



## Human Rights Now

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### **Policy Arguments and Legal Observations regarding Reparations Appeal of ECCC Case 001**

*Human Rights Now*

#### **Introduction**

For the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”), *Human Rights Now (HRN)* issued “*Justice for Victims – Fundamental issues for the Extraordinary Chambers in the Courts of Cambodia*” on September 13th, 2006<sup>1</sup> and called on the ECCC and those concerned to confirm the fundamental principles of victims’ rights, including the right of access to justice through participation in the legal process and a right to reparations. Additionally, HRN submitted “*Comments on the Draft Internal Rules of the ECCC*”<sup>2</sup> on November 17th, 2006, which supported the draft provision empowering a court to issue orders of reparation including collective or symbolic reparation.

Subsequently, the ECCC adopted the first version of the Internal Rules (the “IR”) in June 2007, incorporating processes for victims’ participation as Civil Parties and the system of reparations, as well as the provisions for the establishment of a Victims Unit, all of which were recommended in our paper above.

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<sup>1</sup>.Revised slightly on October 13th, 2006. Available on the HRN website at <http://hrn.or.jp/activity/JusticeforVictims%28HRN-Japan%29english.pdf> (English)  
<http://hrn.or.jp/activity/JusticeforVictims%28HRN-Japan%29japanese.pdf> (Japanese)

<sup>2</sup> <http://hrn.or.jp/activity/CommentsonECCCDraftIRs%28HRN%29.pdf> (English)  
<http://hrn.or.jp/activity/commentsonECCCDraftIRs%28japanese%29.pdf> (Japanese)

Now that the Trial Chamber (the “**TC**”) of the ECCC issued its judgment of Case 001 on July 26, 2010 (the “**TC Judgment**”) <sup>3</sup>, HRN express its concern over serious deficiency in the TC Judgment with respect to reparation measures, as one of the international NGOs that has engaged in the discussions of victims’ rights at the ECCC since 2006<sup>4</sup>.

In fact, HRN considers that the TC Judgment regarding reparation should be vacated due to both an error on a question of law and an error of fact for the following reasons.

We hope this memorandum would serve as any reference for the Judges of the Supreme Court Chamber in correcting errors in the TC Judgment, and for other relevant parties involving the appeal process of the Case 001, as well as for all of those who are interested in how the reparation mechanism of the ECCC should be developed in order to safeguard the interests of victims and achieve justice for them.

## **A. Background**

In the TC Judgment, Kaing Guek Eav *alias* Duch was found guilty of crimes against humanity and war crimes and sentenced to 35 years of imprisonment (with a reduction of 5 years due to illegal detention). The reparations awards issued by the ECCC as part of the TC Judgment, however, were very limited, including only (i) listing the names of all accepted Civil Parties and the name of any family member who died at Khmer Rouge S-21 prison in the TC Judgment, and (ii) an order for a compilation of all statements of apology and acknowledgments of responsibility made by Duch during the course of the trial. Other requested reparations, such as memorials or trust funds for victims, were rejected because they either “lacked specificity” or “were beyond the scope of available reparations before the ECCC”. The co-lawyers for Civil Parties criticized the TC Judgment regarding reparations as “unimaginative”.<sup>5</sup> Under the IR, the Supreme Court Chamber of the ECCC may grant an appeal on the ground of “an error on a question of law invalidating the judgment or decision” or “an error of fact which has occasioned a miscarriage of justice”.<sup>6</sup> As such, the co-lawyers for Civil Parties have filed notices of appeal, which argued that the rejection of the reparation requests is both an error on a question of law and an error of fact.<sup>7</sup>

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<sup>3</sup> Judgment in Case 001 against Accused Kaing Guek Eav *alias* Duch, July 26, 2010, (referred to as “TC Judgment”), at [www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.pdf).

<sup>4</sup> As suggestions for effective system of victims’ participation at the ECCC, HRN also published on July 9, 2008 “*Mass Victims Litigation Practices - Suggestions for Victims’ Participation at the ECCC from Japanese Experiences in Mass Plaintiff Cases*”.

