



Practical, Feasible and Meaningful: How the Khmer Rouge Tribunal Can Fulfill its Reparations Mandate

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Our purpose

This paper is meant to help the Extraordinary Chambers in the Courts of Cambodia (ECCC), the civil parties before the Court and other Khmer Rouge period survivors and their families deal with the practical and legal issues that have come up in the course of fulfilling the reparations mandate of the ECCC. That mandate is novel and when the ECCC orders reparations to be made to victims in Case 001, it will arguably be the first time in any international ad hoc, hybrid or permanent criminal court that justice will be done for, and not just in behalf of, victims. The International Center for Transitional Justice (ICTJ), through its Reparations Unit, hopes to contribute to the realization of this important step for victims and survivors.

The Cambodian experience as precedent

Unlike the regional human rights courts and mechanisms in other regions— where States are parties in the case and can be ordered to provide reparations -- the mandates of the different international ad hoc and hybrid criminal courts² that were constituted before the ECCC do not include a power to grant reparations. The president of the International Criminal Tribunal for the Former Yugoslavia (ICTY) recently lamented this omission. He said³ that "the international community has forgotten the victims (since) there is no efficient mechanism through which victims

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² S.C. Res. 827, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993) (ICTY); S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000) (Special Court of Sierra Leone); UNTAET Reg. 2000/11, March 6, 2000 (Establishing the Special Panels for Serious Crimes in East Timor)

³ "Robinson calls for reparations for war crime victims," Oct. 9, 2009, found at <http://www.emportal.rs/en/news/region/100889.html>

can seek damages for their injuries, despite the fact that their right to compensation is deeply ingrained in international law." The Rome Statute that established the International Criminal Court (ICC) tries to fill this gap. It permits the Court to award reparations to victims,⁴ but this mandate is prospective and because the Statute promotes the principle of complementarity, many victims may still end up waiting for their own States to establish reparations programs.

More than merely compensation, then broader concept of reparations has emerged as a norm in international law. Through the 2005 UN General Assembly resolution on the *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*,⁵ (to be referred to here as the *Basic Guidelines*), most States now recognize that victims of human rights violations have a separate right to reparations and that States have an obligation to establish the means by which this right is made meaningful. If and when the ECCC orders reparations, it could be setting a very important precedent for the ICC and for other future tribunals, depending upon how reparations orders are crafted by the Court and how, in turn, these orders manage and address the expectations and needs of victims and survivors.

The meaning of “moral and collective reparations”

There is no binding legal definition of “moral reparations” as well as of “collective reparations.” These two concepts, however, suggest that a distinction is being made with *material* reparations – specifically financial compensation – and with *individual* reparations. There is no fundamental obstacle to the Court limiting its reparations awards only to moral reparations, although the Court’s Internal Rules⁶ seems to recognize that these may also be material in character, e.g. services, publication and memorials. The *UN Basic Guidelines* recognizes the fact that many massive and systematic human rights violations may be “directed against groups of

⁴ Art. 75 of the Rome Statute

⁵ UN General Assembly, *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 : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147*

⁶ Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev 4), as of September 11, 2009

persons who are targeted collectively”⁷ and, at least in international law, reparations are arguably not necessarily individualized.

In a January 2009 international conference on collective reparations co-organized by ICTJ in Rabat, Morocco with the Moroccan human rights council, government and victims’ advocates from seven countries where collective reparations programs are being implemented or planned,⁸ talked about two approaches to collective reparations. One approach may be based on what binds a group of victims:

*“Collective reparations are focused on delivering a benefit to groups of victims that suffered from human rights violations. These groups may be bound by a common identity, experience or form of violation. Collective reparations may conceivably address the gender-based aspects of individual violations, such as sexual violence committed against individual women. In other instances, they might address violations affecting the population of an area – such as those involving massacres of entire villages, the deliberate destruction or displacement of indigenous communities or the targeting of civilian organizations seen as resisting a regime or opposing combatants in a conflict...The impact of these violations may be felt in different forms and suffered in various degrees by individual victims...”*⁹

A second approach is founded on looking at collective reparations “as a way of simplifying delivery of reparations in contexts with practical limitations or when concern exists about distinguishing between classes of victims or between victims and non-victim groups. Collective reparations are thought to avoid the potentially disruptive effect individual payments can have on communities.”¹⁰ The Court can opt for a very practical approach, as discussed next, by identifying collectives based on the combination of such circumstances as the *impact of violations* suffered, the *common location or geographic origin* of victims, their common *ethnic or religious identity* or even by treating the entire universe of victims as a single collective.

Should the ECCC award reparations for each group of civil parties in each case or is there a better approach?

