



## **Cambodian Human Rights Action Committee and REDRESS**

### **CONSIDERING REPARATIONS FOR VICTIMS OF THE KHMER ROUGE REGIME**

#### **A Discussion Paper**

**November 2009**

#### **I. Introduction**

The Cambodian Human Rights Action Committee (CHRAC), also known as the Action Committee, was established in 1994 by a group of local NGOs in order to promote human rights, rule of law, peace and democracy. CHRAC is a coalition of currently 21 local neutral, non-partisan, non-governmental organizations in Cambodia. The coalition maintains a permanent Secretariat in Phnom Penh. CHRAC is envisioning Cambodia as a peaceful and liberal democracy where development takes place in an environment where human rights are respected and protected. Under this vision, CHRAC aims at reducing the number of serious human rights violations in Cambodia.

REDRESS is an international human rights organisation which supports survivors of torture and related international crimes to seek justice and other forms of reparation. It takes on individual cases on behalf of victims, and works to advance laws and practices relating to victims' right to a remedy and reparation at domestic and international levels.

On 26-27 November 2008, a high-level conference on reparations took place in Phnom Penh. The conference was organized by CHRAC and the ECCC Victims Unit in association with REDRESS, ICTJ, the International Federation for Human Rights (FIDH) and the Open Society Justice Initiative (OSJI).<sup>1</sup> This Discussion Paper is borne out of some of the issues raised in that conference. Thirty years after the end of the Khmer Rouge regime in Cambodia, the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) provides an opportunity that something is done to address the harm that victims of the regime suffered. The Discussion Paper takes into account the progress at the ECCC in Case 001 and Case 002, and the mandate of the ECCC with respect to reparations.

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<sup>1</sup> See *Reparations for Victims of the Khmer Rouge Regime*, Conference Report (edited by Ch. Sperfeldt/W. Winodan), CHRAC/ECCC Victims Unit, Phnom Penh, May 2009.

The purpose of this Discussion Paper is to outline some of the key issues for civil society in respect of reparations, and to provide some suggestions on the way forward. It recognises that there are a range of actors involved in determining strategies, structures and processes for a workable system of reparations. It is hoped that this Discussion Paper will assist in furthering some of the discussions that have started and outlining some of the areas in which decisions are required.

## **II. The Situation of Victims of the Khmer Rouge**

The Khmer Rouge regime was responsible for wide scale arrests, torture and executions of anyone perceived to be an ‘enemy’. A vast prison system existed throughout the country during the Khmer Rouge regime, and it is estimated that 400,000 to 600,000 people were imprisoned in one or many of these detention centers.<sup>2</sup> The exact numbers of people who died as a result of the Khmer Rouge’s policies is estimated at about 1.7 million people or 21 percent of the country’s population.

The scars in Cambodian society are ever present. Available empirical information on the scale and scope of victimisation in today’s Cambodia remains limited, however there have been recent efforts to assess the scope of the exposure to violence during the Khmer Rouge regime, among the Cambodian population, such as the work undertaken by the Documentation Center of Cambodia or the recent survey by the Human Rights Center of the the University of California, Berkeley.<sup>3</sup>

There are very few Cambodians who have not been directly affected (by harm to themselves or their immediate family members) by the atrocities.

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<sup>2</sup> See H. Locard, “The Khmer Rouge Prison System”, in: *Khmer Rouge History; From Stalin to Pol Pot. Towards a Description of the Pol Pot Regime*, Phnom Penh: ADHOC and CSD, January 2007.

<sup>3</sup> The survey found that among those respondents who lived through the Khmer Rouge regime, most reported to have suffered starvation/lack of food (82 percent), personal property stolen or destroyed (71 percent), forced evacuation (69 percent) and torture (27 percent). See P. Pham et al, *So We Will Never Forget. A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, Human Rights Center, University of California Berkeley, January 2009, 24-25.

### III. The Legal Framework for Reparations

#### a. Reparations in International Law

The right to a remedy and to reparation has been affirmed by a range of treaties,<sup>4</sup> United Nations bodies,<sup>5</sup> regional courts,<sup>6</sup> as well as in a series of declarative instruments.<sup>7</sup> Despite the requirement that reparation reflect and respond to the nature and gravity of the breach, it is clear that the most serious violations of human rights are by their nature irreparable and any remedy will be disproportionate to the harm suffered. Nonetheless it is an international legal obligation that an internationally wrongful act be remedied to the fullest possible extent.<sup>8</sup> The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.<sup>9</sup> Internationally recognized forms of reparation include restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition,<sup>10</sup> and in most instances some combination of these forms will be understood as adequate and appropriate in the circumstances. The content of the right to a remedy depends on the nature of the substantive right at issue. It must be effective in practice as well as in law,<sup>11</sup> and must be suitable to grant appropriate relief for the legal right that is alleged to have been infringed.

