

Strengthening the Participation of the Victims at the ECCC? A look at the revised legal framework for Civil Party participation

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From 1975 - 1979 it is estimated that roughly 1.5 to 2 million people perished under the control of the Khmer Rouge—roughly one quarter to one third of the population of Cambodia. Almost every family suffered loss of some kind, and for decades following the conflict there have been frequent calls to hold a number of individuals responsible. It is only recently, however, that the accountability process has taken shape. In 2007, the Extraordinary Chambers in the Courts of Cambodia (ECCC or Court) began trying individuals accused of committing serious crimes during the Khmer Rouge regime.¹ This accountability process is remarkable for the fact that it allows the active participation of victims in the criminal process. However, after encountering some challenges in the first trial, the Judges have recently revised the legal framework for Civil Party participation. Although the amendments certainly attempt to address issues of efficiency, it is questionable whether they strengthen the participation of victims in proceedings as claimed by the Court.

The ECCC is a mixed or hybrid criminal tribunal, meaning that it combines domestic and international elements in its laws and staff. The labeling of a court as ‘mixed’ or ‘hybrid’ depends on a variety of criteria. The criteria range from the court’s legal basis, its location within or outside of a domestic court system, its subject matter jurisdiction and the composition of the court’s personnel.² In the case of the ECCC, the Court is established and operated by UN and Cambodian officials, it has a unique relationship with the domestic court system, and it has five sources of applicable law, comprising the Framework Agreement between the UN and Cambodia, the ECCC Law, the Internal Rules (drafted by the Judges of the Court), the Cambodian Code of Criminal Procedure and International Standards.

Five former top Khmer Rouge officials are presently in the custody of the Court, including: Nuon Chea (also known as Brother No. 2), Khieu Samphan (former Head-of-State), Ieng Sary (former minister of foreign affairs), his wife Ieng Thirith (former minister of social affairs), and Kaing Guek Eav (known as Duch, former commandant of the infamous Tuol Sleng interrogation center). The trial of Duch in Case 001 heard closing arguments in late 2009 and judgment is scheduled for July 2010, but it is

¹ The Court has personal jurisdiction over senior leaders of the Khmer Rouge and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia that were committed between 17 April 1975 to 6 January 1979. See 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, 06 June 2003, Article 1-2; On the history of discussions between Cambodia and the United Nations see Daniel K. Donovan, ‘Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal’, 44 *Harv. Int’l L. J.* 551-576 (2003).

² John Cerone and Clive Baldwin, ‘Explaining and Evaluating the UNMIK Court System,’ 41, note 2, in Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner, *Internationalized Criminal Courts and Tribunals* (2004).

expected that the remaining defendants' trial, consolidated in Case 002, will not get under way until 2011.

The legal framework of the Court is remarkable for various reasons. First, due to Cambodia's colonial past the ECCC is heavily influenced by the French civil law tradition, which stands in contrast to other international criminal courts which leaned more towards the common law tradition. Second, the ECCC is the first hybrid court that employs two Co-Prosecutors, one Cambodian and one international, which jointly have exclusive competence to initiate prosecution of crimes, and two Co-Investigating Judges, one Cambodian and one international, which are jointly responsible for investigating the facts as laid out in the Introductory Submission submitted by the Co-Prosecutors. Third, the five-judge Pre-Trial Chamber, five-judge Trial Chamber and seven-judge Supreme Court Chamber, are comprised of Cambodian and international judges with a majority of judges in all of the Chambers being Cambodian. Decisions are based on a super-majority formula, meaning that at least one of the international judges must agree in every decision.³ The most innovative feature of the Court, however, has to do with the participation of victims as Civil Parties in the proceedings.

The participatory rights of victims in the proceedings can be found in the Internal Rules, which were drafted and revised by the Judges and form the authoritative source of procedural law at the Court. Although the provisions on Civil Party participation are similar to provisions commonly associated with the Cambodian domestic process, they also deviate in a number of respects so as to ensure efficiency of the trial process, particularly for trials dealing with mass victimization. During the Court's Seventh Plenary Session, which took place between 2 and 9 February 2010, the Judges once again revised the Court's Internal Rules, focusing a great deal of attention on victim participation provisions. The Judges, who have championed the need for change, argue that the changes will "strengthen the participation of the victims."⁴ The changes are meant to provide for effective and efficient proceedings and, in many ways, are a response to the perceived problems associated with the participation of Civil Parties in Case 001, but it is still unclear whether the changes will in fact strengthen the participation of victims or whether they are merely a way of curtailing participation rights.

In the first case to go to trial, 94 Civil Parties participated and were represented by four legal teams comprising Cambodian and international lawyers. It was unclear from the beginning of trial what the exact parameters of participation would be. The Internal Rules only provide for broad rights and are vague in many respects, requiring the Trial Chamber Judges (who come from various backgrounds) to shape much of the participation. The decisions by the Court regarding participation, as well as their lack of clear guidance on a number of important issues, contributed to a challenging process for all concerned, particularly for the victims themselves. Two major problems in Case 001 included repetitive questions from the various Civil Party lawyers and the fact that just weeks before the end of trial the Defense challenged 24

³ Sylvia de Bertodano, 'Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers', 4 *Journal of International Criminal Law* 285-293 (2006).