The Court can either interpret its power to grant reparations as requiring it to award reparations only within the context of each case; or it can interpret this power flexibly by looking at

⁷ *Preamble*, UN Basic Guidelines

⁸ These collective reparations programs are in Indonesia (Aceh), Colombia, Liberia, Morocco, Peru, Timor Leste and Sierra Leone.

⁹ International Center for Transitional Justice (ICTJ), The Rabat Report, “*The Concept and Challenges of Collective Reparations*,” 2009 (unpublished)

¹⁰ *Id.*

the universe of victims and survivors before making comprehensive orders on reparations and without making this assessment dependent on who committed the violation. Under the *UN Basic Guidelines*, victims are entitled to reparations *because of the harm they suffered* and “regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted.”¹¹

The civil parties in Case 001 constitute a relatively smaller and homogenous group of survivors and families of victims – only seven out of more than 14,000 prisoners survived the prison overseen by the defendant; only 94 persons have come forward to claim reparations (the trial chamber has already rejected one applicant, while the defense has challenged the claims of about 1/3 of the total).¹² The Court can craft a specific order of reparations for this group as a collective, especially in response to the crime of torture and its consequences. The UN Convention Against Torture (CAT), to which Cambodia is a State party, explicitly requires States to

“ensure... 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” and that “(i)n the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”¹³

On the other hand, there may be survivors or families of victims of torture – whether they were tortured in the same prison or elsewhere – who could conceivably belong to a collective of torture victims but may not have come forward as civil parties. Under the CAT as well as under the *UN Basic Guidelines*, they would have the right to reparations. The Court needs to take this into account.

Similar possibilities exist with respect to victims of most of the other crimes. The Court *may* treat each group of civil parties (or sub-sets within those groups) as a collective for reparations purposes but it will then have to consider that civil parties in the other cases before the Court could just as properly belong to different kinds of collectives either because they

¹¹ Under the UN Basic Guidelines, par. IV (9)

¹² Communication with Terith Chy, Team Leader, Victim Participation Project, Documentation Center of Cambodia (DC-Cam)

¹³ Article 14(1), Convention Against Torture, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85

suffered the same impact or harm, share the same experience, location or geographic origin or have a common ethnic or religious identity.

Due to its implications on how Cambodians and victims in particular perceive justice, the Court's reparations mandate – it cannot be overemphasized -- has to be approached with the same appreciation for nuance and complexity as the criminal aspect of the case. Providing one collective of victims certain forms of reparations will invariably raise the expectations of other collectives. Treating one collective differently from another could cause dissatisfaction. Therefore, it may be more practical for the Court to situate its reparations orders within a larger framework than just within each case in its docket. This is more strategic and recognizes that the overall interest of victims – rather than factors affecting the trial of alleged perpetrators – is the more important consideration. In cases ending in conviction, the Court can then involve the civil parties directly in the process of designing the most feasible, meaningful and practical reparations measures appropriate to all or to specific victims groups.

This does not mean that the Court should not issue specific reparations orders at the conclusion of each case. Certain orders – for example, the publication of the judgment, the holding of a ceremony or the building of a *stupa* for a specified group – can be carried out in relation to each decision. But longer-term measures requiring more significant resources and broader victim consultations may be reserved by the Court for when it has consolidated its perspectives regarding the universe of victims. The Court may even want to delegate to a court-created body the task of submitting recommendations on reparations. Such a body will earn added credibility if it has representation for victims, civil society, religious groups, and Cambodian professionals with a background in documentation, culture, forensics and social development. Similar bodies in Peru¹⁴ and Sierra Leone¹⁵ have recognized the importance of victim participation and these experiences may be useful in the Court's own approach at managing this process in Cambodia.

¹⁴ In Peru, the *Comisión Multisectorial de Alto Nivel (CMAN)* has 10 government representatives from relevant agencies and four civil society representatives, including those from victims' organizations. CMAN recommends collective reparations policies to the president. (See

<http://www.planintegraldereparaciones.gob.pe/portada.php?Id=1&opcion=CMAN>

¹⁵ In Sierra Leone, the Reparations National Steering Committee has 19 government representatives and two civil society members. The United Nations Peacebuilding Fund (PBF) has given a grant of \$3 Million to start the reparations program; See its report at www.unpbf.org/docs/.../Sierra-Leone-30-June.../PBF-SLE-A-4.doc

Forms of reparations measures under the Internal Rules

In the Internal Rules, the Court has given itself room for designing and adjusting reparations so they corresponding as much as possible to the expectations and limitations of the Cambodian context. While the IR identify specific forms of reparations, its language is clear that these are not the only forms that the Court can award. The Guidelines explicitly say that reparations may take the following forms: “(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.”¹⁶ Based on this non-exhaustive enumeration, with the “collective and moral” standard in mind, comparative experiences outside Cambodia can aid the Court in deciding the possible forms of reparations it can order:

Publication of the judgment: The conventional approach would be to publish the judgment in Khmer at the convicted person’s expense. This is important but may not reach most Cambodians. The Cambodian government says “only 36 percent of the population over fifteen years of age is functionally literate.”¹⁷ However, the Rules say that publication can be made in “other media,” so the Court might consider alternatives that may be more accessible and meaningful to victims.

- *Publication by personal appearance.* The convicted parties may be ordered to “publish the judgment” by directing them to appear before the civil parties *and before non-civil party victims*. The convicted person can read the judgment and, *if the parties agree*, answer questions and make declarations that can contribute to the concept of satisfaction as a form of reparations.¹⁸ The importance of publishing by personal appearance goes

¹⁶ Internal Rules (Rev.4), 11 September 2009

¹⁷ See “Adult Functional Literacy,” Ministry of Education, Youth and Sport, Royal Government of Cambodia, at http://www.moeys.gov.kh/old_moeys.gov/en/education/nfe/adult_functionality_literacy.htm

¹⁸ The UN General Assembly *Basic Guidelines on the Right to Remedy* describes “satisfaction” as including:

beyond accessibility. By physically appearing in the victims' milieu, the convicted person can contribute to a more personal sense of justice for survivors. For families of the deceased or missing, it might bridge the gap between a trial that cannot bring back the dead or the disappeared and the need of their families to understand why their loved ones are lost. It may be imperfect justice, but it may presumably be better than being informed that a perpetrator has been sentenced to years of imprisonment in Phnom Penh.

■ *Broadcasting as publication.* In one case¹⁹ at the regional Inter-American Court of Human Rights (IACHR) system, the court noted that the “severity of the crime” – the extra-legal execution of fifteen judicial officers – “warranted a full television program that explained what happened.” An equally important practice is for the order of publication to be tailored to the needs of victims. In *Saramaka People v. Suriname*,²⁰ the IACHR ordered the State to publish sections of the court’s judgment in Dutch in the local newspaper, but also ordered two radio broadcasts explaining the Court’s opinion in the language of the Saramaka people. In *Tiu Tojín v. Guatemala*,²¹ the court specified passages of the opinion to be published,²² the languages in which these would be broadcast, and synchronized the printed publication of the passages with radio broadcasts to be done on four Sundays with a four-week interval over a six-month period.²³ In *Yakye Axa Indigenous Community v. Paraguay*²⁴ the court specified that the radio broadcast be on a radio station to which the members of the victimized community have access.

“(b) Verification of the facts and full and public disclosure of the truth ...; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; ... (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

¹⁹ *Case of the Rochela Massacre v. Colombia*. Merits, Reparations and Costs (2007) para. 277.

²⁰ *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs (para. 196).

²¹ *Case of Tiu-Tojín v. Guatemala*, Series C No. 190

²² *Id.* at (para. 108).

²³ *Id.* at (para. 108).

²⁴ *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs (para. 227).

■ *Apologies as publication.* Whether or not the Court can order a convicted defendant to apologize is a more difficult question. In the Inter-American system, since States are the principal respondents, the court's orders to apologize have been directed at States although carried out by government officials. Nonetheless, these examples may be useful where the convicted defendant is willing to make a public apology; in such a case, the Court can provide a detailed setting for it. In *The Case of Huilca-Tecse v. Peru*²⁵ the IACHR ordered the respondent (the State of Peru):

"to acknowledge publicly the State's international responsibility for the extrajudicial execution of Pedro Huilca Tecse and make a public apology to Martha Flores Gutiérrez, José Carlos Huilca Flores, Indira [Isabel] Huilca Flores, Flor de María Huilca Gutiérrez, Pedro Humberto Huilca Gutiérrez, Katuska Tatiana Huilca Gutiérrez and Julio César [Escobar] Flores [...], for having concealed the truth for more than 12 years.

"The public act shall be attended by the most senior authorities of the Peruvian State, trade unions and human rights organizations, in the presence of the victim's next of kin. This act shall be held within three months of the date on which the agreement is signed[;]"

Funding a non-profit activity. While the language of the Rules here implies a substantial financial cost, it need not be the case. In the examples below, the fact that a convicted person has little or no financial capacity (a situation discussed further in this paper) is taken into account:

■ *Website for listing and tracing the deceased or disappeared.* In one case²⁶ the IACHR ordered the creation of "a web page for tracing the disappeared children." In Germany, the website²⁷ of the International Committee of the Red Cross (ICRC)-run International Tracing Service (ITS) contains information about the fate of over 17.5 million persons and their families during the Nazi regime. The ITS allows families of victims to make on-line requests for the tracing of the fate of individuals. The work of such a tracing service shows both actual and potential value if a non-government institution like the

²⁵ Judgment of March 3, 2005 (*Merits, Reparations and Costs*)

²⁶ *Case of the Serrano-Cru Sisters v. El Salvador* (March 1, 2005)

²⁷ See http://www.its-arolsen.org/en/humanitarian_requests/application_forms/online_form/index.html

Documentation Center of Cambodia (DC-CAM) were to be clothed by the Court with a similar mandate.

■ *Genetic and other forensic information.* In two other cases²⁸ in the Inter-American system, the court ordered the creation of a genetic information system that could be used in identifying deceased victims. While a comprehensive, sustained and long-term effort at locating, exhuming and identifying the remains of those who died in the conflict in Cambodia more properly belongs to the State, the Court can *initiate* the establishment of such a system. It can direct the convicted persons to contribute funds as well as personal knowledge of such facts as the sites of mass graves, locations where torture and killing may have taken place, the movement of populations and armed units, and the relevant decisions taken by Khmer Rouge leaders.

Despite the long and still-continuing debate over how many persons were killed in the conflict involving the Khmer Rouge,²⁹ most of the previous and recent efforts at estimating the number of those who died relied “mainly on social science research methods (and)...on staff untrained in forensic sciences.”³⁰ Hence, what the Court can initiate – for the first time – is a judicially-sanctioned, forensic-science-founded effort not only to determine the number of those who died, but possibly, enable many families in the future to identify and properly rebury the deceased.

■ *Memorials and other symbolic reparations.* Memorials as symbolic reparations are meant to acknowledge the experiences of victims. But they also have the function of ensuring the remembrance of what happened. That is particularly important in Cambodia

²⁸ *Case of the ‘Mapiripán Massacre’ v. Colombia* (September 15, 2005); *Case of Tiu Tojin v. Guatemala* (November 26, 2008)

²⁹ See Ben Kiernan, ‘The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975–79, and East Timor, 1975–80,’ *Critical Asian Studies* 35(4) (2003); see also Craig Etcheson, “The Number” -- Quantifying Crimes Against Humanity in Cambodia, at <http://www.mekong.net/cambodia/toll.htm>

³⁰ Melanie Klinkner, *Forensic Science for Cambodian Justice, The International Journal of Transitional Justice*, Vol. 2, 2008, 227–243,

where younger generations aren't familiar with the Khmer Rouge.³¹ There are, however, some considerations to reflect on. First, in a number of developing countries, symbolic reparations unaccompanied by reparations that have material impact on the daily lives of victims can often lead to frustration. For example, victims might ask why monuments are prioritized over social services. In Cambodia, most victims have stressed the importance of economic and social services as reparations.³² The example of the Cambodia Land Mine Museum³³ and its corresponding Landmine Relief Fund might be useful in looking at how these objectives can be combined. As discussed later, the work around assisting victims of unexploded ordnance and landmines in Cambodia may also be useful in looking at reparations policies in general.

Second, aesthetic values imparted by symbolic reparations should be appropriate not only to the local culture but to specific sub-cultures,³⁴ such as victims among the Cambodian Cham population. The leadership of the Court's Cambodian judges in this area would be important.

One possibility might be to look at simple additions to existing memorials in and near Phnom Penh -- some have suggested plaques with the names of victims -- so that relatively more resources can be invested in the provinces. At a November 2008 conference in Phnom Penh that focused on the Court's reparations mandate,³⁵ a specific recommendation was made for the Court to recognize each victim in memorials already or which might be established. As a consequence of truth commission processes, the listing of names has been a feature of reparations programs. In Chile and in Peru,

³¹ See Human Rights Center, University of California at Berkeley, "So We Will Never Forget: A Population Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia (ECCC), at <http://hrc.berkeley.edu/pdfs/so-we-will-never-forget.pdf>

³² Id.

³³ The Museum is a non-profit entity, and its website is at <http://www.cambodialandminemuseum.org/ourmission.html>

³⁴ International Center for Transitional Justice (ICTJ), The Rabat Report, "*The Concept and Challenges of Collective Reparations*," 2009 pp. (unpublished), where concern over whether the symbols recognized by indigenous populations in Peru and ethnic minority populations in Morocco are reflected in the memorials being built in those countries' collective reparations programs.

³⁵ Conference on Reparations for the Victims of the Khmer Rouge, co-organized by the ECCC and the Cambodia Human Rights Action Committee (CHRAC)

victim's names were published within the body of the truth commission's report. Additionally, in Chile, victims or their families received an individual copy of the report. In German and United States reparations programs relating to World War II, victims were given an individual letter of apology along with the check representing financial compensation.

