

# *Justice for Victims*

Fundamental Issues for  
the Extraordinary Chambers in the Courts of Cambodia

September 13, 2006  
(Revised) October 13, 2006

*Human Rights Now*

Project Team on Khmer Rouge Trials



[www.ngo-hrn.org](http://www.ngo-hrn.org)

<b>Introduction .....</b>	<b>2</b>
<b>I. Victims’ Rights and International Standards .....</b>	<b>2</b>
<b>1. Applying International Standards to the Gross Human Rights Violations during the Khmer Rouge Regime .....</b>	<b>2</b>
<b>2. Right to an Effective Remedy.....</b>	<b>3</b>
<b>3. International Standards on the Right to Remedy for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law ....</b>	<b>4</b>
<b>II. The Nature of Victims’ Rights to Remedy under Cambodian law and International Standards .....</b>	<b>6</b>
<b>1. Access to Justice .....</b>	<b>7</b>
<b>(1) Victims’ Entitlement to Participate in the Criminal Procedure under Cambodian Law8</b>	
<b>(2) Victim Participation as Standard Practice of International Criminal Tribunals .....</b>	<b>8</b>
<b>(3) Taking Necessary Measures to Ensure Victims’ Participation .....</b>	<b>9</b>
<b>2. Right to Reparation.....</b>	<b>11</b>
<b>(1) ECCC’s Power to Make Orders of Reparation under Cambodian Law.....</b>	<b>11</b>
<b>(2) Judgment on Civil Reparation Accords with the ICC Procedure .....</b>	<b>11</b>
<b>3. Practical Questions That Need To Be Addressed.....</b>	<b>12</b>
<b>(1) Statutes of Limitations.....</b>	<b>12</b>
<b>(2) Collective Representation .....</b>	<b>14</b>
<b>(3) Forms of Reparations Other Than Monetary Compensation .....</b>	<b>15</b>
<b>(4) State Responsibility of Reparations and the Role of the ECCC .....</b>	<b>16</b>
<b>(5) Participation <i>Per Se</i> Is Critically Important .....</b>	<b>17</b>
<b>Recommendations .....</b>	<b>19</b>

## **Introduction**

The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“ECCC”) has started its operation and is awaiting the commencement of trials. *Human Rights Now*, a human rights non governmental organization, sees the following issues as remaining and fundamental: victims’ access to, and their participation in, the entire ECCC procedure as well as reparations for victims.

Victims’ participation and reparations are critical issues which the ECCC needs to address. *Human Rights Now* here calls on those concerned to confirm the fundamental principles for the victims’ rights as soon as possible in order to achieve real justice, as described in detail below.

### **I. Victims’ Rights and International Standards**

#### **1. Applying International Standards to the Gross Human Rights Violations during the Khmer Rouge Regime**

The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea (“*Establishment Law*”) provides:

*The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure 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.”<sup>1</sup>*

This means that, while the ECCC must be operated in accordance with the procedural rules including procedural rights which are recognized by “*existing procedures in force*” under Cambodian law, international standards also inform the

---

<sup>1</sup> [2004 Law to Amend the 2001 Law on the Establishment of the Extraordinary Chambers](#), Article 33 new.

ECCC proceedings irrespective of whether or not the international standard in question has been incorporated into Cambodian domestic law. Accordingly, the rights of victims of gross human rights violations during the period of the Khmer Rouge regime and bereaved families should have procedural rights derived from not only Cambodian law but also from international standards in the ECCC procedure.

Furthermore, Cambodia must comply with the treaties to which Cambodia is a party, including the International Covenant of Civil and Political Rights (“ICCPR”).<sup>2</sup> Consequently, the ECCC as a national court in Cambodia (with the UN’s support and international participation at all stage of process) needs to incorporate these international obligations in its procedure. The Cambodian government must ensure that these obligations are fully recognized and met.

As such, one of the most important questions here is whether the Extraordinary Chambers will comply with international standards for victims’ rights in case of gross human rights violations.

In this connection, victims’ access to justice and reparations in case of gross human rights violations are among the issues for which international standards have undergone rapid development, as discussed further below.