[http://hrn.or.jp/activity/KRT\\_Mass\\_Victims\\_litigation\\_HRN\\_eng.pdf](http://hrn.or.jp/activity/KRT_Mass_Victims_litigation_HRN_eng.pdf) (English)

[http://hrn.or.jp/activity/KRT\\_Mass\\_Victims\\_Litigation\\_HRN\\_jpns.pdf](http://hrn.or.jp/activity/KRT_Mass_Victims_Litigation_HRN_jpns.pdf) (Japanese)

<sup>5</sup> Civil Parties Group 1 lawyer Karim Khan said the reparations ruling was “really the most minimal, most conservative, and perhaps it’s fair to say unimaginative that could have been ordered”. The Phenom Penh Post, July 27, 2010. See <http://www.phnompenhpost.com/index.php/2010072740791/National-news/reparations-remain-a-key-issue.html>.

<sup>6</sup> ECCC Internal Rules, Rule 104(1).

<sup>7</sup> Notice of Appeal by Co-Lawyers (Civil Party Group 2) for Kaing Guek Eav *alias* Duch against the Trial Chamber Judgment of 26 July 2010, September 6, 2010 at

Based on the foregoing, set forth below is legal observation of HRN on the TC Judgment regarding reparation awards in connection with the reparations appeal.

## **B. The ECCC's Jurisdiction to Enforce Reparations Awards**

A critical issue in connection with the reparations appeal is whether the ECCC has the jurisdiction to enforce the reparations award requested by the Civil Parties in the Duch case. Paragraph 661 of the TC Judgment states that the ECCC “lacks the competence to enforce reparations awards”<sup>8</sup>, and refers to Article 1 of the ECCC Law,<sup>9</sup> which provides that “the purpose of the law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law...”. This seems to indicate that the ECCC lacks the jurisdiction to enforce reparations awards because, under the ECCC Law, it is only given the power to prosecute the responsible individuals but not to enforce any reparation awards. However, this is not correct as a matter of law based on the following reasons:

1. **ECCC's Duties under the Internal Rules.** The fact that the ECCC Law has not explicitly granted power to the ECCC to enforce reparations awards does not necessarily mean that the ECCC lacks the jurisdiction to do so. Rather, the ECCC has a duty to safeguard the interests of victims, to guarantee fairness and to respect victims' rights pursuant to Rule 21(1) of the IR. The ECCC would be unable to comply with these duties if it had no jurisdiction to enforce reparation awards.
2. **The ECCC is in a Better Position to Enforce Reparations.** Although paragraph 661 of the TC Judgment states that reparations awards should be enforced within the ordinary Cambodian court system instead of the ECCC, it would be uncertain whether and how the Cambodian court system would enforce reparation awards effectively. Given that the ECCC (in particular, the Victim Support Section) generally has a better understanding of the victims' interests, the ECCC, instead of a Cambodian court that is not involved in the matter, is in a better position to enforce the reparation awards.

In addition, enforcement within the ordinary Cambodian court system would not necessarily mean that the ECCC lacks the jurisdiction to enforce the reparations. Although the power to order concrete enforcement actions may be conferred on Cambodian courts, the ECCC may, based on its authority, issue an order that would direct the Cambodian courts to enforce such order.

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[http://www.eccc.gov.kh/english/cabinet/courtDoc/683/E188\\_14\\_EN.PDF](http://www.eccc.gov.kh/english/cabinet/courtDoc/683/E188_14_EN.PDF); Notice of Appeal by Co-Lawyers (Civil Party Group 3) for Kaing Guek Eav alias Duch against the Trial Chamber Judgment of 26 July 2010, August 18, 2010 at [http://www.eccc.gov.kh/english/cabinet/courtDoc/675/E188\\_4\\_EN.PDF](http://www.eccc.gov.kh/english/cabinet/courtDoc/675/E188_4_EN.PDF).

<sup>8</sup> See TC Judgment, footnote 1145.

<sup>9</sup> The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (as amended October 27, 2004).

How much discretion the ECCC may have in ordering reparation awards based on various considerations would be another separate question, but there should be inherent limitation to such discretion as judicial institution. In any event, it would be incorrect as a matter of law to outright declare that the ECCC legally lacks such jurisdiction.

3. **International Guidance.** Article 33 of the ECCC Law states that if the “existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.”