Existing Cambodian memorials, compared to similar but more famous sites in developed countries, are modest, 'low-tech' and simple. These values are seen as positive by some.³⁶ It may also be useful to consider some of the survey-based recommendations noted by ICTJ's Louis Bickford in a paper about Choeung Ek³⁷ and how it "could become (an) important place of truth-telling about the Khmer Rouge period."³⁸ In the absence of a truth commission in Cambodia and the limits of using trials for truth-telling, memorials could serve this function.

Social services as collective reparations. Most victims have expressed their desire for social services as reparations³⁹ and the civil parties have specified these to the Court. These have included health services including psychological and physical care, and education. Obviously, if the Court adopts a narrow interpretation and vests the burden of financing reparations on convicted defendants (and does not go further in verifying their claims of indigence), the feasibility of establishing and maintaining these social services will be in serious doubt. Nonetheless, the Court may want to consider the experiences elsewhere where specific kinds of social services were ordered or provided as reparative measures.

In the Inter-American system, the court has ordered funding for *specific* infrastructure to be built or maintained as collective reparations – such as the cost of building a chapel where

³⁶ *Id.*

³⁷ Louis Bickford, "Transforming a Legacy of Genocide: Pedagogy and Tourism at the Killing Fields of Choeung Ek," ICTJ (2009), available at http://www.ictj.org/static/Asia/Cambodia/ICTJBickford_KHM_ChoeungEK_pa2009.pdf

³⁸ *Id.*

³⁹ Berkeley survey, *supra*.

families can pay their respects to those who were killed⁴⁰ -- alongside other general orders of reparations. In another case, the court ordered that a specific amount be turned over to a three-person committee that would determine what health, housing and education programs should be funded.⁴¹

Those familiar with the Inter-American system have noted that “when establishing a fund for community development, the Court tends to grant administrative control to the victims. The Court realizes that the best way to reconstitute shattered communities is to give the surviving community members the resources they need to cultivate new beginnings.”⁴² On the other hand, in other countries where communities of victims were given a decisive role in deciding the kind of social services and infrastructure to build or maintain, hierarchies as well as the distribution of power within a community have tended to either create or reinforce exclusions, including the exclusion and disempowerment of women.⁴³

It would also be important for the Court to consider whether these services may be extended not only to civil parties and their families but also to non-civil party victims and their families. This could mean greater costs especially in a country where most people have no access to basic health services. But by comparison, in Chile (although concededly a more developed setting), a health care program called PRAIS⁴⁴ initially set up for victims of torture, was later expanded to accommodate victims of other violations and their dependents. In other words, the approach can be gradual and incremental.

Another consideration in the expansion of social services as collective reparations would be whether those perceived as perpetrators and their families should be able to access the same services. In Cambodia, this may be a pertinent question in provinces and communities where former Khmer Rouge leaders and members freely live and work with those who were victims or survivors of the regime. In developed and middle-income countries where social services are

⁴⁰ *Case of the Plan de Sánchez Massacre v. Guatemala* (2004)

⁴¹ *Case of Moiwana Community v. Suriname*

⁴² Bridgett Mayeux and Justin Mirabal, under the supervision of Prof. Ariel Dulitzky of the University of Texas School of Law Human Rights Clinic, “*Collective and Moral Reparations in the Inter-American Court of Human Rights*,” 2009, (unpublished), prepared as a supplement to this ICTJ brief

⁴³ Rabat report, *supra*.

⁴⁴ Programa de Reparación y Ayuda Integral en Salud y Derechos Humanos

relatively accessible, this could be seen differently. But in the still emerging system of the African Court of Human and Peoples' Rights, for example, which would apply the provisions of the Banjul Charter expressly guaranteeing equal access to health care and other social services, this certainly creates a dilemma.⁴⁵

It is also important to remember that Cambodia is not without valuable experience in providing basic social services to victims of the Khmer Rouge conflict. The conflict left behind an estimated 2-5 million landmines and this has resulted in more than 40,000 amputees⁴⁶ in need of attention and services. The government has created a Cambodia Mine Action and Victims Assistance Authority,⁴⁷ and a significant number of Cambodian and international non-government initiatives have demonstrated the different ways that the needs of this particular group of victims may be addressed through education, housing and other social services. One very important lesson from this experience is that in offering social services as reparations, attention may also be focused on, if not given to, the most economically and physically vulnerable members of a developing country. For example, services for disabled mine victims has brought attention to the fact that many disabled Cambodians *in general* have little or no access to specialized medical services.⁴⁸

Who should bear the cost of reparations?

