

# VICTIMS' RIGHTS

## Before the Extraordinary Chambers in the Courts of Cambodia (ECCC)

### A Mixed Record for Civil Parties

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,





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## Acronyms

<b>ADHOC</b>	Cambodian Human Rights and Development Association ( <i>Association des droits de l'Homme au Cambodge</i> )
<b>AKRVC</b>	Association of Khmer Rouge Victims in Cambodia
<b>ASF</b>	Lawyers without borders ( <i>Avocats sans frontières</i> )
<b>BAKC</b>	Bar Association of the Kingdom of Cambodia
<b>CHRAC</b>	Cambodian Human Rights Action Committee
<b>CDP</b>	Cambodian Defenders Project
<b>CJA</b>	Center for Justice and Accountability
<b>CPK</b>	Communist Party of Kampuchea
<b>DC-Cam</b>	Documentation Center of Cambodia
<b>ECCC</b>	(Extraordinary Chambers): Extraordinary Chambers in the Courts of Cambodia
<b>FIDH</b>	International Federation for Human Rights
<b>ICC</b>	International Criminal Court
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for Former Yugoslavia
<b>LAC</b>	Legal Aid of Cambodia
<b>LAG</b>	Litigation Action Group of FIDH
<b>LICADHO</b>	Cambodian League for the Promotion and Defense of Human Rights ( <i>Ligue cambodgienne pour la promotion et la défense des droits de l'Homme</i> )
<b>NGO</b>	Non-Governmental Organisation
<b>SCSL</b>	Special Court for Sierra Leone
<b>UNAKRT</b>	United Nations Assistance to the Khmer Rouge Trials
<b>UN</b>	United Nations

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# FOREWORD

The International Federation for Human Rights (FIDH), in partnership with its member organizations in Cambodia, the Cambodian Human Rights and Development Association (ADHOC) and the Cambodian League for the Promotion and Defence of Human Rights (LICADHO), has contributed to the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), charged with prosecuting the former leaders of the Khmer Rouge regime for international crimes committed in the country between 1975 and 1979. It has sent numerous missions to Cambodia, particularly during discussions for the implementation of this hybrid court, as well as conducted training and awareness raising workshops targeting civil society and research on national legislation, which served as the basis for reports. In particular, the FIDH has worked to ensure recognition of the rights of victims before the ECCC, and full participation by victims in the proceedings, through advocacy for the inclusion of adequate provisions in the Internal Rules.

Once the ECCC was established, FIDH worked to ensure effective implementation of the victims' rights through legal representation.

Indeed, thanks to its *Litigation Action Group (LAG)*, a network of lawyers, judges and academics working on a *pro bono* basis, FIDH supports victims of the Khmer Rouge regime both legally and judicially. Patrick Baudouin, a lawyer at the Paris Bar, coordinator of the LAG and FIDH Honorary President, and Marie Guiraud, a lawyer at the Paris Bar and member of the LAG, have thus been representing 10 Cambodian victims, living in France, participating as Civil Parties in Case 002 before the ECCC for the last 4 years.

The appropriate participation mechanism for victims appearing before a court with jurisdiction over mass crimes is currently an important issue. It has been raised by the judges of the International Criminal Court (ICC), who are currently introducing more restrictive interpretations of certain victim rights than initially admitted. It will also arise during drafting of the Rules of Procedure of the African Chambers within the Senegalese courts responsible for trying the international crimes committed under Hissène Habré. In this regard, the ECCC is a good case study, as it was considered to be the most progressive victims' participation mechanism before the court procedures evolved over time in response to so-called pragmatic considerations. The issue is now to establish the bottom line and basic conditions needed to guarantee the rights of victims and their essential participation in the work of justice for the most serious crimes.

FIDH asked Marie Guiraud to write this report in order to share her experience as a trial lawyer before the ECCC. Based in Paris, she follows the regular discussions between Civil Party lawyers and was able to travel to Phnom Penh with FIDH several times, and even more frequently since the opening of the first sub-trial in Case 002, in the framework of judicial and advocacy missions.