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<sup>4</sup> For example, the International Covenant on Civil and Political Rights (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6)); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (Art. 6); Convention of the Rights of the Child (1989) (Art. 39); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984) (Art. 14); and Statute of the International Criminal Court (1998) (art. 75). It has also figured in regional instruments, e.g. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Arts. 5(5), 13 and 41); the American Convention on Human Rights (ACHR) (1969) (Arts. 25, 63(1) and 68); and the African Convention on Human and Peoples' Rights (ACHPR) (1981) (Art. 21(2)). See also, the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED), of 2006, not yet entered into force (Art. 24). At time of writing, the Convention has 73 signatures and 4 ratifications.

<sup>5</sup> See, for example, Human Rights Committee (HRC), General Comment (GC) No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 26/05/2004, (U.N. Doc. No. CCPR/C/21/Rev.1/Add.13, at paras. 15-17; United Nations Committee against Torture (CAT), GC No. 2, *Implementation of Article 2 by States Parties*, (U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007).) at para. 15.

<sup>6</sup> See, e.g., *Velasquez Rodriguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) (Judgment of 29 July 1988) at para. 174. See also *Papamichalopoulos v. Greece* (Art. 50) (1995), (Appl. no. 14556/89) ECHR Judgment (31 Oct. 1995) at para. 36.

<sup>7</sup> 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, Res'n 2005/35 (UN Doc. No. E/CN.4/RES/2005/35 (2005)) and GA Res'n 60/147 (UN Doc. No. A/RES/60/147 (2006)). See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 Nov. 1985; and the Universal Declaration of Human Rights (UDHR) (1948) (Art. 8).

<sup>8</sup> *Chorzow Factory case*, Permanent Court of International Justice, Ser. A, No. 9 at 21 (1927).

<sup>9</sup> UN General Assembly resolution 56/83, Annex, *Responsibility of States for Internationally Wrongful Acts*.

<sup>10</sup> The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.

<sup>11</sup> *Aksoy v. Turkey* (Appl. No. 21987/93) ECHR Judgment (18 Dec.1996), para. 95. See also, Council of Europe, Recommendation Rec(2004)6 of the Committee of Ministers (COM) to member states on the improvement of domestic remedies (adopted by COM on 12 May 2004, at its 114th Session); Inter-American Court on Human Rights, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 ACHR), Advisory Opinion OC-9/87 (8 Oct. 1987), para. 24. See also, *Cordova v. Italy* (No. 1) Appl. No. 40877/98, European Court of Human Rights (2003) at para. 58.

## **b. The Legal Framework for Reparations in Cambodia**

The principle of reparations is well-recognised under Cambodian law. The Cambodian law on criminal procedure enables civil actions for the purpose of claiming reparation for damages caused by an act of offense to be filed by the injured party as part of the criminal case. Therein it is specified that the injured party shall receive an award proportionate to the damages incurred to him/her. Accordingly, Article 14 of the Code of Criminal Procedure of the Kingdom of Cambodia provides that

“An injury can be compensated by paying damages, by giving back to the victim the property that has been lost or by restoring damaged or destroyed property to its original state.

The damages shall be proportionate to the injury suffered.”

In addition, Cambodia has ratified international treaties which recognise and incorporate the right to reparations for victims of serious violations of human rights. For example, Article 2(3) of the International Covenant on Civil and Political Rights which Cambodia<sup>12</sup> acceded to, provides:

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 14 of the UN Convention against Torture<sup>13</sup> provides,

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

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<sup>12</sup> Signed 17 October 1980; acceded May 1992.

<sup>13</sup> Acceded 15 October 1992.

### c. The Legal Framework for Reparations in the ECCC

The right to claim reparations did not feature in the ECCC statute, though it is reflected in the internal rules. Internal Rule 23(1) stipulates that one purpose of civil action before the ECCC is to ‘allow victims to seek collective and moral reparations’. In addition, Internal Rule 23(11) provide that the Chambers may award these ‘collective and moral reparations’ and that such awards are to ‘be borne by convicted persons.’<sup>14</sup>

The ECCC’s internal rules refer to the possibility for the Chambers to award collective and moral reparations, in the forms of ‘a) An order to publish the judgment in any appropriate news or other media at the convicted person’s expense; b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or c) Other appropriate and comparable forms of reparation.’<sup>15</sup>

Regarding implementation, Internal Rule 113(1) on the enforcement of civil party reparations merely mentions that “enforcement of reparations shall be made at the initiative of a civil party”. No further provisions exist to ensure an effective oversight and enforcement procedures to implement reparations awards.