The Internal Rules say that reparations "shall be awarded against, and be borne by convicted persons."⁴⁹ So far, all the accused before the Court have sought and were apparently given the status of indigent defendants. A narrow and literal interpretation of the rule that reparations is to be "borne by convicted persons" could potentially defeat the civil parties' right to receive such reparations. The defendants can invoke their court-recognized indigent status. Defendants who do not claim to be indigent can simply refuse to disclose the assets they have.

⁴⁵ African (Banjul) Charter on Human and Peoples' Rights (*Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986*)

⁴⁶ Shefali Lall, "Cambodia Landmine Museum opens a window to the horrors of landmines," available at <http://www.mediaglobal.org/article/2009-07-01/cambodia-landmine-museum-opens-a-window-to-the-horrors-of-landmines>

⁴⁷ Royal Government of Cambodia, Royal Decree No. NS/RKT/0199/17 dated January 20, 2000

⁴⁸ Cris Dammers, "Participatory Monitoring and Evaluation of Humanitarian Mine Action in Cambodia.," available at <http://www.unidir.org/pdf/articles/pdf-art1873.pdf>

⁴⁹ Para. 11 Section 23 of the IG

Moreover, if a convicted defendant is found to have assets that were acquired unlawfully -- such as, for example, by profiting from illegal logging, mining or other activities in which Khmer Rouge forces were publicly reported to have been engaged in before the trials⁵⁰ -- those assets cannot be used for reparations. Instead, under the law creating the ECCC,⁵¹ the court "may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct" and "(t)he confiscated property shall be returned to the State."

The latter provision suggests that the Court has the power to determine the extent of a defendant's assets and whether all of those assets were acquired lawfully. In order not to defeat any prospective reparations order, the Court should consider exercising its powers to order the investigation of a defendants' financial capacity, to conduct seize and seizure,^{52,53} and even to issue a freeze order if assets are found. This has been the practice in the ICTY. The ICTY's rules of procedure⁵⁴ do not explicitly authorize the court to freeze the assets of an accused person, but the ICTY invoked its own power to issue orders "as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."⁵⁵ This was how the ICTY froze the assets of Slobodan Milosevic.⁵⁶

In cases before the ICC, the Rome Statute is more mindful of victims' rights and expectations. Prior to any order awarding reparations, the Court can "take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims."⁵⁷ Once reparations have been ordered, the Court may determine whether it should take other measures to ensure reparations are actually delivered.⁵⁸

Non-financial reparations and the possibility of a Trust Fund

⁵⁰ See Global Witness report, "The Khmer Rouge and the Funding of the Civil War"; last visited at http://www.globalwitness.org/pages/en/khmer_rouge_and_civil_war.html

⁵¹ Chapter XI Article 39

⁵² Rule 61

⁵³ Rule 62 (1) and (2); under Rule 93, even the Trial Chamber can exercise this power during the trial itself.

⁵⁴ Rules of Procedure and Evidence of the ICTY (*cite*)

⁵⁵ Rule 54, Rules of Procedure of ICTY

⁵⁶ The Prosecutor v. Slobodan Milosevic, Case No. IT-99-37-I, "Decision on Review of Indictment and Application for Consequential Orders" 24 May 1999

⁵⁷ Article 57 par. 3(e) ICC Statute

⁵⁸ Article 75 par. 4 in relation to Article 93

But what if after ascertaining the financial capacity of convicted defendant, no assets can be found to pay for reparations? It may be necessary for both the Court and the civil parties to jointly (a) make the effort at generating funds for court-ordered reparations and (b) advocate a significant role for the State in fulfilling the right to reparations, through the establishment of a broader national reparations program.

At the very least, the Court must maintain a flexible interpretation of its rules. First, the rule that defendants should bear the cost of reparations need not mean only bearing its *financial* burden. In Timor-Leste, ex-militia members who sought to return to communities where they had committed less serious human rights violations were given the option of performing "acts of reconciliation" under a Community Reconciliation Program (CRP). With the consent of victims, perpetrators performed manual labor, contributed farm animals and publicly apologized and offered symbolic tokens to victims and their communities.⁵⁹ Although this was in the context of truth commission efforts, the Court can take a similar flexible approach in the civil aspect of its cases.

Second, civil parties have called for the creation of a trust fund. The setting up of a transparent and efficient process where donors can contribute resources or financing for reparations may mean the establishment of a trust fund; but this might also mean simply identifying specific resources that can fund specific forms of reparations. In other experiences, the establishment of a trust fund has not necessarily led to the implementation of reparations. This is because a trust fund, although governed by fiduciary standards, does not guarantee that money will be contributed. Some trust funds proposed or created as a result of truth commission recommendations have either not been created or funded.⁶⁰ Both the UN Voluntary Fund for Victims of Torture as well as the Trust Fund for Victims (TFV) of the ICC remain under-funded; nonetheless, these trust funds have tried to maximize their work based on the resources they can raise.