# PREAMBLE

*“I lost more than half of my family members. Years later, I constantly think about them. I need to know what happened to them. I want justice.”*

Chhin Mea, a Civil Party in Case 002, represented by the FIDH Litigation Action Group

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were created to prosecute leaders of Democratic Kampuchea and those most responsible for serious crimes committed between 17 April 1975 and 6 January 1979.

Integrated into the Cambodian judiciary, the ECCC is a “hybrid” court: the judges, prosecutors and lawyers are both Cambodian and foreign, and apply both Cambodian and international law.<sup>1</sup>

One of the main innovations of the ECCC, compared to other international or hybrid courts prosecuting mass crimes, is a greater recognition of the victims in the proceedings as a means of fulfilling its mandate to assist the Cambodian people’s pursuit of justice and “national reconciliation”.<sup>2</sup>

Any natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC is considered a “victim”.<sup>3</sup>

Victims can participate in two ways before the ECCC:

- They may file complaints with the Co-Prosecutors, which the latter take into account when deciding whether or not to prosecute. They may thus participate as ***complainants***.
- They may also apply to the Co-Investigating Judges to become ***Civil Parties*** if they have suffered physical, moral or material harm as a direct consequence of at least one of the crimes alleged against a person under investigation.<sup>4</sup>

Before the ECCC, Civil Party action has a dual purpose:<sup>5</sup>

- Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC (*public action*); and
- Seek collective and moral reparations (*civil action*).

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1. The ECCC are charged with bringing to trial senior leaders of Democratic Kampuchea and those who were 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 during the period of Democratic Kampuchea. The mission of prosecuting the senior leaders of Democratic Kampuchea is the responsibility of the Co-Prosecutors (one Cambodian and one foreign), who determine the scope of the investigation. Pre-trial investigations are conducted by two independent Judges, the Co-Investigating Judges (one Cambodian and one foreign).

2. Preamble to the Agreement between the United Nations and the Royal Government of Cambodia.

3. ECCC Internal Rules, glossary: “*Victim: refers to a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.*”

4. Rule 23bis of the ECCC Internal Rules.

5. Rule 23 of the ECCC Internal Rules.

In this system, the Civil Parties have an interest in the result of the public action since they have a clear and direct interest in seeing the accused convicted of the specific crimes that caused their own suffering in order to found their exercise of civil action for damages.

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Whereas other international courts have sometimes adopted a purely utilitarian perspective on victims<sup>6</sup> (who were involved as mere witnesses in support of the Prosecution), this system of Civil Party participation views them as real subjects of law, as full participants throughout the legal proceedings.

Not only is this the most advanced form of victim participation authorized by criminal procedure, but this is also the first time it has been applied before hybrid and/or international courts.

The challenge raised by this form of participation is significant: given that the criminal trial is primarily a confrontation between the accused and society (or the national community), it is not easy to integrate the presence of victims as Civil Parties in a judicial process of such magnitude.

In this regard, the ECCC experience raises essential questions concerning the mode of participation of victims: is Civil Party participation the best way to ensure realistic, effective participation of victims in mass crimes trials? Were the ECCC given the practical means to explore all the possibilities offered by this system? What preliminary lessons can we learn from this form of victim participation for other courts prosecuting this type of international crimes, and first and foremost the International Criminal Court (ICC)?

\*\*\*

Case 001, concerning Kaing Guek Eav alias Duch, the former head of the Khmer Rouge security centre S-21 (now fully tried), which provided a mixed perspective on the participation of victims as Civil Parties, has led to significant changes in the system. This report is written while the first segment of the trial at first instance is on-going in Case 002, against three former Khmer Rouge leaders, Nuon Chea, Khieu Samphan and Ieng Sary, which has been severed from the rest of the case file.

The introductory section of this report seeks to show how the principle of Civil Party participation by victims, despite being firmly rooted at the heart of the Extraordinary Chambers' mandate, has undergone many changes "along the way" in order to adapt the model to the specificity of each trial (Introduction).

The report aims to provide a practical perspective of the pillars upon which the Civil Party system is built and to identify the challenges the ECCC must meet in order for the wide ranging rights of Civil Parties set out in the founding texts to take *real, concrete form*.

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6. Especially before the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL).

It will, thus, examine four key issues relating to victims' rights:

- The *admissibility* of Civil Party applications decided on a case by case basis during the preparatory judicial investigation (**Part I**);
- Individual *representation*, each Civil Party being represented by a lawyer (of course Cambodian, with the possibility of an international lawyer) (**Part II**);
- Dualist *participation*, each Civil Party participating individually in the preparatory stage, but as part of a “consolidated group of Civil Parties” at trial (**Part III**);
- A right to *reparation* leading to collective and moral reparations (**Part IV**).



# The ECCC

## Main Facts and Figures

### Chronology of the establishment of the ECCC

In **June 1997**, nearly two decades after the fall of the Khmer Rouge regime led by Pol Pot, responsible for millions of deaths and countless serious violations of human rights and international crimes between **17 April 1975** (date of arrival) and **6 January 1979** (fall from power), the Cambodian government requested United Nations (UN) assistance to organise trials to prosecute the senior Khmer Rouge leaders.<sup>7</sup> In December of the same year, the UN General Assembly adopted a resolution (A/RES/52/135) on the situation of human rights in Cambodia, stating the will of the international community to open investigations into the crimes of the Khmer Rouge, considered as genocide and crimes against humanity.

In **August 2001**, the Cambodian National Assembly passed a law establishing a hybrid tribunal with jurisdiction to prosecute crimes committed under the Khmer Rouge regime from 1975 to 1979.

On **6 June 2003**, an agreement was signed between the United Nations and the Royal Government of Cambodia for the purpose of bringing to justice the leaders of Democratic Kampuchea and those most responsible for crimes and serious violations of Cambodian criminal law and international law committed during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979 (“**ECCC Agreement**”).<sup>8</sup> The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (“**ECCC Law**”), amending the 2001 Law, was promulgated on **27 October 2004**.<sup>9</sup>

Yet it would only be on **18 January 2006** that the Extraordinary Chambers were formally established and on **8 May 2006** that the Cambodian and international judges and prosecutors were sworn in. On **12 June 2007**, the ECCC Internal Rules were finally adopted after long and complex negotiations.

### Jurisdiction of the ECCC

- **Temporal Jurisdiction:** 17 April 1975 to 6 January 1979.
- **Territorial Jurisdiction:** The territorial jurisdiction of the ECCC has not been specified. It is for the Extraordinary Chambers to determine whether their jurisdiction is limited to the territory of Cambodia or whether they can exercise jurisdiction regardless of where the crimes were committed.

7. As co-Prime Ministers in June 1997, Prince Norodom Ranariddh and Hun Sen wrote to Kofi Annan, then Secretary General of the United Nations, to request the assistance of the UN in the prosecution of crimes committed by the Khmer Rouge. Indeed, the Cambodian judiciary lacked the resources and expertise to undertake such a complex task, especially given the magnitude of the crimes. The UN provides support and technical assistance by assigning ECCC judicial officers and international administrators, who form UNAKRT (United Nations Assistance to the Khmer Rouge trials). Source: <http://www.eccc.gov.kh>

8. [http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf)

9. <http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended>

- **Personal Jurisdiction:** this refers to senior leaders of Democratic Kampuchea and those most responsible for serious violations and crimes within the jurisdiction of the ECCC.
- **Substantive Jurisdiction:** The ECCC apply both national and international law. The 2004 ECCC Law indicates that Cambodian law takes precedence over international law, but that if there are inconsistencies and gaps in Cambodian law, international law may serve as a guide
- **Crimes under international law:** genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of protected cultural property during armed conflict in accordance with the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and crimes against persons enjoying international protection under the 1961 Vienna Convention on Diplomatic Relations;
- **Crimes under Cambodian law:** murder, torture and religious persecution, as defined in the 1956 Cambodian Penal Code.

## Structure of the ECCC

The ECCC are integrated into the Cambodian judiciary. However, they are considered to be a “hybrid” or “internationalised” court, not only because they apply both Cambodian and international law, but also because of their structure, which provides for international participation.

- **At the preparatory stage,** national and international participation is co-equal. The preliminary enquiry is conducted by an international and a Cambodian Co-Prosecutor, and judicial investigations by a national and international Co-Investigating Judge, holding identical powers. Any disagreement between them is sent before the Pre-Trial Chamber, composed of five Judges, two international and three Cambodian (including the President).
- **At the trial stage,** international participation is in the minority. The Trial Chamber is composed of five Judges, two international and three Cambodian (including the President) and decisions require a “super majority” of at least 4 Judges. The Appeals Chamber is composed of seven Judges, three international and four Cambodian (including the President) and decisions require a “super majority” of at least five Judges.

## Cases before the ECCC

### Case 001 - against Kaing Guek Eav (aka “Comrade Duch”)

Born in 1942, “Duch” was the head of the infamous S-21 detention and torture centre at Tuol Sleng in Phnom Penh during the Khmer Rouge regime.

He was detained by the Cambodian authorities and placed in military prison in 1999.

Charged with crimes against humanity, he was provisionally detained by the ECCC on 31 July 2007.

His **trial** began on **30 March 2009** and closed on **26 July 2010**, when the Trial Chamber rendered its verdict and sentenced him to 35 years in prison for crimes against humanity and war crimes. He was convicted of the crimes against humanity of persecution on political grounds, extermination, enslavement, imprisonment, torture (including rape) and other inhumane acts, as well as grave breaches of the Geneva Conventions of 1949, including wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving prisoners of war or civilians of their right to a fair trial and the illegal detention of civilians. His sentence was reduced to 19 years by the Judges, taking account of prior periods



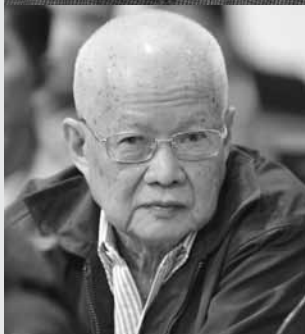
of detention under the authority of the ECCC and illegal detention under the authority of the Cambodian Military Court from May 1999 to July 2007.

Several **appeals** were filed, both by the Defence (including a challenge to the jurisdiction of the Extraordinary Chambers), the Co-Prosecutors (requesting a life sentence and the inclusion of all charged crimes) and the Civil Parties (involving the rejection of certain Civil Party applications and the reparation decision).

On **3 February 2012**, the Chamber of the Supreme Court handed down its Appeal Judgment, granting the appeal by the Co-Prosecutors by cancelling the 35 year sentence imposed by the Trial Chamber and sentencing Duch to **life imprisonment**, the maximum penalty prescribed by law. The Chamber of the Supreme Court considered in particular that the Trial Chamber had attached undue weight to extenuating circumstances and insufficient weight to the gravity of the crimes and aggravating circumstances.

Moreover, the Chamber of the Supreme Court allowed the appeals of 10 Civil Parties whose claims had been rejected and ruled on the appeals on collective and moral reparations, confirming the Trial Judgment decision to publish all the excuses and expressions of responsibility made by Duch during his trial on the ECCC website.

A total of **93 Civil Parties** participated in the proceedings in Case 001 (3 withdrew their applications during the trial). The Civil Parties were organized into four groups, each represented by counsel. 22 Civil Parties gave evidence during the trial. However, the Trial Chamber rejected 24 of the Civil Party applications after the final judgment. On appeal, the Chamber of the Supreme Court decided on 3 February 2012 to allow the appeals of 10 Civil Parties whose applications had been rejected.



**Case 002 - against Nuon Chea, Ieng Sary and Khieu Samphan** (Ieng Thirith is no longer an accused in this case, as she was declared unfit to stand trial)

Case 002 concerns three former senior Khmer Rouge leaders:

- **Nuon Chea** (aka “Brother Number Two”), former President of the Assembly of People’s Representatives of Democratic Kampuchea, Deputy Secretary of the Communist Party of Kampuchea (CPK), ideologist of the regime and Pol Pot’s right hand man;
- **Khieu Samphan**, former Head of State of Democratic Kampuchea;
- **Ieng Sary**, former Deputy Prime Minister for Foreign Affairs.
- **Ieng Thirith** (aka “Sister Phea”), former Minister of Social Affairs, the wife of Ieng Sary, was initially accused in Case 002, but her case has been severed as she has been declared unfit to stand trial.

After the Co-Prosecutors filed their **Introductory Submission** on **18 July 2007**, requesting the Co-Investigating Judges to open an investigation, the four former senior Khmer Rouge leaders were arrested in September 2007 (Nuon Chea) and November 2007 (the other three). Although “Duch” was among those named by the Co-Prosecutors in their Introductory Submission, the Co-Investigating Judges decided in November 2009 to sever the cases and investigate them separately.

The four other leaders were indicted on 15 September 2010 and accused of crimes against humanity (including extermination, enslavement, torture and persecution), genocide (Cham and Vietnamese), war crimes (including wilful killing, torture and inhuman treatment) and other counts of crimes under Cambodian law (homicide, torture and religious persecution). On **13 January 2011**, the Trial Chamber confirmed the indictments, with minor changes.

Case 002 focuses on a range of sites and criminal activities, including three periods of massive population displacement, 6 cooperatives and work sites, 11 security centres and 3 execution sites, as well as crimes against the Cham, Vietnamese and Buddhists and cases of forced marriage.

The **initial hearings** before the Trial Chamber were held in June 2011 to discuss preliminary procedural issues and study the list of potential witnesses. **Preliminary hearings** on the fitness to stand trial of accused Ieng Thirith and Nuon Chea were held in August and October 2011, during which the Trial Chamber reviewed reports by medical experts. Preliminary hearings on the issue of reparations took place in October 2011.

On **22 September 2011**, the Trial Chamber issued a **severance order**, deciding to segment the trial in Case 002 by cutting it into several trials concerning different parts of the indictment. The first “mini-trial” in Case 002 concerns forced movement due to the evacuation of Cambodian cities to rural areas between 17 April 1975 and mid 1976, and related crimes against humanity. It also examines the structure of Democratic Kampuchea, the roles of each of the accused before and during the period and the policies of the Government of Democratic Kampuchea. An appeal against the severance order by the Co-Prosecutors, arguing that it should be reformulated in the interests of justice, was rejected in October 2011. Some Civil Parties and their lawyers have criticized the decision, which does not serve the interests of victims.

On **17 November 2011**, the Trial Chamber, finding that Ieng Thirith suffered from dementia and was **unfit to be tried**, severed the proceedings against her in Case 002. On 13 December 2011, the Chamber of the Supreme Court ordered that Ieng Thirith follow medical treatment and that her fitness for trial be reassessed in six months, during which time the accused was to remain in custody. On 13 September 2012, the Trial Chamber decided, after further examination, that the accused was still unfit to stand trial and, confirming the severance of the charges against her, suspended her trial indefinitely. On **16 September 2012**, the President of the Chamber of the Supreme Court decided to **release Ieng Thirith**, on bail. The decision of the Trial Chamber has been appealed by the Co-Prosecutors, with no decision at the time of writing.

**Substantive hearings** in the first sub-trial in Case 002 began on **21 November 2011**. They are still in progress.

**3,866 Civil Parties** were admitted to participate in the Case 002 proceedings, forming a “collective” or “consolidated group” of Civil Parties that is collectively represented at the trial, with legal representation being coordinated by two Lead Co-Lawyers.

#### **Cases 003 and 004**

On **9 September 2009**, the **international Co-Prosecutor** filed **Introductory Submissions alleging crimes by five additional suspects, in what has become known as Case 003 and 004**. Two months later, in November 2009, the Pre-Trial Chamber decided to refer these cases to the Co-Investigating Judges. Although their names had not been released by the ECCC, many media sources have identified the two former government officials suspected in Case 003, the commander of the Khmer Rouge air force, Sou Met, and the commander of the Khmer Rouge navy, Meas Muth. Four suspects were named in Case 004. In both cases, evidence of political interference and a lack of transparency in the progress of Cases 003 and 004 have raised concern, especially among Civil Parties and civil society.

#### **Case 003**

On **2 February 2011**, the Co-Investigating Judges declared that their work on Cases 003 and 004 was focused on “*examining and analyzing the documents available on the Case Files, particularly the existing documents in the previous Cases Files 001 and 002*”, and that no field investigation had been conducted at that stage. On **29 April 2011**, the Co-Investigating Judges announced that the investigation in Case 003 was complete.

On **9 May 2011**, the **international Co-Prosecutor** requested further investigative action and the granting of additional time for Civil Parties to apply in Case 003, making this request public. Later, faced with an order by the Co-Investigating Judges dated 18 May 2011 and the considerations of the Pre-Trial Chamber date 24 October 2011, the international Co-Prosecutor decided on 27 October 2011 to withdraw his public statement concerning Case 003.

On **7 June 2011**, the **Co-Investigating Judges** rejected all of the requests by the international Co-Prosecutor, considering that the exceptional conditions justifying individual action by one Co-Prosecutor (delegation of authority or disagreement proceedings) were not met. Three days later, the international Co-Prosecutor re-submitted the requests for further investigation and extension of the deadline for Civil Party applications in Case 003, after having filed four formal disagreements, as required by the Internal Rules. He also gave notice of appeal against the Co-Investigating Judge’s order to the Pre-Trial Chamber, arguing that he did not accept their interpretation of the ECCC Law.

On **24 October 2011**, the Pre-Trial Chamber decided that the appeal by the international Co-Prosecutor was admissible but could not reach the number of votes necessary for a decision on the merits of the appeal, with the result that the order by the Co-Investigating Judges remained in force.

On **11 December 2011**, an international reserve Co-Investigating Judge (having taken over after the resignation of the preceding international judge) declared admissible the request for investigative measures previously submitted by the international Co-Prosecutor and decided that **the investigation in Case 003 should continue**.

In **March 2012**, the international reserve Co-Investigating Judge reported having made a number of decisions relating to acts of investigation, informed the suspects in Cases 003 and 004 of their rights and the crimes alleged against them, and heard a number of Civil Parties, before resigning because of the barriers to the investigation he claimed the national Co-Investigating Judge had raised.

On **26 October 2012**, a new international Co-Investigating Judge was sworn in and will continue to work on Case 003 and 004.

#### **Case 004**

On **16 June 2011**, the international Co-Prosecutor informed the public that he had submitted a request for investigative action and a Supplementary Submission to the Co-Investigating Judges concerning the on-going investigation in Case 004.

On **11 October 2011**, the Defence Support Section requested the Pre-Trial Chamber to suspend the proceedings before it in Case 004 in the absence of effective legal representation for the suspects. On 20 February 2012, the Pre-Trial Chamber declared the application for a stay inadmissible.

In **November 2011**, the **Co-Investigating Judges** informed the public of the sites and criminal episodes covered in the Introductory Submission establishing Case 004.

On 26 October 2012, a new international Co-Investigating Judge was sworn in and will continue to work on Cases 003 and 004.

By 30 August 2011, the Victims Support Section had received **382 applications for Civil Party participation** in Cases 003 and 004.

# INTRODUCTION

## The participation of Civil Parties before the ECCC: a strongly rooted principle under perpetual change

*“It is difficult to conceive of a trial concerning crimes which touched each family, each and every village in Cambodia, crimes that left visible traces 30 years on without the victim participation.”*<sup>10</sup>

*“Victims ... are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”*<sup>11</sup>

The principle of victim participation through Civil Party action is at the heart of the ECCC mandate (I), yet the Court has regularly and sometimes profoundly adapted its practical implementation to meet the specific challenges raised by the proceedings (II).

### **I – THE PARTICIPATION OF VICTIMS AS CIVIL PARTIES: A PRINCIPLE ANCHORED AT THE HEART OF THE ECCC MANDATE**

Victim participation is mentioned quite elliptically in the founding documents of the ECCC (I), but Cambodian national law (which recognizes the participation of victims as Civil Parties) (2) served as a model for the ECCC Internal Rules, which clearly place the protection and guarantee of Civil Parties rights at the heart of the Court’s mandate (3).

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10. E125/2, Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek, 12 March 2012.

11. UNDoc. A/RES/40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985: <http://www.un.org/documents/ga/res/40/a40r034.htm>

## 1) The participation of victims was included in the ECCC's founding texts

The ECCC Law<sup>12</sup> - whether the 2001 version referred to in the 2003 Agreement between the Cambodian government and the United Nations (the "Agreement")<sup>13</sup> or the 2004 version - expressly offers *victims* the opportunity to participate in proceedings conducted before the Extraordinary Chambers.

The ECCC Internal Rules, adopted by the Judges, provide that "victim" refers to any natural person (individual) or legal entity (e.g. victims' association, school or temple) who has suffered harm caused by a crime within the jurisdiction of the ECCC.