⁴ Sothanarith Kong, 'Tribunal Judges Consider Duch Verdict,' in *Voice of America (VOA)*, Khmer, 2 February 2010 (noting that in their opening statement Judges Kong Srim and Sylvia Cartwright said a representative model would "strengthen the participation of the victims.")

of the 94 Civil Parties on the grounds that they provided insufficient evidence supporting their status as a Civil Party. Despite the fact that the Civil Party applications were processed, reviewed and provisionally accepted by the Court, the Court has yet to decide on the fate of these individuals. It was evident from Case 001 that specific issues regarding participation would need to be addressed before trial in Case 002 begins, which has four defendants and over 4,000 Civil Parties applying to participate.

Rule 23 of the Internal Rules provides that the purpose of a Civil Party action is to participate in the proceedings against those responsible “by supporting the prosecution” and seeking “collective and moral reparations.”⁵ In order to qualify as a Civil Party before the ECCC individuals must have suffered actual personal injury, defined as physical, material or psychological.⁶ This definition allows both direct and indirect victims (family members of direct victims) to participate. However, the Internal Rules do not specify the necessary familial relationship, suggesting that the Judges have discretion when deciding on whether an indirect victim has a close enough relationship with a direct victim in order to qualify as a Civil Party. From the issuance of the Closing Order by the Co-Investigating Judges, all Civil Parties accepted to participate must have legal counsel.⁷ The Internal Rules provide that Civil Parties may choose a legal representative from a list of lawyers organized through the Court. At their discretion, the Judges may also group the Civil Parties together under common representation so as to make Civil Party participation more manageable.⁸

During the pre-trial phase, Civil Party lawyers may request the Co-Investigating Judges to carry out specific investigations on their clients’ behalf and may attend and participate in pre-trial hearings and appeals of provisional detention orders.⁹ At trial, victims will also have broad rights. Victims’ Legal Counsel may propose a list of witnesses for the Court to call, question witnesses heard by the Court, lead and challenge evidence, make submissions on law and fact, call Civil Parties to speak before the Court without taking an oath, make closing statements and seek collective and moral reparations.

An important amendment to the Internal Rules made at the Seventh Plenary deals with legal representation at trial. The amendments create two Civil Party Lead Co-Lawyers.¹⁰ At trial these Lead Co-Lawyers will carry out the bulk of the advocacy, strategy and in-court presentation on behalf of all Civil Parties in the case. However, Civil Parties are still free to choose their own legal representative for representation during the pre-trial stage as well as behind the scenes during trial. The Lead Co-Lawyers will therefore need to seek the views of the independent Civil Party lawyers representing the various groups of victims and try to coordinate with them in order to best represent their collective interests. It is still unclear how this arrangement will work in practice but it is expected that some internal procedures or policies will be developed. It is not difficult to envision tensions between the different legal teams

⁵ Extraordinary Chambers in the Courts of Cambodia (ECCC), Internal Rules, Rule 23(1), as revised 9 February 2010.

⁶ *Id.* at Rule 23 *bis* (1).

⁷ *Id.* at Rule 23 *ter* (1).

⁸ *Id.* at Rule 23 *ter* (3).

⁹ *Id.* at Rule 55(10).

¹⁰ *Id.* at Rule 12 *ter* and Rule 23(5).

who may have divergent views on the case. How the Lead Co-Lawyers will represent the divergent views at trial is uncertain. Although not leading the advocacy in the courtroom, the Civil Party lawyers will nonetheless continue to play an important role. During the pre-trial stage, for example, they will continue to request investigations, and at trial they can support the Lead Co-Lawyers by providing them with written submissions or examining their clients or other witnesses in court.

The Lead Co-Lawyers will be located within a separate section of the Court so as to safeguard their independence from other departments handling victim issues such as the Victims Unit, now renamed the Victims Support Section (VSS).¹¹ The VSS is tasked with various responsibilities, such as maintaining a list of lawyers willing to represent Civil Parties, assisting victims and other survivors in filing complaints or applications, facilitating participation and common representation of Civil Parties, and assisting in victim-related outreach. Further amendments made during the Seventh Plenary have broadened the VSS mandate to include the implementation of non-legal programs aimed at addressing victims' interests and concerns generally. Thus, its responsibilities will now include greater emphasis on victim outreach and non-legal projects. Many civil society groups welcome these amendments but are fearful that proper funding will be unavailable given the budgetary problems of the Court and that NGOs will continue carrying out such projects on their own.

Importantly, the amendments also provide for a modest increase in funds for Court-funded legal representation for Civil Parties. Previously, no legal aid scheme for Civil Parties existed. This new legal aid scheme is particularly important for the large number of unrepresented Civil Parties in Case 002. In addition, in direct response to the issue that arose in Case 001 concerning the admissibility of Civil Party applications, the Judges determined that all admissibility challenges would be determined during the pre-trial stage by the Co-Investigating Judges and Pre-Trial Chamber rather than at trial. This amendment should help in addressing the uncertainty experienced by the Civil Parties in Case 001.

Finally, the Judges at the Plenary Session reiterated their support for a future amendment requiring Lead Co-Lawyers to make a single claim for collective and moral reparations on behalf of the consolidated Civil Parties. This position is in contrast with the first case in which the four Civil Party legal teams had the opportunity to request a variety of reparations. Civil society and Civil Party lawyers are actively opposing this amendment.

The proposed amendment concerning reparations and other rules fine-tuning the parameters of participation will be taken up at the next Plenary Session scheduled for the autumn of 2010, where once again participation will be modified so as to ensure the Court can achieve its mandate. Whether these modifications will address the needs and concerns of victims is yet unanswered. However, one thing seems clear: the February amendments to the Rules suggest that the Judges aimed to address the need for expeditious trials and not the strengthening victim participation generally.

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¹¹ Id. at Rule 12 *bis*.

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