Neither the ECCC Law nor the IR clearly addresses whether reparations awards may be enforced by the ECCC. The only reference to enforcement of reparations in the IR is Rule 113, which states that, “the enforcement of reparations shall be made at the initiative of a Civil Party”. It is, however, unclear how a Civil Party may initiate an action to enforce reparations without any support from the ECCC.

In this regard, international standards generally guarantee the right of reparation to victims of gross human rights violations<sup>10</sup>, and the ECCC, therefore, should seek guidance from procedural rules established at the international level in accordance with Article 33 of the ECCC Law.

In this respect, the law and procedures of the International Criminal Court (the “**ICC**”) may provide useful guidance. Article 75(2) of the Rome Statute of the ICC (the “**ICC Statute**”) provides that the ICC may “make an order directly against a convicted person specifying appropriate reparations to, or in respect of victims, including restitution, compensation and rehabilitation” and “where appropriate, the ICC may order that the award for reparations to be made through the Trust Fund”.<sup>11</sup> Given that the ICC is an international model based on the continuous discussions in the international community with regard to providing justice to victims of gross human rights violations, the ICC Statute is one of the best sources of guidance for international standards. Accordingly, it would be incorrect as a matter of law for the ECCC to say that it lacks the jurisdiction to enforce reparation awards, without taking into account established international standards.

4. **Additional Observation.** Finally, even if the Supreme Court Chamber were to find that the Trial Chamber of the ECCC has no jurisdiction to enforce reparations awards, it would not necessarily mean that the ECCC has no authority to approve relief that it lacks the jurisdiction to enforce. The ECCC could make non-binding recommendations to the Cambodian government regarding the requested reparations. It is difficult to see how making non-binding recommendations itself exceeds the scope of ECCC’s power and fall into “national governmental prerogatives”<sup>12</sup>, given that the Cambodian government has discretion whether to adopt such

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<sup>10</sup> See TC Judgment, footnotes 1146-1148.

<sup>11</sup> Rome Statute of the International Criminal Court, available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf)

<sup>12</sup> See TC Judgment, paragraph 671.

recommendations. Accordingly, the ECCC should at least have the power to make such non-binding recommendations<sup>13</sup> to the Cambodia government.

### **C. The “Certainty/Specificity” Requirement**

Paragraph 651(b) of the TC Judgment states that requests for reparations by Civil Parties will only be granted if they are “sufficiently certain or ascertainable to give rise to an enforceable order against the Accused”. There are, however, two major concerns with the ECCC’s interpretation of this paragraph.

1. **The TC Judgment itself is Unclear.** The TC Judgment itself is not clear on whether it lacks competence to issue orders that are incapable of enforcement. Paragraph 665 of the TC Judgment provides that “[t]he Chamber is, additionally, unable to issue orders where the object of the claim is uncertain or unascertainable, and which are incapable of enforcement.”<sup>14</sup> It is not clear whether the clause “and which are incapable of enforcement” qualifies “orders where the object of the claim is uncertain or unascertainable”, rather than “orders”. If it is the former, orders where the object of the claim is “certain or ascertainable” can be “capable” of enforcement, and as such, a court can, under certain circumstances, issue such orders.)
2. **Lack of Authority.** It should also be incorrect as a matter of law for the ECCC to reject a reparation award merely because it is uncertain or unascertainable. Neither domestic nor international law provides a legal basis for requiring a degree of specificity with respect to reparations awards. If the ECCC is concerned about the harm being uncertain or unascertainable, it can implement various estimation mechanisms (both for legal and economic purposes) to determine the harm. It would be incorrect as a matter of law to not even consider the possibility of estimating the harm. This is particularly true where there are strong policy reasons for granting reparations and, as described below, where there is international guidance.

While it may be difficult to determine the costs of implementing the requested reparations given the huge number of potential victims involved, it is not justifiable for the court to reject the requested reparations without making any effort to do so. Again, the court should at least adopt certain mechanisms to estimate the costs before determining whether it is feasible to implement the proposed reparations given other political and economical constraints. In addition, since the ECCC is comprised of international staff (judges, co-prosecutors, lawyers, etc.) who have experience in dealing with cases involving international gross human rights violations, we believe the ECCC is in a better position than the victims (who lacks the experience and resources) to manage the cost estimation process.