The ECCC has adopted an application process in which civil parties may apply for reparations. The Internal Rules appear to limit the right to request reparations to civil parties only, and consequently only a very limited proportion of victims will benefit, unless the rules are interpreted broadly. This is made worse by limited outreach to victims to inform them of this limitation and the fact that the Chambers has instituted very tight deadlines for victims to apply to become civil parties, currently articulated as 15 days after notification of the conclusion of the judicial investigation.<sup>16</sup> The ECCC does allow victims to participate through victims’ associations;<sup>17</sup> however it is unclear what role such associations will have in the reparations phase, given the Internal Rules’ specific reference to only civil parties as the recipients of reparations. This is also despite that forms of reparations will be collective before the ECCC.

Currently, the ECCC Judges are in the process of introducing fundamental changes to the Court’s victim participation scheme which will most likely also affect existing regulations on reparation.<sup>18</sup> It is therefore an opportune time to consider in a comprehensive way the most feasible and meaningful solutions for the implementation of the ECCC’s reparations mandate.

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<sup>14</sup> Art. 23(11) of the Internal Rules.

<sup>15</sup> Art. 23(12) of the Internal Rules.

<sup>16</sup> See, ECCC Victims’ Unit, Key Message For Civil Party Applicants In Case File 002, 28 September 2009, available at: [http://www.eccc.gov.kh/english/cabinet/press/133/vu\\_statement\\_en.pdf](http://www.eccc.gov.kh/english/cabinet/press/133/vu_statement_en.pdf).

<sup>17</sup> Internal Rule 23(9).

<sup>18</sup> See ECCC Press Release, Sixth Plenary Session Concludes, 11 September 2009.

## **IV. Policy Considerations**

There are a number of policy considerations relevant to deciding upon, planning and implementing a reparations scheme for victims of the Khmer Rouge Regime. These considerations are explored below:

### **a. The relationship between the ECCC and other potential national processes**

The ECCC has a limited mandate to afford reparations as is described above. The ECCC is primarily a national institution, with certain international elements.

There is extensive experience of countries that have sought to afford reparations in the aftermath of mass atrocities. In most cases in which governments have sought to address the serious harm caused to citizens by the legacy of serious and massive crimes, they have established specialised administrative mechanisms to assist them with the process. There are numerous examples of such administrative processes, which include:

- i) Truth and Reconciliation Commissions, most of which have included a significant reparations component
- ii) Reparations / Compensation Commissions, where the Commission has a specific mandate to address the harm caused by specific events or crimes
- iii) Special governmental directives designed to assist victims in the aftermath of conflict – e.g., special dispensations for free medical or psychological care, the establishment of special treatment facilities, pensions, or educational grants.
- iv) Symbolic acts of government – naming of streets, assigning memorials, creating registers of victims' names, creating special civic commemoration days.

The ECCC is not the only body, nor necessarily the most appropriate body, that can afford the types of measures identified above. In most other countries, it is the governments themselves that recognise the importance of taking the leadership to develop appropriate and effective reparations programmes for those that have suffered. The UN Basic Principles and Guidelines stipulate that “states should endeavor to establish national programs for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations”.<sup>19</sup> This provision would certainly apply in the case of the ECCC which is tasked with trying a few, potentially indigent defendants. In most cases, governmental action could be complemented by the work of civil society groups.

Symbolically, it is important for the Government to adopt measures of reparation on behalf of the society. This will go a long way in recognising that the harm done to the society by the past regime was wrong and will not be repeated. The actions of civil society groups can assist or complement, but should not displace this primary obligation of the Government.

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<sup>19</sup> Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para, VIII(16).

Similarly, and as will be described more fully below, limiting liability to a few penurious persons accused by the ECCC will not achieve the symbolic purpose of reparations.

#### **b. Beneficiaries**

In the context of Cambodia, the number of persons who have experienced serious harm is immense. There are a large number of living survivors, and just about every Cambodian will have been affected by the harm caused to one or more of their immediate family members.<sup>20</sup>

As indicated, only civil parties have the possibility to apply for reparations before the ECCC. To date, there are 93 civil parties in Case 001 and, as of 30 September 2009, roughly 2,200 civil party applications had been received by the ECCC Victims Unit in relation to Case 002 (out of which 170 had been admitted by the OCIJ).

It is important to consider the relationship between the ‘symbolic’ and ‘collective’ reparations that the ECCC may afford and the civil parties currently participating in ECCC proceedings. Taking into considerations the limitations and inadequate provisions for outreach, it is clear that many of the most vulnerable victims will not necessarily have had occasion to apply to be a civil party.<sup>21</sup> Whilst civil society groups have been proactive in reaching out to victims throughout the country, and even abroad, it is unsafe to say that all victims, particularly the most vulnerable, have had ample time and opportunity to apply.

One of the reasons why the forms of reparations had been specified as symbolic and collective is because of the very large number of victims of the Khmer Rouge regime.

Interpreting the ECCC mandate narrowly, one might recognise that reparations will be symbolically achieved mainly through the fact of the ECCC’s criminal jurisdiction and a number of discrete projects aimed at assisting the civil parties that have been recognised by the ECCC.