## **2. Right to an Effective Remedy**

Many international instruments including the ICCPR have widely recognized the right to an effective remedy.<sup>3</sup> For example, Article 2-3 of the ICCPR expressly provides for the right to an effective remedy, articulating that:

*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*

---

<sup>2</sup> Cambodia is a signatory to the ICCPR from 1980 and its State party from 1992.

<sup>3</sup> Relevant provisions in international instruments that constitute international standard other than the ICCPR are (but not limited to) Article 8 of the Universal Declaration of Human Rights, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Articles 68 and 75 of the Rome Statute of the International Criminal Court. *See also* Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), and Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977. (Cambodia is a State Party to all the treaties here except for the Hague Convention.)

*any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*

The victims of gross human rights violations during the period of Khmer Rouge regime had been denied their right to life, right not to be subject to torture, and right not to be subject to arbitrary detention, all of which are guaranteed by the ICCPR. Therefore, the victims or bereaved families are entitled to enjoy the right to an effective remedy.<sup>4</sup> As a State party to the ICCPR, Cambodia is obliged to ensure the victims' rights to effective remedy. The ECCC also needs to see the rights to effective remedy as an international standard.

### **3. International Standards on the Right to Remedy for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law**

For *gross* violations of international human rights law and international humanitarian law, current international standards specify further concrete obligations.<sup>5</sup>

On 16 December 2005, the United Nations General Assembly adopted and proclaimed the resolution 60/147, "*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*" (*the Basic Principles and Guidelines*).<sup>6</sup>

*The Basic Principles and Guidelines* were adopted with the understanding that they do not entail new international or domestic legal obligations but identifies mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian

---

<sup>4</sup> See also Human Rights Committee, general comment No. 31 (2004), paras. 15-20.

<sup>5</sup> Any international standard referred to in this paper is without prejudice to the victims' rights under domestic and international law. This principle is, for instance, described in paragraph 26 of *the Basic Principles and Guidelines*.

<sup>6</sup> The resolution was adopted without a vote. Prior to the GA's adoption, *the Basic Principles and Guidelines* have been adopted by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005 and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the *Basic Principles and Guidelines*. See also the Final Report of the Special Rapporteur Mr. M Cherif Bassiouni, "The right to restitution, compensation and rehabilitation for victims of gross violation of human rights and fundamental freedoms," E/CN.4/2000/62, January 18, 2000.

law which are complementary though different as to their norms.<sup>7</sup> *The Basic Principles and Guidelines* are a genuine reflection of current norms of international human rights and humanitarian law regarding the rights of victims of gross human rights violations. As the ECCC is going to address gross and massive human rights violations during the Khmer Rouge regime, the ECCC should comply with *the Basic Principles and Guidelines* and take all necessary measures to achieve the international standard.

In *the Basic Principles and Guidelines*, each state's obligation under international law in case of gross violations of international human rights law and serious violations of international humanitarian law is described as follows<sup>8</sup>:

*The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:*

...

*(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and*

*(d) Provide effective remedies to victims, including reparation, as described below.*

With respect to the right to effective remedy, *the Basic Principles and Guidelines* do not intend to create it, but premise its existence. The right to an effective remedy is also seen as one of the internationally recognized rights (*see also* "2. Right to an Effective Remedy" above). On that basis, *the Basic Principles and Guidelines* then articulate the nature of victims' rights to remedies as including<sup>9</sup>:

*(a) Equal and effective access to justice;*

*(b) Adequate, effective and prompt reparation for harm suffered;*

*(c) Access to relevant information concerning violations and reparation mechanisms.*

---

<sup>7</sup> Preamble 7 of *the Basic Principles and Guidelines*.

<sup>8</sup> Paragraph 3 of *the Basic Principles and Guidelines*.

<sup>9</sup> Paragraph 11 of *the Basic Principles and Guidelines*.

