

**What Transitional Justice Means to Cambodians and Colombians:  
Standing & Reparations to Civil Parties  
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Under the Khmer Rouge's agrarian society, forced agricultural work with minimal nourishment was part of daily life.<sup>1</sup> Everybody was fed only a handful of rice and water each day. Because Sothie's father's family was starving, his grandfather secretly went fishing. He was caught and beaten to death for "stealing from the country." Sothie's grandmother, being Chinese-Cambodian, was likely viewed to be part of the oppressive merchant class. One day while Sothie's mother was working in the fields with her sisters, the Khmer Rouge came and took his grandmother away to be *reeducated* – supposedly to rid her of evil Western capitalist ideals. But everyone knew that no one comes back from being reeducated. Sothie's grandmother nevertheless told her little daughters to constantly let the neighbors know where they will be and if they moved, where they will move to, just in case she came back. She never did.

That was the story of Sothie's family in Cambodia. To Juan, coming from Colombia, the sorrow of Sothie's family sounds familiar. Although not a victim of the Colombian armed conflict, peace is a foreign word for Juan; violence, instead, was one of the first words others associated with his country as he grew up. The memories of Sothie's parents sounded a lot like the suffering of many Colombians.

As Colombia's prolonged war winds down, the country is preparing to host trials for the atrocities perpetrated in the longest internal armed conflict witnessed by humanity. Both Sothie and Juan clerked for the Khmer Rouge tribunal. As Colombians start learning what a country in peace looks like, the trials in Cambodia offer experiences worth being shared in Colombia's historic transition to peace. "*Transitional justice*" are words that have significantly impacted Sothie and his fellow Cambodians, as much as they could impact Juan and his fellow Colombians. It is a term of art that calls for deep reflection for both of them.

**I. Colombia, FARC-EP, and the Special Jurisdiction for Peace**

Colombia is living a historic transition from war to peace. After more than fifty years of war with the Colombian government and — more recently — paramilitary groups, the Revolutionary Armed Forces of Colombia–People's Army ("FARC-EP") entered into a final peace agreement with the incumbent government. An initial version of the agreement was rejected in a plebiscite on October 2, 2016. This triggered a series of changes in the text of the

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<sup>1</sup> See DAVID CHANDLER, A HISTORY OF CAMBODIA 255 (4th ed. 2008). See also *Khmer Rouge History*, CAMBODIA TRIBUNAL MONITOR, <http://www.cambodiatribunal.org/history/cambodian-history/khmer-rouge-history/> (last visited Sept. 26, 2017).

agreement before its final version was executed on November 24, 2016.<sup>2</sup> Approved by Congress on November 30, 2016<sup>3</sup> in a special legislative procedure validated by the Constitutional Court,<sup>4</sup> the agreement created a new system of transitional justice.<sup>5</sup> It is composed of a Truth Commission, a Unit to Search for Forcibly Disappeared Persons, and a series of extraordinary chambers called the Special Jurisdiction for Peace (“SJP”).<sup>6</sup> The SJP chambers will host foreign jurists working as *amici curiae* with national judges,<sup>7</sup> in a semi-hybrid fashion that reminds the hybrid nature of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).<sup>8</sup>

The times are changing, however. The last fifteen years of atrocities in Colombia fall within the temporal jurisdiction of the International Criminal Court (“ICC”).<sup>9</sup> The ICC will thus have jurisdiction over any atrocity crime of sufficient gravity that the local authorities are unwilling or unable to investigate and prosecute before the SJP or the ordinary judicial system.<sup>10</sup> The Khmer Rouge crimes, in contrast, did not fall within the Rome Statute framework.

