

# KRT TRIAL MONITOR

Case 002 ■ Issue No. 3 ■ Specifications of Reparations ■ 19 October 2011



Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center

*It is difficult to conceive of a trial concerning crimes which have touched each family, each and every village in Cambodia, crimes that left visible traces 30 years on, [...] without victim participation. Who better than they can legitimately tell the story and demand that truth be brought to light and justice rendered?*

- Elizabeth Simonneau-Fort, Civil Party Lead Co-Lawyer

## I. OVERVIEW

In a Memorandum dated 23 September 2011, the Trial Chamber made several observations about inadequacies in the reparations awards requested by the CPLCL at the Initial Hearing on 29 June 2011.<sup>1</sup> The Court decided to schedule a special hearing to address the specification of civil party reparations claims,<sup>2</sup> and to provide the CPLCL the opportunity “to supplement, update and, where necessary, remedy the initial specifications they provided at the Initial Hearing”<sup>3</sup> in accordance with Internal Rules 80bis (4) and 23quinquies (3)(b). The Chamber allocated three hours for the CPLCL to present their reparations submissions and gave the other parties sufficient opportunity to respond. This report summarizes and provides commentary on the special hearing on specifications of reparations claims of Civil Parties held on 19 October 2011.

The CPLCL, as well as a number of Civil Party Lawyers,<sup>4</sup> submitted that the Chamber has failed to provide adequately clear definitions or standards relating to its requirements for specificity in the reparations proposals. Citing previous reparations awards in other jurisdictions, the Parties claimed that the Chamber has adopted an unduly restrictive requirement for specificity. They explained that crafting reparations plans is a concerted effort that necessitates time-consuming consultations with the nearly 4,000 Civil Parties in this case. Despite their concerns, the Counsels for the Civil Parties nevertheless presented several particularized reparations proposals at the hearing.

## II. CIVIL PARTY PARTICIPATION

This section provides a précis of the following matters that were discussed by the Civil Party Co-Lawyers during the hearing: (A) their arguments challenging the degree of specificity in the reparations claims required by the Trial Chamber; (B) the Civil Parties’ reparations claims in detail; (C) expressions of the Civil Party Co-Lawyers’ attestations to the authority of the

ECCC to award their proposed reparations claims; and (D) the import of meaningful reparations.

#### **A. Requirement for Specificity in the Initial Reparations Claims**

During the oral submissions, Civil Party Co-Lawyer Ms. Martine Jacquin raised a number of objections to the Trial Chamber's 23 September memorandum. First, she argued that the Chamber had placed an unduly burdensome requirement of specificity on the Civil Parties when there was plainly insufficient time to confer with the 1,728 applicants who had been recently admitted to the case by virtue of the Pre-Trial Court's 24 June 2011 Decision. Second, Jacquin asserted that Rule 80*bis* of the ECCC Rules does not require a detailed presentation of reparations claims at this early stage of the proceedings. Rather, it simply directs the Civil Parties to give the first indications of their claims. In any event, she contended that nothing in the Rules provides for the Chamber to be involved in the lawyers' planning for the reparations claims of the civil party clients they represent.

Jacquin reasoned that it is premature and unreasonable to require the submission of detailed reparations claims at this stage of the trial. A number of legal issues under appeal on reparations in Case 001 (which were substantially the same as those requested in Case 002) are still pending judgment by the Supreme Court Chamber. For instance, Jacquin noted that the Civil Parties feel the Trial Chamber in Case 001 adopted an unduly restrictive interpretation of "collective and moral reparations," and failed to state sufficient reasons for the denial of the awards sought. In deciding the appeal, Supreme Court Chamber's ruling will also contribute to the scope of reparations in the present case.

Speaking separately during the hearing, Civil Party Co-Lawyer Mr. Som Sokong, reminded the Chamber that drafting reparation claims that reflect the interest of the victims is a complex task. He explained that it requires extensive consultations and cooperation among various entities: the Civil Parties, the CPLCL, the ECCC's VSS, and the NGOs assisting the victims. He stressed that the Chamber has not clarified its requirement for "sufficient specificity," and that there is no definition in the Rules, jurisprudence, or other legal basis to justify this legal requirement. Additionally, Som Sokong asserted that the level of detail ostensibly required by the Chamber for, *inter alia*, precise locations for memorials, exact contents of educational materials, potential costs, and funding sources, is unreasonable and not supported by international jurisprudence.

Som Sokong suggested that the Trial Chamber refer to the practices of other international tribunals for persuasive authority on the matter of reparations. He cited, for example, the ICC Rules, where the terms "specific" and "specificity" are not employed. While there is, as of yet, no case law demonstrating how the ICC interprets its rule on reparations, the plain language of the ICC Rules does not expressly require a high degree of specificity. In the same vein, decisions of the Inter-American Court of Human Rights (**IACHR**) do not reflect the high threshold of specificity set by the Chamber. As Som Sokong argued, The IACHR has awarded reparations to victims without obligating them to specify the exact number of memorials, locations, estimated costs and other details of their claims. He quoted the case of *Mapiripán Massacre v. Colombia*,<sup>5</sup> where the IACHR considered the following in awarding the reparations:

...given the gravity of the facts in the instant case and the situation of partial impunity, the intensity of the suffering caused to the victims, changes in the conditions of their existence and other pecuniary or non-pecuniary consequences, the Court deems it necessary to order the payment of compensation for non-pecuniary damages, in fairness.<sup>6</sup>

In the cited case, the IACHR ordered the erection of a monument<sup>7</sup> without requiring the victims to provide detailed specifications. Similarly, Som Sokong submitted that the Civil Parties at the ECCC should not be left with the burden of guessing the level of specificity required to satisfy the Chamber.

## **B. Proposed Reparations**

Notwithstanding the reservations and arguments expressed by the CPLCL and the Counsel for Civil Parties above, nonetheless complied with the Chamber's request and presented their reparations proposals. They reportedly developed these proposals in consultation and coordination with the Civil Parties, Civil Party Lawyers, the VSS, and other partner organizations. They grouped the proposals into four categories for the purpose of presenting them to the Court: (a) Remembrance and Memorialization; (b) Rehabilitation; (c) Documentation and Education; and (d) Other Reparations Requests.

### **a. Remembrance and Memorialization**

The National CPLCL, Mr. Pich Ang, explained that the proposals are preliminary descriptions of projects aimed at commemorating and giving respect to the victims who died during the Khmer rouge regime, as well as a "literal and metaphoric process for grieving and reflection." The following are the specific projects for remembrance and commemoration:

- i) *Facilitation of a National Commemoration Day or Memorial Day.* This is an advocacy project that seeks to establish national and international memorial days for the recognition of the sufferings of victims during the Khmer Rouge regime. The Civil Parties suggest for this day to be set during or after the Pchum Ben Festival, the 17<sup>th</sup> of April or the 20<sup>th</sup> of May. They also proposed additional memorial days for victims of specific crimes. This project requires interaction with government or other international bodies for implementation.
- ii) *Stupas and Other Ecumenical Monuments.* Buddhist *stupas*, as well as structures that do not represent any particular religious denomination would commemorate and pay tribute to the memories of the victims of the Khmer Rouge regime and would give an opportunity for the younger generation to recognize the victims in a permanent and collective way. Implementing this program requires approval from the authorities in the locations where the monuments will be erected. Negotiations and contact with governors in some places are already underway.
- iii) *Ceremonies after Judgment and Other Occasions.* This project aims to gather Civil Parties for them to express their grief over their sufferings and their insights on the judgment.
- iv) *Organization and Preservation of Crime Sites.* The preservation of crimes sites is important to ensure maintenance of evidence of the atrocities committed. The government has issued a circular to preserve such places such as Choeung Ek, and the Civil Party Co-Lawyers are identifying other crime sites in collaboration with the VSS, which in turn, is already coordinating with government authorities for this project.

### **b. Rehabilitation**

- i) *Promotion of Psychological and Physical Health.* This program is aimed at building health centers for Civil Parties with physical and psychological conditions as a result of their sufferings during the Khmer Rouge regime. This may be implemented in

coordination with the existing organizations such as the Transcultural Psychosocial Organization (**TPO**).

- ii) *Creation of Self-Help Groups.* Another proposed project is the creation of groups to encourage the Civil Parties to express their feelings, their sufferings and experiences, and enable them to move towards reconciliation. This is especially useful for victims of gender-based violence and forced marriages. TPO has launched a similar project but further cooperation with the VSS, NGOs and other intermediaries is required.

### **c. Documentation and Education**

Documentation and education projects aim to facilitate understanding by the public of the history of the Khmer Rouge and the experiences of the victims during that regime, so that the next generation will look back to what had happened and refrain from committing the same atrocities. The Civil Parties seek to enhance the curriculum prepared by the Ministry of Education by including more information about the Khmer Rouge and the work of the Court through the programs below.

- i) *Documentation Centers, Museums, and Libraries.* The Civil Parties proposed the establishment of institutions that will provide space for public access to documents and a place for people to educate themselves about the Khmer Rouge and ECCC trials. The documentation centers will maintain, preserve and distribute documents for the benefit of the Civil Parties and future generations.
- ii) *Register of Victims.* This project seeks the creation of a document entitled the “Golden Book” to commemorate the victims. It will be a register open for all victims to add their names and contribute their narratives. Apart from being published in a hard-copy format, it will also be accessible digitally through the existing Virtual Tribunal Project of the ECCC.
- iii) *Publication of Names of Civil Parties in the Judgment.* This envisions the publication of the full names of the Civil Parties, their birthplace, place residence and occupation. This is intended for distribution throughout the country.
- iv) *Cultural Information Center.* The Civil Parties suggested the establishment of a center to disseminate information about the events during the regime, and the culture and the customs of the Cambodian people prior to the regime. This is a project of the Legal Aid of Cambodia, with the sponsorship of the French Embassy.
- v) *Center for the Preservation of the Cham Culture.* The Khmer Rouge’s attacks against the Chams – Khmer Muslims – almost resulted in the loss of their culture and language. This project seeks to preserve the Cham culture through the establishment of a cultural center in Kampong Cham Province.

### **d. Other Reparations Requests**

- i) *Establishment of a Trust Fund.* Notwithstanding the rejection by the Trial Chamber of Case 001 Civil Parties’ request for the establishment of a voluntary trust fund,<sup>8</sup> the CPLCL reiterated the inclusion of a trust fund in their requests. Contrary to the prior ruling, they maintained that this is not outside the ECCC’s reparations framework. They explained that this pool of resources does not need to be called “trust fund,” which may be perceived as a means of granting financial reparations. Instead, it may be referred to as a “project for the establishment of collective and moral reparations trust fund,” which will be used to finance and implement reparation projects.

- ii) *Creation of an Implementing Body.* The CPLCL also proposed the establishment of an organization, which will implement the reparations awards, particularly after the ECCC has completed its mandate.
- iii) *Facilitation of Cambodian Nationality for Ethnic Vietnamese Civil Parties.* While the CPLCL are aware that the Court does not have the power to compel the government to grant Khmer citizenship to ethnic Vietnamese victims, the International CPLCL, Elizabeth Simmoneau-Fort, clarified that this reparation claim does not envisage encroaching on the Cambodian government's prerogatives. Instead, it only seeks the *facilitation* of Vietnamese victims' applications for reacquisition of their Khmer citizenship in accordance with existing laws. The proposal includes an information program to educate these victims about nationality laws, assist applicants with their documentation requirements, submit the applications to the appropriate government bodies, and liaise with local government bodies to inform them of the plight of ethnic Vietnamese victims.
- iv) *Needs Assessment and Livelihood Training for Civil Parties.* Another proposal is to have working groups in to identify the needs of Civil Parties, such as those who were subjected to forced marriages. The proposal also includes professional or skills training for victims and micro-financing projects.

### **C. Authority of ECCC to Award Reparations Claims**

In its 23 September Memorandum on the initial reparations claims, the Trial Chamber had opined that certain proposals, including the establishment of a trust fund for the reparations awards, fall outside the ECCC's legal framework. Further, the Chamber added that other measures such as the institution a day of remembrance may only be endorsed by the ECCC to the Royal Government of Cambodia, but not ordered, since the RGC alone has the final authority and competence to implement these measures.

In response to these observations, Jacquin reiterated that the issue on the authority of the ECCC to award reparations is a matter under appeal before the Supreme Court Chamber in Case 001. In their appeal, the Civil Parties in Case 001 asserted that, even if the ECCC does not have the jurisdiction to require the government of Cambodia to provide reparations, victims may make these claims against the Accused, the enforcement of which may involve Government intervention. She added that the Kingdom of Cambodia's international commitments obligate it to provide reparations to victims of the Khmer Rouge regime.

As regards the proposal to institute days of remembrance, Som Sokong explained that they are not asking the ECCC to order the Government to act on their request. Instead, they intend to liaise with the Government with the assistance of the VSS prior to making their final request. Presently, they only ask the Chamber to recognize the developments in this process.

In response to the Civil Party proposals, Ieng Sary's International Defense Counsel, Mr. Michael Karnavas, expressed support for certain measures, such as building monuments, establishing a viable legal aid institute, and spearheading educational programs that will present a more comprehensive history of Democratic Kampuchea and not just events that occurred during the temporal jurisdiction of the ECCC. Nevertheless, he noted that he is not convinced that the Chamber has the authority to grant most of the reparations requests. In his view, the proposals reflect what the government should be doing in favor of the victims, and not what the Chamber should legislate from the bench.

The Counsels for the other Defendants also raised their concerns on some proposals, especially as regards the project proposed for the ethnic Vietnamese victims. Mr. Phat Pouy Seang, Ieng Thirith's National Counsel, raised vehement objections, arguing that this is

beyond the power of the ECCC to grant, and must be determined by the proper government authorities in accordance with Cambodian law. Further, he maintained that the Vietnamese can be divided into two groups: legal immigrants and illegal immigrants. The Chamber, he argued, should consider if reparations may in fact, be awarded to the latter. He also stressed that, since Rule 23*quinqies* provides that awards should be collective and moral, reparations should benefit all victims, and not just certain groups or nationalities such as Chams or Vietnamese. Preferential reparations for certain ethnic minority groups, he argued, might lead people to wonder why there are no reparations for “Cambodians.”

Mr. Ang Udom, National Counsel for Kheiu Sampan, cautioned that the Trial Chamber’s decision on reparations must comply with the law. He posited that under Cambodian law, there are only four methods to grant nationality to foreigners: (i) birth in Cambodian territory; (ii) marriage to a Cambodian citizen; (iii) investment in Cambodia; and (iv) donations to government. He questioned the grounds on which the grant of citizenship to Vietnamese victims will be based.

In reply, Simmoneau-Fort noted that the Defense Counsels may have misunderstood some of the reparation claims, particularly those relating to Cham and Vietnamese victims. She reminded the parties that the proposed projects are of equal importance, and that no project takes precedence over others. She also acknowledged that while most of the reparations projects are for all Cambodians, there are certain civil parties that will benefit more from some projects. She further clarified that with regard to Vietnamese victims, they are not asking the Chamber to grant them Khmer citizenship, but simply to recognize their program for the facilitation of applications for citizenship. The CPLCL insisted that this facilitation project is entirely within the power of the Chamber to award the Civil Parties.

#### **D. Quest for Meaningful Reparations**

At the conclusion of the hearing, Simmoneau-Fort expressed Civil Parties’ appreciation for the opportunity to provide additional details on their reparations proposals. She emphasized the importance of reparations in the judicial process and the need for civil party participation in order to bring justice on behalf of the Cambodian people. She maintained that the Civil Parties represent all the victims of the regime.

Simmoneau-Fort likewise highlighted the importance of arriving at meaningful reparations in the judicial process despite possible hardships, debates on issues, or even a lengthening of the trial. She stressed that reparations are not merely cold-hearted and easily implementable, technical measures. They have to be satisfactory to each Civil Party, who has to feel that he is receiving compensation that will attenuate his pain. Reparations would have no significance if the Civil Parties do not understand their meaning and impact. She quoted the ICC Pre-Trial Chamber Judgment in the case of *Prosecutor v. Lubanga Dyilo*, which declared that, “the success of the Court is, to some extent, linked to the success of its reparations system.”<sup>9</sup>

She further expressed that the Civil Party Co-Lawyers are aware that they are ambitious in their requests and that there will be difficulties in their implementation. She reasoned, however, that they would not be fully representing the victims if they were not ambitious in their reparations requests. She challenged the Chamber to decide “beyond what seems easily feasible and... ordinary... to pronounce measures (with) more extraordinary character that will constitute a true form of reparation.” This will ensure that these reparations are not simple measures without significance that will give rise to bitterness and rancor.

The OCP expressed its support to the reparations claims of the Civil Parties, and echoed the need for meaningful reparations. They declared that justice must be afforded the victims in case of convictions, and acknowledged the importance of gaining meaningful reparations,

As previously indicates, Counsels for the Defense, on the other hand, continued to question the authority of the ECCC to enforce certain reparations requests. Most projects, they argued, are more properly within the authority of the government to authorize and implement.

The Trial Chamber, through its President, Mr. Nil Nonn, successfully limited the discussion within the Scheduling Order of the hearing. The Civil Party Co-Lawyers attempted to introduce the issue of case severance and to explain its impact to the Civil Parties but the Chamber did not allow them to proceed.

Only leng Thirith, leng Sary and Noun Chea were present at the start of the hearing. leng Sary requested to leave after about an hour into the proceedings. Noun Chea also requested to leave due to high blood pressure and headache at 10:25 am.

Around 10 Civil Parties sat in the courtroom during the hearing. The public gallery was filled with 50 of Civil Parties, a substantial number of NGOs representatives, the press and students.

Translation in general went smoothly although there are times that the speaker was too fast for the translator to follow, so some parts of the statements may have been missed. Towards the end of the session, the President asked the translator to amend the translated announcement of the time allotted for a party in the afternoon hearing.

DATE	START	BREAK	LUNCH	BREAK	RECESS	TOTAL HOURS IN SESSION
Wednesday 19/10/11	09.00	10.21-10.48	11.57	–		2 hours 29 minutes
<b>Average number of hours in session:</b> 2 hours and 29 minutes						

**Unless specified otherwise,**

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (Case No. 002/19-09-2007-ECCC) before the Extraordinary Chambers in the Courts of Cambodia;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- **Case 001** refers to *Case of Kaing Guek Eav alias "Duch,"* Case No. 001/18-07-2007-ECCC; and
- photos are courtesy of the ECCC.

**Glossary of Terms**

CIA	Central Intelligence Agency
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or "KRT")
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IR	Internal Rules of the ECCC Rev. 8 (2011)
KR	Khmer Rouge
OCP	Office of the Co-Prosecutors of the ECCC
RAK	Revolutionary Army of Kampuchea
VSS	Victims Support Section
WESU	Witnesses and Experts Support Unit



\* This report was authored by Mary Kristerie A. Baleva, Samuel Gilg, Princess Principe, Noyel Ry, Kimsan Soy, Penelope Van Tuyl and Flavia Widmer as part of AIJI's KRT Trial Monitoring and Community Outreach Program. AIJI is a collaborative project between the East-West Center, in Honolulu, and the University of California, Berkeley War Crimes Studies Center. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia.

<sup>1</sup> Trial Chamber. "Memorandum on Initial Specification of the Substance of the Reparations Awards sought by the Civil Party Lead Co-Lawyers pursuant to Internal Rule 23quinqies(3)" (23 September 2011). E125 [hereinafter, **MEMORANDUM ON INITIAL SPECIFICATION OF THE SUBSTANCE OF REPARATIONS AWARDS**]. p.3. The Trial Chamber observed that some reparations awards sought is outside the scope of the ECCC legal framework and would require specific government approval or authorization. It also stated that some measures sought lacked sufficient specificity for the Trial Chamber to comment.

<sup>2</sup> Trial Chamber. "Scheduling Order for Hearings on 19 and 20 October 2011 (10 October 2011). E129 [hereinafter, **SCHEDULING ORDER**]. p. 3.

<sup>3</sup> MEMORANDUM ON INITIAL SPECIFICATION OF THE SUBSTANCE OF REPARATIONS AWARDS. p.3.

<sup>4</sup> Under Internal Rule 12 *ter* (as amended on 23 February 2011), the task of organizing civil party representation fall on the National and International Civil Party Lead Co-Lawyers, who are to consult and coordinate with the lawyers of the civil parties.

<sup>5</sup> *Case of the Mapiripan Massacre v. Colombia*. Inter-American Court of Human Rights. "Judgment of September 15, 2006 (Merits, Reparations and Costs)" (15 September 2006).

<sup>6</sup> Ibid. par. 285.156.

<sup>7</sup> Ibid. par. 315. 169.

<sup>8</sup> Case 001. Trial Chamber. "Judgement" (26 July 2010). par. 670-71.

<sup>9</sup> See *Prosecutor vs. Thomas Lubanga Dyilo*. ICC-01/04-01/06. ICC Pre-Trial Chamber I. Decision (17 January 2006).