Victim`s Participation before the Extraordinary Chambers in the Courts of Cambodia*

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I. Introduction

The Extraordinary Chambers in the Courts of Cambodia (otherwise known as the ECCC, or the Khmer Rouge Tribunal) is the first internationalized Court dealing with mass crimes that allows victims to apply as civil parties and to become a party to the proceedings alongside the prosecution and the defense. In case 1, against Kaing Guek Eav (alias Duch), the former director of the security center, S-21, the Trial Chamber announced a judgment in July 2010. This judgment is currently under appeal by all Parties. The Supreme Court Chamber will hold the Appeal hearings by the end of March 2011.

In case 2, against four senior leaders of the Khmer Rouge regime, indictments were finalised in January 2011 and the Trial Chamber and all parties to the proceedings are currently preparing for the trial. The substantive hearing in case 2 is expected to be scheduled for the middle of this year.

Now that case 1 has finished in the first instance and the substantive hearings in case 2 is looming, the time is ripe for stocktaking some of the issues in this unique jurisdiction. It is worthwhile to look at (1) what lessons can be learnt from the experience in case 1; (2) what significant changes between the first and second case, have been made to the Internal Rules, which govern the conduct of proceedings and (3) relevant jurisprudence which definitively affect civil parties and their participation.

Since my time is limited, I am only able to focus on some aspects of civil party participation and have therefore tried to identify those issues which most significantly impact on civil parties. Although there is much to discuss, I will limit myself to only the following issues:

- Admissibility criteria and procedure for civil parties in case 1 and 2
- Right to reparation; the judgment on reparation in case 1; pending appeals and the Rule amendments in case 2
- Legal representation and the new Lead Co-Lawyer section, affecting participation rights
- Dealing with sexual crimes

II. Admissibility criteria and proceedings

In case 1 only 94 victims applied as civil parties, of whom one was declared inadmissible by the Trial Chamber at the beginning because of having missed the deadline for applying. Three others withdrew in the course of the proceedings. Out of the remaining 90 civil party applicants, 28 were declared admissible within the closing order (the indictment) by the Co-Investigating Judges who are seized with the investigations, very similar to the French system.

The Trial Chamber was then seized with the decision on the admissibility of the remaining 66 civil party applicants, and responsible for the decision to either grant them full procedural rights, or to reject them, thereby invoking their rights to appeal this decision before the Supreme Court Chamber.

Due to the public pressure to start the hearing as soon as possible, the Trial Chamber failed to take a decision on the admissibility of the civil party applications at the beginning. Instead, it either granted them "interim status" or started to refer to them as "civil parties", even though the decision on their admissibility had not yet been made. In this way, the Trial Chamber allowed all 90 civil parties and applicants to fully participate.

During the course of the trial, these 66 civil party applicants were treated equally to the admitted civil parties. Through their lawyers, they submitted motions, made requests, and questioned witnesses, experts and civil parties. In addition, these persons testified as a civil party without being required to give an oath and also questioned the accused personally. They were present in the court room and took part in regular monthly meetings with their lawyers in order to get updated, informed and involved with the trial. Because of the degree of participation they were permitted, these individuals felt like fully admitted civil parties. Importantly, they were, during the whole trial, referred to as "civil parties" instead of "applicants". The individuals took on a prominent position in their communities and made frequent visits to Phnom Penh, revered by their communities because of their apparent "civil party" status.

On the day of the judgment, more than eight months after the closing statements in November 2009, and after nearly all civil parties and applicants had exercised full participation rights, the names of the admissible applicants were read out in a broadcasted session, while the 24 (27,7 %) rejected were not named. The impact of this broadcasted judgment, on the victims, was a shocking moment which led to traumatic experiences – not only for those whose applications were rejected but also for those who were admitted, who suffered in solidarity.

This problem occurred because the Trial Chamber applied a two step-process: First the applicants were granted "interim status". Then, at the end of the trial the Chamber decided on the admissibility of all applicants and even all civil parties who had already been admitted by the Co-Investigating

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* This article is based on a speech held on 5 March 2011 in London at the 2nd Biennial War Crimes Conference on: "Justice? – *Whose* Justice? Punishment, Mediation of Reconciliation?" at the International Institute of Advanced Legal Studies.

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Judges. The Chamber was of the opinion that it had the right to decide on admissibility at the end of the trial. It derived this opinion from Rule 100, which arguably, only stated that the decision about the civil party claims will be issued in the judgment.

