneficiaries and the extent of harm suffered by victims. The financial capacity of the State—the defendant—is not taken into account as a consideration.[80] The practice of the ECHR and IACHR is equitable, and does not confuse the applicant's legal right to a certain amount of reparation with the defendant's ability to pay that amount. In other words, the two courts drew a distinction between a legal right and the ability to enforce that right.

For example, in *Rwamakuba*, the ICTR Appeals Chamber issued an award for compensation despite the fact that the Registrar had no budget to provide compensation. The ICTR held that "budgetary matters cannot interfere with the Tribunal's authority to award financial compensation as an effective remedy for a human rights violation."[81] The Trial Chamber, with which the Appeals Chamber expressly agreed with and cited to, stated, "Questions relating to the mechanisms for giving effect to an order for compensation, such as budgetary matters or the appropriate body for lodging a claim, constitute extra-legal considerations which cannot constitute bars to the provision of financial compensation when it appears to be the effective remedy for a human rights violation."[82] To the ICTR, an import distinction must be drawn between considerations related to the execution of an order, including budgetary concerns, and considerations related to whether an applicant has a legal right to an award. The ICTR concluded these two sets of considerations must necessarily be kept distinct.

In Rwamakuba, the Tribunal drew a parallel with domestic legal systems, where lack of budgetary resources cannot be used to justify refusal to award compensation.[83] In traditional remedies frameworks, budgetary considerations are not a factor used by courts in determining damages. Damages are assessed based on the plaintiff's harm. Limiting the de jure right of the plaintiff to the financial means of the defendant—or the financial resources of an institutional entity such as VSS or the TFV—would be unfair, unjust, and inequitable. While it is true that some defendants are "judgment-proof," this does not mean the Court does not issue awards against them, only that these awards cannot be enforced. A court's competence is in determining what the just award should be. It is then the State's obligation, if possible, to enforce these awards.

Of course, reparations for war crimes will necessarily depart from traditional remedies frameworks in some way. Reparations for war crimes will often involve a large number of victims, incredible amounts of damage and sums of money far beyond the defendant's ability to pay. In order to address this challenge, the ICC established the Trust Fund for Victims to complement a defendant's assets with other resources to fund reparation schemes. Under Article 75(2) of the Rome Statute, the ICC can also order for reparations to be paid through the TFV, rather than by the convicted person.[84] However, the ICC had to be careful in issuing awards *against* the TFV, as the TFV, an independent entity, is not legally liable for Lubanga's crimes. While it is unfair to limit the victims' legal right to reparation to the amount of funds available to either the defendant or the TFV, the ICC cannot order a legally binding reparation award upon the TFV. In the principles on reparation laid out in the *Lubanga* decision, the ICC tried to balance between these two concerns, respecting the victims' right to extensive reparations for serious harm, and acknowledging that the TFV would be working with limited resources. The approach the ICC eventually took was more flexible than that taken by the ECCC in Case 001, and more equitable.

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[80] Id; Case of Velásquez-Rodríguez v. Honduras, Series C No. 4., Compensatory Damages ¶ 40 – 52 (July 21, 1989).
[81] Rwamakuba Appeal, *supra* note 67, at ¶ 30.
[82] Rwamakuba, *supra* note 68, at ¶ 60.
[83] Rwamakuba Appeal, *supra* note 67, at ¶ 30.
[84] *Rome Statute*, art. 75(2); Human Rights Now, *Policy Arguments*, *supra* note 2, at 4.

In the principles on reparations laid out by the ICC in *Lubanga,* the ICC wrote that, "Reparations…are to be applied in a broad and flexible manner, allowing the Chamber to approve the widest possible remedies for the violations of the rights of the victims and the means of implementation."[85] The ICC's Internal Rules do not contain any obligation to consider budgetary limitations or available funds when determining an award.[86] On the contrary, the ICC's Internal Rules note that reparations should be assessed taking into account "the scope and extent of any damage, loss or injury" to victims.[87] The ICC may appoint experts to help determine "the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations."[88] In *Lubanga,* the ICC stated that, "The awards ought to be proportionate to the harm, injury, loss and damage as established by the Court. The measures will depend on the particular context of this case and circumstances of the victims, and they should accord with the overarching objectives of reparations."[89] The ICC does not include the availability of funds of either the TFV or the defendant in the initial calculation of award amounts, but instead focuses almost singularly on the extent of the victims' harm.

However, the ICC may take availability of funds into account when deciding what type of reparation to award, i.e., individual or collective reparations. Under the Internal Rules, the ICC is able to award collective reparations "where it deems it appropriate."[90] Further, the Court "may order that an award for reparations against a convicted person be made through the Trust Fund *where the number of the victims and the scope, forms and modalities of reparation*s makes a collective award more appropriate."[91] (emphasis added) In other words, where the ICC deems there are insufficient funds for individual awards, the ICC is able to issue collective awards in order to reach more victims.[92]

The ICC's attention to funding in regards to individual versus collective awards is far more limited than the effectiveness requirement developed by the ECCC in Case 001. In *Lubanga,* when laying out the principles on the different types of reparations that may be awarded by the ICC, including restitution, compensation, and rehabilitation, the Court *only* mentioned availability of funds in regards compensation. The Court noted that three factors should be considered when determining if compensation should be awarded, including if "the available funds mean this result is feasible."[93] The ICC's addition of the funding consideration in assessing whether or not to award individual compensation, and only when assessing whether or not to award compensation, implies that availability of funds is *not* a

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[85] Lubanga Decision on Reparations, *supra* note 46, at ¶ 180.

[86] Rules of Procedure and Evidence of the International Criminal Court, Doc No. ICC-PIDS-LT-02-002/13_Eng, *second edition published in 2013* [hereinafter ICC Rules of Procedure and Evidence], Rule 97 and Rule 98.

[87] ICC Rules of Procedure and Evidence, *supra* note 86, Rule 97 (1); International Federation for Human Rights (FIDH), *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* 11 (4 May 2010), *available at* http://www.fidh.org/Victims-Rights-Before-the.

[88] ICC Rules of Procedure and Evidence, *supra* note 86, Rule 97 (2).

[89] Lubanga Decision on Reparations, *supra* note 46, at ¶ 243.

[90] ICC Rules of Procedure and Evidence, *supra* note 86, Rule 97 (1).

[91] ICC Rules of Procedure and Evidence, *supra* note 86, Rule 98 (3).

[92] International Federation for Human Rights (FIDH), *supra* note 87, at 16-17.

[93] The ICC cited to paragraph 20 of the *UN Basic Principles* to support the Court's description of compensation and the relevant factors to be considered. The *UN Basic Principles*, however, do **not** mention the availability of funds as a factor to be considered when deciding whether or not to award compensation, or when deciding how much compensation should be awarded; *See, e.g.*, Lubanga Decision on Reparations, *supra* note 46, at ¶ 226; *UN Basic Principles*, *supra* note 37, at ¶ 20.

consideration when determining the content of collective reparations.[94] As the ECCC already awards collective reparations, rather than individual compensation, taking the availability of funding into account when deciding what reparations to award falls out of line with ICC practice.

In *Lubanga*, the Court endorsed a collective approach to reparations due to the limited resources available.[95] Lubanga—like Duch—is indigent. The ICC, like the ECCC, saw Lubanga's indigence as a barrier to issuing reparations awards directly against him. The ICC decided that Lubanga could not contribute financially to reparations.[96] Numerous parties who had filed briefs in the case disagreed with the Court. The International Center for Transitional Justice noted that issuing an award against Lubanga would have symbolic impact, even though the award would likely be unenforceable.[97] The prosecution argued that the Chamber had the authority to order Lubanga to pay compensation, as there is no bar on issuing reparations orders against an indigent individual. [98] The prosecution noted that issuing an award might frustratingly raise victims' expectations, but that the Court should keep Lubanga's financial affairs under review in case they could enforce the award at a later date.[99] However, the ICC decided that awards in the *Lubanga* case would draw upon Trust Fund resources, rather than potential future earnings of the defendant.

While the ICC was careful about its wording regarding the binding nature of reparations awards to be implemented through the Trust Fund, the ICC was not as restrictive as the ECCC in its interpretation of the amount of reparations to be awarded through the TFV. The ICC stated that the Trust Fund "*shall* complement the funding of a reparations award, albeit within the limitations of its available resources and without prejudice to its assistance mandate."[100] (emphasis added) In other words, the Trust Fund had to provide funding to court-ordered reparations, but the Court did not set an amount that the Trust Fund must raise. Like VSS, the Trust Fund can do assistance projects outside the context of court-ordered reparations. However, in *Lubanga,* the ICC noted that the Trust Fund's primary responsibility is to ensure that court-ordered reparations have sufficient funding.[101] The ICC is able "to draw on the logistical and financial resources of the Trust Fund in implementing the award."[102] The ICC went on to note that "when the Court orders reparations against an indigent convicted person, the Court may draw upon 'other resources' that the TFV has made reasonable efforts to set aside." In other words, the Court may issue binding orders upon the Trust Fund to use their resources to implement reparations as laid out in an eventual judgment, but cannot punish the TFV for failing to raise any particular amount of funding.[103]

Unlike the ECCC, the ICC did not limit reparation awards to money already available to the TFV. Instead, the Court and Trust Fund envisioned further fundraising to happen as the last stage in the reparations process—after the principles had been issued, consultations with victims were complete, and the Court had approved the TFV's eventual reparations plan.[104] The TFV noted that it would start fundraising "once the Chamber ha[d] decided on the parameters of a reparations award" and the Chamber had approved the method of

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[94] *See generally* Lubanga Decision on Reparations, *supra* note 46, at ¶ 222-236.
[95] Lubanga Decision on Reparations, *supra* note 46, at ¶ 274.
[96] Lubanga Decision on Reparations, *supra* note 46, at ¶ 269.
[97] Lubanga Decision on Reparations, *supra* note 46, at ¶ 135.
[98] Lubanga Decision on Reparations, *supra* note 46, at ¶ 131.
[99] Lubanga Decision on Reparations, *supra* note 46, at ¶ 131.
[100] Lubanga Decision on Reparations, *supra* note 46, at ¶ 273.
[101] Lubanga Decision on Reparations, *supra* note 46, at ¶ 272.
[102] Lubanga Decision on Reparations, *supra* note 46, at ¶ 270.
[103] Lubanga Decision on Reparations, *supra* note 46, at ¶ 271.
[104] *See e.g.*, Lubanga Decision on Reparations, *supra* note 46, at ¶ 147-149, 281-282.

implementation. The TFV noted that the Assembly of State Parties, which oversees the TFV, would be in the position to contribute to the award.[105] The Trust Fund conceived of its contribution as the "starting capital" of a reparations award, with further contributions forming the meat of the award.[106] Further, the Registry, one of the four organs of the Court, noted that if funds were not available from the convicted person or the TFV to fund the award at the time of the order, the TFV would have the ability to raise the necessary amount of money to implement the award. The Registry believed the Court could "play a role in notifying reparations proceedings to States… inviting them to contribute to reparations through their voluntary contributions."[107] Following the Registry's suggestion, in the principles laid out in *Lubanga*, the ICC called upon States Parties, international organizations, individuals, corporations and others to contribute to the TFV to help ensure the delivery of reparations.[108]

While it may seem the differences between the ECCC's and ICC's availability of funds requirements are small, the two courts different approaches have an enormous impact on the ability for reparations to address victims' needs, rather than donors' desires. During ECCC Case 002/001, the LCLs and VSS have been working to develop reparations plans and solicit donations. When presenting the final reparations claims, both the LCLs and VSS feel they must have a specific guarantee of funding in order for the ECCC to approve the project.[109] Due to the effectiveness requirement and the need for a "tangible availability of funds," the LCLs and VSS are probably correct in assuming the ECCC will only approve projects that have sufficient funding. While early fundraising is beneficial, the ECCC's approach has the danger of rubber-stamping projects chosen by donors—i.e., the projects that get funding in advance of the Court's decision—rather than preferencing victims' priorities in ordering reparation projects. While it is true funding is limited and the reparations eventually implemented will be partially dependent on how many voluntary donations are received, this does not mean the ECCC should sanction *by law* the prioritization of donor desires over victims' needs.

The ordering of the reparations process at the ICC is much more conducive to respecting victims' rights. For example, under the ICC's process, victims' needs are assessed, the TFV formulates an implementation plan, and the Court approves this plan. Fundraising happens throughout the process, but the Court's approval does not depend on which aspects of the plan currently have funding. If funds are not available at the time of the Court's approval, the TFV goes out and solicits more donations. The ICC's approach has the benefit of making reparations dependent on a verdict based upon victims' needs, rather than the verdict being dependent on reparations determined by donor support. In addition, the ICC's approval of reparations projects will likely help in fundraising, as donors are more likely to support a project that is declared an official, court-ordered reparation.

Under the current framework, the ECCC adds little value to the reparations process. The ECCC will not order, create, or enforce any reparations projects that have not already been determined and approved by donors. Before a verdict, the ECCC provides a convenient forum for bringing together victims and international actors, allowing them to collaborate in the design and implementation of reparations projects.[110] By the time of the verdict, however,

[105] Lubanga Decision on Reparations, *supra* note 46, at ¶ 147.
[106] Lubanga Decision on Reparations, *supra* note 46, at ¶ 148.
[107] Lubanga Decision on Reparations, *supra* note 46, at ¶ 149.
[108] Lubanga Decision on Reparations, *supra* note 46, at ¶ 297.
[109] Conversation with Christopher Dearing, DC-Cam Legal Advisor, July 9, 2013; *See also* Stuart White, *Little time for reparations at KRT*, The Phnom Penh Post, Aug. 7, 2013, *available at* http://www.phnompenhpost.com/national/little-time-reparations-krt.
[110] Conversation with Christopher Dearing, DC-Cam Legal Advisor, July 9, 2013.

projects have been determined, and the Court's approval of these projects adds little to the content or scope of reparation projects. If the ECCC were to align itself more closely with the ICC in Case 002, it could add significant value to the reparations process. Instead of simply approving projects already determined by donors, the Court could assess, approve, and endorse a number of priority projects that do not yet have funding. This approval would likely help victims raise funds for implementation of these projects, and have the symbolic added value of acknowledging victims' needs, despite financial limitations.

The Supreme Court Chamber laid down some promising, albeit limited, guidance in this regard in Case 001. In some instances in Case 001, the Supreme Court Chamber would *endorse* reparations claims as "appropriate forms of reparation for the harm suffered" even if the Court could not issue an enforceable order.[111] For example, the ECCC recognized "the provision of medical and psychological treatment for direct and indirect victims, naming public buildings after victims and installation of informative plaques, holding commemorative ceremonies, and erection of memorials such as pagodas, pagoda fences and monuments" as appropriate forms of reparation. The Court encouraged national authorities, the international community and other donors to provide financial and other support to implement these reparations.[112] When reparations requests were not "specific" enough, the Court was more reticent to endorse the reparation claim.[113] In doing so, the SCC noted that "acknowledgement of a proposed award as an appropriate reparation measure has a potential of being *per se* a form of satisfaction and redress, possibly capable of attracting attention, efforts, and resources toward its actual realisation."[114] At another point, the Court noted that "official and solemn acknowledgement by the ECCC of the adequacy of the present reparation request constitutes in and of itself a form of reparation irrespective of its future implementation."[115] While the SCC's endorsements were not without meaning, they were limited in the support they offered to victims.

In Case 002, the Court has the opportunity to provide more robust protection to victims by *ordering*, rather than suggesting, that certain priority projects be included in the list of to-be-implemented reparations. In order to do so, the Court will have to construct a management mechanism to oversee and administer awards. The Court could order VSS or some other management body, like the ICC's group of experts, to solicit funding and resolve any administrative issues in order to implement these projects. Like *Lubanga,* a court order would more strongly incentivize an expert management body to go out and raise the funds, and would require that this management body continue functioning until all ordered reparations had been delivered. If reparations are only suggested, a management body would have the opportunity to dissolve before meaningful reparations were awarded. In addition, a specific court order would hopefully make it easier to attract donors for specific projects. The implementation of reparations awards will come with a slew of challenges—how to prioritize projects, how to ensure reparations are being delivered equitably, how to ensure that the management body is functioning efficiently, and keeping victims' interests in mind. The most significant challenge, however, is the ECCC's concern about *ordering* a non-liable third party to implement currently non-funded reparations. This concern will be the most difficult issue to resolve before ordering awards or constructing a management mechanism. The issue, however, is not impossible and should not be used by the ECCC to justify a failure to award meaningful, victim-oriented reparations.

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[111] Case 001 Appeal Judgment, *supra* note 17, at ¶ 717.
[112] Case 001 Appeal Judgment, *supra* note 17, at ¶ 717.
[113] Human Rights Now, *Policy Arguments*, *supra* note 2, at 4-5.
[114] Case 001 Appeal Judgment, *supra* note 17, at ¶ 661.
[115] Case 001 Appeal Judgment, *supra* note 17, at ¶ 691.

V. Legal and policy discussion: The ECCC's specificity requirement and possible management mechanisms to oversee reparations after the resolution of Case 002.

a. The ECCC should lower its specificity requirement for reparations projects and establish a management committee to oversee the process.

The ECCC has a "specificity" requirement for reparations awards. At the Trial Chamber stage in Case 001, a number of reparation requests were rejected for lack of "specificity." The SCC provided further enumeration of the "specificity" requirement in the Case 001 Appeals Decision. Again, the Court's key concern was the ability to ensure the remedy was "effective." The specifics the Court seemed particularly concerned about in Case 001 were the imposition of obligations on third parties[116] and the need for sophisticated or long-term administration of reparation awards. For example, the Court did not grant medical and psychological assistance as a reparation because of the sophisticated administrative structure that would be needed.[117] As another example, the Civil Parties requested that memorials be built. The Court noted that building a memorial necessarily encroaches on public or private land ownership, the administration of that land and requires a building permit.[118] The Court felt issues of land ownership and permits had to be resolved before reparations orders could be granted.[119] The SCC was reticent to award reparations that would require complex management and oversight after the ECCC ceased functioning.

The specificity requirement was tied closely with the Court's concerns about "effectiveness." The SCC held that a reparation award must include a "reasonable level of detail,"[120] and "must be specific enough to permit enforcement without requiring subsequent administrative decision and administrative discretion for its implementation."[121] However, the Court did note that "lack of specificity [was] not a fatal flaw in a reparation request," as long as "the request demonstrates that the award sought would be otherwise appropriate and enforceable against [the defendant]."[122] In Case 001, the ECCC held that the Court could help Civil Parties ascertain specifics of an award through the use of its own powers.[123] The Court did not specify how this process would work, beyond noting that under the Cambodian Code of Criminal Procedure courts may take evidence on their own initiative.[124] In Case 001, the Court never tried to ascertain further specifics of an award.

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[116] Case 001 Appeal Judgment, *supra* note 17, at ¶ 684.
[117] Case 001 Appeal Judgment, *supra* note 17, at ¶ 703.
[118] Case 001 Appeal Judgment, *supra* note 17, at ¶ 689.
[119] Case 001 Appeal Judgment, *supra* note 17, at ¶ 689.
[120] Case 001 Appeal Judgment, *supra* note 17, at ¶ 687.
[121] Case 001 Appeal Judgment, *supra* note 17, at ¶ 688.
[122] Case 001 Appeal Judgment, *supra* note 17, at ¶ 685.
[123] Case 001 Appeal Judgment, *supra* note 17, at ¶ 685 (citing to ECCC Internal Rule 87(4) and the Cambodian Code of Civil Procedure 2006, art. 124(2) (regarding the court's power to take evidence on its own initiative)).
[124] The Court interpreted its powers to help victims' ascertain specifics of awards as more limited than Cambodian courts. In Cambodian criminal cases, courts are empowered to resort to equity in determining civil awards. The scope of Cambodian courts' reparative powers are relatively broad, and are not curbed to the reparations and specifics of claims put forward by Civil Parties. In Case 001, the SCC noted that, "The role of the adjudicating criminal court in assisting one party to the proceedings must, however, be limited and does not translate into the court's 'ultimate task of designing a just and equitable remedy for the injured party.'" [Case 001 Appeal Judgment, *supra* note 17, at ¶ 685] The SCC further wrote that "evidentiary proceedings [at the ECCC] on reparations remain claimant-driven." Case 001 Appeal Judgment, *supra* note 17, at ¶ 689. The Supreme Court Chamber did not try and ascertain further details for any of the reparation requests on appeal in Case 001.

The SCC did not endorse reparation requests that were not sufficiently specific. For example, the SCC did not endorse the Civil Parties request for free annual visits to memorial sites "even as a non-binding recommendation" because of its lack of specificity.[125] The Court also refused to endorse the Civil Parties' reparation request for medical and psychological assistance, as it was "not mature to be singled out for the Chamber's individual endorsement."[126] The Court highlighted that the request lacked information on estimated cost and the number and identity of beneficiaries. One of the memorial requests was singled out as a good example for having the required amount of specificity. The Court lauded the proposal's "high level of specificity," its "notable endorsement by all civil party applicants in Case 001," and the fact that the victim's association had already designed their own fundraising initiative. The reparation request included "core descriptive elements" of the memorial, its desired location within S-21, its impact on UNESCO-recognized sites, and technical specifications on management of the site and cost. The plan noted that the memorial should not disturb the UNESCO-recognized site, and that the memorial would be adjusted if necessary to comply with UNESCO's directions.[127] Despite that "the construction of a memorial…is a complex process that needs the constructive participation and coordination of several entities and administrative bodies," the Court endorsed it as an appropriate reparation and encouraged national and international bodies to help facilitate any measures needed to give the reparation effect.[128]

An onerous specificity requirement departs from international standards. The specificity requirement puts the burden on victims to calculate financial costs and develop detailed designs of reparation requests. Civil Parties are not well placed to do this, and most—if not all—lack the experience necessary to design reparation schemes that satisfy complex legal requirements and require complicated administrative, financial and design background.[129] The ECCC is much better placed to ascertain the costs of reparations projects, the potential legal implication on third-party rights and questions regarding what body, if any, is best suited to oversee, manage, and administer projects after the ECCC stops functioning.[130]

The ECCC's specificity requirement is a departure from the practice of the ICC and regional human rights courts.[131] The ICC is given significant powers to help ascertain reparations awards for victims. According to Article 75(1) of the Rome Statute, the ICC "may…upon request…determine the scope and extent of any damage, loss, and injury to, or in respect of, victims…" In addition, Article 97(2) of the ICC Rules of Procedure and Evidence provides that "at the request of victims…the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations…" In *Lubanga,* the ICC did not concern itself with the "specificity" of reparations awards. The ICC envisioned the actual design of reparations projects to happen after the trial by the Trust Fund for Victims (TFV). The Trial Chamber laid out general principles to guide the design of reparations projects, but it did not define specifics—either in terms of content or budget. Most regional human rights courts have far less onerous

[125] Case 001 Appeal Judgment, *supra* note 17, at ¶ 693-694.
[126] Case 001 Appeal Judgment, *supra* note 17, at ¶ 704.
[127] Case 001 Appeal Judgment, *supra* note 17, at ¶ 690.
[128] Case 001 Appeal Judgment, *supra* note 17, at ¶ 692.
[129] Berkeley School of Law International Human Rights Clinic, Access to Justice Asia & The Center for Justice and Accountability, *Victims Right to Remedy: Awarding Meaningful Reparations at the ECCC* 6-8 (2011); Human Rights Now, *Policy Arguments*, *supra* note 2, at 7.
[130] Human Rights Now, *Policy Arguments*, *supra* note 2, at 5.
[131] Human Rights Now, *Policy Arguments*, *supra* note 2, at 5-6.

specificity requirements for reparations requests than the ECCC. The IACHR, for example, has ultimate responsibility for designing a just and equitable remedy for victims. The IACHR can create reparations it deems appropriate, and is not bound by the requests put forward by victims.[132]

In Case 002, the amended Internal Rules make specificity a requirement for reparation claims, but expand the assistance provided to victims in determining specifics. Under Rule 23 *quinquies* (2), the consolidated group of Civil Parties must make a single submission for collective and moral reparations. The submission must include a description of the award sought, a reasoned argument as to how the reparation addresses the harm suffered, and "the single, specific mode of implementation sought," i.e., whether or not the reparation is to be borne by the convicted person or designed and funded in cooperation with VSS.[133] VSS has now been empowered to help victims develop sufficiently specific awards and has worked with NGOs, governmental organizations, the LCLs, and donors to develop ready-to-implement projects to be presented to the Court.

While the changes made to the Internal Rules are helpful in terms of assisting victims to design projects, the rationale the Court used to justify the specificity requirement remains a challenge to victims seeking reparations that are appropriately overseen and managed after Case 002 wraps up. In Case 001, the Supreme Court Chamber justified its specificity requirement by turning again to the question of enforceability. The Court noted that the IACHR is able to apply a "significantly lower standard of specificity" because it can pass some burden onto the State to execute and administer the reparations order.[134] The ECCC, however, does not have jurisdiction over the Cambodian State and "lacks monitoring powers." [135] ECCC orders must be "executed within the court system, i.e., by the bailiff (*huissier de justice*)."[136] The Court interpreted "enforceable awards" as those specific enough to be executed without further legal oversight from the ECCC and that were not so complex as to significantly delay the resolution of the trial. However, the Court's justifications are founded on a myth—that a sufficiently specific, and funded, reparations project can then be implemented smoothly, with no bumps in the road and therefore no need for oversight. However, regardless of how specific an award is when it is presented to the Court, some level of oversight will be needed—legal issues do not stop with project design—and this oversight will likely continue to be needed throughout implementation.

For example, court-ordered reparations have a "nexus requirement." In Case 001, the ECCC Supreme Court Chamber held that reparations must aim to remove the consequences of the harm victims suffered. This nexus requirement, or "a causal link between the crime and the form of reparations sought," has been established in jurisprudence by the ECHR and IACHR.[137] At the ECCC, admissibility of the civil parties depends on a first nexus requirement, i.e., "the presence of an injury suffered as a direct consequence of the crime." [138] Once admitted, a civil party is eligible to seek reparation. However, the form of the reparation must satisfy a second nexus requirement: The reparation must have a "relation with the harm" by "being aimed at, and suitable to, removing the consequences of the criminal wrongdoing, as well as restoring, to the extent possible, the prior lawful status." [139] For example, the SCC

[132] Case 001 Appeal Judgment, *supra* note 17, at ¶ 685.
[133] Internal Rules (Rev. 8), Rule 23 *quinquies* (2).
[134] Case 001 Appeal Judgment, *supra* note 17, at ¶ 688.
[135] Case 001 Appeal Judgment, *supra* note 17, at ¶ 688.
[136] Case 001 Appeal Judgment, *supra* note 17, at ¶ 688, *citing to* The Cambodian Code of Civil Procedure 2006, art. 336 (Execution organs).
[137] Case 001 Appeal Judgment, *supra* note 17, at ¶ 699.
[138] Case 001 Appeal Judgment, *supra* note 17, at ¶ 699.
[139] Case 001 Appeal Judgment, *supra* note 17, at ¶ 699.

recognized that physical and psychological treatment for victims satisfied the second nexus requirement, as "the injury established on the part of the victims is the damage to their physical and/or psychological health."[140] According to the ICC, court-ordered reparations require a but/for relationship between the crime and the harm. In other words, Lubanga's crimes must have been the proximate cause of the harm for which reparations are sought.[141] The nexus requirement has been modified and retained in the ECCC's most recent revision of the Internal Rules.[142]

It will be difficult for organizations to apply these legal standards while implementing reparations projects—in identifying appropriate beneficiaries, in shaping the details of assistance, and in ensuring any changes made to the project don't threaten the legal nexus between the harm suffered and the assistance provided. Many of these questions could be resolved at the design stage. A well-written contract could stipulate the scope of a project, the specifics of implementation and develop detailed guidelines as to how to identify appropriate beneficiaries and determine eligibility for reparations assistance. Even with a detailed contract, however, organizations might still struggle when assessing whether ongoing work that has been adjusted due to unforeseen circumstances maintains a close enough nexus between harm suffered and service offered, or whether new beneficiaries admitted to a project fit within the ECCC's legal standards for eligible victims. The most difficult challenge, however, will be ensuring that the contracts that define adequate reparations are implemented as written. In short, enforcement, as the ECCC foresaw, will remain a significant challenge. As such, some sort of judicial oversight may be necessary to ensure reparations remain the binding legal entitlement they are meant to be. Rather than taking a defeatist approach, and noting that it cannot offer meaningful reparations because it cannot adequately oversee them, the ECCC should look to the ICC and other bodies with experience in providing reparations for an example as to how the Court can delegate some key tasks to a management body to administer reparation awards—either VSS or a separately constituted body—and, perhaps, remain involved in the process by exercising oversight of the process, either through the current judicial chambers or a separately constituted, but still legal, entity. Possibilities for oversight and management mechanisms are discussed below.

b. The current reparations process, including identifying, designing, fundraising, and implementing projects, involves a range of actors—including VSS and the LCLs—that have different visions for how reparations should be overseen following the resolution of Case 002.

The legal framework for the reparations process under the ECCC requires VSS and the LCLs to work together. ECCC Internal Rule 23 *quinquies* (3)(a)-(b) governs the two avenues for court-ordered reparations. The first is a civil claim against the accused, which is enforced by the ordinary Cambodian courts, not the ECCC. This was the sole method of reparations available in Case 001. The second avenue for reparations is "reparation initiatives."[143] Under Rule 23 *quinquies*, the Court can recognize specific projects as reparations if they "have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding."[144] Like the ICC's TFV, under the amended rules VSS was directed to identify and design court-ordered reparations with the

[140] Case 001 Appeal Judgment, *supra* note 17, at ¶ 699.
[141] Amann, *supra* note 44, at 814.
[142] Internal Rules (Rev. 8), Rule 23 *quinquies* (2); Berkeley School of Law, *supra* note 129, at 1.
[143] Evans, *A Day on Limitations and Reparations, supra* note 6.
[144] Internal Rules (Rev. 8), Rule 23*quinquies* (3)(a)-(b).

LCLs,[145] NGOs, and governmental organizations.[146] The LCLs may then request the Trial Chamber to recognize that specific reparations measures are appropriate for implementation with external funding.[147]

The Internal Rules can (and have been) interpreted to require VSS's involvement in the identification and design stages of reparation projects; however the LCLs and implementing partners also have the freedom to break away from VSS during the implementation, monitoring, and oversight stages.[148] In other words, the Internal Rules establish authorities and duties for VSS and the LCLs.[149] VSS has the authority to identify, design and implement reparations projects, but has the duty to identify, design and implement the project in coordination with the LCLs.[150] The LCLs have a duty to collaborate with VSS during the identification and design phases of the reparations, but have no express duty to collaborate with VSS during implementation.[151] The Internal Rules may have remained silent on this aspect of implementation because it did not foresee LCL involvement in implementing projects. The LCLs are, after all, attorneys with no duty to implement projects and no budget with which to do so. In Case 002, however, the LCLs have reached out to third parties to act as their agents of implementation, using the loophole within the Internal Rules to widen the scope of their role throughout the reparations process.[152]

Like the ECCC's Internal Rules on reparations, Article 75 of the Rome Statute links the award of reparations to the defendant's conviction. Significant delays in the delivery of reparation awards—for both the ECCC and the ICC—have been the result. These delays make it difficult to solicit and secure funding (sometimes years in advance of implementation) and make it harder to offer concrete benefits to victims while the ECCC is ongoing and—in the case of Cambodia—elderly victims and perpetrators remain alive. Under the new Internal Rules, VSS has been empowered to develop and implement "non-judicial programs and measures addressing the broader interests of victims."[153] Non-judicial measures (NJMs) may be developed and implemented with governmental and non-governmental organizations.[154] NJMs are meant to occur outside of formalized court proceedings, and may be implemented before the judgment is delivered.[155] NJMs may encompass a broader range of services than court-ordered reparations, as well as provide support to a more inclusive

[145] Internal Rules (Rev. 8), Rule 12 *bis* (2).
[146] Internal Rules (Rev. 8), Rule 12 *bis* (2).
[147] Internal Rules (Rev. 8), Rule 23 (3)(b); Rule 23 *quinquies.*
[148] *See, e.g.*, Agreement between DC-Cam and the Civil Party Lead Co-Lawyers Section, *Letter of Engagement on DC-Cam's Genocide Education Project as a Reparation*, May 23, 2013.
[149] Rule 12 *bis* (2), which governs VSS, foresees a role of VSS in the implementation of court-ordered reparations. Internal Rules (Rev. 8), Rule 12 *bis* (2) ("the Victims Support Section shall, in co-operation with the Lead Co-Lawyers, and, where appropriate, in liaison with governmental and non-governmental organisations, endeavour to *identify, design and later implement* projects envisaged by Rule 23*quinquies* (3)(b)) (emphasis added). Rule 23 *quinquies,* however, which governs the LCLs, only notes that reparations must be designed **or** identified with VSS and does not mention an implementing role for the Section. Internal Rules (Rev. 8), Rule 23 *quinquies* (3)(b) ("recognise 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").
[150] Internal Rules (Rev. 8), Rule 12 *bis* (2).
[151] Internal Rules (Rev. 8), Rule 23 *quinquies* (3)(b).
[152] *See, e.g.*, Agreement between DC-Cam and the Civil Party Lead Co-Lawyers Section, *Letter of Engagement on DC-Cam's Genocide Education Project as a Reparation*, May 23, 2013.
[153] Internal Rules (Rev. 8), Rule 12 *bis* (3).
[154] Internal Rules (Rev. 8), Rule 12 *bis* (3).
[155] Studzinsky, *supra* note 25, at 3.

cross-section of victims than those who are admitted as Civil Parties.[156] NJMs do not come with the strict procedural constraints and evidentiary barriers that Civil Parties face when making reparations claims before a court.[157] VSS has the sole authority to develop and implement NJMs. It has no duty to coordinate with the LCLs for NJMs.[158] The LCLs might be able to help VSS identify and design NJM projects, but this would be outside the framework of the Internal Rules, as the Internal Rules are silent on even the possibility of an LCL role in the context of NJMs.[159] VSS foresees that projects that are not ordered as reparations might be able to shift to NJMs so as to still remain an ECCC-recognized project.[160]

There are different approaches in terms of the management and oversight structure for reparations after the ECCC wraps up. One approach can be for the ECCC to function in a design role, while NGOs take the lead on implementation after reparations are awarded. In this respect, donors can function in a monitoring and oversight role—as they do for all projects—and there is no need to create an artificial mechanism, particularly one through VSS, to manage and oversee the reparations projects. The LCLs however, believe that some sort of legal oversight is required during the reparations process, and would prefer that a legal entity be set-up to oversee and resolve any legal issues that arise throughout implementation. VSS seems to favor a semi-state institution to house a trust fund, contract out projects to NGOs and ensure cohesiveness and complementarity of various projects by managing them all under one umbrella entity, i.e., a Victim's Foundation. On this note, VSS and LCL could be said to have similar, albeit, separate visions because while VSS seems more concerned with ensuring adequate funding and providing deliverables to beneficiaries, LCL appears to be focused on ensuring legal oversight and the fulfillment of specific court requirements.

All involved actors, however, are concerned with funding. There are a number of ways to approach funding. First, as is advocated by VSS, a trust fund could be established. However, trust funds, like the TFV, tend to be under-funded.[161] In general, specific reparations programs are more likely to get funded.[162] If a trust fund is established under the auspices of VSS, however, the ECCC might re-interpret its mandate to include oversight of the reparations process, as the ICC did in *Lubanga.* Second, the Court could suggest that Cambodia follow the lead of other post-conflict countries and create a governmental or civil society steering committee to oversee reparations, as well as to manage contributions to reparation programs. These two functions—soliciting funding and oversight to ensure legality—could be kept distinct. Both options – a trust fund under court auspices and a steering committee, with or without a trust fund, will likely have difficulties with fundraising. Most successful reparations programs have had state funding dedicated to them, as international donations tend to quickly wane.

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[156] *Seventh Plenary Session of the ECCC Concludes*, Press Release (ECCC, Phnom Penh, Cambodia), Feb. 9, 2010, http://www.eccc.gov.kh/fr/node/10444.
[157] Amann, *supra* note 44, at 816.
[158] Internal Rules (Rev. 8), Rule 12 *bis* (3).
[159] Internal Rules (Rev. 8), Rule 12 *bis* (3) ("the Victims Support Section shall be entrusted with the development and implementation of non-judicial programs and measures addressing the broader interests of victims. Such programs may, where appropriate, be developed and implemented in collaboration with governmental and non-governmental organisations external to the ECCC").
[160] Conversation with Visal Tan, VSS Program Manager, and Thomas Truemper, VSS Advisor, Victim Support Section, July 16, 2013.
[161] Ruben Carranza, *Practical, Feasible and Meaningful: How the Khmer Rouge Tribunal Can Fulfill Its Reparations Mandate* 15-16 (International Center for Transitional Justice 2009).
[162] Carranza, *supra* note 161, at 15-17, footnote 60.

c. *Option 1: The Court could model VSS after the TFV by establishing a trust fund and increasing the ECCC's oversight of VSS.*

Establishing a trust fund for victims, perhaps similar to the ICC's TFV, has been suggested at numerous points in ECCC proceedings. A trust fund was requested as early as Case 001.[163] For example, in Case 001, the SCC gave some recognition (albeit in a footnote) to the possibility that an ECCC trust fund might help resolve some of the Court's concerns about specificity and enforceability. In regards the reparation request for medical assistance to victims, the Court noted that, "a workable solution may be the establishment of an externally-subsidised trust fund, the administrative structure of which would be tasked with the implementation of the measures sought."[164] Establishing a trust fund was beyond the Court's reparative powers in Case 001 (as it would not be borne by the defendant). However, due to the changes made to the Internal Rules ahead of Case 002, reparations can now be externally funded.[165] As such, the SCC encouraged Civil Parties in Case 002 (in the same footnote) "to seek [the establishment of a trust fund as a reparation] through the amended system."[166] While the LCLs included a reparation request for a trust fund in Case 002, they have subsequently dropped the request, getting indication from the Court that the ECCC would not establish a fund as reparation. VSS has begun to take steps to establish a Victims' Foundation as a non-judicial measure, but it is unlikely the Foundation will get off the ground in advance of the decision in Case 002. While proposals for donations have been submitted, VSS has received less than 2% of the projected budget needed to fund the Foundation.[167] Both a court-ordered reparation trust fund or an NJM Victims' Foundation, however, would provide the Court more room to order meaningful reparations in Case 002. The ICC's TFV is the most logical place to turn for best practice and precedent setting in regards trust funds tied to international criminal courts.

The ICC's Trust Fund for Victims is a unique entity. Under Article 79 of the Rome Statute, "A Trust Fund shall be established…for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." VSS has important similarities with the TFV, but is not yet a parallel institution. If the ECCC would like VSS to follow in the TFV's footsteps, important changes will have to be made. Primarily, the ECCC would have to create a trust fund under VSS's auspices and establish Court oversight mechanisms to ensure the Section was living up to its mandate. In order to better understand the similarities (and distance remaining) between VSS and the TFV, the following section will provide a brief overview of the TFV's mandate, work and management structure.

The Trust Fund for Victims has two mandates.[168] First, the TFV has a reparations mandate through which it implements court ordered reparations.[169] Reparations can be funded

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[163] Studzinsky, *supra* note 25, at 3.
[164] Case 001 Appeal Judgment, *supra* note 17, at ¶ 704, footnote 1430.
[165] Case 001 Appeal Judgment, *supra* note 17, at ¶ 704, footnote 1430.
[166] Case 001 Appeal Judgment, *supra* note 17, at ¶ 704, footnote 1430.
[167] PowerPoint, *Update Meeting on Funding Status to ECCC Reparation Program 2013-2017*, Visal Tan, VSS Program Manager, June 27, 2013, at 3.
[168] About the International Criminal Court: Reparations for Victims, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/reparation/Pages/reparation%20for%20victims.aspx (last visited June 13, 2013).
[169] Under Article 21 of the Rome Statute, the ICC Rules of Procedure and Evidence also form part of the body of applicable law determining reparations at the ICC. The Rules of Procedure and Evidence further elaborate on the TFV's two mandates and provide further guidance on the procedure to be followed when issuing reparations awards. ICC Rules of Procedure and Evidence, *supra* note 86, Rule 98.

through damages paid by the defendant or through voluntary contributions from donors. The external funding system for the TFV is quite similar to that of VSS. However, unlike VSS, the TFV has strong limitations on donors' ability to earmark funds for specific projects. Governments may not earmark donations at all, and other donors may only earmark funds for up to a third of the contribution and when certain other conditions are met.[170] Strong limitations on earmarking ensure that the TFV, rather than donors, maintains primary authority for designing and shaping reparation programs. Second, the TFV has a general assistance mandate[171] through which it provides physical and psychosocial rehabilitation and/or material support to victims of crimes within the jurisdiction of the ICC.[172] Similar to VSS's NJMs, general assistance projects can only be funded by voluntary contributions.[173] In addition, and again similar to NJMs, general assistance projects can be implemented before the conclusion of a trial and are not limited to victims participating before the ICC. General assistance projects help set up the operational frame for later court-ordered reparations, as well as help inform the ICC of victim's needs. Currently, all of the TFV's 34 approved projects fall under the general assistance mandate.

The TFV works with NGOs, community groups, experts, governments, and UN agencies. The TFV uses a sub-contracting system in implementing reparations projects. In other words, the TFV provides grants to organizations that already have an operational presence on the ground or experience in addressing the specific harm the TFV hopes to address. Before providing grants, the TFV carries out field assessments to ensure that projects (a) directly address the harm caused by conflicts where the Court has jurisdiction, and (b) target the most vulnerable and marginalized victims. The TFV accepts proposals from organizations with expertise in relevant areas and considers them when providing grants. Victims are given a role in designing, implementing and managing reparation and assistance awards. If the ICC decides to order collective reparations, the Court may order that reparation be made through the Trust Fund and the reparation may then also be paid to an inter-governmental, international or national organization.[174]

While VSS is an ECCC entity, the TFV is managed separately from the ICC. The Assembly of State Parties has overall authority of the TFV.[175] The TFV also has a five-member board of directors, which is elected by the Assembly of States Parties for three-year terms,[176] and a Secretariat.[177] In 2005, the ASP established regulations for the Trust Fund.[178] These regulations determine the management and oversight of the TFV, the receipt of funds, the activities and projects of the TFV and the TFV's reporting requirements. In addition, the

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[170] International Federation for Human Rights (FIDH), *supra* note 87, at 25.

[171] ICC Rules of Procedure and Evidence, *supra* note 86, Rule 98(5) ("other resources of the Trust Fund may be used for the benefits of victims").

[172] The Trust Fund for Victims, http://www.trustfundforvictims.org/ (last visited July 5, 2013).

[173] The Trust Fund for Victims, *supra* note 171.

[174] About the International Criminal Court: Reparations for Victims, *supra* note 191.

[175] Evans, *supra* note 54, at 12 – 15; International Federation for Human Rights (FIDH), *supra* note 87, at 21.

[176] *See generally* Resolution ICC-ASP/1/Res.6, *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of families of such victims*, 3rd plen. mtng., ICC-ASP/1/Res.6 (Sept. 9, 2002), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-06-ENG.pdf

[177] *See generally* Resolution ICC-ASP/3/Res.7, *Establishment of the Secretariat of the Trust Fund for Victims*, 6th plen. mtng., ICC-ASP/3/Res.6 (Sept. 10, 2004), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-07-ENG.pdf.

[178] *See generally* Resolution ICC-ASP/4/Res.3, *ICC Regulations of the Trust Fund for Victims*, 4th plen. mtng., ICC-ASP/4/Res.3 (Dec. 3, 2005), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP4-Res-03-ENG.pdf.

Regulations provide a detailed legal regime concerning both the reparations mandate and the general assistance mandate. The Regulations could serve as a model for reforming VSS to bring it more in line with procedures at the ICC, and to make it more efficient in fulfilling its reparations mandate.

In *Lubanga,* the ICC envisioned the actual design of reparations projects to happen after the trial by the Trust Fund for Victims (TFV). Within the *Lubanga* principles, the ICC recommended that a multidisciplinary team of experts, including government representatives and reparation specialists, should be formed to assess the harm suffered by victims and to identify the most appropriate forms of reparations in consultation with victims.[179] The experts were also tasked with helping fundraise for the eventual implementation of reparations.[180] The Court delegated the task of selecting the experts and overseeing their work to the TFV.[181] The Court also endorsed the five-step reparation implementation plan developed by the TFV, which included: a) identifying the localities to be involved in the reparations process; b) consulting with the identified localities; c) assessing the extent of the harm; d) hosting public debates with victims to explain the reparations principles and procedures; and e) collecting reparations proposals and presenting them to the Trial Chamber for approval.[182]

If VSS were modeled after the TFV, all projects would get channeled through the Section. VSS would oversee a subcontracting system like that of the TFV, where VSS is ultimately responsible for managing money, accepting project proposals and then overseeing implementation through subcontracted partners. The benefit of this system is that there—ideally—is a clear system of oversight and all projects are funneled through one management mechanism, ensuring a certain cohesiveness to the overall reparations process. In addition, as a section of the ECCC, VSS is ultimately responsible to the Judicial Chambers. There is even some precedent for the Court to direct orders against some of its own units.[183] VSS has experience with the ECCC, the legal regime and the requirements for reparations, and the ECCC has the authority to order its various chambers to complete tasks.

It is tempting to advocate for a trust fund, modeled after the ICC and housed under VSS as the most appropriate solution. However, the Cambodian context is quite different than that of the ICC, and not only because the ECCC has a limited mandate. The ICC delegated a number of tasks to the TFV because the ICC believed the TFV had already proven its competence to oversee the reparations process by successfully fulfilling its assistance mandate. The Court repeatedly referred to the TFV's experience in implementing projects in DRC, and noted that this experience made the TFV well placed to lead the reparations process.[184] VSS, on the other hand, has not yet fully begun implementing NJMs. There have been some concerns about politicization and lack of progress at VSS. In practice, the LCLs have taken a lead role in regards to reparation design in Case 002. VSS has begun implementing some NJMs, and recently received authority to begin implementing reparations in advance of a court-order. However, progress has been slow. Due to concerns about VSS's ability to effectively implement projects and a lack of desire to work under VSS's

[179] Lubanga Decision on Reparations, *supra* note 46, at ¶ 264, 281.
[180] Lubanga Decision on Reparations, *supra* note 46, at ¶ 263.
[181] Lubanga Decision on Reparations, *supra* note 46, at ¶ 265.
[182] Lubanga Decision on Reparations, *supra* note 46, at ¶ 281-282, 283.
[183] The SCC ordered PAS and VSS to grant the victims' request to produce and disseminate audio and video material about Case 001, and to publish the statements of apology made by Duch. The SCC noted that much of the request was already included in the mandates of the PAS and VSS, but "further direct[ed]" the two sections to undertake appropriate additional outreach activities with "due consideration to the present claims" from the Civil Parties; Case 001 Appeal Judgment, *supra* note 17, at ¶ 705-709.
[184] Lubanga Decision on Reparations, *supra* note 46, at ¶ 285.

framework, a number of NGOs have carefully designed contracts with VSS to ensure that if reparations are not awarded the project does not shift to an NJM, and simply becomes an independent project under the NGO's authority. One repeated concern is that the Internal Rules require that the LCLs are composed of one international and one national representative.[185] The international and national LCL lawyers are required to act together in fulfilling their duties.[186] VSS, however, has no requirement for an attorney to work within the section, or a requirement that the section contain international staff.[187] In addition, VSS remains underfunded.[188] For some, it makes more sense for the Court to try and establish a new entity rather than try to create VSS into the ICC's TFV, something critics do not think it can become.

However, it is possible that VSS could fulfill a similar role as the TFV if sufficient court-oversight is established. Even in the ICC's case, with a TFV with significant experience implementing projects in the communities affected by the crimes at the Court, the ICC felt judicial oversight was important. Like the ECCC Statute, the ICC Statute is silent as to what sort of body is meant to monitor and supervise reparations proceedings. In *Lubanga,* the ICC decided that the Judiciary was responsible for supervising the reparations process.[189] The TFV was tasked with principally dealing with reparations, while a differently composed Chamber would monitor and oversee the TFV's work, as well as resolve any contested issues that arose throughout the TFV's work.[190] The Chamber noted that it would not issue any further orders or instructions to the TFV on the implementation of reparations to be funded by voluntary contributions. The Court envisioned that this process would be overseen and managed by the Board of Directors at the TFV.[191]

The ICC felt that the reparations process was intrinsic to the Court's mandate. The ICC stated in *Lubanga,* the "reparations proceedings are an integral part of the overall trial process."[192] As such, the ICC was clear that judicial oversight of the process was necessary to ensure that reparations remained aligned with the ICC's orders and mandate throughout the process. In addition, despite the promise of some judicial oversight, the delegation of certain judicial functions to the TFV, as well as supervision of reparations by a newly constituted Chamber, is currently on appeal at the ICC.[193] Both the victims and defense objected, stating that in order to successfully fulfill its mandate and deliver appropriate reparations, the same judicial Chamber had to oversee the reparations process. While the ECCC, as a limited, ad hoc tribunal, has a different mandate than the ICC, and will eventually have to cease functioning, the reparations mandate of the Court is one of its key functions.

There are no obvious legal bars to the ECCC continuing to monitor the reparations process—although there are numerous practical concerns, not least of which being the massive amount of funds required to keep the Court functioning. Under Article 47 of the ECCC Establishment Law, the ECCC will "automatically dissolve following the definitive conclusion" of proceedings. It is unclear how "definitive conclusion" is defined.[194] It does not seem too far a stretch to ask the Court to interpret definitive conclusion as the end of reparation implementation, in particular oversight of reparation initiatives. The Internal Rules

[185] Internal Rules (Rev. 8), Rule 12 *ter* (4).
[186] Internal Rules (Rev. 8), Rule 12 *ter* (4).
[187] *See e.g.,* Internal Rules (Rev. 8), Rule 12 *bis*.
[188] Carranza, *supra* note 161, at 15.
[189] Lubanga Decision on Reparations, *supra* note 46, at ¶ 260.
[190] Lubanga Decision on Reparations, *supra* note 46, at ¶ 261, 262, 286.
[191] Lubanga Decision on Reparations, *supra* note 46, at ¶ 287.
[192] Lubanga Decision on Reparations, *supra* note 46, at ¶ 260.
[193] Lubanga Reparations Appeal, *supra* note 51, at ¶ 35.
[194] ECCC Establishment Law, art. 47.

do not provide any guidance on (or barriers to) how the ECCC could play a role in monitoring reparations.[195] As the ICC stated, "Reparations proceedings are an integral part of the overall trial process."[196] The ICC felt that monitoring and supervising reparations "fall within the responsibilities and functions of the Judiciary."[197]

The Internal Rules provide guidelines on how all the ECCC's orders will be enforced, *except* for externally-funded reparation initiatives. Enforcement of reparations borne by the accused "shall be done by appropriate national authorities in accordance with Cambodian law."[198] In Case 001, the SCC reiterated that "domestic courts are bound to give effect to the ECCC reparation orders against convicted persons, similar to any other reparation order issued by domestic courts."[199] Reparation initiatives, however, fall outside of this framework and do not result in enforceable awards. The Internal Rules are silent as to how Civil Parties could go about claiming their awards after the ECCC wraps up, and offer no guidance on ways to ensure Civil Parties receive the benefits of court-ordered reparation initiatives.[200] One way to ensure that reparations are meaningful and effective is to provide for Court oversight—again, either through the currently constituted Chambers or a separate chamber convened for this purpose— throughout the reparation implementation process. Even the most specific awards will raise issues while being implemented.

d. Option 2: Based on precedent set by TRCs, the Court could suggest the creation of a steering committee, including governmental actors, NGOs, and civil society coalitions, for managing reparations projects.

If the ECCC is uncomfortable establishing a legal entity to oversee the implementation of reparations, the Court should suggest the creation of a steering committee, either located within the government or managed by a civil society coalition, to oversee reparation projects. A number of Truth and Reconciliation Commissions (TRCs) have managed reparations through other institutional bodies after the commission ceases functioning. In a number of cases, management bodies included steering committees composed of government agencies, victims and/or NGO coalitions. These steering committees exercise oversight and manage and administer reparation projects.[201] Some governments, like Sierra Leone, have also tried to establish trust funds to finance and oversee long-term reparations projects. However, reparation trust funds tend to be underfunded.[202] Without domestic government support, including financial support, for reparation projects and funds, reparation programs often remain severely underfunded. If the RGC follows other post-conflict countries' leads and creates a governmental institution to oversee reparations, as well as to manage governmental contributions to reparation programs, a steering committee might be a more sustainable alternative to a court-managed trust fund.