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<sup>13</sup> Please note that proposal for the ECCC to make non-binding recommendations to the Cambodia government was rejected in the ECCC’s 8th Plenary Session on September 17, 2010, available at [http://www.eccc.gov.kh/english/cabinet/press/170/ECCC\\_PR\\_17Sep2010\\_\(Eng\).pdf](http://www.eccc.gov.kh/english/cabinet/press/170/ECCC_PR_17Sep2010_(Eng).pdf). Based on the press release of the 8th plenary session, it is not clear why such proposal was not adopted other than because it is “considered to be beyond the scope of the ECCC’s power”. See [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=370](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=370).

<sup>14</sup> See TC Judgment, paragraph 665.

3. **International Guidance.** In accordance with Article 33 of the ECCC Law (see above), the ECCC should again seek guidance from international procedure rules. Article 75(1) of the ICC Statute provides that when assessing reparations, “the Court may...upon request...determine the scope and extent of any damage, loss, and injury to, or in respect of, victims...”. In addition, Article 97(2) of the ICC Rules of Procedure and Evidence provides that “at the request of victims...the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations...”<sup>15</sup>.

The ICC model represents the appropriate international standard that the ECCC should follow and therefore it would be incorrect as a matter of law for the ECCC to reject the requested reparations merely on the ground of lack of certainty or specificity; provided that the ECCC could at least appoint an expert/specialist to determine the precise nature and costs of the requested reparations before deciding whether to accept or reject them.

#### **D. Indigency of the Accused and Victim Trust Fund**

Paragraph 666 of the TC Judgment provides that “constraints also stem from the overwhelming losses suffered by the Civil Parties and the unlikelihood of recovery from Kaing Guek Eva, who appears to be indigent”. While it is understandable that the ECCC may not have enough financial resources to fund the requested reparations awards if the accused is indigent, it would be incorrect as a matter of law to reject the awards merely on such ground. As noted above, the ECCC has a duty to safeguard the interests of victims, to guarantee fairness and to respect victims’ rights pursuant to Rule 21(1) of the IR. The ECCC will not be able to comply with these duties if it has no financial resources to implement the awards but does nothing to address such situation. The ECCC could at least be more flexible in finding ways to implement the awards. Although paragraph 670 of the TC Judgment provides that “All requests which, whether directly or indirectly, seek individual monetary awards to Civil Parties, or the establishment of a trust fund for victims, are beyond the scope of reparations before the ECCC”, it may be possible for the ECCC to establish a trust fund dedicated to the purpose of implementing moral and collective reparation awards only, with no individual monetary awards granted directly to victims. It is difficult to see why establishing such a trust fund, if properly configured, would be beyond the scope of the ECCC. On this view, it is incorrect as a matter of law for the ECCC to exclude the possibility of establishing a trust fund for implementing moral and collective reparation awards only.

Although the ECCC has recently amended the IR to allow external funding for reparations awards, it would still be incorrect as a matter of law for the ECCC to

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<sup>15</sup> See supra note 11.

reject the requested reparations in Case 001 based on paragraphs 666 and 670 of the TC Judgment.<sup>16</sup>

## **E. Scope of Collective and Moral Reparations**

Finally, there is an issue regarding the exact scope/definition of “collective and moral reparations”. Paragraph 651(a) of the TC Judgment states that requests for reparations will be granted if the awards sought qualify as collective and moral reparations within the meaning of the IR 23(1)(b). Paragraph 674 of the TC Judgment states that the requested reparations with respect to provision of access to free medical care and educational measures are outside the scope of available reparations of the ECCC because they are not collective and moral reparations. However, this would be incorrect as a matter of law.

1. **Form of Reparations under the Internal Rules.** The IR 23(12) provides that reparation awards may take the form of (i) 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 reparations. Although it is unclear what would constitute “appropriate and comparable forms of reparations”, it seems that access to free medical care and educational measures will at least fall into the category of “non-profit activity or services that is intended for the benefit of Victims”.