The Internal Rules (Rev. 3) are clear with regard to the admissibility process and do not provide for a two step-process such as this.

Although the Internal Rules did not clearly determine when the decision on the civil party application has to be carried out, it is clearly derived from the fact that only "civil parties" can perform their participation rights, that the respective body (either Co-Investigating Judges or Trial Chamber) has to decide on civil party admissibility as soon as possible in order to enable the victim to perform his/her participation rights as a civil party.

Consequently, the rejection orders for all 24 rejected applicants are under appeal before the Supreme Court Chamber.

With regard to the serious impact of the Trial Chambers' delayed decision on the victims, the lesson learned from case 1 is that the bodies of the Court must provide clarity and demonstrate strict application of the Internal Rules and the Cambodian law.

In September 2009, the plenary of the judges adopted an amended procedure for the applications of victims seeking to become a civil party with regard to (1) the process and responsibility of taking the admissibility decisions, (2) the regulation on the appeal against rejections, and (3) the deadline for applications.

Under the current Internal Rules, the Co-Investigating Judges must decide on all civil party applications, at the latest, by the issuance of the closing order. These admissibility decisions can be appealed to the Pre-Trial Chamber within an expedited timeframe of ten days. The Internal Rules explicitly exclude any requests for extensions of time. It is noteworthy that nearly 4000 persons applied to become civil parties, and that the OCIJ issued 25 admissibility orders, over a period of two weeks, with orders based on the residence of the applicants by provinces. This is the context in which the decisions and corresponding appeals were conducted in case 2. You can only imagine that this was a very intensive time for Civil Party Lawyers!

In addition, the deadline for applications in case 2 has been shortened, compared to case 1, when the deadline was ten days before the Trial Chamber's Initial Hearing. In case 2, the deadline was changed to 15 days after the announcement of the closing of the investigations by the Co-Investigating Judges, which was the 29th January 2010.

Importantly, in case 2, all civil party applicants applied under previous revisions of the Internal Rules (Rev. 1-4). The previous applicable Internal Rule 23 (2) reads, "the right to take civil action may be exercised by Victims of a crime coming within the jurisdiction of the ECCC". The personal, temporal and subject matter jurisdiction is determined in the Agreement between the Kingdom of Cambodia and the UN, and in the implementing ECCC law. Accordingly, the ECCC tries senior leaders and those most responsible for crimes and serious violations of the Cambodian Penal Code, international humanitarian law and custom and international conventions recognized by Cambodia, committed from 17th April 1975 to 6th January 1979. The subject matter is further defined in Art. 3 new to 8 of the ECCC law.

Most of the victims' application forms were collected with the assistance of NGOs. In the absence of any information from the Court they logically collected the applications in accordance with the Internal Rules which were in forth at the time of collection.

In November 2009, shortly before the deadline for applications expired, the Co-Investigating Judges announced in a press release, the crimes and crime sites they had been investigating since 2007. They further announced that only applicants who raise facts, linked to these crimes and crime sites, would be admitted as civil parties.

In the following plenary in February 2010, after the deadline for applications had already expired, the substantive criteria for civil party admissibility were changed and brought in accordance with the substance of the OCIJ's press release from November 2009.

Consequently, the applicant must, "demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury" (Internal Rule 23bis (1) (b).

When the first civil party applicants learned about the new changes they wrote an open protest letter to the OCIJ and claimed to be recognized as civil parties on the basis of the Rules that were in forth at the time that they applied and demanded that the rules not be changed in the middle of the game.

Nevertheless, this amendment was retroactively applied on all applicants, regardless of the broader admissibility criteria provided in previous rules, according to which they had to demonstrate only that they were victims of a crime within the jurisdiction of the Court.

Despite the chance to collect and submit supplementary information from the applicants until the end of June 2010, 48 % of the applicants were still rejected. Further, some civil parties were rejected in decisions made before the opportunity to gather and submit further supplementary information was granted for all applicants. Consequently, Civil Party Lawyers submitted extensive appeals for around 1800 rejected persons. These appeals are still pending before the Pre-Trial Chamber.

In both cases 1 and 2, the lack of clarity of the organs of the Court with regard to the process and criteria for admissibility resulted in an enormous injustice for victims, including creating secondary harm to civil party applicants. The amended Internal Rules, and all the corresponding system of inadmissibility decisions, in both cases, is even less comprehensible given that mandatory legal representation and a lead Co-Lawyer system is now in place. The institution of the Co-Lead Lawyer system was created with a view to managing what was envisaged to be an extensive civil party participation in case 2. I will speak in more detail about this issue later on.

III. Reparations

Since its establishment, the Internal Rules provided only "collective and moral" reparations for civil parties. This deviated from the applicable national criminal procedure code according to which financial compensation for the civil party, born by the convicted person, is the standard.

In case 1 the Internal Rules stipulated that "collective and moral" reparations, which were not defined, had to be borne by the accused. The civil party applicants were not guided by the Trial Chamber as to what "collective and moral" reparations could be. Therefore, the applicants continued to be in an ongoing state of uncertainty in terms of what types of reparations they could claim.

Noteworthy to mention is that since the beginning, all Accused were held out as being indigent by simple statement of the Defence Support Section. No further financial investigations into their financial affairs were conducted by the court. Civil party lawyers requested for financial investigation into the assets of the accused in case 2, but the demand was rejected by the Co-Investigating Judges, alleging that investigating the accused' assets is beyond their mandate. The Pre-Trial Chamber rejected the appeal of the Civil Parties as inadmissible and ruled that the ECCC is not vested with the power to investigate the financial situation, or to preserve, freeze or seize assets of the accused.

Nearly all reparation requests that were brought before the Trial Chamber in case 1 were rejected. The only reparations granted were the mere inclusion of the names of the civil parties and their relationship to the immediate victims, the publication of the final judgment on the homepage of the Court and the compilation of the apologies of the accused which were made during the trial.

This outcome was very disappointing for the civil parties. After analyzing the judgment, it was clear that the Trial Chamber did not decide on some of the requests at all. In addition, it required a degree of specificity of the claim such as particulars of estimated costs or the necessary permissions either of the owner of a location for the construction of a memorial or necessary state permissions, for example, for state-owned land where it was requested that a memorial be built. The requirement for this level of specificity is an unacceptable burden for civil parties and goes beyond what they could possibly do. Further, claims such as free medical and mental health care were rejected as not falling under the criteria of "collective and moral" and were instead, deemed, to be individual financial reparation. It also seemed to be the case, that the Trial Chamber considered the indigence of the Accused to be an obstacle to any reparation requests which had a financial ramification.

In my opinion, the Trial Chamber's reasoning was flawed. It is, in fact, questionable whether there was any reasoning at all! The Trial Chamber's narrow and uncreative approach very much disappointed the civil parties who expected much more than what was granted to them. In retrospect, considering the judicial outcomes, it seems to me that the numerous discussions with civil parties organized by NGOs and lawyers in order to identify the civil parties' needs in the framework of moral and collective reparations, were largely wasted time.

Hopefully, the Supreme Court Chamber will overturn the judgment in case 1 with regard to the reparation order, and grant the reparations that were requested.

For case 2 the Internal Rules have changed, but the scope of reparation continues to be limited to "collective and moral" reparations. However, unlike in case 1, the previous form of reparations, which had to be exclusively borne by the accused, was extended. In case 2, reparations can be borne by third entities. In addition, the mandate of the Victims Support Section is broader and it can implement so called "non-judicial measures for victims". The Internal Rules stipulate that the Victims Support Section "shall be entrusted with the development and implementation of non-judicial programs and measures addressing the broader interests of victims. Such programs may be developed and implemented in collaboration with governmental and non-governmental organizations external to the ECCC".

This, of course, sounds rather promising at first glance, since two new avenues have been added which broaden the possibility for civil parties and victims to receive reparation.

In case 2, the final reparation request has to be filed at the end of the hearing – foreseeably in a time of two to four years. Meanwhile, the Victims Support Section could, within its new mandate, make reparation in the form of non-judicial measure readily available.

However, after more than one year of being seized with this mandate, nothing visible has been done by the Victims Support Section. Only recently, in October 2010 a national program manager was hired and in December 2010 an international advisor to the reparation mandate joined the Victims Support Section to give expert advice on "the development and implementation of non-judicial measures addressing the broader interests of victims". Only by making use of strong project management skills this mandate can be performed. It is questionable if the burden on the Victims Support Section to design and implement reparations, which necessarily includes fundraising for projects, is too hopeful, and cannot be accomplished given the lack of resources.

For the civil parties and the victims the outcome in case 1 and case 2, so far, is ZERO, disregarding the tiny awards that were granted in case 1. With an eye toward the future the hope of providing meaningful reparations either to civil parties or victims generally, does not seem very promising with the developments so far. For instance, there have been no steps towards the establishment of a national trust fund, which would be necessary to implement any projects or programs under the Victims Support Sections new mandate. Interesting, the need for a trust fund has been often discussed and noted, although nothing has yet been done toward that goal.

IV. Legal representation and the new Lead Co-Lawyer section, affecting participation rights of civil parties

The Internal Rules made legal representation mandatory early on. However, it did not set up a legal aid scheme. Whilst at the very beginning, civil parties were given a right to speak

personally and directly in the hearings, this changed in 2008, when civil parties' participation in court had to be exercised strictly only through their lawyers. When the trial in case 1 started, civil parties could only speak in person when they were summoned by the Court to testify.

However, the representing lawyers had direct contact with their clients and could frame questions to witnesses, civil parties and experts according to the instructions of their clients. To reach that point, it was necessary that civil parties be closely informed about the ongoing trial in order to be able to work out what they wanted to know and subsequently what questions should be asked. With regard to legal issues the lawyers could directly intervene in the best interest of their clients and submit their respective legal opinions.

The civil party lawyers in case 1, who had never before worked together, improved coordination and cooperation among themselves during the hearing.

In case 2, involving 12 different legal teams of representatives, the framework of civil party representation has fundamentally changed. A Lead Co-Lawyer section was established, comprised by one national and one international Lead Co-Lawyer, employed by the Court to begin their work at the commencement of the trial phase. They represent qua Internal Rules the interests of the so called "consolidated group" of all civil parties, and pursuant to Internal Rule 12ter to ensure effective organization of civil party representation, including having ultimate responsibility for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group. Lead Co-Lawyers do not have powers of attorney and have no direct client-lawyer relationship. This means that civil party lawyers still carry the majority of the workload.

According to the Internal Rules the role of civil party lawyers is to support the Lead Co-Lawyers. Only three national lawyers are paid by the court. International posts were advertised but never filled. $^2/_3$ of all Civil Parties and applicants are represented by non-court funded lawyers who are not paid for their work at all.

Although civil party lawyers hold the direct powers of attorney with their clients, they are now excluded from directly representing their clients in court, and rely on the good will and bona fides of the two Lead Co-Lawyers to permit them leave to act.

In addition, the new system disadvantages civil party lawyers as their deadlines for drafting and submitting motions are shortened, having to necessarily go through the lead lawyers before any submission can be filed by the required deadline. As the international Lead Co-Lawyer is French, the need for translation at the drafting stage, again, leads to further shortened deadlines for the English speaking teams.

The new structure demonstrates that the Court is far from paying appropriate and sufficient attention to the needs of civil parties and their proper legal representation.

By imposing on them Lead Co-Lawyers at a late stage of the proceedings, who have yet to become familiar with the court procedural rules, and the jurisdiction, as well as the very complex facts in case 2, without properly referring to the non-paid work of civil party lawyers, the Court clearly demonstrates that it is not interested in having participation rights performed by civil party lawyers, who themselves have the working relationship with the civil parties. Any lawyer working with victims would know that this relationship is the key to any success.

In short, the Lead Co-Lawyer scheme has presented huge challenges for civil party participation at the ECCC, affecting the performance and participation rights of civil parties. The contribution by pro-bono civil party lawyers is reduced in practical terms, by the shortening of deadlines, language obstacles and the dependence on the ability and willingness of the Lead Co-Lawyers to accept drafts and proposals from civil party lawyers and to deal with them in a timely manner.

V. Dealing with sexual crimes

The first preliminary investigations by the Co-Prosecutors which resulted in the Introductory Submission – binding the Co-Investigating Judges – did not include cases of sexual violence at all. Although this Court was established after the ad hoc-tribunals and the ICC, the ECCC seems to be far behind these courts with regard to the investigation of sexual crimes.

In case 1, only one case of rape, disclosed and admitted by the accused during the investigations, was indicted and subsequently convicted. It was the rape of a prisoner by an interrogator. The accused did not punish him which was – according to the accused – with the agreement of his superior, a member of the Standing Committee. Although there was more evidence that suggested that other cases of rape were committed, these cases were not investigated, and witnesses were not interviewed in detail. The rape case of a civil party that was disclosed only during the hearing when she saw the perpetrator testifying was rejected on the basis that it was introduced too late.

The Trial Chamber used the narrow rape definition of the ICTY Appeals Chamber in the Kunaraca case which excludes the application of rape against males and requires proving the absence of the consent of the victim.

Evidence that indicated that under the order of the Accused, at least one case of forced marriage among staff had taken place was not included and the respective witness was removed from the witness list.

Any questioning on the topic of forced marriage was interrupted by the President of the Trial Chamber. It was even considered to be unworthy to shed light on this aspect of the life and working conditions of staff.

All efforts by civil party lawyers to have sexual violence cases included into case 1, beyond the single admitted rape case, failed.

In case 2, I had, early on, tried to push the issue of forced marriages by seeking further investigations from the Court on this widespread practice of the Khmer Rouge. In my interviews with clients, I had discovered that this was a very common policy –and crime in Democratic Kampuchea. Fortunately, this has been acknowledged by the court, and the crime, nation-wide, was included as part of the "scope of investigations". 628 Civil Parties were admitted on the basis of the forced marriage claims they raised. This must be seen

as one of the successes of the participation of civil parties many of whom are direct and indirect victims of forced marriages. Forcing people to marry was a population policy which was widespread and systematically imposed on hundred thousands of victims in order to breed the new revolutionary human.

The investigations resulted in the indictment of forced marriage as rape under crimes against humanity and forced marriage as another inhuman act. But the indictment does not hold the Accused liable for the few investigated cases of rape in security centers and worksites, alleging that rape was not one of the common purposes of the Khmer Rouge, and stating, to the contrary, that sexual violence was harshly punished (as a policy) if discovered.

Civil party lawyers are going to demonstrate that this conclusion is not justified and submit that rapes were committed, akin to torture, ill-treatment and killing against the declared enemy, without being punished.

The accused appealed the closing order inter alia with the objection to the charge of rape as a crime against humanity stating that during the relevant time 1975-1979, rape was not yet applicable as a listed crime under crimes against humanity. The Pre-Trial Chamber agreed with this argument and held in its 17th of February 2011 decision that rape was not a crime in its own but ruled that the facts described as rape can be subsumed as "other inhumane acts".

The legal characterization of the Pre-Trial Chamber is not binding for the Trial Chamber which has already concluded in case 1 that rape existed as a listed crime under crimes against humanity. However the Trial Chamber has to look into the arguments more thoroughly.

The half victory that civil parties achieved by having forced marriages country wide, included into the indictment, is tainted by the exclusion of rapes outside of the context of forced marriage, the flawed definition for the facts of forced marriage and rape, and the Pre-Trial Chamber decision which excludes rape as a crime against humanity at all, for the relevant period of time.

VI. Conclusion

The ECCC is the first court dealing with mass crimes that grants victims the role of parties to the proceedings. This could be a unique chance for the ECCC to have victims actively involved as a party and to become a model for any future internationalized courts.

However, as demonstrated by the examples arising out of the four selected topics – civil party admissibility, reparations, representation by Lead Co-Lawyers and dealing with cases of sexual violence – the first experiences from case 1 have been rather disappointing for the victims. The practice of the civil party admissibility decisions did actual harm to the civil party applicants and possible remedy is awaited by the Supreme Court Chamber and Pre-Trial Chamber respectively dealing with the appeals.

The amended reparation scheme opening new paths for civil parties and victims can only be used for the benefit of victims, if the Victims Support Section is provided with sufficient resources to fulfill its mandate as it is responsible for the implementation of the Trial Chamber awards and the realization of non-judicial measures for victims.

Furthermore, the amendments to the Internal Rules have effectively reduced the actual possibilities of civil parties to participate by imposing a Lead Co-lawyer section, responsible for representing the "consolidated group".

It could be demonstrated that the ECCC, since the beginning, has disregarded cases of sexual violence and that what has been achieved can be seen as the result of civil party lawyers' work. The Court itself seems to be rather hesitant about properly and appropriately addressing sexual crimes.

However, the role of civil parties to obtain some remnant of justice through actively participating in this process remains a continuing challenge and one that must be balanced against secondary harm cause to civil parties and applicants by the gaps and inadequacies that have resulted so far in both cases 1 and 2.

It is unfortunate that there is so little time remaining for further embellishment about these unprecedented issues – however, I would be happy to discuss any points further in the light of any questions from the floor.