⁵⁹ See <http://www.ictj.org/static/Timor.CAVR.English/09-Community-Reconciliation.pdf>

⁶⁰ The Sierra Leone TRC recommended a War Victims Fund; in Timor Leste, a Solidarity Fund was created, and in Ghana, a Reparations Trust Fund was also created. In all these cases, the trust funds themselves were not funded, even as other reparations initiatives were implemented, but in very limited ways.

Finally, the Court (and the government of Cambodia) must already begin the process of exploring the different ways in which funding for reparations can be generated. Donors will understandably need to see a transparent, feasible and meaningful approach to reparations, whether within a comprehensive reparations program or in a series of reparations measures ordered by the Court. Many donor agencies from developed countries are open to funding transitional justice measures but regrettably, not reparations. Often, this is simply a reflection of the privileging within the international community of prosecutions and trials as approaches to accountability over the more direct ways in which accountability might benefit victims.

In other instances, some countries have refused contributing to reparations for fear that this might be construed as accepting accountability. Certainly, foreign States accountable for violations that took place in a conflict ought to contribute to reparations. A few have done so voluntarily;⁶¹ other States have agreed to settle the question through international litigation⁶² and other States have worked with the State of the conflict's victims to recommend specific reparative measures.⁶³

Certainly, a process that prioritizes the victims of a conflict over the more politically-charged process of assigning State responsibility should be a good starting point for reparations. In Cambodia, the complex regional armed conflict and complicated ideological struggles that involved the United States, China and Vietnam is an unavoidable consideration. It is notable that in addressing the legacy of Agent Orange-dioxin (AOD) contamination and its impact on Vietnamese, the United States is willing to pursue, "practical, constructive cooperation" with the Vietnamese government to address the "health of the Vietnamese people and the safety of its environment."⁶⁴

⁶¹ For example, see AP, "*Italy Agrees to \$5 Billion Libya Reparations*", Aug. 3, 2008

⁶² International Court of Justice, Judgment in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005).

⁶³ See The Final Report of the Commission of Truth and Friendship, Indonesia-Timor Leste, March 31, 2008, available at http://socrates.berkeley.edu/~warcrime/East_Timor_and_Indonesia/Reports/PER%20MEMORIAM%20AD%20SPEM%20Eng_ver.pdf

⁶⁴ Testimony of Scott Marciel, Deputy Assistant Secretary, Bureau of East Asian and Pacific Affairs, US Department of State, on US-Vietnam Cooperation on Issues Related to Agent Orange, June 4, 2009, available at <http://www.state.gov/p/eap/rls/rm/2009/06/124351.htm>

One recurrent question that has been raised precisely about the Court's jurisdiction is the exclusion of war crimes and crimes against humanity that have been attributed to American military bombardment of Cambodia, for example. At the November 2007 conference, some victims categorically sought reparations *for those violations* as well.

While these involve political question that cannot be answered by the Court, victims should not be left holding the empty bag of reparations. There are other options in raising reparations resources that can be learned from other experiences. Some countries have proposed (and collected) one-time taxes to fund specific measures, such as a mining tax in Peru to help the collective reparations program. Argentina's government floated commercial bonds to finance compensation payments for victims. On the other hand, instead of incurring more debt just to fund reparations, countries such as Ghana have leveraged their status as a Heavily-Indebted Poor Country (HIPC) under World Bank and International Monetary Fund (IMF) programs, to allocate to reparations what would have been used for foreign debt payments. In Morocco, the European Union has been a key donor; in Sierra Leone, the UN Peacebuilding Fund has also given start-up funding for reparations. But in all of these examples, the government had to take the initiative and had to show that it had the political will to implement reparations.

The role of the State and the implementation of reparations

The ECCC is part of a domestic court system, albeit an extraordinary chamber. It is this character that complicates the question of the State's role in fulfilling the victims' right to reparations. There are three roles that the State can and should commit to assuming.

First, Cambodia's government should be the guarantor of the enforcement of the court's reparations orders. This means the use of the judiciary's coercive power in enforcing writs, including in the event that certain reparations measures have not been completed or implemented after the ECCC ceases to function.

Second, the government of Cambodia also has to be the implementer of those orders, when the role is called for. For instance, Cambodian agencies will have to assist the court in the

identification of the assets of convicted defendants that can be applied to fund reparations. In implementing certain forms of reparations – such as publication through broadcasts, the holding of public events, memorialization and possibly access to social services – the government’s facilities and personnel should be made available. There are certain measures, such as for instance, the naming of public facilities in honor of victims that can *only* be done through the State. (This may also be done jointly with non-government organizations; in Sierra Leone for example, the government reparations agency contracted NGOs with knowledge of customs of the country’s ‘chiefdoms’ to organize and hold public ceremonies that form part of a set of symbolic reparations measures.)

Third, as stated in Principle IX par. 16 of the *Basic Guidelines*, “States should endeavour to establish national programmes 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.” While this is a guideline, it carries normative weight. Within the ECCC context, where domestic and international legal norms both apply, the role of the State is decisive in the event that assets of convicted perpetrators aren’t able to fund reparations. For example, in Colombia, a law⁶⁵ established a Justice and Peace court process for demobilizing ex-combatants and directed that assets of perpetrators of human rights violations – whether those assets were legally or illegally acquired -- be used for reparations.⁶⁶ The Colombian constitutional court ruled specifically on a reparations issue and said⁶⁷ that:

⁶⁵ Law 975 (2005) Justice and Peace Law,

⁶⁶ Law 975, Article 54. “**Fund for the Reparation of Victims.** The Fund for the Reparation of Victims is hereby created as a special account ... whose controller of expenditure shall be the Director of the Social Solidarity Network. The Fund’s resources shall be executed pursuant to the rules of private law. The Fund shall be made up of all the assets or resources that under any concept may be surrendered by the persons or illegal armed groups referred to herein, resources from the national budget, and donations in cash and in kind, both national and foreign.”

“The resources administered by this Fund shall be under the surveillance Comptroller-General Office. Paragraph. The assets referred to in Articles 10 and 11 shall be surrendered directly to the Fund for the Reparation of Victims created herein. The same procedure shall be observed regarding assets linked to criminal investigations and forfeiture proceedings in course at the time of demobilization, provided the acts were perpetrated on occasion of their membership in the illegal armed group and before the coming into force of this law. The Government shall regulate the operation of this Fund and, in particular, everything concerning the claims and surrender of assets regarding good-faith third parties.”

⁶⁷ Corte Constitucional de Colombia, Judgment No. C-370/2006, D-6032 (May 18, 2006), *Gustavo Gallón Giraldo y otros v. Colombia*. ICTJ filed an amicus brief in the case and the English translations quoted in this paper are unofficial translations by ICTJ.

“The principal responsibility for reparations lies with the perpetrators of the crimes, and it is a solidary obligation of the specific group to which the perpetrator belongs. Before resorting to State resources for the reparation of victims, it must be demanded of the perpetrators of the crimes or the front or unit to which they belonged, to surrender their personal assets for repairing the damages caused to the victims of these crimes. The State enters this sequence only in a residual role, to cover the victims’ rights, particularly those of victims who do not have a judicial decision establishing the amount of compensation to which they are entitled (second paragraph of Law 975 of 2005, article 42) and in the event that the resources surrendered by the perpetrators prove insufficient”.

In Cambodia’s case, the Court may want to consider language in its reparations orders that reflect its interpretation of this norm: does the Court believe that this norm would apply if and when defendants are “unable or unwilling to meet their obligations” to the victims? The Court can also express its views on the practical advantage of the government establishing a national reparations program (based on the court’s orders) compared to an organ of the court, such as the victims support unit, attempting to do that with its relatively limited reach and resources.

Conclusions

These conclusions can only be tentative. They will have to be weighed against how the Court proceeds with its first attempt at providing reparations. Like the *UN Basic Guidelines* that have become the principal reference in how States have had to grapple with the challenges of reparations, the proposals made and issues raised here are culled from experiences that were shaped by different circumstances. Nonetheless, many of these experiences -- while possibly indifferent to the uniqueness of the Court’s place in post-Khmer Rouge Cambodia -- may resonate in that they are also set in post-conflict situations of poverty, underdevelopment and difficult attempts at transitional justice and reparations.⁶⁸

In the thirty years it has taken to bring Khmer Rouge leaders to trial, paradigms of justice have shifted and legacies of abuse and impunity elsewhere have been challenged. For the generation of Cambodians who lost and suffered through the war and the regime that it spawned, expectations that may have already been lowered were raised again when the Court was created

⁶⁸ See Ruben Carranza, “*The Right to Reparations in Situations of Poverty*,” ICTJ (2009), available at http://www.ictj.org/static/Publications/bp_carranza_reparations_EN_rev2.pdf

and raised even higher when reparations were promised. The difficulty of managing, let alone meeting, those expectations is indisputable. But reparations is a right, not just a promise. No matter how impractical and non-feasible it may seem, providing reparations is an obligation as inherent as the guarantee of human rights. This paper has laid out ways by which the Court and the Cambodian government can give meaning to this obligation; but the most meaningful ways would be those that clearly and unequivocally *acknowledge* the experiences of victims: what they went through, who they lost and what they can never fully recover.