Interpreting the ECCC mandate somewhat more broadly, one might recognise that whilst only civil parties may apply for reparations the awards issued by the ECCC, as they are collective and symbolic in nature, many incorporate measures that may also apply to a broader constellation of victims, beyond just the immediate civil parties.<sup>22</sup>

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<sup>20</sup> Youk Chhang, Director of DC-Cam, has frequently put the estimated number of survivors at 5 million.

<sup>21</sup> A population-based survey conducted by the Human Rights Center, University of California, Berkeley, found that 39 percent of the respondents had no knowledge of the ECCC, and 46 percent had only little knowledge of the Court. See Pham, P. et al, *So We Will Never Forget. A Population-Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, Human Rights Center, University of California Berkeley, January 2009.

<sup>22</sup> Similar thoughts appear in an article by Thomas and Chy, see S. Thomas and T. Chy, “Including the Survivors in the Tribunal Process”, in: J. Ciorciari and A. Heindel (eds.), *On Trial. The Khmer Rouge Accountability Process*, Phnom Penh: Documentation Center of Cambodia, 2009, 284.

It should be considered, therefore, whether the ECCC's awards should be directed at the civil parties only, or whether there is an ability to conceive of them as reaching a wider constellation of victims similarly situated. Legally, this would be facilitated if the funds to afford reparations came from voluntary, governmental and other possible sources, and not only from convicted perpetrators.<sup>23</sup>

### **c. Evidence to substantiate reparations claims**

Typically, in a civil party claim for reparations, the civil parties will be required to provide evidence that they have suffered harm as a result of the actions of the accused/perpetrator. They will also have to provide evidence of their injuries in order to sustain an award for pecuniary and non-pecuniary losses.

At the ECCC, the civil parties will not be entitled to an individual award for pecuniary and non-pecuniary losses irrespective of the nature and strength of evidence that they provide. The ECCC simply does not have the mandate to order individual awards.

It is recommended that the ECCC consider this limitation in its mandate in determining how victims must 'apply' for reparations, the type of proof they must furnish to prove entitlement to reparations, etc.

### **d. Forms of Reparation**

As indicated, international law recognises at least five broad categories of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The ECCC's mandate is limited to collective or symbolic forms of reparation. But the language of Rule 23(12) suggests there is some room for the Court to design forms of 'collective and moral reparations'. There are a variety of ways in which these can be conceived.

#### **i) Collective forms of reparation**

Collective forms of reparation are simply measures that are adopted to respond to the harm suffered by several persons or groups collectively. Collective measures can respond to a variety of needs including material, restitutive and/or symbolic.

The previously mentioned survey of the Human Rights Center supports the assertion that reparations are relevant and much needed in the Cambodian context. According to its findings, 88 percent of all respondents believe that it is important to provide symbolic (moral) reparations to victims of the Khmer Rouge or their families. Moreover, 68 percent are of the opinion that any reparations should be provided to benefit a community as a whole. Based on their findings, the authors of the same survey report suggest that 'ECCC judges have the authority to rule that reparations of a collective, symbolic, and moral – but

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<sup>23</sup> Defence counsel would not have had an opportunity to respond to claims coming from a wider constellation of victims, which would be important if the defendants are judged to be civilly liable.



not financial – nature be provided to certain groups of victims. Such reparations could include erecting statues, building memorials, renaming public facilities, establishing days of remembrance, expunging criminal records, issuing declarations of death, exhuming bodies, and conducting reburials.<sup>24</sup>

Among civil society initiatives, the Cambodian Human Rights and Development Association (ADHOC) organised four regional consultation workshops in between August 2008 and June 2009 involving more than 450 victims, the majority of which were civil parties and civil party applicants. At the occasion of these four consultation workshops, victims discussed the notion of collective and moral reparations and requested among others a variety of collective measures, such as memorials, statues, stupas, museums, psychological and other medical care centres, and education about the Khmer Rouge period for the young generation.

Civil party lawyers in Case 001 have requested in a joint submission on reparations for outreach and the dissemination of information, provision of medical care (including psychological and physical care), education programmes and memorialisation.<sup>25</sup> Many of these requested measures could build on existing initiatives in civil society and reinforce these initiatives through reparations awards. Examples for such projects include in the field of psychological care the free counselling offered to witnesses, civil parties and other victims by the Trans-cultural Psychosocial Organisation (TPO); and in the field of education programmes the genocide education project of the Documentation Center of Cambodia (DC-Cam) which developed a textbook about the Khmer Rouge period and assists the Ministry of Education in developing a curriculum and training teachers.<sup>26</sup>

There are a range of measures the ECCC could take as part of an award for collective reparations. The exact forms of reparation should reflect the views and submissions of civil parties as well as other submissions that the ECCC may decide to receive, and additional investigations/consultations undertaken by the ECCC to obtain a broader picture of the position and needs of the most vulnerable survivors and their families. Such collective awards could provide an important recognition and acknowledgement of the suffering of victims and ideally would also serve as a catalyst for broader measures to be adopted in future by the Cambodian Government.

i) *Knowing the truth*

The right to truth is a well-recognised and fundamental component of most reparations processes,<sup>27</sup> both as a procedural measure and as a result of measures to be adopted or put

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<sup>24</sup> Human Rights Center Survey, Pham et al, 2009, 43-44, 47.