In addition, when the IR was first adopted in June 2007, the ECCC Judicial Officers noted that although the rights of victims are not directly addressed in the ECCC Law, “collective, non-financial reparation is possible”.<sup>17</sup> Thus, considering such circumstances of its conclusion the term “collective and moral reparations” should be construed as intending to mean “collective and non-financial reparations” when the IR was first adopted: As such, unless the ECCC can clearly demonstrate why access to free medical care and educational measures would not be considered “non-financial reparations”, they should not reject such reparations awards.

2. **International Guidance regarding the scope of Collective and Moral Reparation.** The term “collective and moral reparations” is neither defined in the ECCC Law nor in the IR. It would be difficult to determine whether reparations that are both symbolic and material, such as access to free medical care and educational measures, fall within the scope of “collective and moral reparations”. In accordance with Article 33 of the ECCC Law (see above), the ECCC should seek guidance from established international rules to determine the scope of collective and moral reparations.

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<sup>16</sup> Note that the amendment to the IR to allow external funding to implement reparations awards was adopted in the ECCC’s 8th Plenary Session on September 17, 2010.

<sup>17</sup> ECCC Plenary Session Unanimously Adopted Internal Rules, Joint Statement by Judicial Officers, 13 June 2007, available at [http://www.eccc.gov.kh/english/cabinet/press/29/Joint\\_Press\\_Statement\\_on\\_internal\\_rules\\_eng\\_fr\\_13\\_june\\_2007.pdf](http://www.eccc.gov.kh/english/cabinet/press/29/Joint_Press_Statement_on_internal_rules_eng_fr_13_june_2007.pdf)

First of all, “*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*”<sup>18</sup> defines the term “reparation” as including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The terms “rehabilitation” and “satisfaction” are to include various measures such as medical and psychological care, commemorations and tributes to the victims, an accurate account of the violations that occurred in educational material at all levels, etc.<sup>19</sup> While it is clear that the term “collective and moral” is intended to exclude “compensation” in monetary form from the types of reparations the ECCC can grant, there is no ground under the ECCC Law or the IR to exclude other types of reparation measures internationally recognized as reparation.

In this regard, the Inter-American Court of Human Rights (“**IACHR**”) has a history of success in ordering and enforcing reparations and can serve as an international model. In the context of IACHR, it can be said that the term “moral reparation” is used to indicate non-pecuniary reparation<sup>20</sup>, and indeed the IACHR has frequently ordered rehabilitation and reconciliation, including free access to medical care and educational facilities.<sup>21</sup> For example, in the case of the *Plan de Sanchez Massacre v. Guatemala* (2004)<sup>22</sup>, where over 250 people were abused and murdered during the Guatemala’s civil war, the IACHR ordered various symbolic acts of reparation and reconciliation, including among others, a ceremony to honor the memory of the dead, and free medical and psychological care. Accordingly, the ECCC should follow the practice of the IACHR and adopt a flexible approach in interpreting the scope of “moral and collective reparations”, which should cover any non-pecuniary reparations, including access to free medical care and educational measures.

## **F. Conclusion**

Based on the foregoing, the decision on reparation rendered by the Trial Chamber would be premature and should be vacated as both an error on a question of law and an error of fact. The Supreme Court Chamber need to duly examine feasible ways for adequate reparation measures given the nature of the damage suffered by the Civil Parties.

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<sup>18</sup> A/RES/60/147 (16 December 2005)

<sup>19</sup> See also Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, (26 May 2004) at para.16.

<sup>20</sup> See Inter American Court on Human Rights (IACHR), *Case of Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), Series C no. 4. and IACHR, *Case of Velázquez-Rodríguez v. Honduras*, Judgment of 21 July 1989 (Reparations and Costs), Series no. 7

<sup>21</sup> See B. Mayeux and J. Mirabel, *Collective and Moral Reparations in the Inter-American Court of Human Rights* (2009), available at

[http://www.utexas.edu/law/clinics/humanrights/work/HRC\\_F09\\_CollectiveReparations.pdf](http://www.utexas.edu/law/clinics/humanrights/work/HRC_F09_CollectiveReparations.pdf)

<sup>22</sup> Case of the Plan de Sánchez Massacre v. Guatemala (Reparations and Costs), Inter-. Amer. Ct. H.R. (ser. C.) No. 116 (Nov. 19, 2004), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_116\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf).