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Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

MEMORANDUM – TRIAL CHAMBER

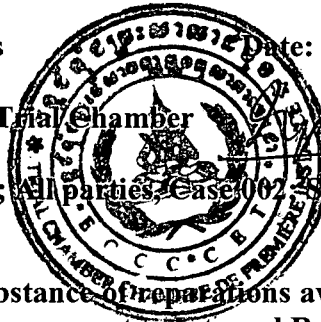
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TO: Civil Party Lead Co-Lawyers

FROM: Judge NIL Nonn, President, Trial Chamber

CC: Judges of the Trial Chamber; All parties, Case 002 Senior Legal Officer, Trial Chamber

SUBJECT: Initial specification of the substance of reparations awards sought by the Civil Party Lead Co-Lawyers pursuant to Internal Rule 23quinquies(3).



Date: 23 September 2011

Reference is made to the Trial Chamber's Orders in advance of the Initial Hearing (E86 and E86/1) inviting the Civil Party Lead Co-Lawyers, in accordance with Internal Rules 80bis(4) and 23quinquies(3)(b), to provide initial specifications of the substance of the reparations awards they intend to seek within their final claim for collective and moral reparation.

To facilitate matters, the Chamber wishes to recall some fundamental features of the reparations scheme introduced into the Internal Rules by the ECCC Plenary Session in September 2010.

a) Awards borne by the convicted persons (Internal Rule 23quinquies(3)(a)).

The "traditional" Civil Party claim against the Accused was maintained in the Internal Rules (Rule 23quinquies (3)(a)). This is to be enforced through local courts should the costs of the awards granted not be voluntarily paid by the convicted persons. As is the case in relation to any civil claim, it will need to satisfy the legal requirements for enforcement through courts pursuant to Cambodian domestic law (including with regard to specificity). The Trial Chamber has commented on this in its verdict in Case 001 (Duch judgement, para. 661). Any claim under this provision needs to be specified at the latest during closing arguments. This memorandum is not concerned with awards sought under Rule 23quinquies (3)(a).

*Signature*

*b) Reparations initiatives identified in cooperation with the Victims Support Section and supported by external funding (Internal Rule 23quinquies(3)(b)).*

Given the uncertainties of recovery of victims' reparation through the "traditional" Civil Party claim, a new and independent avenue for reparations was created (Rule 23quinquies(3)(b)). These initiatives do not result in enforceable claims against the Accused.

The idea was to ensure that tangible, externally funded awards acknowledging the suffering of Civil Parties could be realized soon after a verdict becomes final. This presupposes the development of awards (technically through program management) in parallel with the ongoing trial. Given that the Victims Support Section already deals with non-judicial measures, allocation of project development in relation to Rule 23quinquies (3)(b) to this section was the obvious choice. A program manager tasked with the development of these awards was installed in the Victims Support Section. S/he is expected to design the award(s) identified by the Co-Lead Lawyers, and ensure their funding and readiness for implementation at the verdict stage. To ensure that requests for such awards are not technically, numerically or financially unrealistic, close cooperation between the project manager and the Lead Co-Lawyers was envisaged from an early stage. It should be clarified that it was never intended that the Lead Co-Lawyers should be burdened with project development or with the securing of funds.

To avoid potentially costly, time-consuming or misguided project development – which may eventually not be recognized by the Trial Chamber under Rule 23quinquies (3)(b) – the requirement for initial specification of awards at an early stage was introduced (Rule 80bis (4)). This allows the Trial Chamber to raise concerns at an early stage, when changes to project development are still feasible. The Chamber considers this to be a vital component in ensuring that measures pursued by the Lead Co-Lawyers over the course of proceedings in Case 002 are within the scope of the Internal Rules and may therefore result in meaningful outcomes for victims, and an optimal utilization of resources both by the Victims Support Section and external donors. A further purpose of these initial specifications is to permit the Chamber oversight as to the conformity or otherwise of the reparations sought with the ECCC legal framework and to enable early guidance to be provided, where necessary.

Rule 80bis(5) specifies that while the final claim for collective and moral reparation may deviate from the initial specification where necessary, the Lead Co-Lawyers are under an obligation to specify both the substance and the mode of implementation of each award. Possibly due to a misunderstanding of the concept, the Chamber's request for specifications regarding both the detail and proposed modality of implementation for each award sought by the Civil Parties was resisted by the Lead Co-Lawyers at the Initial Hearing (T., 29 June 2011, pp. 100, 110).

The Chamber wishes to emphasize that the purpose of these initial specifications is to encourage sufficient specificity and advance planning so as to ensure that meaningful reparation can result to Civil Parties within the ECCC's lifespan. It is therefore entirely to the benefit of the consolidated group of Civil Parties that as much specificity as possible is provided to the Chamber at an early stage regarding reparations measures sought on their

*As. Nun*

behalf. It was acknowledged that the particulars of the awards sought may evolve over time and that the claims as ultimately presented might differ in terms of certain details (E86/1).

The Chamber makes the following further observations regarding certain categories of reparation initially specified by the Civil Party Lead Co-Lawyers at the Initial Hearing on 29 June 2011:

- *Establishment of a trust fund to pay for reparations awards* (T., 29 June 2011, p. 109). The Trial Chamber has previously indicated that a trust fund and individual financial compensation to victims falls outside the scope of the ECCC legal framework (*Duch* judgement, at para. 670). This has since been embodied within Internal Rule 23*quinqies*(1). No requests for collective or individual financial compensation for Civil Parties or the establishment of a trust fund can therefore be entertained by the Trial Chamber in Case 002.
- *Measures requiring governmental approval*. Other measures initially specified by the Lead Co-Lawyers may also be beyond the scope of the ECCC to provide, being the prerogative of governmental authorities to grant (*Duch* judgement, paras. 663, 671, 674). These include provision of citizenship to Vietnamese victims (T., 29 July 2011, p. 109) and instituting a day of remembrance (T., 29 June 2011, p. 107). Initiatives such as these may only be endorsed by the Trial Chamber as reparations where it is clear that such measures have been approved or implemented by the Royal Government of Cambodia.
- *Required specificity of other measures*. It is observed that a number of other measures sought lack sufficient specificity to enable the Chamber to give meaningful comment at this stage. These include: the establishment of stupas and memorial sites, preservation of killing sites, creation of educational programs about the history of Democratic Kampuchea and for children, establishment of a framework of psychological support for victims and the creation of centres to provide such services and the establishment of museums, archives or libraries in Phnom Penh (T., 29 June 2011, pp. 107-109). Depending on what specifically is envisaged by each measure, some may also constitute measures requiring specific governmental approval or authorization (above). Others may be appropriately conceived; however, the Lead Co-Lawyers are reminded of a number of practical issues that would need to be addressed in order to ensure that even a limited cross-section of these measures can meaningfully be achieved within the applicable time-frame (*see e.g. Duch* judgement, paras. 665, 672, 673).
- *Measures that are within the scope of the ECCC legal framework*. Other measures, such as dissemination of the Case 002 Judgment and compilation of a list of Civil Parties (T., 29 June 2011, p. 109) are akin to measures previously recognized as appropriate and achievable measures within the specific ECCC context (*Duch* verdict, paras. 667, 669).

As all Civil Party admissibility appeals were determined by the Pre-Trial Chamber only shortly before the Initial Hearing (Decision on appeals against orders of the Co-Investigating Judges on the admissibility of Civil Party applications, D411/3/6, 24 June 2011), the Trial Chamber has previously indicated its intention to permit the Civil Party Lead Co-Lawyers to supplement their initial reparations submissions at a later date (E86).

The Chamber accordingly informs the Lead Co-Lawyers of its intention to schedule a hearing for 19 October 2011 to permit them the opportunity to supplement, update and, where necessary, remedy the initial specifications given at the Initial Hearing, in view of the above guidelines. A scheduling order in relation to this hearing will follow shortly.

*A. Min*