*Human Rights Now* calls upon the ECCC to guarantee each of the above three aspects of the rights to remedy. While this paper focuses on “Access to Justice” and the “Right to Reparations,” the issue of “Access to Information” also deserves mention. In this regard, we also refer to the *Rome Statute of the International Criminal Court*, and its rules of procedure and evidence, as international standards for criminal procedure in terms of the rights of the victims of gross human rights violations are specifically embedded in them.

Furthermore, *Human Rights Now* makes emphatic reminder that, based on international standards including *the Basic Principles and Guidelines*, any state that is directly responsible for gross violations of international human rights law or international humanitarian law is obliged to grant the victims adequate, effective, and timely reparations.<sup>10</sup> Accordingly, besides the proceedings in the ECCC where only individuals are to be prosecuted, the State of Cambodia itself should provide reparation in order to discharge its responsibility.

## **II. The Nature of Victims’ Rights to Remedy under Cambodian law and International Standards**

In considering the actual nature of a victim’s right to remedy, especially the issues of Access to Justice and the Right to Reparations, the following factors must be taken into account.

First, the ECCC is the sole, competent mechanism for justice for both Cambodia and the international community to address gross human rights violations during the period of the Khmer Rouge regime. In this sense, the ECCC’s existence is of paramount importance to the victims and bereaved families.

A second factor is the role that the ECCC is to play “in the pursuit of justice, and national reconciliation, stability, peace and security.”<sup>11</sup> For this reason, not only the

---

<sup>10</sup> *The Basic Principles and Guidelines*, paragraph 15. See also international instruments in *supra* note 3, and the Final Report of the Special Rapporteur Mr. M Cherif Bassiouni, *supra* note 6, at paragraph 16 of the Annex. Here, the Khmer Rouge regime was directly responsible for the massive crimes during the period from 17 April 1975 to 6 January 1979 over which the ECCC has jurisdiction. The current Cambodian government would consider the Khmer Rouge regime to be at least a different government from itself, if not a different State. Even in such a case, however, the State or Government successor should provide reparation to the victims. The Final Report of the Special Rapporteur Mr. M Cherif Bassiouni, *supra* note 6, at paragraph 20 of the Annex.

<sup>11</sup> See the Preamble of the [Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the](#)

actual outcomes but also the process of the ECCC trials are undoubtedly of legitimate concern to the Cambodian people and the international community.

A third factor is the right to truth. It could be said that the ECCC has been established in response to the UN resolutions on the right to truth.<sup>12</sup> In this sense, the right to remedies including Access to Justice and the Right to Reparations should be considered in terms of a victim's right to the truth also.<sup>13</sup>

The ECCC should bear all the factors above in mind in considering the victims' rights to remedies.

### **1. Access to Justice**

Equal and effective access to justice is a fundamental prerequisite for obtaining a remedy. In reality, however, there has been no effective and competent mechanism for victims to seek a remedy and thereby have a chance to obtain justice in relation to the Khmer Rouge's victimization until the establishment of the ECCC. In this regard, participation in the ECCC's proceedings is practically the only way for victims to access justice and to seek a remedy.

However, the *Establishment Law* itself is not necessarily clear in addressing the procedural nature of a victim's right to access justice. No procedure is specifically provided for in the *Establishment Law* for victims or bereaved families to participate in

---

#### Period of Democratic Kampuchea.

<sup>12</sup> E/CN.4/RES/2005/66 (adopted without a vote), etc. It states that:

1. *Recognizes* the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights;
2. *Welcomes* the establishment in several States of specific judicial mechanisms, as well as other non-judicial mechanisms such as truth and reconciliation commissions that complement the justice system, to investigate violations of human rights and violations of international humanitarian law, and appreciates the elaboration and publication of the reports and decisions of these bodies;

.....

4. *Encourages* other States to consider establishing specific judicial mechanisms as well as, where appropriate, truth and reconciliation commissions to complement the justice system, to investigate and address gross violations of human rights and serious violations of international humanitarian law[.]

<sup>13</sup> Also, "right to truth" is a concept that has been developing in the inter-American system in recent years.