<sup>25</sup> Civil Parties' Co-Lawyers' Joint Submission on Reparations, 14 September 2009, para. 11-30.

<sup>26</sup> For more information, see [www.tpocambodia.org](http://www.tpocambodia.org) and [www.dccam.org](http://www.dccam.org)

<sup>27</sup> A *right to know* had been stipulated for instance by Mr Joinet in his report to the UN Commission on Human Rights, see 'Question of the impunity of perpetrators of human rights violations', Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN doc. [E/CN.4/Sub.2/1997/20/Rev.1 of 2

in place. Furthermore, the Co-Prosecutor equally pointed out that it is regarded as one of the main mandates of the Court that victims should know the truth about what happened during the period of Democratic Kampuchea.<sup>28</sup> Truth mechanisms could consist of specialised dissemination measures of the judgment, including the dissemination of popular versions or summaries of the judgment, the provision of explanatory materials, dissemination by a variety of means, including radio and video broadcast, wide paper dissemination throughout the country, as well as storage methods aimed at preserving the judgment for future generations.<sup>29</sup> Other measures could include genocide and human rights education in schools and related special education programmes; the search for disappeared persons, the proposed Victims Register in the ECCC Victims Unit and establishment of information centers throughout the country.

*ii) Acknowledgment of victims*

Measures to acknowledge and recognise victims are of particular relevance. Such measures could include public letters from the Court to victims who have sought participation in the legal proceedings to thank them for their contribution and to acknowledge their suffering; acts of memorialisation at various crime sites and other symbolic locations throughout the country; apologies from convicted persons, but also from the Government, as being the representative of the State<sup>30</sup>; renaming of public venues or facilities; religious ceremonies and the construction of stupas etc.

*iii) Psycho-social support*

Psychosocial support could include the range of activities current undertaken by TPO, specialised multigenerational support programmes, individualised and group trauma care and other activities aimed at reducing the stigma associated with psychological health, promoting mental health recovery.

**ii) Other non-judicial measures for the benefit of victims**

Taking into account the many uncertainties surrounding the prospects in establishing a future scheme to design and implement collective and moral reparations for victims of the

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October 1997], para. 17ff. See, also, the 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity,' Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Commission on Human Rights, E/CN.4/2005/102/Add.1 of 8 February 2005.

<sup>28</sup> Statement of Co-Prosecutors, 21 August 2008, para. 3, available at [http://www.eccc.gov.kh/english/cabinet/press/90/2008-08-21\\_OCP\\_Statement.pdf](http://www.eccc.gov.kh/english/cabinet/press/90/2008-08-21_OCP_Statement.pdf), accessed on 13 Nov 2009.

<sup>29</sup> See for instance J. Ramji, 'A Collective Response to Mass Violence. Reparations and Healing in Cambodia', in: J. Ramji and B. Van Schaak (eds.), *Bringing the Khmer Rouge to Justice. Prosecuting Mass Violence before the Cambodian Courts*, Lewiston: Edwin Mellen Press, 2005, 372.

<sup>30</sup> Such apologies, also by the Government, have also been requested by civil parties and civil society representatives, see also Long Panhavuth, 'Calling for a Government Mea Culpa', Letter to the Editor, Phnom Penh Post, 6 January 2009.

Khmer Rouge before and after the Court ceases to exist, the ECCC should start already to implement measures for the benefit of victims that manage to have a quick impact and can be implemented throughout the time of the existence of the ECCC. The ECCC Victims Unit could play here an important role, and it could build on and reinforce existing initiatives and ideas. Some of these measures could potentially be linked to reparations awards at a later stage of the proceedings.

*i) A Victims Register at the ECCC Victims Unit*

In August 2009, the ECCC Victims Unit made an initial proposal for the creation of a Victims Register to complement the formal participation of victims in the judicial process before the ECCC.<sup>31</sup> It is hoped that such a register could provide some official recognition to victims. According to the proposal, the register would be open to victims who have sought to participate in the legal proceedings as well as to other victims who look for alternative ways to receive recognition. Indeed, such a Victims Register could become an important legacy project for the ECCC. It has the possibility to create the basis for other measures for the benefit of victims, such as a documentary and audiovisual archive, memorialisation, commemorative services and truth-seeking initiatives. As such, it has also the potential to support a collective reparations scheme or be itself included in future reparations awards.

**e. Financing Reparation - The need to establish a Trust Fund**

In respect of the ECCC, reparations orders are made against the convicted perpetrator who has the responsibility to comply with the award. The likelihood that perpetrators will be judgment-proof and in this sense unable to finance reparations awards, is exceedingly high.

**i) Need to undertake asset tracing and confiscation**

As mentioned previously, the Internal Rules stipulate that reparations would be awarded against and be borne by convicted persons. This has to involve Court-based actions to investigate the assets and property of the accused in order to recover potential resources to fund reparation awards after a conviction. Currently, it does not appear that significant efforts have been undertaken by Court organs to investigate into the assets of the defendants in order to examine or challenge their claim for indigence and to identify illegally acquired property. According to Internal Rules 55, the power to make requests for investigative action lies generally with the Co-Investigating Judges. Civil society groups and civil parties have frequently called in the past for such investigative actions, in particular in relation to the four accused persons in Case 002.<sup>32</sup>

Such investigative actions are all the more necessary since there have been repeatedly claims about the alleged wealth of some of the accused before the ECCC in Case 002.<sup>33</sup> In

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<sup>31</sup> ECCC Victims Unit, A Victims Register for the ECCC: Initial Proposal from the Victims Unit, 8 August 2009.

<sup>32</sup> See for instance CHRAC Open Letter to the Members of the Rules and Procedure Committee, 3 June 2009.

<sup>33</sup> See article in Cambodia Daily, 14 November 2007. Moreover, reports from the beginning of the 1990s estimated that the Khmer Rouge generated up to \$100 million per year from its control over timber and gem

the event that the Court orders the confiscation of assets or property of convicted persons, these assets “shall be returned to the State” according to Article 39 of the Law on the Establishment of the ECCC. This provision substantiates that the State will play a role in implementing or administering any Court-ordered reparations. Furthermore, other states in which assets of the accused persons and other Khmer Rouge assets obtained illegally are present may inform the ECCC about these assets and should explore options for providing reparations to victims from these resources.<sup>34</sup>

## ii) Trust Fund

However, if no or not sufficient property can be found to fund reparations after a conviction, the Court would need to explore other options to implement reparations awards. The International Criminal Court, which has a somewhat similar reparations process, anticipated this problem and established a trust fund for victims, which can receive voluntary contributions as well as other sources of funds.<sup>35</sup> The Trust Fund has a dual mandate. First, it is mandated to use its voluntary resources as necessary to provide support to victims and their families, independent of any reparations order emanating from the ICC. This possibility reflects the fact that many victims will not be able to await a Court’s judgment for urgent support. Second, the Trust Fund is mandated to implement reparations orders emanated from the Court, when the Court so instructs it.

At present, the ECCC has not established a Trust Fund. The Cambodian Government has not set up a trust fund to assist with implementation of ECCC reparations orders or to fuel its reparations process (which is none). Civil society groups, humanitarian agencies have a number of initiatives which provide assistance to victims of the Khmer Rouge regime, though none of these initiatives are currently designed to implement specifically the awards of the ECCC, nor could they possibly seek to afford reparations on behalf of the State.

There have been a number of discussions about whether a Trust Fund should be established, and if so, by whom, with what financial and other controls, and to be supported by whom.<sup>36</sup> Propositions for the establishment of a trust fund alongside the ECCC to fund reparations for victims date back to the time even before the establishment of the Court. The Report of the Group of Experts consisting of Rajsoomer Lallah, Sir Ninian Stephen and Steven Ratner which was sent to assess the feasibility of the establishment of a UN-supported tribunal recommended the creation of such a trust fund:

“212. The Group believes that the wealth of Khmer Rouge leaders convicted by a tribunal should represent a form of monetary reparation for the victims of the Khmer Rouge. The possibility of requiring defendants to pay compensation to victims is included in the statutes of the existing ad hoc

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exports and the cross-border trade with Thailand. See Abuza, Zachary, The Khmer Rouge Quest for Economic Independence, *Asia Survey*, Vol. 33, No. 10, October 1993, 1010. Similar numbers have been put forward by Global Witness in 1995, see at [http://www.globalwitness.org/pages/en/khmer\\_rouge\\_and\\_civil\\_war.html](http://www.globalwitness.org/pages/en/khmer_rouge_and_civil_war.html)

<sup>34</sup> This was also proposed in the Report of the Group of Experts for Cambodia, 18 February 1999.

<sup>35</sup> Article 79 of the ICC Statute.

<sup>36</sup> See for example Mr. THUN Saray, President of ADHOC, at the 2008 reparations conference (reparations conference report, 38); or the International Center for Transitional Justice’s (ICTJ) submission to the Universal Periodic Review of Cambodia at the UN Human Rights Council, 14 April 2009, para.17; or “Lawyers Renew Call for KR Victim Trust Fund”, Cambodia Daily, 4 June 2009.

tribunals and has recently been affirmed in the statute of the International Criminal Court. We thus recommend that any tribunal provide for the possibility of reparations by the defendant to his victims, including through a special trust fund, and that States holding such assets arrange for their transfer to the tribunal as required to meet the defendant's obligations in this regard. Beyond this, States in which Khmer Rouge assets obtained illegally are present should explore other options for providing compensation to victims from these assets.<sup>37</sup>

More recently, civil party lawyers in Case 001 renewed such demands and called jointly for the establishment of a trust fund to fund the implementation of collective and moral forms of reparations in case of indigent convicted persons. The lawyers requested the creation of an independent and voluntary victims' trust fund which, according to the lawyers' proposition, could be managed either through the ECCC Victims Unit or another body specifically mandated to administer the fund, and funded through external voluntary contributions as well as through the transfer of the defendant's confiscated illegally acquired property to the fund, if any should be found. In addition, it was argued that locating the trust fund in the Victims Unit would benefit from the Unit's close relationship to victims and avoid spending additional administrative resources.<sup>38</sup>

*i) Financial and other controls*

It is vital that any trust fund to be established should be administered to the highest standards and contain detailed and comprehensive rules to ensure transparency and independent oversight. This is even more relevant in light of ongoing corruption allegations at the ECCC and the way these allegations have been handled. Ideally, such a fund could be administered through a Board of eminent persons including representatives of victims, civil society and specialists in accounting and financial oversight. The fund could be established through the ECCC though with some independence from it, in order that it could continue to support initiatives for the benefit of survivors and their families even after the work of the ECCC comes to a close.

The United Nations and other members of the donor community should be consulted about the appropriate financial controls to accompany such a fund, and to benefit from their experience of establishing similar trust funds in other contexts.

*ii) Funding sources and contributions*

As other contexts demonstrate, contributions to the trust fund could come from a number of defined sources, such as follows:

- i) Assets from convicted persons: These could come from confiscated property from within Cambodia or seized abroad through other States;
- ii) Government contributions: Since resources with the Government are limited, one could consider creative solutions to allow for Government contributions, such as through allocating a certain percentage of the revenues from ticket selling at

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<sup>37</sup> Report of the Group of Experts for Cambodia established pursuant to GA resolution 52/135, 18 February 1999, para 212.

<sup>38</sup> Civil Parties' Co-Lawyers' Joint Submission on Reparations, 14 September 2009, para. 31-35.

Tuol Sleng and Choeung Ek to the fund<sup>39</sup>; or a percentage from the upcoming revenues expected to result from oil projects off the Cambodian coast; or a debt relief scheme that could channel saved interests from foreign debt payments to the fund;

- iii) Other voluntary contributions: Other entities and individuals could also contribute voluntarily to the fund, such as individuals from Cambodia and the Diaspora, international donors, private foundations, etc.

However, the experience from other trust funds also suggests that raising sufficient funds will remain a challenge. Contributions to most of these bodies have remained limited. Thus, expectations towards such a future fund in the Cambodian context should therefore be kept reasonable. A practical approach could aim at funding a certain number of concrete projects in relation to collective reparations throughout the country.

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<sup>39</sup> This idea was also included recently in an additional reparations request by the Co-Lawyers for Civil Party Group Two in Case 001, see Cambodia Daily, 11 November 2009.

## Recommendations

### 1. Create a Road Map for the reparations process

- 1.1. If the ECCC takes its reparation mandate seriously, there is an urgent need to prepare for future reparations orders in Case 001 and Case 002 and to ensure their implementation. Since the ECCC Judges decided to commit much of the next **Plenary Session in January 2009** to discuss issues in relation to victim participation, it is recommended that they also allocate sufficient time to elaborate on the future reparations process.
- 1.2. Since there are many complexities in relation to the Court's reparations mandate, the Judges may consider discussing first a **conceptual framework** for reparations as done similarly in relation to victim participation generally at the last Plenary Session.
- 1.3. On the basis of such framework decisions, it is recommended that Judges design a **road map** which outlines the next necessary steps to put into practice the ECCC reparations mandate. Such a road map should address the immediate needs for clarification in Case 001 but also the broader implications of the upcoming Case 002.
- 1.4. Finally, Judges may consider giving to a special **Sub-Committee** the task to clarify the Court's reparations mandate, to put forward feasible and meaningful solutions for its implementations and to prepare draft changes in the Internal Rules, where necessary, for consideration at the next Rules and Procedure Committee meeting in mid-2010.

### 2. Consult about the forms and the design of collective and moral reparations

- 2.1. In order to manage expectations among victims, civil parties and non-civil parties need to be properly informed about the Court's reparations mandate and its limitations. Joint **message development** among the Court, its Victims Unit and intermediary organisation is a requirement for adequate communication to victims.
- 2.2. If collective reparations through the ECCC are to be meaningful for its beneficiaries, civil parties and other victims need to be engaged in **consultations** about the forms of collective and moral reparations they want to request. The Victims Unit and intermediary organisations have to play here an important role.
- 2.3. Before and after a reparations award, there should be an **involvement** of the potential beneficiaries in designing the concrete form and implementation of these awards, i.e. a memorial or a stupa.

### 3. Investigate into the assets and property of the accused persons

- 3.1. The Internal Rules currently stipulate that reparations be borne by the convicted persons. Thus, there is an urgent need for the Co-Investigating Judges to take credible **investigative action** into the assets of the accused persons.

- 3.2. If the available human resources at the OCIJ do not allow for such action, the Co-Investigating Judges may consider asking stakeholders outside the Court, such as specific donors, to provide temporarily a **consultant** with the necessary expertise to conduct investigations to determine the assets of accused persons inside and outside of Cambodia.
- 3.3. If any illegally acquired assets are to be found, the Court would need to start discussions with the Royal Government of Cambodia about how these assets could be used for the purpose of funding reparations awards, if the accused persons are found guilty.

#### **4. Plan for the establishment of a trust fund for victims**

- 4.1. The Court must **explore the range of options to implement reparations awards**. Even if a certain amount of property or assets of perpetrators can be located, seized and transferred for the benefit of the reparations process, the Court should nonetheless explore additional options to implement reparations awards, as the needs are great and it is clear that assets from perpetrators alone cannot suffice to repair victims. There are many international examples from which the Court could seek inspiration for designing feasible and creative solutions.
- 4.2. In this regard, the Court may consider the **creation of a trust fund** or a comparable body to fund reparations orders. Such a body would not necessarily require a complex institutional framework, and there exist multiple international examples of funding structures one could look at. The fund could assist in implementing concrete restorative or reparative projects designed through consultations with victims in a specific period of time and using a variety of funding sources from convicted persons, governmental and other voluntary contributions.
- 4.3. The establishment of a trust fund needs careful planning and negotiations with different stakeholders. It is therefore recommended that either the ECCC Victims Unit or another appropriate body hires a short-term consultant at the earliest possible opportunity to prepare a **feasibility study** on the creation of a trust fund for victims. This study would aim at providing options for the institutional framework, highest standards for transparency and financial control, and funding sources, such as from convicted persons, governmental contributions and other voluntary contributions (donors, foundations, individuals etc.).

#### **5. Envisage and implement necessary changes in the Internal Rules**

- 5.1. The current wording in the Internal Rules provides the Court with some room to design collective and moral reparations. However, it restricts largely the Court's ability to *implement* potential reparations awards. Therefore, it is necessary that Judges – and/or the proposed Sub-Committee – consider necessary **changes in the ECCC's Internal Rules** to provide themselves with much needed space to put into practice the ECCC's reparations mandate.



5.2. In particular, the Judges may consider **broadening the sources for reparations** in case of indigent convicted persons. For instance, there have been suggestions in the past to change Internal Rule 23(11) as to allow voluntary contributions to fund reparations awards in case convicted persons are indigent and not sufficient property can be found to pay for reparations.

5.3. **Other changes in the rules** may relate to clarifying the basis for implementation and regulations on enforcement of reparations orders by the Court. Moreover, Judges may consider providing themselves with the power to simply endorse certain requests from civil parties without necessarily translating them into an order and thereby to allow for implementation through other venues.

## **6. Mandate the Victims Unit to implement other non-judicial measures for victims**

6.1. Taking into considerations the Court's public commitment to counter-balance the envisaged restriction in civil party rights at the next Plenary Session with additional services to victims in general, it is necessary to **extend the mandate of the ECCC Victims Unit** in order to allow the Unit to engage in other non-judicial and restorative measures for the benefit of civil parties and victims generally. Therefore, it is recommended to amend at the next Plenary Session Internal Rule 12 in a way as to mandate the Victims Unit with these new tasks.

6.2. With regard to the practical implementation of the extended mandate, the Victims Unit may consider **creating a new fundraiser/project manager position** to look for additional voluntary funding from donors, outside the ECCC core-budget, for victims-related activities and to manage their implementation. The feasibility of such an approach had already been demonstrated successfully by the substantial ear-marked funding provided by the German Ministry of Foreign Affairs to the Victims Unit.

6.3. The proposed **Victims Register** has the potential to become an important element to *complement* the current legal process of victim participation. The scope and function of the register should be designed with consultation of victims and civil society organisations. It could involve, for instance, the collection and compilation of complete testimonies and victim stories and be combined with a system of audio-visual recording. Copies could be made available to victims which they could take back to their communities. Taken into consideration the large number of victims in the country and the limited time frame of the ECCC, the Victims Unit should consider planning early for the work of such a register beyond the existence of the Court.