A safeguard that both the ECCC and the SJP have in common, on the other hand, is their international human rights obligations — specifically the International Covenant on Civil and Political Rights (“ICCPR”). In Cambodia, fair trial rights under the ICCPR are expressly recognized by the specific Statute through which the ECCC was established (“ECCC Law”).<sup>11</sup> Similarly, when reviewing the procedure through which the Colombian Congress approved the peace agreement, the Constitutional Court stressed that reconciliation is not to be done at the expense of human rights.<sup>12</sup> In the words of a member of the United Nations (“UN”) Human Rights Committee during Colombia’s last periodic review,

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<sup>2</sup> MESA DE CONVERSACIONES, ACUERDO FINAL PARA LA TERMINACIÓN DEL CONFLICTO Y LA CONSTRUCCIÓN DE UNA PAZ ESTABLE Y DURADERA [FINAL AGREEMENT FOR THE END OF THE CONFLICT AND THE CONSTRUCTION OF A STABLE AND DURABLE PEACE] (Oficina del Alto Comisionado para la Paz eds., 2017) [hereinafter, FINAL AGREEMENT], <http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/Acuerdo-Final-AF-web.pdf>.

<sup>3</sup> Helen Murphy, *Colombian peace deal passed by Congress, ending 52-year war*, REUTERS (Nov. 30, 2016), <http://www.reuters.com/article/us-colombia-peace-idUSKBN13P1D2>.

<sup>4</sup> See generally Corte Constitucional [C.C.] [Constitutional Court], Dec. 13, 2016, Sentencia C-699/16 (Colom.). See also Corte aprueba el ‘fast track’ para implementar el acuerdo de paz [Court approves fast-track procedure to implement peace agreement], EL TIEMPO (Dec. 13, 2016), <http://www.eltiempo.com/politica/justicia/corte-constitucional-aprueba-el-fast-track-para-nuevo-acuerdo-de-paz/16772050>.

<sup>5</sup> FINAL AGREEMENT, *supra* note 2, at 124-92.

<sup>6</sup> *Id.* at 129.

<sup>7</sup> *Id.* at 167-168, 191. See, e.g., ICTJ Names Human Rights Leader Juan E. Méndez to Colombia Justice Committee, ICTJ (Feb. 3, 2017), <https://www.ictj.org/news/ictj-human-rights-juan-m%C3%A9ndez-colombia-justice>

<sup>8</sup> See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea arts. 33 new, 35 new, Oct. 27, 2004, NS/RKM/1004/06 [hereinafter, ECCC Law], [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

<sup>9</sup> The Rome Statute was ratified by Colombia on August 5, 2002 and entered into force on November 1, 2002. Colombia made a reservation, however, to the court’s temporal jurisdiction with regards to war crimes, which starts on November 1, 2009. See *Preliminary examination: Colombia*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/colombia> (last visited Sept. 26, 2017).

<sup>10</sup> Rome Statute of the International Criminal Court, art. 17, July 17, 1998, 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

<sup>11</sup> See ECCC Law, Oct. 27, 2004, NS/RKM/1004/06, [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

<sup>12</sup> C.C., Dec. 13, 2016, Sentencia C-699/16, ¶ 35.5 (Colom.) (*citing* C.C., Aug. 28, 2013, Sentencia C-579/13, ¶ 8.2.1) (“[P]ara garantizar la paz era preciso permitir la celebración acuerdo de reconciliación ‘lo cual exige cierta flexibilidad a la hora de aplicar los principios que dominan el ejercicio de la función judicial sin desconocer

[W]e would not like to enter into a debate on whether what is happening in Colombia may or may not be reviewed under the standards or by the international organizations for the human rights protection . . . [T]he examination we will be doing here is precisely to determine whether this covenant [applies] and how to apply this covenant, with or without [an armed] conflict, with or without transitional justice (translation by authors).<sup>13</sup>

Colombian international human rights obligations under the ICCPR, therefore, stand, both for victims and accused, regardless of any amnesties, alternative and reduced sentences granted by the peace agreement or, more specifically, the SJP. In this Article, specifically, we focus on the rights of the victims, also known as *civil parties* in both Colombia and Cambodia.

## II. Cambodia, the Khmer Rouge, and the ECCC

On June 6, 2003, the UN and the Royal Government of Cambodia agreed to establish the ECCC, also known as the Khmer Rouge tribunal, to bring to trial leaders of Democratic Kampuchea<sup>14</sup> and prosecute crimes committed during that period.<sup>15</sup> The Cambodian genocide is one of the worst in human history.

The Khmer Rouge, Cambodia's communist faction, rose to power mainly because of spillovers from the Vietnam War.<sup>16</sup> During the Vietnam War, Cambodian routes were used by the North Vietnamese for transportation and mobilization purposes.<sup>17</sup> The United States decided to conduct a series of secret bombings on Cambodia to destroy these routes. It was known as Operation Menu, which included Operation Breakfast, Lunch, Dinner, Dessert, Snack, and Supper.<sup>18</sup> From October 4, 1965 to August 15, 1973, the United States dropped 2,756,941 tons worth of bombs on a neutral country.<sup>19</sup> For perspective, the Allies dropped just over 2 million

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las obligaciones internacionales de los Estados en el compromiso universal de respeto a la dignidad y a los derechos humanos, sino permitiendo que se cumplan de manera especial.” [To guarantee peace, it is necessary to allow a reconciliation agreement to be reached, ‘which requires some flexibility when applying the principles applicable to the judicial function without neglecting the international obligations of the States in the universal covenant to respect human rights and dignity, but especially allowing their compliance.’]).

<sup>13</sup> Human Rights Committee, *Consideration of Colombia - 3313th meeting 118th Session of Human Rights Committee*, UN WEB TV (Oct. 19, 2016), 22:43-24:01 (“[N]o quisiéramos entrar en un debate de que lo que está pasando en Colombia en el marco de los acuerdos puede o no ser revisable por los estándares o por los organismos internacionales de protección de derechos humanos . . . [E]l examen que vamos a hacer acá, es precisamente determinar si éste pacto, y cómo se aplica éste pacto, con o sin conflicto, con o sin justicia transicional, y si la justicia transicional es un esquema en el cual nosotros debemos o no bajar las garantías de la protección de los derechos humanos.”).

<sup>14</sup> Democratic Kampuchea was Cambodia's official name when it was under the control of the Khmer Rouge.

<sup>15</sup> Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. 41723, <https://treaties.un.org/doc/Publication/UNTS/Volume%202329/Part/volume-2329-I-41723.pdf>.

<sup>16</sup> See Taylor Owen & Ben Kiernan, *Bombs Over Cambodia*, THE WALRUS, Oct. 2006, at 63, [http://gsp.yale.edu/sites/default/files/walrus\\_cambodiabombing\\_oct06.pdf](http://gsp.yale.edu/sites/default/files/walrus_cambodiabombing_oct06.pdf).

<sup>17</sup> See CHANDLER, *supra* note 1, at 241.

<sup>18</sup> See WILLIAM SHAWCROSS, *SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA 27* (1979).

<sup>19</sup> See Owen & Kiernan, *supra* note 16, at 63.

tons during World War II, which means Cambodia may be “the most heavily bombed country in history.”<sup>20</sup> The bombs contributed to the rise of the Khmer Rouge in a major way.<sup>21</sup>

In April 1975, the Khmer Rouge took over Cambodia.<sup>22</sup> They attempted to revolutionize Cambodia into an agrarian socialist society at a rapid pace.<sup>23</sup> As a result, “money, markets, formal education, Buddhism, books, private property, diverse clothing styles, and freedom of movement . . . ”<sup>24</sup> were removed. This also meant that anyone who opposed or was a threat — intellectuals, military officers from the old regime, “imperialists” — was executed.<sup>25</sup>

Life during under the Khmer Rouge was horrendous and undignified. Vann Nath, who was not executed by the Khmer Rouge because he was assigned to paint and sculpt portraits of the Khmer Rouge leader, Pol Pot, described the horrors he experienced at torture center S-21:

‘The conditions were so inhumane and the food was so little’ . . . ‘I even thought eating human flesh would be a good meal.’ ‘I lost my dignity’ . . . [t]hey even gave animals more food.’ . . . ‘We were so hungry, we would eat insects that dropped from the ceiling.’ . . . ‘We would quickly grab and eat them so we could avoid being seen by the guards.’<sup>26</sup>

Approximately, sixteen thousand people were tortured and later killed at S-21, with only fourteen people, including Vann Nath, thought to have survived.<sup>27</sup> The rest of Cambodia’s population who were not taken to torture camps, were forced to undertake agricultural work.<sup>28</sup> People worked more than twelve hours a day with no rest or adequate food.<sup>29</sup> Approximately, two million people or twenty percent of the population died from disease, starvation, forced labor, and political execution.<sup>30</sup> The Khmer Rouge regime ended on January 7, 1979.<sup>31</sup>

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<sup>20</sup> *Id.* at 67.

<sup>21</sup> *Id.* at 68. Former Khmer Rouge officer Chhit Do stated, “The ordinary people sometimes literally shit in their pants when the big bombs and shells came. Their minds just froze up and they would wander around mute for three or four days. Terrified and half crazy, the people were ready to believe what they were told. It was because of their dissatisfaction with the bombing that they kept on co-operating with the Khmer Rouge, joining up with the Khmer Rouge, sending their children off to go with them...[sic] Sometimes the bombs fell and hit little children, and their fathers would be all for the Khmer Rouge.”

<sup>22</sup> See generally CHANDLER, *supra* note 1.

<sup>23</sup> See *id.* See also Extraordinary Chambers in the Courts of Cambodia [ECCC], Aug. 7, 2014, Case 002/01 Judgement 002-19-09-2007/ECCC/TC, ¶ 544, <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2017-06-16%2009:01/E313.pdf>.

<sup>24</sup> CHANDLER, *supra* note 1.

<sup>25</sup> See *Khmer Rouge History*, *supra* note 1.

<sup>26</sup> *Khmer Rouge Survivor Tells of Horrific Conditions at Torture Centre*, THE GUARDIAN (June 29, 2009), <https://www.theguardian.com/world/2009/jun/29/cambodia>.

<sup>27</sup> See *id.*

<sup>28</sup> See *Khmer Rouge History*, *supra* note 1. See also ECCC, Aug. 7, 2014, Case 002/01 Judgement 002-19-09-2007/ECCC/TC, ¶¶ 544, 547, <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2017-06-16%2009:01/E313.pdf>.

<sup>29</sup> See *id.*

<sup>30</sup> CHANDLER, *supra* note 1, at 259. See generally Patrick Heuveline, *The boundaries of genocide: Quantifying the uncertainty of the death toll during the Pol Pot regime in Cambodia (1975–79)*, 69 POPULATION STUD. 201 (2015). See also *Population, total: Cambodia 1975-1979*, THE WORLD BANK, [https://data.worldbank.org/indicator/SP.POP.TOTL?end=1979&locations=KH&start=1975&year\\_low\\_desc=true](https://data.worldbank.org/indicator/SP.POP.TOTL?end=1979&locations=KH&start=1975&year_low_desc=true).

<sup>31</sup> See *Khmer Rouge History*, *supra* note 1.

### **III. Standing, Reparations, and Funding at the ECCC**

#### **1. Standing and Reparations**

Recognizing victims' standing and reparations is, perhaps, the first and foremost step taken by the ECCC in providing justice to the survivors and the people of Cambodia. One remarkable aspect of the ECCC, to say the least, is that it is the first court to offer reparations to civil parties.<sup>32</sup> The ECCC law also expressly grants victims standing in the proceedings.<sup>33</sup> Victims' participation could similarly be implemented in Colombia's SJP as well. Both direct and indirect victims have standing and reparations at the ECCC. According to the ECCC's Supreme Court Chamber, "for legal standing as a civil party, it is necessary that such person sustained an injury," which refers to "direct victims," "whose rights were violated or endangered by the crime charged," and "indirect victims," "who actually suffered psychological injury, for example, as a result of the injury, whether temporary or permanent, of their loved ones."<sup>34</sup> This is in keeping with the UN 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 ("Basic Principles on the Remedy and Reparation"), which recognize the status of indirect victims.<sup>35</sup> Likewise, the ICC Appeals Chamber has found that, as long as the harm is "suffered personally by the victim ... it can attach to both direct and indirect victims."<sup>36</sup> Proof of direct harm must, moreover, be analyzed on a holistic basis.<sup>37</sup>

Injuries at the ECCC include physical and economic loss, as well as psychological pain and suffering. Certainly, bodily injuries are recognized at the ECCC as "biological damage, anatomical[,] or functional."<sup>38</sup> The ECCC has found that material injury refers to "a material object's loss of value, such as complete or partial destruction of personal property, or loss of income."<sup>39</sup> Beyond bodily and material harms, many survivors from the Khmer Rouge

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<sup>32</sup> Civil Parties are victims recognized as participants in ECCC proceedings. *See* ECCC, Aug. 7, 2014, Case 002/01 Judgement 002-19-09-2007/ECCC/TC, ¶ 1109, <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2017-06-16%2009:01/E313.pdf>. *See also* *Victims Support*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/victims-support> (last visited Sep. 27, 2017).

<sup>33</sup> *See* ECCC Law art. 36 new, Oct. 27, 2004, NS/RKM/1004/06, [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf). *See also* Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.9) Rule 23 (2015), [https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal\\_Rules\\_Rev\\_9\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf).

<sup>34</sup> ECCC, Feb. 3, 2012, Case 001 Appeal Judgment 001/18-07-2007-ECCC/SC, ¶¶ 416-17, <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>.

<sup>35</sup> *See* G.A. Res. 60/147, annex, 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 Principle 8 (December 16, 2005) [hereinafter Basic Principles and Guidelines on the Right to a Remedy], <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

<sup>36</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals of the Prosecutor and the Defense Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶¶ 1, 32 (July 11, 2008), [https://www.icc-cpi.int/CourtRecords/CR2008\\_03972.PDF](https://www.icc-cpi.int/CourtRecords/CR2008_03972.PDF).

<sup>37</sup> *See* *Prosecutor v. Kony*, ICC-02/04-01/05, Judgment on the Appeal of the Defense Against the Decision Entitled Decision on Victims' Applications, ¶¶ 2, 36 (Feb. 23, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_01314.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01314.PDF).

<sup>38</sup> ECCC, Feb. 3, 2012, Case 001 Appeal Judgment 001/18-07-2007-ECCC/SC, ¶ 415, <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>.

<sup>39</sup> *Id.*

dictatorship almost starved to death, endured forced labor, lost loved ones, and some were also tortured; even today they continue suffering from nightmares, depression, and post-traumatic stress disorder.<sup>40</sup> Pursuant to the ECCC, “[an injury] may also be psychological and include mental disorders or psychiatric trauma, such as post-traumatic stress disorder.”<sup>41</sup> Additionally, “[i]n grave or prolonged cases, psychological injury may lead to physical injury by causing various ailments.”<sup>42</sup> The ECCC jurisprudence on this point is in keeping with the ICC’s interpretation of *psychological suffering*.<sup>43</sup> The ECCC, moreover, coined a double presumption for first-degree relatives. They are presumed to have a bond of affection and to have suffered mental harm in cases of death of their relatives as direct victims.<sup>44</sup>

The Basic Principles on the Remedy and Reparation declares that the victims of mass abuses have a right to “adequate, effective and prompt reparation for harm suffered.”<sup>45</sup> Under the principles, full and effective reparation includes “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”; restitution “should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.”<sup>46</sup> Former UN Secretary-General Ban Ki-moon asserted that “[r]eparations are arguably the most victim-centred [sic] justice mechanism available and the most significant means of making a difference in the lives of victims. United Nations experience demonstrates that reparations may facilitate reconciliation and confidence in the State, and thus lead to more stable and durable peace in post-conflict societies.”<sup>47</sup>

While regional human rights courts have previously awarded reparations to victims, the ECCC is the first international criminal court to offer reparations to civil parties. ECCC Internal Rule 23 *quinquies* states that if an accused is convicted, the tribunal may only award collective and moral reparations to civil parties.<sup>48</sup> Internal Rule 23 expressly states that the awards may not be monetary payments to the civil parties.<sup>49</sup> The ECCC has no jurisdiction to order the State to make reparation to their citizens or impose obligations on persons or entities that are not a party

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<sup>40</sup> See generally Nadine Stammel, et al., *Prolonged Grief Disorder Three Decades Post Loss in Survivors of the Khmer Rouge Regime in Cambodia*, 144 J. AFFECTIVE DISORDERS 87 (2013).

<sup>41</sup> ECCC, Feb. 3, 2012, Case 001 Appeal Judgment 001/18-07-2007-ECCC/SC, ¶ 415, <https://www.eccc.gov.kh/sites/default/files/documents/court/Case%20001AppealJudgementEn.pdf>, citing ECCC, July 26, 2010, Case 001 Trial Judgment 001/18-07-2007/ECCC/SC, ¶ 641, [https://www.eccc.gov.kh/sites/default/files/documents/court/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](https://www.eccc.gov.kh/sites/default/files/documents/court/20100726_Judgement_Case_001_ENG_PUBLIC.pdf).

<sup>42</sup> *Id.* ¶ 417.

<sup>43</sup> See Prosecutor v. Lubanga, ICC-01/04-01/06, Decision on ‘Indirect Victims,’ ¶ 50 (Apr. 8, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_02492.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_02492.PDF).

<sup>44</sup> See ECCC, Feb. 3, 2012, Case 001 Appeal Judgment 001/18-07-2007-ECCC/SC, ¶ 562, <https://www.eccc.gov.kh/sites/default/files/documents/court/Case%20001AppealJudgementEn.pdf>. See also Prosecutor v. Kony, ICC-02/04-01/05, Judgment on the Appeal of the Defense Against the Decision Entitled Decision on Victims’ Applications, ¶ 36 (Feb. 23, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_01314.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01314.PDF).

<sup>45</sup> Basic Principles and Guidelines on the Right to a Remedy, *supra* note 36, Principle 11 (b).

<sup>46</sup> *Id.* Principles 18, 19.

<sup>47</sup> U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, § 26, U.N. Doc. S/2011/634 (October 12, 2011), [https://www.un.org/ruleoflaw/files/S\\_2011\\_634EN.pdf](https://www.un.org/ruleoflaw/files/S_2011_634EN.pdf).

<sup>48</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.9) Rule 23 *quinquies* (2015), [https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal\\_Rules\\_Rev\\_9\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf).

<sup>49</sup> *Id.*

to the proceedings.<sup>50</sup> In deciding the awards' modes of implementation, the court may order the convicted person to cover its costs.<sup>51</sup> The court can also recognize projects that collectively award the civil parties<sup>52</sup> to contribute to "their rehabilitation, reintegration and restoration of dignity . . ." <sup>53</sup> where sufficient external funding has been secured. Therefore, under the ECCC, only collective or moral reparations may be offered, and they must be funded by the convicted person or an external source. While these moral and collective reparations are not in any way equal to the pain and suffering of the survivors, they are a step towards national healing and reconciliation. The SJP could consider providing victims with reparations on the basis of general principles of law and the jurisprudence of the ECCC in terms of symbolic reparations and funding.

In case 002/02, the Trial Chamber recognized that as a result of the crimes of the accused — Khmer Rouge leaders Nuon Chea and Khieu Samphan — "the Civil Parties and a very large number of additional victims, have suffered immeasurable harm, which includes physical suffering, economic loss, loss of dignity, psychological trauma[,] and grief arising from the loss of family members or close relations."<sup>54</sup> The Trial Chamber found that the awards suggested by the Lead Co-Lawyers,<sup>55</sup> provide moral and collective reparations to the civil parties.<sup>56</sup> The awards include remembrance and memorialization projects, such as a national holiday and a construction of a memorial; therapy and psychological assistance to victims' projects; and documentation and education projects, such as exhibitions and the inclusion of a chapter within Cambodian school curriculum on forced population movement and executions to advance the goals of acknowledgement, awareness, and remembrance of the crimes committed and the suffering resulting therefrom.<sup>57</sup> These projects all secured funding from national and international authorities, non-governmental organizations, and other donors.<sup>58</sup> The measures and reparations were designed to benefit not only the civil parties, but also all victims.<sup>59</sup>

The ECCC, in choosing to implement symbolic reparations, contributes to extending the scope of reparations to the victims as a collective instead of just the civil parties.<sup>60</sup> This avoids discriminatory approaches and the challenges of mass victim participation.<sup>61</sup> It is important that the victims who did not participate in the criminal process also benefit from any conviction in the

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<sup>50</sup> See ECCC, July 26, 2010, Case 001 Judgement 001/18-07-2007/ECCC/TC, ¶¶ 662-663, [https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf).

<sup>51</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.9) Rule 23 *quinquies* (3) (a) (2015), [https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal\\_Rules\\_Rev\\_9\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf).

<sup>52</sup> *Id.* Rule 23 *quinquies* (3)(b).

<sup>53</sup> ECCC, Aug. 7, 2014, Case 002/01 Judgement 002-19-09-2007/ECCC/TC, ¶ 1116, <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2017-06-16%2009:01/E313.pdf>.

<sup>54</sup> *Id.* ¶ 1150.

<sup>55</sup> Namely, the national and international lawyers who represent the civil parties collectively.

<sup>56</sup> ECCC, Aug. 7, 2014, Case 002/01 Judgement 002-19-09-2007/ECCC/TC, ¶ 1151, <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2017-06-16%2009:01/E313.pdf>.

<sup>57</sup> See *id.* ¶¶ 1151-1160.

<sup>58</sup> See *id.*

<sup>59</sup> See *7th Plenary Session of the ECCC Concludes*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Feb. 9, 2010), <https://www.eccc.gov.kh/en/articles/7th-plenary-session-eccc-concludes>.

<sup>60</sup> See Christoph Sperfeldt, *From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia*, 11 J. INT'L CRIM. JUST. 1111, 1133 (2013).

<sup>61</sup> See *id.*

form of acknowledgement, awareness, and remembrance of the crimes committed and their suffering.

## 2. Funding and Collecting Damages from the Accused

The accused in ECCC's case 002/01 were found to be indigent. Thus, all projects proposed by the Lead Co-Lawyers had to secure external funding. Funding is a main issue for the ECCC because the Court does not have the power to order any person or entity that is not a party to the proceedings to do something.<sup>62</sup> The Court cannot order the Cambodian State to implement any kind of reparation. The reparations must be moral and collective and must be funded by either the convicted person or through an external source.

While it is possible to anticipate that this could similarly happen in the SJP, alternatives can be sought. Beyond FARC-EP senior leaders' alleged wealth, many of the combatants on the ground may, however, declare that they are impecunious. Yet, being able to seize and confiscate remaining assets is symbolically important for survivors.<sup>63</sup>

The SJP can find funding for reparations by criminalizing and seeking damages from corporate actors who participated in atrocity crimes. The SJP indeed may entertain jurisdiction over:

any conduct of funding or collaboration with paramilitary groups or any actor in the conflict, which is not the result of duress, with respect to those people who had an active or determining participation in the commission of crimes within the competence of this jurisdiction, as set out in section 40, unless they have previously been convicted by the judiciary for those same behaviours (translation by authors).<sup>64</sup>

It remains to be seen, however, whether actors in the private industries who supported illegal armed groups in Colombia will actually face domestic prosecutions in the SJP. Congress has proposed a bill where the agreement's wording of "*determining participation*"<sup>65</sup> has been defined as "an effective and decisive action."<sup>66</sup> According to the Attorney General, moreover, "businesspersons who, under duress, extortion, or blackmail, contributed to the funding of the armed conflict, are not obliged to show up to any court, such as the Special Jurisdiction for Peace or the ordinary [courts] . . . (translation by authors)."<sup>67</sup>

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<sup>62</sup> See ECCC, Aug. 7, 2014, Case 002/01 Judgement 002-19-09-2007/ECCC/TC, 597, <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2017-06-16%2009:01/E313.pdf>.

<sup>63</sup> *Id.* ¶ 1134.

<sup>64</sup> FINAL AGREEMENT, *supra* note 2, at 149 ("[S]erán de competencia de la Jurisdicción Especial para la Paz las conductas de financiación o colaboración con los grupos paramilitares, o con cualquier actor del conflicto, que no sean resultado de coacciones, respecto de aquellas personas que tuvieron una participación activa o determinante en la comisión de los crímenes competencia de ésta jurisdicción, según lo establecido en el numeral 40, salvo que previamente hubieren sido condenadas por la justicia por esas mismas conductas.").

<sup>65</sup> *Id.*

<sup>66</sup> *Informe de Conciliación al Proyecto de Acto Legislativo Numero 002 de 2016 Cámara, 002 de 2017 Senado*, 152 GACETA DEL CONGRESO 1, 9 (Mar. 21, 2017) (Colom.),

[http://www.imprenta.gov.co/gacetap/gaceta.mostrar\\_documento?p\\_tipo=797&p\\_numero=002&p\\_consec=47480](http://www.imprenta.gov.co/gacetap/gaceta.mostrar_documento?p_tipo=797&p_numero=002&p_consec=47480)

<sup>67</sup> *La Fiscalía Aclara Situación de Empresas que Hayan Financiado Grupos Ilegales* [The Attorney General's Office Clarifies the Situation Regarding Enterprises that had Funded Illegal Groups], REVISTA SEMANA (Sept. 2, 2016),



Under the Rome Statute, in contrast, criminal responsibility and the grounds for its exclusion shall be determined in the courtroom: “[t]he Court shall determine the applicability of the grounds for excluding criminal responsibility [such as duress] to the case before it.”<sup>68</sup> Moreover, “assets and instrumentalities of crimes” could be subject to forfeiture.<sup>69</sup> While participation of corporate actors is an issue still to be considered by the SJP, it is worth mentioning that the retributive functions of justice would be achieved once victims get back what was taken from them and private actors give up everything they were not entitled to take.

#### **IV. Conclusion**

The ECCC provides invaluable lessons. For the SJP, it is worth considering adopting rules such as the ECCC’s rules in allowing both direct and indirect victims to have standing and reparations within its chambers. Standing and reparations will allow victims and their suffering to be acknowledged by the State, and it shall contribute to reconciliation, stability, and durable peace. The SJP may secure funding for reparations from the wealth and properties obtained by both leaders of armed groups and corporate actors who participated in atrocity crimes.

Having standing and reparations is an essential step towards national healing. For Sothie, it is important that atrocious crimes, and especially the bravery and suffering of victims and survivors, are never forgotten for all eternity. For Juan, justice will not be complete if the voices of communities affected by atrocities are not heard, in court and everywhere.

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<http://www.semana.com/nacion/articulo/fiscalia-habla-sobre-empresas-que-habrian-financiado-grupos-ilegales/492200> (“[A]quellos empresarios que por coacción, extorsión o chantaje contribuyeron con la financiación del conflicto armado no están obligados a comparecer a ninguna jurisdicción como la Jurisdicción Especial para la Paz o la ordinaria . . .”).

<sup>68</sup> Rome Statute of the International Criminal Court, art. 31(1)(d), 31(2), July 17, 1998, 2187 U.N.T.S. 90.

<sup>69</sup> *Id.* ¶ art. 93(1)(k).