<http://www.cidh.org/relatoria/showarticle.asp?artID=156&IID=1>. For instance, in a case of 2000 on the extra-judicial execution of Monsignor Oscar Romero in El Salvador, the Commission held that the State was responsible for violating its duty to provide society and the victim's family with the truth about the scope of the violations as well as the identities of those who participated in them. As in previous cases, the Commission recognized that the State's obligations to the victims' direct relatives and society at large stem from Articles 1(1), 8, 25, and 13 of the Convention.



the proceedings, present their statements, and express their views, anguish, and hopes to trials. Notably there is no victims' unit to assist victims to exercise their rights in the ECCC process.

In this regard, *Human Rights Now* calls attention to the existing system that recognizes the victims' rights of access to justice. The victims are entitled to participate in the ECCC procedure in accordance with Cambodian law. In addition, international standards on this respect too should be reflected on the ECCC process.

### **(1) Victims' Entitlement to Participate in the Criminal Procedure under Cambodian Law**

The Cambodian law provides for victims' participation in criminal justice. Namely, the Cambodian domestic criminal procedure allows victim to file a civil action before a criminal court.<sup>14</sup> Once a victim files a civil action, as a civil party, the victim is guaranteed to be heard, request hearing of witness, and make closing statement.<sup>15</sup> Criminal courts must make decisions on civil remedies (as discussed further later).<sup>16</sup>

Accordingly, there is no ground to exclude victims from the ECCC proceedings, since the ECCC procedure must be in accordance with Cambodian Law (Article 12 of the Agreement between the UN and Cambodia). In the proceedings of the ECCC, the Cambodian civil action system should be incorporated *mutatis mutandis* into the ECCC procedure. The arbitrary deprivation of the right to participate in criminal justice proceedings, a right which Cambodian people ordinarily enjoy, cannot be justified. It should be made clear that the victims or bereaved families have the right to participate in the ECCC process by filing a civil action.

### **(2) Victim Participation as Standard Practice of International Criminal Tribunals**

A victim's right to participate in international criminal tribunals has become the current international standard in cases of gross violations of international human rights law and international humanitarian law.

The international standard for victims' rights is incorporated in the statutes and the rules of procedure and evidence of the international criminal tribunals. In particular,

---

<sup>14</sup> The current Cambodian Criminal Procedure Code recognizes a civil action in the criminal procedure as provided for in Article 9, 16, etc. (Kram Dated February 8, 1993 on Criminal Procedure). *See also* Article L.131-10 of the Draft Code of Criminal Procedure which is expected to replace the current statute in the near future.

<sup>15</sup> Criminal Procedure Code (1993), Article 132, 133, and 137. *See also* the Draft Code, Article L.513-7, 513-9, 513-20.

<sup>16</sup> Criminal Procedure Code (1993), Article 151. *See also* the Draft Code, Article 514-9.

*the Rome Statute of the International Criminal Court* spells out the nature of victims' access to justice and participation as follows:

*Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence (Article 68-3).*

Furthermore, *the Rules of Procedure and Evidence of ICC* provide a concrete guarantee for victims to participate in proceedings. According to Rules 89-94, victims can participate in the proceeding with a written application (89, 91), and may choose a legal representative, as appropriate, with financial support (90), provide questions (91), express their views before the court (93), and request for remedy (94).

All State Parties to the ICC have accepted the legal obligation to comply with the ICC's rule of procedure regarding crimes under the ICC jurisdiction, notwithstanding the existence of domestic laws that may not allow civil actions in criminal procedure.<sup>17</sup>

As subject matters over which the ECCC and the ICC can exercise their jurisdiction are common, it is logical that the ICC procedural rules which embody international standards relating to victims' rights be applied in the ECCC context. Additional factors mentioned above ("the right to truth," "the ECCC as the only competent justice mechanism," and "the ECCC's expected role in Cambodia") should encourage the ECCC to adopt ICC-like procedural rules.

### **(3) Taking Necessary Measures to Ensure Victims' Participation**

*The Basic Principles and Guidelines* state that, for the guarantee of access to justice, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;*
- (b) Take measures to minimize the inconvenience to victims and their representatives,*

---

<sup>17</sup> Cambodia ratified the Rome Statute on 11 April 2002.

*protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;*

*(c) Provide proper assistance to victims seeking access to justice;*

*(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.*

In order to follow the above requirements, the ECCC needs to disseminate information of the ways to participate in the ECCC proceedings; and how it will protect and assist the victims' access to justice, including providing adequate legal representatives.

In this regard, the ECCC should also look at the ICC system. In *the Rules of Procedure and Evidence of ICC*, the ICC established a clear and concrete system for victims to participate in the proceedings. First, the *Registrar* of the ICC is in charge of: (a) providing notice or notification to victims or their legal representatives; and (b) assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information.

Second, the ICC established *victims and witness's unit*, which focuses on the protection and provision of security measures and assistance with rehabilitation.

Third, *the Office of Public Counsel for Victims (OPCV)* provides support and assistance to the legal representatives of victims and to victims who are participating in the proceedings and asking for reparations.<sup>18</sup> According to Rule 90, a victim or group who lacks the necessary means to pay for a legal representative may receive assistance from the Registry, including, as appropriate, financial assistance.

Fourth, the court provides the list of counsels who are qualified and admitted by the court.

The ECCC should be required to take necessary measures similar to the ICC in order to ensure the victims' participation in the procedure. To this end, international donors and the international community are called upon to support and fund necessary mechanisms.

---

<sup>18</sup> Regulation 81 of the Regulations of the Court  
<http://www.icc-cpi.int/victimissues/victimscounsel/OPCV.html>

## **2. Right to Reparation**

### **(1) ECCC's Power to Make Orders of Reparation under Cambodian Law**

According to Articles 38 and 39 of the *Establishment Law*, the ECCC can make determination of a custodial sentence, as well as order the confiscation of property. However, it does not mean that the ECCC has no power to make an order of reparation directly against a convicted person.

As discussed before, Cambodian people, especially victims or bereaved families, are entitled to directly participate and seek remedy in criminal procedure under Cambodian law. In response to that, the criminal court must make a decision on civil remedy. Article 151 of the Criminal Procedure Code (1993) stipulates that “[t]ogether with the decision on the punishment, the court shall also decide on the reparation and the damages.”<sup>19</sup> Cambodian criminal courts are clearly authorized to make decisions on civil remedies. According to the provision, victims in Cambodia have the right to obtain reparation. This recognized victim’s right should not be derogated and deprived just because they were victimized by the Khmer Rouge regime. The system of judgment on civil remedies should therefore be incorporated into the ECCC procedure *mutatis mutandis* by the adoption of appropriate internal regulations, as necessary.

### **(2) Judgment on Civil Reparation Accords with the ICC Procedure**

Judgment on civil reparations has become the current standard in the international criminal tribunal procedure. Article 75 of Rome Statute provides for the judgment of reparation as follows:

*The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. (75-1)*

*The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. (75-3)*

The introduction of a civil reparation order is in accordance with the ICC procedure and current international standard. Even if the judgment is symbolic, reparation orders would be meaningful, at least in terms of satisfaction which is discussed later.

---

<sup>19</sup> See also the Draft Code, Article L.514-9 “Judgment on Civil Remedy.”

### **3. Practical Questions That Need To Be Addressed**

#### **(1) Statutes of Limitations**

It may be argued that victims and bereaved families have no right to file a civil action since the statute of limitation under Cambodian law has expired. However, it is submitted that the statute of limitation should not be applied to the Khmer Rouge cases. Rather, the victims or bereaved families should be entitled to participate in the ECCC as discussed later, notwithstanding the result of the interpretation of the statute of limitation.

##### **A. Cambodian law**

It is argued that by following the law of the day (Cambodian civil law of 1975) – and thereby adhering to the legal principle that the formation and effects of substantive rights should be determined in accordance with the law at the time of the alleged matter – that retroactive deprivation and expropriation of such rights is not allowed.

The Civil Code effective in 1975 (“Old Civil Code”) contains the provision on statutes of limitations in Article 929. It set forth the statute of limitation as 3 years (when the perpetrator lives in the same commune) and 5 years (when the perpetrator lives in different commune) and they run from “*a dater du jour de son exigibilite.*” There is no other provision regarding the expiration period.

In considering the issue of the statute of limitations, the ECCC should take into account various factors. The first problem is inaccessibility to information that would enable the victims to file civil actions against the perpetrators. They could not have identified perpetrators and other responsible persons and their precise wrong-doings. Also they have not been able to receive protection and security guarantees to avoid acts of vengeance. Accordingly they have been prevented from seeking the truth, namely, whereabouts of disappeared families, bodies of killed families, and the natures of their disappearances and deaths.

For these very reasons, it would not be an exaggeration to say that most (if not all) of the victims and bereaved families have been virtually unable to file civil actions. At the same time, there has been no effective, competent, and independent judicial mechanism for them to seek remedies. The State of Cambodia has failed for a long time to provide any effective mechanism for reparations.

Considering these factors in conjunction with the historical background of Cambodia, and the scale, magnitude, and seriousness of these human rights violations, it would be possible and appropriate that the statute of limitation should be interpreted so

that it has not started to run until the commencement of the proceedings in the ECCC. Similarly, the invoking of the statute of limitation by the alleged perpetrators should constitute the abuse of rights.<sup>20</sup> The ECCC should interpret the statute of limitation as not being applied to the civil actions before it for these reasons, and the reasons discussed below.

### **B. International standards**

Regarding the doctrine of the statute of limitations, *the Basic Principles and Guidelines* states:

#### *IV. Statutes of limitations*

6. *Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.*

7. *Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.*

The above provision is indicative of the evolved international standard in cases of gross violations of international human rights law and international humanitarian law in order to ensure the victims' rights to effective remedy. It should be noted that matters to be heard in the ECCC would be gross violations of international human rights law and/or serious violations of international humanitarian law which constitute crimes under international law. The same underlying violations would constitute causes of civil actions to be tried in the same proceedings.

This principle is also embodied in *the International Convention for the Protection of All Persons from Enforced Disappearance* which was adopted on June 23 of 2006 in the first session of the *Human Rights Council*. Article 8 of *the Convention* provides that:

*1 A State Party which applies a statute of limitation in respect of enforced*

---

<sup>20</sup> Apparently, the Old Civil Code was enacted with the influence of French civil law. On the other hand, the Civil Code of Japan was also enacted with the influence of French civil law. In this regard, Japanese jurisprudence has developed on how to limit the application of statutes of limitations in case of serious human rights violations. As a human rights NGO in Japan, we can provide further relevant information and materials on this development.

*disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceeding:*

*(a) Is of long duration and is proportionate to the extreme seriousness of this offence;*

*(b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.*

*2 Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.*

This provision is an expression of the firmly recognized international norm that in cases of gross violations of human rights such as enforced disappearance, victims' rights to effective remedy should be guaranteed for at least the same duration as the criminal statute of limitation which itself should be extended proportionate to the gravity of the crimes.

The ECCC is required to pay special attention to the development of this internationally recognized principle in interpreting the statute of limitation under Cambodian law. When this international principle is taken into account along with the factors as already discussed, the appropriate interpretation should be that the statute of limitation under Cambodian law would not be applied for the human rights violations during the Khmer Rouge regime.

## **(2) Collective Representation**

Given the widespread nature of the atrocities committed during the Khmer Rouge regime, there are a vast numbers of victims. This very problem makes it difficult for all victims to participate in the ECCC procedure and to achieve justice in a timely and effective manner. The ECCC should, however, be required to consider for whom justice should be achieved and fully aware that excluding victims from the procedure would undermine the very purpose of its existence.

In order to achieve both effectiveness of justice and victims' participation, the ECCC should take note of the Rule 90 of the ICC, which stipulates that:

*[T]he Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, to choose a common legal representative or representatives.*

*The Basic Principles and Guidelines* also states that:

13. *In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.*

The ECCC should develop the method of collective representation in order to ensure that the vast number of victims can participate in the process, in consultation with NGOs and civil society in Cambodia. The ECCC may provide to the public a list of legal counsels in which qualified foreign lawyers should be included, request all the victims who wish to participate to choose the lawyer or lawyers from the list, and set up the deadline to apply. It would also need to disseminate other relevant information for the participation of victims.

### **(3) Forms of Reparations Other Than Monetary Compensation**

One of the challenges in dealing with Khmer Rouge cases is that the magnitude of victimization is so enormous that it might be almost impossible for the State to allocate monetary damages as compensation in proportion with the suffering experienced by each of enormous numbers of victims. Unlike the ICC, there is no Trust Fund for the victims of the Khmer Rouge. However, as described in *the Basic Principles and Guidelines*, reparations for victims are not limited to monetary compensation. Reparations include restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>21</sup> For instance, rehabilitation includes psychological and medical assistance for victims' trauma.<sup>22</sup> Satisfaction includes a public apology, including acknowledgement of the facts and acceptance of responsibility, as well as commemoration and tributes to the victims.<sup>23</sup> The latter would include the construction of historical memorials, creating museums dedicated to the memory of the victims, and ceremonies for victims as well as burials.<sup>24</sup> Non-repetition would include institutional reform as well as preparation of school textbooks covering this period.<sup>25</sup> The ECCC

---

<sup>21</sup> *The Basic Principles and Guidelines*, Paragraph 18.

<sup>22</sup> *The Basic Principles and Guidelines*, Paragraph 21.

<sup>23</sup> *The Basic Principles and Guidelines*, Paragraph 22 (e) and (g).

<sup>24</sup> FIDH Reprot, "The Place of Victims," March 2-3, 2005; FIDH, ADHOC and LICADHO joint statement on victims and witnesses; and "Paramount for Designing a Reparation Program in Peru," International Center for Transitional Justice.

<sup>25</sup> *The Basic Principles and Guidelines*, Paragraph 23; and *Id. supra* note 24.



could prepare in advance the list of examples of reparations that may be considered in sentencing. Collective and symbolic forms of reparations should also be taken into consideration.

#### **(4) State Responsibility of Reparations and the Role of the ECCC**

Neither the *Establishment Law* nor the Agreement between the UN and Cambodia mentions State's responsibility of reparation. That does not mean, and should not be interpreted so as to negate the State's obligation to provide reparations.

In this relation, according to Article 39 of the *Establishment Law*, the ECCC may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct, and the confiscated property must be returned to the State. If Cambodia receives the confiscated property in accordance with this provision, the State should allocate the funds raised from the confiscated property to provide reparations.

Furthermore, *Human Rights Now* emphasizes that the State of Cambodia has primary responsibility to address the issue of reparations by mobilizing as many resources as possible, including calling for international assistance. Effective ways of making reparations should be determined in consideration of the collected resources. In view of the importance of reparations for the transitional justice and peace building processes in Cambodia as a whole, they need to be fair and equitable, and to positively impact on society as to facilitate national reconciliation, solidarity and the non-repetition of human rights violations. In this regard, the methods and forms of reparations should be determined in a transparent manner with the full participation and consultation with victims and civil society. The State of Cambodia also needs to have due regard for the decisions, opinions, findings, and statements of the ECCC, which should contain and reflect victims' opinions as they should be entitled to participate in the proceedings as discussed above. In this way, the ECCC could be expected to play a key role in helping determine the methods and forms of reparations to be paid by the State.<sup>26</sup> For this reason (as well as for other reasons), the ECCC should listen to the voices of victims, representatives and civil society.

---

<sup>26</sup> FIDH, ADHOC and LICADHO joint statement on victims and witnesses, *supra* note 24.

## **(5) Participation *Per Se* Is Critically Important**

*Human Rights Now* emphasizes the critical importance of victims' participation in the ECCC proceedings.

It may be argued that, according to Cambodian law, by the time victims file a civil action in order to originate proceedings, they would be prevented from participating due to the expiration of the statute of limitation which would result in their claims being dismissed.