Peru, Sierra Leone, Morocco and Guatemala all chose slightly different options for managing reparations programs. Their experiences are informative on the strengths and weaknesses of various institutional frames. Morocco offers a best practice example of involving actors from across government sectors and different parts of civil society. Guatemala, on the other hand, shows the difficulties of coordinating between civil society

[195] Cambodian Human Rights Action Committee, *supra* note 15, at 5.
[196] Lubanga Decision on Reparations, *supra* note 46, at ¶ 260.
[197] Lubanga Decision on Reparations, *supra* note 46, at ¶ 260.
[198] Internal Rules (Rev. 8), Rule 113(1).
[199] Case 001 Appeal Judgment, *supra* note 17, at ¶ 665.
[200] Evans, *A Day on Limitations and Reparations, supra* note 6.
[201] Berkeley School of Law, *supra* note 129, at 8; Carranza, *supra* note 161, at 5.
[202] Carranza, *supra* note 161, at 15-17, footnote 60.

actors. Each of the four countries, however, created state institutions to oversee, manage and help implement reparations programs. In addition, the four countries benefitted from legislation passed to enable reparations programs and general government support—if not always paired with financial support—for reparations programs.

Guatemala's case reminds of the various voices and interests present within "civil society" and the need for some sort of oversight and management structure in order to handle and adjudicate conflicts when they arise amongst the different parties involved in implementing reparations. Guatemala initially established a National Reparations Commission similar to that established in Peru. The Commission included members of the state and civil society. However, civil society representatives on the Commission, including human rights groups and indigenous groups, subsequently came into conflict with one another over a range of issues. Now, government representatives solely staff the Commission.[203] Peru, Morocco, and Sierra Leone had more success in bringing together different actors in one, consolidated reparations program.

Peru established a TRC, the Comision de la Verdad y Reconciliacion, or CVR, to look into the massive human rights violations committed during Peru's twenty-year internal armed conflict.[204] In 2003, at the conclusion of its work, the CVR recommended a comprehensive reparations plan.[205] In 2005, the Peruvian government passed many of the CVR's reparation recommendations into law.[206] Further regulations followed in 2006, which included more detailed descriptions of the reparation program.[207] The government placed a state institution, the Comisión Multisectorial de Alto Nivel (CMAN), in charge of designing, implementing and supervising reparations policies across government sectors.[208] CMAN has 10 government representatives from relevant agencies and four civil society representatives, including two from victims' organizations.[209] CMAN recommends collective reparations policies to the president of Peru and is in charge of supervising government policy and actions on reparations. [210]

CMAN has had mixed success.[211] For the first two years, CMAN's impact was limited as it had limited funding, was unable to coordinate effectively between government agencies and NGOs, and had difficulty collaborating with local governments.[212] CMAN has adopted a participatory framework with local communities to develop reparations projects further, but has done a poor job at distinguishing reparations from development projects, and has done a poor job at communicating with local communities, both in terms of explaining how projects are chosen and prioritized and in offering technical assistance to communities.[213] CMAN has also been continuously plagued with a budget too small to implement reparations fully, as well.[214]

The Sierra Leone TRC was set up in 2000. In the TRC's final report issued in 2005, the

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[203] Ruth Rubio-Marin, Claudia Paz y Paz Bailey & Julie Guillerot, *Indigenous Peoples and Reparations Claims: Tentative Steps in Peru and Guatemala* 3 (ICTJ Research Brief:, June 2009).
[204] Cristian Correa, *Reparations in Peru: From Recommendations to Implementation* 1 (ICTJ 2013).
[205] Correa, *supra* note 202, at 1.
[206] Correa, *supra* note 202, at 1.
[207] Symposium, *The Rabat Report: Concept and Challenges of Collective Reparations*, ICTJ 29-32 (Feb. 12-14, 2009) [hereinafter The Rabat Report].
[208] The Rabat Report, *supra* note 205, at 29 – 32.
[209] The Rabat Report, *supra* note 205, at 54-57.
[210] Rafael Barrantes Segura*, Reparations and Displacement in Peru* 12 (ICTJ & Brookings Institute 2012).
[211] Segura*, supra* note 208, at 12.
[212] Correa, *supra* note 202, at 5.
[213] Segura*, supra* note 208, at 12; Correa, *supra* note 202, at 13.
[214] Segura*, supra* note 208, at 12.

TRC recommended that reparations be awarded to victims.[215] Almost two years after the TRC's recommendations, the Sierra Leonean government designated the National Commission for Social Action (NaCSA), a governmental organization, as the lead agency to implement the recommended reparations measures.[216] However, the reparations program did not get off the ground quickly. In 2007, the UN Peace Building Fund (UNPBF) provided a 3 million USD grant to Sierra Leone in order to move the stalled reparations process forward. The UNPBF project was primarily meant to help with capacity building within NaCSA.[217] Under the program, NaSCA established a Reparations Directorate, a National Steering Committee, the Special Trust Fund for War Victims, and a five year strategy for implementing reparations projects.[218]

NaCSA has done a relatively good job at involving civil society in the reparations program. Due to a condition imposed by the UNPBF before offering funding, IOM has been heavily involved in monitoring and oversight of NaSCA's reparation program.[219] The National Steering Committee is co-chaired by NaCSA and IOM and includes numerous governmental representatives, two representatives each from civil society and victims' groups, the chairman of the Trust Fund (to be discussed later) and a representative from the Sierra Leone Association of Journalists. [220] In addition, in 2008, to ensure better engagement with stakeholders, NaCSA established outreach structures across the country. These structures took the form of reparations stakeholder committees and comprised representatives from local councils, traditional leaders, civil society, religious groups, victims' organizations, and other partners. Finally, NaSCA also contracted with certain NGOs to implement reparations projects.[221] However, one of the key components of Sierra Leone's reparations program is the Sierra Leone Trust Fund for War Victims. There are no NGO representatives on the Trust Fund's Board of Directors.

Morocco offers a best practice example in terms of bringing together governmental and civil society actors. In Morocco, in 2004, King Mohammed VI established the Equity and Reconciliation Commission (IER). In 2005, the IER submitted its report and recommendations. As the IER was empowered by its statute to provide reparations, the IER issued financial compensation to 9,779 victims, and recommended other individual measures, including medical and psychological rehabilitation. The IER also sought to issue collective reparations, and organized a national forum on reparations including over 200 organizations, both governmental and non-governmental actors, and 50 national and international experts to help it design the reparations program.

During the first year of implementation, the reparations program was run jointly by the Advisory Council on Human Rights (CCDH), a government institution, and the Fondation Caisse de Dépôt et de Gestion (FCDG), a non-profit. CCDH was responsible for policy-making, while FCDG was responsible for project management. CCDH itself serves as a model in terms of bringing different parties together, as the Council includes governmental authorities, members of civil society including religious leaders, lawyers and doctors, and

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[215] The Rabat Report, *supra* note 205, at 32-36.

[216] National Commission for Social Action – Mission Statement, http://www.nacsa.gov.sl/mission.html (last visited Aug. 5, 2013).

[217] Mohamad Suma & Cristián Correa, *Report and Proposals for the Implementation of Reparations in Sierra Leone* 1 (ICTJ 2009).

[218] Suma, *supra* note 215, at 2.

[219] The Rabat Report, *supra* note 205, at 32-36.

[220] UNPBF, *Support to the Implementation of the Serra Leone Reparations Programme as part of the Recommendations of the Truth and Reconciliation Commission* 5 (Dec. 7, 2010), *available at* mdtf.undp.org/document/download/8202; The Rabat Report, *supra* note 205, at 32-36.

[221] The Rabat Report, *supra* note 205, at 32-36.

members from the NGO community including leaders in the human rights field.[222] Morocco's current reparations program includes a National Steering Committee, a Central Management Unit and local coordination bodies. The National Steering Committee has representatives from CCDH, FCDG, government ministries, donors and the local coordination bodies.[223] The Steering Committee is in charge of oversight, ensuring the program matches the recommendations of the IER, and attracting international financial support.[224] The Central Management Unit, hosted by FCDG, is responsible for management of the project.[225] Finally, the Coordination committees include local authorities and local NGOs and are in charge of coordinating relations between localities and the central government, tracking projects occurring in their locality and ensuring projects are not being duplicated.[226] Projects are either carried out by government agencies or through local NGOs (which submit proposals for consideration). The oversight and management structure of the Moroccan reparations program is complex and has made coordination among the myriad of different actors difficult.[227] However, it involves all the major stakeholders, gives a voice to actors at the local level and helps capacity build across government ministries and NGOs through an exchange of experience.[228]

Cambodia could model its own steering committee off the experience of these countries. Morocco likely provides the best example. For example, Cambodia could create its own National Steering Committee, in charge of oversight of reparations projects. As Cambodian reparations are uniquely legal—tied to a court order—the Cambodian steering committee would have to include legal experts, perhaps even former ECCC judges, to act as experts and to monitor reparation implementation for alignment with the requirements set out in the ECCC's judgments. While the ECCC judges would not be serving as justices of a court, and would thus not be able to offer traditionally binding legal opinions within the committee, they would serve as an important monitoring mechanism. In addition, as implementing partners would likely be bidding for projects—there tend to be more NGOs willing to implement than dollars able to be funded—the committee could use alignment with the ECCC's requirements as a measure for determining whether or not to continue partnership with certain NGOs. Competition among civil society would be a strong incentive for implementing partners to take the opinions of the legal experts on the committee seriously and to abide by them.

