

REPARATIONS TO VICTIMS OF GROSS HUMAN RIGHTS VIOLATIONS: THE CASE OF CAMBODIA

HAO DUY PHAN*

The world community has introduced various legal instruments regarding reparations for gross violations of human rights. In Cambodia, however, reparations for those seriously and systematically deprived of their rights by the Khmer Rouge regime remain an unresolved issue, even after the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. In so complicated a case as Cambodia's, there are many questions regarding the reparations issue that are left unanswered. This Article examines the issue and offers some recommendations for a feasible and effective reparation program for the Khmer Rouge's victims.

I.	INTRODUCTION	277
II.	OBLIGATIONS TO PROVIDE REPARATIONS TO THE VICTIMS OF THE KHMER ROUGE	279
III.	A STATE OF INACTION	284
IV.	POTENTIAL RECIPIENTS OF REPARATION	288
V.	MOST LIKELY FORMS OF REPARATIONS	290
VI.	HOW COMPENSATION SHOULD BE MADE	291
VII.	CONCLUSION.....	297

I. INTRODUCTION

On April 17, 1975, two weeks before the fall of Saigon, Phnom Penh fell to the Khmer Rouge's control, marking the start of the dark history of the "Killing Fields." The Khmer Rouge regime launched a campaign to create a "clean social system" through which it massively abused human rights, forcing as many as three million people to evacuate the

* Hao Duy Phan holds an S.J.D. from American University Washington College of Law. He has been a Research Fellow at the Institute of Southeast Asian Studies, Singapore and the East-West Center in Washington D.C. The views expressed here do not reflect those of his affiliations.

cities and march into the countryside where they were forced into slave labor, and killing anyone alleged to threaten its goals.¹

More than three decades have passed, but the goal of comprehensive reparations is still out of reach for the victims whose rights were seriously and systematically deprived by the Khmer Rouge. The issue of reparations has received little attention from the government and the international community, even after the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“ECCC”).²

Is the current government legally obliged to compensate the victims of a past regime? Who may make claims for reparations? What are the most appropriate and feasible forms of reparations in Cambodia? These are only some of the many questions surrounding reparations in the case of Cambodia that remain unanswered. With a view toward determining the Cambodian government’s obligation to make reparations and offering some recommendations for a feasible and effective reparations program for the Khmer Rouge’s victims, this Article tries to answer these questions.

This Article is thus organized into five sections. In Part II, it examines the legal obligation of the government of Cambodia and the responsibility of those who committed the atrocities in making reparations to the victims. Part III examines what has been done so far to solve these issues and tries to account for the current state of inaction. Next, Part IV identifies some bases on which to decide who should receive reparations. Part V then assesses the most likely forms of reparations to the victims in Cambodia. The last section offers some

¹ See, e.g., *The Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, Annex, ¶¶ 16, 19, 20, 30, 56, U.N. Doc. A/53/850-S/1999/231 (Mar. 15, 1999) [hereinafter *Group of Experts Report*] (discussing forced evacuations and other human rights abuses); Katheryn M. Klein, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 NW. J. INT’L HUM. RTS. 549, 549, 553-54 (2006) (documenting evacuations and forced labor).

² The ECCC, also known as the Cambodia Tribunal, is a joint court established by an agreement between the United Nations and Cambodia to try those accused of crimes under the Khmer Rouge between 1975 and 1979. See the ECCC website at <http://www.eccc.gov.kh/english> (last visited Oct. 28, 2009) for more general background information about the ECCC.

recommendations on how compensation should be made. Translating this right into reality remains an enormous challenge. Yet, this challenge should be overcome, and the issue of reparations to the victims of the Khmer Rouge should be resolved as soon as possible to ensure that real justice is brought to the victims of gross violations of human rights in Cambodia.

II. OBLIGATIONS TO PROVIDE REPARATIONS TO THE VICTIMS OF THE KHMER ROUGE

The United Nations Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law defines reparations as consisting of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.³ Traditionally, restitution has been the preferred form of reparation.⁴ Restitution “seek[s] to reestablish the victim’s *status quo ante*,”⁵ including, for example, return of property, restoration of liberty, citizenship and other legal rights, return to place of residence, and restoration of employment.⁶ As the most common form of legal remedy, compensation is the payment of money as a form of recognition of the wrong done and to make good the losses suffered.⁷ Rehabilitation usually includes medical and psychological care as well as legal services.⁸ Satisfaction consists of, among other things, acknowledgement of violations, full and public disclosure of the truth, formal apologies and acceptance of responsibility, and commemoration

³ 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, G.A. Res. 60/147, Annex, ¶ 18, U.N. Doc. A/RES/60/147 (2005) [hereinafter U.N. Basic Principles].

⁴ Stef Vandeginste, *Reparation, in* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 145, 145 (David Bloomfield et al. eds., 2003).

⁵ Pablo de Greiff, *Justice and Reparations, in* THE HANDBOOK OF REPARATIONS 451, 452 (Pablo de Greiff ed., 2006).

⁶ U.N. Basic Principles, *supra* note 3, ¶ 19.

⁷ U.N. Basic Principles, *supra* note 3, ¶ 20; de Greiff, *supra* note 5, at 452; Dinah L. Shelton, *Reparations for Victims of International Crimes, in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 137, 139-40 (Dinah Shelton ed., 2000).