The problem of the statute of limitations under Cambodian law should be overcome as discussed in Part 3 (1). Regardless of whether the statute of limitation would ultimately be applied, victims should be entitled to participate in the process. The ECCC would carefully need to consider actual cases before it in order to decide on whether or not the statute of limitation would be applied to them, so that the ECCC could not dismiss the civil claims until at least the fact findings of these cases are closed. It would be impossible to determine the issue of the statute of limitation without considering the exact nature of these cases. The ECCC could and should establish the practice of the victims' participation irrespective of the possibility of the statute of limitations applying.

Moreover, beyond the issue of reparations, participation in the criminal justice process itself should be considered a fundamental right for victims. As discussed above, reparations are not limited to monetary compensation, as a variety of reparations could be provided. This indicates the fundamental nature of the right to remedies. The right to participation in justice would be considered the logical basis of the right to effective remedies; and the right to effective remedies in turn requires the participation of the right holders. Participation would ensure the victims' rights to truth<sup>27</sup> and the right to express their views. The ECCC also needs to look at Article 36 of the *Establishment Law* which provides victims' own rights to appeal. If victims had no right to participate in the process, their rights to appeal would not be exercised meaningfully.

In addition, victims' participation and presence is essential to achieve real justice, and would serve the public interest and the ultimate purpose of the establishment of the ECCC. Victims are expected to play a key role to ensure fair and impartial justice that to realize accountability. Without victims' participation, the ECCC process would lose the fundamental pillar to overcome impunity and achieve justice. Without victims' participation, judgments would not have a genuine impact within Cambodian society. Therefore, the exclusion of victims would seriously undermine the whole ECCC

---

<sup>27</sup> See *supra* note 12 and 13.

mechanism and perhaps even the justice system of Cambodia more broadly into the future. In light of the central roles that victims play in the process of transitional justice, victims now should be entitled to participate.

## **Recommendations**

### **For the Extraordinary Chambers and to Each Judge:**

- To recognize the fundamental principle of victims' rights to effective remedies, including, but not limited to, the Right of Access to Justice and the Right to Reparations;
- To confirm victims' rights to participate in proceedings, based on the well-established rights of victims under Cambodian law to file civil actions for reparations;
- To ensure a court's power to make orders of reparation against the convicted persons;
- To take necessary measures to ensure victims' participation in the proceedings, through the adoption of internal regulations and other appropriate means, including: (a) establishing the modality to communicate with the victims and to disseminate information regarding the procedure of participation for the victims; (b) providing a list of qualified legal counsels including foreign qualified lawyers; (c) providing financial support, as appropriate, that would enable the victims to retain their legal representatives; and (d) establishing a specialized victim's unit to protect and assist victims who participate and wish to participate in the procedure;
- To develop an appropriate method of group representation in order to ensure broad and effective participation of victims; and
- To secure funds as necessary for these purposes by inviting extrabudgetary contributions from the Cambodian and other interested governments and donors.

### **For the Government of Cambodia:**

In order to ensure the meaningful participation of, and reparations for, the victims

- To take all necessary measures to ensure victims' participation, in particular, in terms of protection and assistance for victims;
- To identify the most effective forms of reparations in consultation with victims and civil society, and by having due regard for the opinions and findings of the ECCC; and
- To secure funds as necessary for these purposes by inviting extrabudgetary contributions from interested governments and donors.

**For International Donors and the International Community:**

- To support and fund necessary mechanisms for the participation of victims in the ECCC process, as well as the provision of reparations to victims.



[www.ngo-hrn.org](http://www.ngo-hrn.org)

***Justice for Victims***

Fundamental Issues for the Extraordinary Chambers in the Courts of Cambodia

(September 13, 2006; revised on October 13, 2006)

---

**Human Rights Now**

[info@ngo-hrn.org](mailto:info@ngo-hrn.org)

Marukou Bldg. 3F, 1-20-6, Higashi-Ueno

Taitou-ku, Tokyo 110-0015 Japan

Phone: +81-3-3835-2110 Fax: +81-3-3834-2406