A separate management unit, like Morocco's Central Management Unit, and perhaps housed by a body related to VSS, could oversee administration of projects, and work to identify further funds to finance projects. Dividing these two tasks—soliciting funds and overseeing the implementation of projects—would also help solve the problem of issuing binding orders against non-liable third parties. Issuing binding orders against non-liable third parties was a major concern of the Court in Case 001, and a particularly thorny legal issue—how could the court place mandatory obligations on donors, not liable for any crime, who were voluntarily contributing funds to reparations? Separating funding from administration would help resolve this issue. Donor funding would be provided to the overall reparations apparatus—perhaps through a trust fund, maybe even earmarked for certain projects. Once

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[222] Presentation, *The Advisory Council on Human Rights (CCDH) and its role in emigration*, *available at* http://www.carim.org/public/polsoctexts/PO3MOR1040_822_EN.pdf.

[223] Kingdom of Morocco National Human Rights Council, Steering Committee, http://www.ccdh.org.ma/spip.php?article1998 (last visited August 5, 2013).

[224] The Rabat Report, *supra* note 205, at 54-57.

[225] The Rabat Report, *supra* note 205, at 54-57.

[226] The Rabat Report, *supra* note 205, at 54-57.

[227] The Rabat Report, *supra* note 205, at 54-57.

[228] The Rabat Report, *supra* note 205, at 54-57.

provided to the reparations program, however, the Management Unit would be in charge of identifying partners to implement projects, and the Steering Committee would be in charge of ensuring that project design and later implementation was in line with court-ordered reparation requirements. The Committee, signing new contracts with implementing partners, could make alignment with the Court's reparation orders a part of the contract, tying grants for projects to compliance. Implementing partners, unlike donors, would have to consent to these obligations as a part of the contract allowing them to receive funding.

Management of reparations programs is complex; effective fundraising is crucial. Different countries have taken different approaches. Most effective programs have been financed in large part from the state, although Morocco provides an example of when international funding served as a crucial catalyst to establishing an effective reparations program. According to ICTJ's Ruben Carranza, reparation trust funds are "good for guaranteeing one time payments, but not long or mid-term support like in health care and education."[229] Funding strategies must match reparation aims, and trust funds have not proven the most sustainable funding systems. Contributions from donors and/or the private sector have often been less than expected. For example, the fund in Sierra Leone has received only small contributions, and the reparations program is struggling because of the lack.[230]

Despite the establishment of a trust fund in Sierra Leone, NaCSA has faced serious difficulties with funding, in large part because of a lack of commitment from the Sierra Leonean government to provide financial resources to the program. The Trust Fund had been provided for in a 1999 peace agreement, in the Act establishing the TRC in 2000 and recommended by the TRC's final report in 2005. However, it wasn't until 2009 that the government of Sierra Leone actually established the Special Trust Fund for War Victims. [231] NaSCA was in charge of developing the mandate, structure and operational frame for the Fund. Currently, the Trust Fund has a seven-member Board of Trustees, including a member of Parliament, a traditional leader, 2 religious leaders, a reparations adviser, and members representing the ministries of health and education.[232]

The Trust Fund remains dramatically underfunded. In 2011, only 400,000 USD had been received from the government, along with earmarked UNIFEM funding for victims of sexual violence.[233] The funds could not meet the needs of the 32,000 registered victims of the conflict.[234] Actors in Sierra Leone have criticized the government for the lack of funding, stating that the government's failure to provide the seed donation to the Trust Fund, as well as other needed financial support to reparations may have served as a disincentive to other international organizations to provide support.[235] To date, no donor, except for UNIFEM, has contributed to the overall reparation program.[236] NaCSA has not had enough funding to

[229] ICTJ Program Report: Reparative Justice, May 13, 2013, http://ictj.org/news/ictj-program-report-reparative-justice.
[230] ICTJ Program Report: Reparative Justice, May 13, 2013, http://ictj.org/news/ictj-program-report-reparative-justice.
[231] Joseph A.K. Sesay, *The Reparations Programme: What Hopes For the Victims?*, Centre for Accountability and the Rule of Law, Oct. 3, 2011, http://www.carl-sl.org/home/reports/512-the-reparations-programme-what-hopes-for-the-victims; Suma, *supra* note 215, at 12.
[232] Suma, *supra* note 215, at 12.
[233] UNPBF, *supra* note 218, at 7.
[234] Sesay, *supra* note 229.
[235] For example, the government of Sierra Leone committed to match the UNPBF capacity building grant with funds for administration and overhead expenses. However, while the grant was supposed to give the government the space needed to raise money through revenues and private donations, the government was unable to secure sufficient funding to continue the project in 2009 and 2010 without external support; Sesay, *supra* note 240; The Rabat Report, *supra* note 205, at 32–36.
[236] UNPBF, *supra* note 218, at 16.

implement the planned reparations packages.[237] In numerous contexts, it has been shown that national governments financial support for reparations programs can be crucial in ensuring the program's success and convincing international donors to contribute.[238] There is little precedent of international donors funding reparations programs.[239]

In Morocco, support from the international community provided a catalyst in the implementation of reparations. The European Commission (EC), provided a grant of about 1.8 million USD, which spurred the reparation process forward. Morocco enjoys a special relationship with the EC, however. It is unlikely that such large scale bilateral support will be present in other contexts.[240] The Moroccan government and state institutions also responded to the EC's funding by actively beginning to participate in funding the program.[241] Morocco has not established a trust fund, and most of the programs' finances come from the state.

According to ICTJ, the most reliable source for funding reparations programs is the national budget. Argentina and Chile, often touted as best practice examples in offering comprehensive reparation programs, invested significant state resources into reparations programs. Chile, for example, has invested around 3.2 billion USD in reparations projects. The example is of limited relevance to countries in the global South, however, which may not be economically strong enough to divert funds to reparations. For example, as shown above, Sierra Leone relied on the 3 million USD grant from UNPBF to get the reparations program off the ground. Nepal and Timor-Leste were similarly reliant on large grants from the World Bank.[242]

Cambodia will likely also need significant donor support to get a reparations program off the ground. Cambodia can still be regarded as a low-income society that struggles with many pressing development issues, and it will be difficult to convince the RGC to divert limited resources to reparations rather than development projects. Some developing countries, however, have used their low-income society status to receive loan forgiveness in order to fund reparations.[243] However, as seen from the example of Morocco and Sierra Leone, the programs long-term success will still depend on buy-in, ownership, and financial support from the Cambodian government.

VI. Conclusion

Reparations are a key part of the ECCC's mandate and mission. If the Court fails to provide meaningful reparations to victims, it will have failed to live up to one of its most promising aspects— the first real internationalized criminal court to allow for victim participation and, ideally, inclusion of victims' right to a remedy as one of the central aspects of that court's work. In order to provide meaningful reparations, the ECCC will have to lower the availability of funds and specificity requirements it created in Case 001, which depart from international practice. One way, perhaps the best way, to respond to the Court's concerns about issuing effective awards and the bar on imposing legal obligations on non-liable third parties (i.e., donors), the ECCC could construct a mechanism to oversee reparations projects to ensure compliance with court-ordered requirements and manage

[237] Sesay, *supra* note 229.
[238] Sesay, *supra* note 229; Suma, *supra* note 215, at 13 -14.
[239] Suma, *supra* note 215, at 14; The Rabat Report, *supra* note 205, at 32-36.
[240] The Rabat Report, *supra* note 205, at 54-57.
[241] The Rabat Report, *supra* note 205, at 54-57.
[242] ICTJ Program Report: Reparative Justice, May 13, 2013, http://ictj.org/news/ictj-program-report-reparative-justice.
[243] Sperfeldt, *supra* note 16, at 1.

implementation of reparation projects. This mechanism could take a number of forms. The best form would likely be some sort of mechanism that separated the fundraising process from the oversight process. In this way, funds could be solicited and deposited in a trust fund. Once there, the Court would be able to recruit implementing partners, working into the contracts with these partners the requirements for reparation projects laid out by the Court. These contracts—and the work of the management mechanism—could then be overseen by a judicial chamber, akin to the ICC's oversight of the TFV, or by a Steering Committee. The chamber or committee would not exercise legal control over implementing partners; rather it could bring partners to account by ceasing funding or enforcing the contract—like any other contract—in a Cambodian court.