⁸ U.N. Basic Principles, *supra* note 3, ¶ 21; de Greiff, *supra* note 5, at 452.

of victims.⁹ Guarantees of non-repetition include measures that contribute to prevention.¹⁰

The issue of reparations is not new in international human rights and humanitarian law.¹¹ Initial support for this right in international law “could arguably be found in Article 3 of the 1907 Hague Convention IV respecting the Laws and Customs of War,”¹² according to which a party violating the Convention “shall . . . be liable to pay compensation.”¹³ The Universal Declaration of Human Rights, perhaps the greatest achievement of the twentieth century,¹⁴ later provided that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹⁵ Many more international agreements have been reached in the decades following the Universal Declaration of Human Rights that strengthened the right to reparations for victims of human rights violations. Among these are the International Covenant on Civil and Political Rights;¹⁶ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁷ the Third Geneva Convention;¹⁸ and Protocol I to the Geneva Convention.¹⁹ Regional

⁹ U.N. Basic Principles, *supra* note 3, ¶ 22.

¹⁰ *Id.* at ¶ 23.

¹¹ See, e.g., Paul M. Hughes, *Rectification and Reparation: What Does Citizen Responsibility Require?*, 35 J. SOC. PHIL. 244, 245 (2004) (noting that discussions regarding reparations have become prominent in addressing past atrocities).

¹² Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT’L REV. RED CROSS 497, 506 (2003).

¹³ Convention Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

¹⁴ See generally PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 199-270 (2d ed. 2003) (detailing the historical context and impact of the Universal Declaration of Human Rights).

¹⁵ Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., at 71, 73, U.N. Doc A/810 (Dec. 10, 1948).

¹⁶ International Covenant on Civil and Political Rights arts. 2(3) & 9(5), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War art. 68, Aug. 12, 1949, 75 U.N.T.S. 135.

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 91, June 8, 1977, 1125 U.N.T.S. 3.

instruments also contain provisions requiring legal remedies for violations of human rights. Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates the rights of victims of human rights violations to claim for an effective remedy “before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”²⁰ The American Convention on Human Rights entitles everyone to effective recourse to protect against violations of their fundamental rights recognized by the constitution “or laws of the state or by the Convention.”²¹

A careful check reveals that the Cambodian government has a legal obligation to make reparations to victims of the atrocities committed by the Khmer Rouge regime in the 1970s. Currently, Cambodia is a party to many major human rights treaties,²² most of which provide legal obligations for state parties to guarantee effective remedies for victims of

²⁰ Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222, *as amended by* Protocols Nos. 3, 5, 8 and 11 *which entered into force on* Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 *respectively*.

²¹ American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). *See also* African (Banjul) Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (providing every individual the right to an appeal to competent national organs against acts violating his or her fundamental rights as recognized by the conventions, laws, regulations and customs in force).

²² To the surprise of many outsiders, Cambodia is party to many major international human rights instruments, including: ICCPR; International Covenant on Economic, Social and Cultural Rights; Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Elimination of All Forms of Racial Discrimination; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Elimination of All Forms of Discrimination Against Women; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women; Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts; and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. For the current status of Cambodia’s participation in some major international human rights agreements, browse the list of treaties at the United Nations Treaty Collection, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited Oct. 28, 2009).

various kinds of human rights violations. The International Covenant on Civil and Political Rights calls on state parties “[t]o ensure that any person whose rights or freedoms [of the kind recognized by the Covenant] are violated shall have an effective remedy notwithstanding that the violations have been committed by persons acting in an official capacity . . . [and t]o ensure that the competent authorities shall enforce such remedies when granted.”²³ The Human Rights Committee²⁴ concludes that “[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged.”²⁵ Such remedies should take into account the special vulnerability of certain categories of people, particularly children.²⁶ A failure to comply with this obligation “could in and of itself give rise to a separate breach of the Covenant”²⁷ and “cannot be justified by reference to political, social, cultural or economic considerations.”²⁸

The International Convention on the Elimination of Racial Discrimination also asks state parties to provide an effective remedy for victims of racial discrimination.²⁹ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obliges state parties to ensure that any victim of torture “obtains redress and has

²³ ICCPR, *supra* note 16, art. 2(3).

²⁴ See Office of the United Nations High Commissioner for Human Rights, Human Rights Committee—Members, <http://www2.ohchr.org/english/bodies/hrc/members.htm> (last visited Oct. 28, 2009) (“The Human Rights Committee is composed of 18 independent experts who are persons of high moral character and recognized competence in the field of human rights.”). The Committee convenes three times a year for sessions of three weeks’ duration in Geneva or New York. Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, <http://www2.ohchr.org/english/bodies/hrc> (last visited Oct. 28, 2009).

²⁵ Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004).

²⁶ *Id.* ¶ 15.

²⁷ *Id.*

²⁸ *Id.* ¶ 14.

²⁹ See *e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S. 195, 199 (requiring state parties to guarantee effective protection against racial discrimination for every person in the states’ jurisdiction).

an enforceable right to fair and adequate compensation".³⁰ Similarly, the Convention on the Rights of the Child at Article 39 requires all states parties to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim" of any forms of violation.³¹

Victims of the Khmer Rouge include women and children, those dispossessed of their political and civil rights, those suffering torture, and those enduring racial and gender discriminations. All these victims may arguably fall within the scope of the above-mentioned human rights treaties to which Cambodia is a party. Precedents from the cases of Austria,³² Germany,³³ and Japan³⁴ suggest that the Cambodian government has an obligation to seriously consider the possibility of making reparations to the Khmer Rouge's victims, regardless of the fact that atrocities were committed by a former regime that was overthrown by the current government.

While the argument above deals with the Cambodian government's legal obligations to make reparations to victims of the Khmer Rouge, the Khmer Rouge leaders themselves are directly responsible for making reparations for the crimes they committed. According to the Report of the Group of Experts for Cambodia³⁵ established pursuant to General

³⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 17, art. 14(1).

³¹ Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3, 56.

³² See Max du Plessis, *Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery*, 25 HUM. RTS. Q. 624, 639 (2003) (mentioning that Austria paid US \$25 million in reparations to Holocaust survivors in 1990).

³³ See Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews After World War II: A Turning Point in the History of Reparations* (estimating that the German government has paid a total of US \$61.5 billion in reparations to victims of the Nazis between 1965 and 2001), in THE HANDBOOK OF REPARATIONS, *supra* note 5, at 390, 408.

³⁴ See Joseph P. Nearey, *Seeking Reparations in the New Millennium: Will Japan Compensate the "Comfort Women" of World War II?*, 15 TEMP. INT'L L.J. 121, 140 (2001) (describing a US \$10 million government-initiated private fund to correct the wrongs committed against former comfort women).

³⁵ See generally Situation of Human Rights in Cambodia, G.A. Res. 52/135, ¶ 2, U.N. Doc. A/Res/52/135 (1998) (requesting that the Secretary-General consider assisting the government of Cambodia by appointing a group of experts). U.N. Secretary-General Kofi Annan appointed a three-member Group of Experts pursuant to General Assembly resolution 52/135 to evaluate the existing evidence to determine the nature of the crimes

Assembly Resolution 52/135, leaders of the Khmer Rouge have “vast amounts of wealth in the years since their ouster from power.”³⁶ The report recommends that the wealth of Khmer Rouge leaders convicted by a tribunal be used as a source of compensation to the victims and that the ECCC provide for the possibility of reparations by the defendants to their victims.³⁷ There exist both legal means and practical capabilities for the victims to demand reparations from those who committed gross violations in the 1970s.

III. A STATE OF INACTION

Three decades have elapsed since the genocidal regime of the Khmer Rouge collapsed, yet its victims still have not received any adequate remedial justice.³⁸ This indicates that the wrongs have not been comprehensively and completely rectified and the rights of the victims have not been fully recognized. Victims of the Khmer Rouge regime have waited many years for reparation. Concerns have been raised by human rights non-governmental organizations (“NGOs”) but their actions and pressures may be not strong enough to effect real change. The United Nations Trust Funds connected to the establishment and functioning of various tribunals have been unsuccessful in raising funds for purposes of reparations.³⁹ When the United Nations and Cambodia negotiated the agreement to establish the ECCC, hope was raised for including provisions about reparations in the Agreement. However, in a step that Amnesty International described as “a major retreat from the

committed by Khmer Rouge leaders; and to explore legal options for bringing them to justice. *Group of Experts Report, supra* note 1.

³⁶ *Id.* ¶ 211.

³⁷ *See id.* ¶ 212 (“The possibility of requiring defendants to pay compensation to victims is included in the statutes of the existing ad hoc tribunals and has recently been affirmed in the statute of the International Criminal Court.”). The report also recommended that, “any tribunal provide for the possibility of reparations by the defendant to his victims . . . [and] States in which Khmer Rouge assets obtained illegally are present should explore other options for providing compensation to victims from these assets.” *Id.*

³⁸ *See Klein, supra* note 1, at 549.

³⁹ Gregory H. Stanton, *Perfection Is the Enemy of Justice*, BANGKOK POST, June 1, 2003 (responding to Amnesty International’s criticism of the draft agreement between Cambodia and the United Nations).

Rome Statute,⁴⁰ the United Nations and the Cambodian government concluded an agreement without any such provision.

This agreement led to the promulgation of the Law on the Establishment of the ECCC, which does not have any specific references to reparations. While this law limits all forms of penalty to imprisonment,⁴¹ it authorizes the confiscation of personal property, money, and real property acquired unlawfully by the convicted persons.⁴² However, the law dictates that confiscated property shall be returned to the government, not to the victims of the Khmer Rouge regime.⁴³ The Internal Rules of the ECCC is the only document from this agreement that specifically addresses the issue of reparations, but it provides that reparations should be granted only to certain groups of victims (i.e., civil parties) and only in moral or symbolic forms.⁴⁴

Why is it taking so long for the government of Cambodia to realize the rights of its citizens? Why has the issue of reparations to Khmer Rouge's victims received such modest attention from the international community? There are some possible explanations for this state of affairs.

First, the issue of reparation for victims of human rights violations in general became significantly more popular only after the end of the Cold War.⁴⁵ In the case of Cambodia, almost all efforts have focused on seeking truth and justice as these aspects are considered prerequisites for reparation.⁴⁶

Second, after the collapse of the Khmer Rouge regime, the political environment in Cambodia remained unstable through the late 1990s.

⁴⁰ *Id.*

⁴¹ 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 (Council of Jurists trans.), art. 38, http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf (last visited Oct. 28, 2009).

⁴² *Id.* art. 39.

⁴³ *Id.*

⁴⁴ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 4), rule 23 (revised on Sept. 11, 2009) [hereinafter ECCC Rules], *available at* <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv4-EN.pdf> (last visited Oct. 28, 2009).

⁴⁵ Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in THE HANDBOOK OF REPARATIONS, *supra* note 5, at 478-79.

⁴⁶ See Stef Vandeginste, A Truth and Reconciliation Approach to the Genocide and Crimes Against Humanity in Rwanda 9 (May 1998) (Inst. of Dev. Policy & Mgmt., Univ. of Antwerp Working Paper).

From 1979 to 1991, the occupation by Vietnam and the debate over who would be the legitimate representative for Cambodia dominated the limelight, leaving little room for discussions on reparation.⁴⁷ Then from 1991 to 1997, domestic and international attention was further consumed by the internal struggle for power in the country.⁴⁸ Political stability was only realized in 1997 just before Cambodia became an official member of the Association for Southeast Asian Nations.⁴⁹ At that time, the United Nations received a request from the government of Cambodia for assistance in organizing the trial process of the Khmer Rouge.⁵⁰ Since then, attention has been mainly focused on the issue of prosecution, not on the equally important matter of reparation.⁵¹

Third, there is a lack of political interest on the part of the Cambodian government regarding the obligation to make reparations to the Khmer Rouge's victims. Although the Khmer Rouge regime was overthrown, some people who were involved in that particular regime are still holding power.⁵² This situation contributes to making the Cambodian authority reluctant to bring accountability to all the perpetrators and make reparations to the victims of the 1970s massacre.

⁴⁷ See Scott Luftglass, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893, 903 (2004) (explaining that the international community was mainly interested in ensuring Cambodia's stability in the years following the end of the Khmer Rouge).

⁴⁸ See Vannath Chea, *Reconciliation in Cambodia: Politics, Culture and Religion* (recounting the peace process where different political factions struggled for power), in RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK, *supra* note 4, at 49, 50.

⁴⁹ See DAVID W. ROBERTS, *POLITICAL TRANSITION IN CAMBODIA, 1991-99: POWER, ELITISM, AND DEMOCRACY* 168-69 (2001) (discussing how some form of stability was restored following a coup in 1997). See also Seth Mydans, *Fragile Stability Slowly Emerges in Cambodia*, N.Y. TIMES, June 25, 2000, at 1 (describing developments in Cambodia that suggest it is witnessing a "new era of peace and political stability").

⁵⁰ Luftglass, *supra* note 47, at 906; Klein, *supra* note 1, at 554-55.

⁵¹ After five years of long and difficult negotiation, including the six-month deadlock because of the United Nation's withdrawal from the talk, a final agreement was concluded in 2003, focusing on the prosecution of a group of top leaders of the Khmer Rouge, without any reference to reparations issues. See Luftglass, *supra* note 47, at 906-17 (describing the efforts by the United Nations and Cambodia to establish a tribunal).

⁵² See Klein, *supra* note 1, at 554 (giving the example of Hun Sen, a former Khmer Rouge Foreign Minister, who is currently the Prime Minister of Cambodia and has been uncooperative in the negotiations regarding the establishment of the joint tribunal).

Fourth, the international community and NGOs have not been effective in changing the current lack of action and spreading awareness. Even the victims themselves are not always aware of the rights that they possess.⁵³

Last is what J. Angelo Corlett called the “Objection from Historical Complexity”⁵⁴ of a case that occurred long in the past. According to Corlett’s line of argument, history contains so many complex situations that it would be next to impossible to figure out all of the injustices that would require reparations and effectively address them.⁵⁵ For Cambodia, after a quarter of a century, it seems both impractical to measure the harms done to the victims on a case-by-case basis and enormously expensive to restore the rights of victims that were injured so long ago.⁵⁶ It is also very difficult to persuade members of a present generation that they owe a debt to the ancestors of the claimants.⁵⁷

Despite all of these hurdles, the issue of reparation to victims of gross human rights violations in Cambodia should not stand unresolved indefinitely. If investigation, recognition and prosecution are the preconditions for reparation, now is the time, as these other aspects of justice are being delivered, to proceed toward the goal of reparation. Although the Agreement to establish the ECCC does not contain provisions on reparation, there is a legal basis for such reparation established by obligations in treaties to which Cambodia is a party and by Cambodian domestic law itself. Under current Cambodian law, victims may claim reparation in criminal cases for harm they suffered as a result of the crimes being tried,⁵⁸ and under the Internal Rules of the

⁵³ In a survey on the attitudes of the Cambodian population conducted by the Human Rights Center, University of California, Berkeley, although nine out of ten respondents said that reparations should be provided to the victims of the atrocities, 39% required punishment for forgiveness while only 5% selected compensation as means to earn forgiveness. PHUONG PHAM ET AL., *SO WE WILL NEVER FORGET: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 29-30 (2009). Such responses suggest that the respondents did not attach much priority or significance to the right to compensation.

⁵⁴ J. ANGELO CORLETT, *RESPONSIBILITY AND PUNISHMENT* 190 (3d ed. 2006).

⁵⁵ *Id.*

⁵⁶ Falk, *supra* note 45, at 495.

⁵⁷ CORLETT, *supra* note 543, at 190-91.

⁵⁸ See SECRETARIAT OF THE ROYAL GOV'T TASK FORCE, OFFICE OF THE COUNCIL OF MINISTERS, *AN INTRODUCTION TO THE KHMER ROUGE TRIALS* 15 (2004), available at http://www.cambodia.gov.kh/krt/english/introduction_eng/index.htm (last visited Oct. 28,

ECCC, certain forms of reparation may be granted.⁵⁹ The problem is devising feasible and effective ways to fulfill the obligations of making reparations. In that light, the following sections will discuss some practical solutions regarding how reparations to victims of genocide should be made in the case of Cambodia.

IV. POTENTIAL RECIPIENTS OF REPARATION

The first challenge is how to determine who is eligible to claim for reparations in this case, as many of the direct victims have died. Many of the two million people killed in the atrocities have living children and grandchildren. Thus questions are posed: Can their offspring and families receive reparation? Can the families of those who are still alive receive reparation as well? These questions can only be resolved on a case-by-case basis. Ultimately, however, there should be a general framework to determine the recipients of reparations before proceeding with an overwhelming number of individual claims. Fortunately, there are many sources of international law to assist in creating this framework. For example, Article 14 of the U.N. Convention Against Torture provides that, "in the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."⁶⁰ As defined by the former European Commission on Human Rights in *X v. Federal Republic of Germany*, the term "victim" includes "not only the direct victim or victims of the alleged violation but also any person who would indirectly suffer prejudice as a result of such violation or who would have a valid personal interest in securing the cessation of such violation."⁶¹ Similarly, the U.N. Human Rights Committee has concluded that victims may include family members of those who suffered violations.⁶² Recent decisions of the Inter-American Court of Human Rights also indicate that when victims have died, their next of kin is eligible to recover damages; and where evidence of family ties has

2009) (stating that murder, torture, and religious persecution are crimes under Cambodian law).

⁵⁹ See *supra*, note 44 and accompanying text.

⁶⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 17, art. 14(1).

⁶¹ *X v. Federal Republic of Germany*, App. No. 4185/69, 35 Eur. Comm'n H.R. Dec. & Rep. 142 (1970).

⁶² Shelton, *supra* note 7, at 142.

not been presented, family members are given a period of two years after judgment to show proof of their relationship to qualify for damage awards.⁶³ A general framework should be established initially, in which family members of all victims are eligible to claim for reparations; and within this framework, specific solutions can be reached on a case-by-case basis.

Another issue remains, however, regarding the scope of the term “family.” In order to address this issue, it is useful to look at the scope applied in other cases. In *Loayza Tamayo v. Peru*, the Inter-American Court of Human Rights considered that the term “family members” should be understood to include all persons linked by a close relationship, including the children, parents and siblings of a victim.⁶⁴ Similarly, in *Blake v. Guatemala*, the Court decided that all four family members of the disappeared, his parents and his brothers, were directly injured by Blake’s disappearance and death.⁶⁵ In *Suárez Rosero v. Ecuador* and *Bámaca Velásquez v. Guatemala*, the Court likewise ordered the states to pay damages to the wife/widow and the children of each of the victims.⁶⁶ In cases after the 1990 conflict in the Persian Gulf, the U.N. Compensation Commission determined that spouses, children or parents of the individuals could be considered eligible for compensation for their suffering as a result of Iraq’s unlawful invasion and occupation of Kuwait in August 1990.⁶⁷ Precedents established in these cases suggest an answer as to who can claim for reparations in the case of Cambodia. First, the direct victims of the atrocities should be

⁶³ See Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights* (K. De Feyter et al. eds., 2005) (noting that the Inter-American Court has vastly expanded the remedies and measures of reparations it now regularly orders), in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS* 191, 199-200.

⁶⁴ See *Loayza Tamayo Case*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42 ¶ 90 (Nov. 27, 1998) (stating that a victim's next of kin, in the anthropological sense, is not family in the nuclear sense but rather the extended family).

⁶⁵ See *Blake Case*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48 ¶ 57 (Jan. 22, 1999) (holding that the parents and brothers were beneficiaries of the reparations as a result of the violations).

⁶⁶ *Suárez Rosero Case*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 44 ¶ 113 (Jan. 20, 1999); *Bámaca Velásquez Case*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91 ¶ 106 (Feb. 22, 2002).

⁶⁷ David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT’L L. & POL. 1, 22 n.102 (1994).

eligible for reparation. And second, eligibility should be granted to next of kin to victims who were killed in the 1970s, or who have died since, including parents, spouses, siblings and children of those direct victims. Using this general approach, solutions can be reached in granting reparations in specific cases.

V. MOST LIKELY FORMS OF REPARATIONS

Another challenge is how to ascertain what should be the most appropriate measures of reparations in the case of Cambodia among many forms of reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁶⁸ First of all, it might be argued that restitution, given the extent of time and the current situation in Cambodia, is not a likely option for the victims of the Khmer Rouge. As indicated by Article 35 of the International Law Commission Articles on State Responsibility, restitution is not the appropriate form of reparations in cases where it is “materially impossible.”⁶⁹ Circumstances in Cambodia have understandably changed over the last thirty years to the extent that a return to former places of residence or restoration of working and living environments into those before the 1970s is neither possible nor necessary.

Rehabilitation, while being necessary, is unlikely to have much feasibility and applicability given the number of people who really need medical and psychological care as a direct result of the atrocities more than thirty years ago. Measures of guarantee for non-repetition and prevention are always important but they are long-term programs and might not be directed toward the victims of the genocidal Khmer Rouge regime.⁷⁰

Symbolic forms of satisfaction seem to be among the most feasible solutions. It is quite likely that symbolic measures are of lower material cost in comparison with other forms of reparations.⁷¹ Symbolic reparation also constitutes a way to show respect for the victims and to

⁶⁸ U.N. Basic Principles, *supra* note 3, ¶ 18.

⁶⁹ Falk, *supra* note 45, at 483.

⁷⁰ Possible measures to guarantee non-repetition appear in U.N. Basic Principles, *supra* note 3, ¶ 23.

⁷¹ See de Greiff, *supra* note 5, at 453 (contrasting symbolic forms of reparations with material forms, which may include some form of payments or services).

express the government's recognition of the harm suffered.⁷² A formal apology, construction of monuments, establishment of memorial days, and a firm commitment not to repeat these atrocities are not beyond the government's capacity. In fact, this approach seems to have been adopted by the government of Cambodia as reflected in a statement on its official website that reads: "It is difficult to imagine how the many millions of Cambodian victims could receive anything more than symbolic compensation."⁷³ This approach also appears in the Internal Rules of the ECCC, which notes that reparation, if granted, would only be in moral and symbolic forms.⁷⁴

Nevertheless, efforts to make reparations should not stop at this point, for the victims deserve more than the compensating effects of symbolic gestures. If it is generally accepted that the harm suffered merits the right to compensation, there should also be a form of material reparation⁷⁵ as recommended by the Group of Experts for Cambodia,⁷⁶ especially given the responsibility of the convicted and the obligations of the government as examined above.

VI. HOW COMPENSATION SHOULD BE MADE

The case for monetary reparation has been made in earlier arguments. However, how to arrange and make compensation poses other difficulties. What is the best reparation mechanism: judicial or administrative? What are the financial resources out of which to make compensation, given the low level of development of Cambodia? Is it fair to use taxes when arguably most of Cambodian citizens now are not responsible for those violations? More generally, is this the

⁷² *Id.* (enumerating possible forms of symbolic reparations).

⁷³ Secretariat of the Royal Government Task Force, Office of the Council of Ministers, An Introduction to the Khmer Rouge Trials 17 (2004), available at <http://www.cambodia.gov.kh/krt/english/index.htm> (last visited Oct. 28, 2009).

⁷⁴ ECCC Rules, rule 23 (stating that awards may include an order to publish the judgment at the expense of the convicted person, an order to fund a non-profit activity for the victims' benefit, or other comparable reparations).

⁷⁵ See Jaime E. Malamud-Goti & Lucas Sebastián Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies* ("[I]t is generally accepted that [reparations] must include some form of monetary compensation for the harm suffered."), in *THE HANDBOOK OF REPARATIONS*, *supra* note 5, at 539, 539.

⁷⁶ *Group of Experts Report*, *supra* note 1, ¶ 212.

responsibility of the current generation for something that happened to their ancestors? What are the optimal forms that compensation should take? Does cash represent the best option? Should the victims be given the freedom to decide on its use? Should compensation be the same for all even though victims may have suffered in various ways and to different degrees? These issues certainly require careful thought and deliberate discussions before a solution can be worked out. This section does not aim to provide the best answers to all these questions. It does, however, try to offer some recommendations which might be appropriate in a case as complex as Cambodia's.

First, regarding the financial resources out of which reparations can be made; one may argue that it is primarily the obligation of the Cambodian government. This is true in a number of cases. In the case of Iraq's unlawful invasion of Kuwait in August 1990, the U.N. Compensation Commission raised a fund through a tax on Iraqi oil exports.⁷⁷ Several countries have also enacted legislation and established reparation funds that were extracted from state budgets to compensate victims of human rights abuses committed under a previous regime. In 1990, Austria made payments of a total US \$25 million to Jewish survivors of the Holocaust.⁷⁸ Argentina also adopted reparation legislation in 1991 to make compensation for human rights violation victims, especially those in cases of disappearances.⁷⁹ Chile decided in 1995 to use its national budget to establish a fund for implementing a program of reparations for all peasants excluded from agrarian reforms or expelled from their land.⁸⁰ In the same year, Brazil established a reparations commission to compensate the family relatives of 135 armed rebels disappearing when this country was under military rule.⁸¹ Following the September 11, 2001 incidents, the U.S. Congress enacted Public Law 107-42 to establish the "September 11th Victim

⁷⁷ David Bloomfield, *Reconciliation: An Introduction*, in RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK, *supra* note 4, at 10, 16.

⁷⁸ du Plessis, *supra* note 32, at 639.

⁷⁹ Vandeginste, *supra* note 4, at 155.

⁸⁰ See Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile* (describing how the reparations policy set payments according to three different age groups), in THE HANDBOOK OF REPARATIONS, *supra* note 5, at 55, 84.

⁸¹ Vandeginste, *supra* note 4, at 155.

Compensation Fund” of roughly US \$4 billion,⁸² which has been subsidized entirely by the federal government.⁸³ Germany’s enactment since World War II of several measures to pay victims in post-war reparation amounted to more than US \$38.6 billion by the year 2000.⁸⁴ These examples demonstrate that funding mainly has been raised from the state budget.

The case of Cambodia, however, might be somewhat different from other countries that have financed reparations. First, the number of people who have potential reparation claims is in the millions.⁸⁵ Second, unlike the United States, Germany, Japan or Austria, Cambodia belongs to a group of the poorest countries in the world.⁸⁶ Cambodia’s state budget is far from being sufficient to adequately compensate victims.⁸⁷ Third, due to a lack of political interest, it is unlikely that Cambodia’s government would accept the responsibility of compensating victims. Fourth, as described above, those convicted of atrocities are also responsible for compensating victims, and they are, in fact, at least partially capable of doing so.⁸⁸ Last, the international community may also contribute to the fund. A preliminary conclusion of this analysis

⁸² The Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230, 237 (codified at 49 U.S.C. § 40101 note (2001)); see Samuel Issacharoff & Anna Morawiec Mansfield, *Compensation for the Victims of September 11* (contrasting the compensation scheme for September 11th with other initiatives by noting the scheme’s absence of “notions of justice, reconciliation and restitution”), in *THE HANDBOOK OF REPARATIONS*, *supra* note 5, at 284, 284-85, 293.

⁸³ *Id.* at 285.

⁸⁴ Colonomos & Armstrong, *supra* note 33, at 408.

⁸⁵ See *Group of Experts Report*, *supra* note 1 ¶ 19 (noting that up to three million people were forced to evacuate cities and were marched into the countryside); see also Klein, *supra* note 1, at 549 (stating that three million people were forced into slave labor). In contrast, Brazil’s reparation program had only a few hundred potential claims. See *supra*, note 81 & accompanying text.

⁸⁶ See United Nations Statistics Division, National Accounts Section, *United Nations Statistics Division — Demographic and Social Statistics*, <http://unstats.un.org/unsd/demographic/products/socind/inc-eco.htm> (last visited Oct. 28, 2009) (reporting that Cambodia’s per capita GDP is US \$598).

⁸⁷ The Cambodia State budget in 2008 had revenues of US \$1.274 billion. CIA—The World Factbook—Cambodia, <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html> (last visited Oct. 28, 2009).

⁸⁸ The top leaders of the Khmer Rouge regime are said to have a great deal of wealth, mostly from their benefits from timber and gem concessions. *Group of Experts Report*, *supra* note 1, ¶ 211.

recommends that the fund should rely on a combination of various sources such as Cambodia's state budget, the perpetrators' wealth, and contributions of the international community.

The second recommendation concerns managing and distributing the compensatory funds. Judicial compensation to individual claimants may not be possible in this case because it may take too much time and prove too costly. This is especially true because of the current Cambodian judicial system, number of people who were victimized, and number of family members who have suffered from the death or injuries of their loved ones. Judicially compensating individual victims for atrocities committed so far in the past is also extremely complicated. Each victim suffered differently and has a different number of dependants who also uniquely suffered from the atrocities.

Harm assessment is never an easy process,⁸⁹ and it is especially difficult in this case. Among the victims, many people were killed; those who managed to survive suffered mental or physical injuries. In order to judicially compensate on an individual basis, authorities must investigate and compare between different types of suffering. For example, the government would have to decide whether those who were killed by torture or forced labor, or those suffering from mental harms or bodily injuries, should receive the same level of compensation. Since many things have happened to these families between then and now, it is difficult to determine the degree each family suffered from the death of their loved ones. In addition, the disadvantages that family members currently suffer are the result of a long chain of causes through more than one historical injustice.⁹⁰

To correctly measure the degree of suffering in cases happening more than thirty years ago is nearly impossible. Such a task would also inevitably disaggregate victims.⁹¹ Differences in the investigation and

⁸⁹ See Colonomos & Armstrong, *supra* note 33, at 408, 410-11 (explaining the challenges faced by the German government in evaluating the "subjective dimension" of various types of harms).

⁹⁰ See Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 *ETHICS* 114, 117-18 (2001) (describing the difficulty of justifying causal relation between past injustice and present harms of African-American slave descendants).

⁹¹ See de Greiff, *supra* note 5, at 458 ("A case-by-case procedure for settling reparations claims disaggregates *victims* because of unequal access to courts, and of the unequal awards courts make.").

assessment would lead to different judicial awards. This may send an unintentional message that violations of some victims' rights are more significant than the same violations of rights against others, thereby resulting in a "hierarchy of victims."⁹²

Given the analysis above, an administrative approach, as opposed to judicial approach, and collective measures, as opposed to individual measures, are more feasible and appropriate for Cambodia. First, administrative and collective measures have the advantage of reaching a greater number of former victims.⁹³ In contrast, under the judicial approach, courts may easily become overloaded with a huge number of reparations claims and may be incapable of effectively handling all cases.⁹⁴ Second, administrative and collective measures may have less risk of incorrectly assessing the victims' sufferings.⁹⁵ Third, these measures avoid limitations or mistakes concerning the range of beneficiaries.⁹⁶ Fourth, collective measures usually do not include financial considerations alone. Instead, they might also include other aspects such as granting victims the right to express their experiences of victimization or the full disclosure of the truth.⁹⁷ Last, unlike the judicial approach, administrative and collective measures do not focus only on the past; they also look forward to the future.

One can argue that the administrative and collective approaches will dissatisfy specific groups within the Cambodian community. Nonetheless, it should be remembered that there is no perfect solution that will satisfy people from all walks of life. In this regard, the case of South Africa offers a good example to contemplate. For Apartheid victims, the South African government established an administrative

⁹² *Id.* at 458.

⁹³ Vandeginste, *supra* note 4, at 158.

⁹⁴ In particular, the Cambodian judiciary still lacks three key criteria for having fair and effective trials: (1) properly trained judges, lawyers, and investigators; (2) adequate infrastructure; and (3) "a culture of respect for due process." *Group of Experts Report*, *supra* note 1, ¶ 126.

⁹⁵ As opposed to individual judicial compensation, collective administration measures do not require correct suffering assessment of each individual victim of the Khmer Rouge regime and therefore may have less risk of incorrect harm assessment.

⁹⁶ Vandeginste, *supra* note 4, at 158.

⁹⁷ *See de Greiff*, *supra* note 5, at 458 (noting how publicity of a judicial proceeding may negatively affect full disclosure of facts).

uniform award consistent with an injury group.⁹⁸ Such uniform awards of compensation were also made to Japanese Americans for the internment they suffered during the World War II.⁹⁹ In a very interesting collective measure case, victims of the Iraq's invasion of Kuwait in August 1990 were classified into six distinct categories and were awarded compensation based on this classification.¹⁰⁰

The third recommendation concerns the many questions regarding the specific forms that compensations should take. Should cash be the only option? Should recipients use their received money for whatever purposes they choose? Again, the compensations made in South Africa can be useful in guiding the compensatory regimes for Cambodian victims of gross human rights violations. After the collapse of the Apartheid regime in South Africa, victims were offered a "services package"—a combination of rehabilitation and compensation.¹⁰¹ In this case, the Reparation and Reconciliation Committee decided to give the recipients the freedom of choice by recommending financial reparations at levels that would enable reasonable access to essential and basic services.¹⁰² It thus helped create favorable conditions for the victims to utilize their compensations and for the project to achieve its more general objectives.¹⁰³ This might suggest a similar solution in the case of Cambodia to the question of deciding the form of compensations.¹⁰⁴

⁹⁸ Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N. Y. TIMES, Apr. 16, 2003, at A7 (reporting that the South African government intended to compensate Apartheid victims with a one-time payment of about US \$3,900).

⁹⁹ See du Plessis, *supra* note 32, at 650 & n.109 (stating that Japanese Americans were paid US \$20,000 for having been interned).

¹⁰⁰ See Vandeginste, *supra* note 4, at 153-54 (explaining how the U.N. Compensation Commission divided claims into six categories based on the origin of the claim and type of harm suffered).

¹⁰¹ See *id.* at 157 (listing education, housing, health, and other basic services as included in the "services package").

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ For a view of the Cambodian public's opinion toward the form of reparations, see PHAM ET AL., *supra* note 53, at 4 (reporting that 68% of the respondents preferred collective measures to individual measures and 53% thought that reparations should affect their daily lives in forms such as social services (20%), infrastructure development (15%), and economic development programs (12%)).

VII. CONCLUSION

The issue of reparation to victims of gross human rights violations has been shaped and defined by both state practice and major international instruments on human rights, including humanitarian and criminal laws. As argued in this Article, there exists an obligation on part of the Cambodian government to seriously consider the possibility of making reparations to the Khmer Rouge's victims, regardless of the fact that the atrocities were committed by a former regime that the current government overthrew. The Khmer Rouge leaders themselves are also directly responsible for making reparations for the crimes they committed. Victims of grave abuses in Cambodia have their legitimate rights to reparation.

However, translating these rights into reality presents an enormous challenge, given that the atrocities took place so far in the past. The Cambodian government must make several strategic choices and confront a wide range of issues. Overcoming these challenges and resolving the issue of reparation to the victims of Khmer Rouge must be done as soon as possible, together with truth, justice, and prevention. Along that line, this article has made some practical suggestions on how to overcome these challenges toward the goal of making fair reparations to these victims.

Since the end of the Persian Gulf War, the U.N. Compensation Commission has set an important example that suggests international assistance can help make victims' desire for reparations a reality. Without the international community's participation, one might question whether the Iraqi government would have ended up making reparations. This may also be the case in Cambodia. It is unlikely that the Cambodian government will try to make reparations if there is no international influence, cooperation, or assistance from the outside. More pressure, therefore, should be put on the Cambodian government.

On the other hand, the international community could also help provide human resources, as well as assessment and management skills in implementing the reparation program. In this process, international and national NGOs have an important role to play. Specifically, the NGO community can help support the growth of civil society, sponsor education, and raise awareness at the grassroots level. They can also act as coordinators working with the government in assisting the victims and mobilizing financial resources. In the case of German reparations to the

Jews after the World War II, it was the American civil society that promoted the idea of reparations and assisted the Jewish efforts in obtaining compensation.¹⁰⁵ In the case of South Africa, it was representatives from peace and conflict resolution NGOs that made various inputs concerning the need for reparations in the final policy of South Africa.¹⁰⁶ With their participation in the process, we have more reasons to hope for appropriate reparation to be finally made for the victims of the Khmer Rouge.

¹⁰⁵ Colonomos & Armstrong, *supra* note 33, at 393-94 (noting that religious organizations in American civil society used public and legal means to promote reparations from Germany for Holocaust victims).

¹⁰⁶ Christopher J. Colvin, *Overview of the Reparations Program in South Africa* (stating that individuals of NGOs were consulted for the initial conceptualizations of the overall policy issues for establishing the South African Truth and Reconciliation Commission), in *THE HANDBOOK OF REPARATIONS*, *supra* note 5, at 176, 180.