Article 36 of the ECCC Law provides victims the right of appeal against decisions of the Trial Chamber. Of course, this right of appeal can only be understood if they are already parties to the proceedings.<sup>14</sup>

In order to determine the appropriate procedural model to regulate such participation, it appeared logical, given the provisions of Article 12 of the Agreement, to give primary consideration to Cambodian law.<sup>15</sup>

## 2) The participation of victims as Civil Parties: the existing system in Cambodian domestic law

Cambodian domestic law (based on the French legal model) allows victims to apply to intervene in criminal proceedings as "Civil Parties" provided they show they personally suffered injury as a result of the events under investigation.

Article 2 of the Cambodian Code of Criminal Procedure, as amended in 2007, provides:

*"Criminal and civil actions are two separate kinds of legal actions.  
– The purpose of a criminal action is to examine the existence of a criminal offence, to prove the guilt of an offender, and to punish this person according to the law.*

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12. In 2001, the Cambodian National Assembly passed a law establishing a tribunal to prosecute perpetrators of crimes committed under the Khmer Rouge regime from 1975 to 1979. It was amended in 2004 and is available on the ECCC website: <http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended>

13. The Agreement signed between the Cambodian government and the UN in 2003 concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea establishes the framework for international participation and assistance. It is available on the ECCC website: [http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement\\_between\\_UN\\_and\\_RGC.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf)

14. Article 36 of the ECCC Law provides:

*"The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims [emphasis added], or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court."*

15. Article 12 of the Agreement provides:

*"1. The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.*

*2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice."*



– *The purpose of a civil action is to seek compensation for injuries to victims of an offence and with this purpose to allow victims to receive reparation corresponding with the injuries they suffered.*”

*Public action* refers to legal action conducted on behalf of society by prosecutors for the application of criminal law against the perpetrator of an alleged criminal act, as well as to repair damage done to society.

*Civil action* aims to allow the direct victim of a crime to obtain compensation for his or her own injury, by becoming a Civil Party.

This allows victims – as veritable parties - to intervene throughout the judicial proceedings with the dual aims of participating in the search for criminal liability of an accused, and as a corollary, his civil responsibility.

The Civil Parties are therefore bound to the fate of the public action as they have a clear interest in seeing the accused convicted of the crimes that caused their own prejudice.

They have rights conferred on them by law, which allow them to intervene directly within the framework of the public action.

It was the responsibility of the ECCC to adopt Internal Rules reflecting this concern, so that the procedure was consistent with international standards and to provide mechanisms for the prosecution and trial of those responsible for mass crimes falling within their jurisdiction.

### **3) The participation of victims as Civil Parties: a system adapted to the specificity of proceedings before the ECCC by the Internal Rules**

The basic principles adopted by the Extraordinary Chambers place the protection and guarantee of the rights of victims at the heart of the ECCC’s mandate.

Internal Rule 21, which outlines the basic principles that guide the work of the Extraordinary Chambers<sup>16</sup>, places the protection and safeguarding of the interests of victims at the heart of its mandate.

It provides as follows:

*“The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims (emphasis added) and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:*

- a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;*

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16. The ECCC Internal Rules were adopted by ECCC plenary and have undergone several amendments. The latest version of the Internal Rules (8th revision) dated 12 August 2011 is available on the ECCC website: <http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8>

- b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;*
- c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; (...) (emphasis added)."*

Internal Rule 23 unambiguously provides that victims who apply to become Civil Parties become a party to the criminal proceedings and exercise legal action the purpose of which is to both:

- a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
- b) Seek collective and moral reparations, as provided in Rule 23*quinquies*.

Civil Party participation is allowed at *all stages* of the proceedings.

These rules are clear: trials before the ECCC are characterized by the co-existence of two actions, public action and civil action, which have many links between them.

## **II – CIVIL PARTY PARTICIPATION AT THE ECCC: A CONSTANTLY CHANGING SYSTEM**

One of the major difficulties with Civil Party system as provided for in Cambodian law is that it was not initially designed for the trial of mass crimes, which raises specific challenges (1).

Although the ECCC Plenary Assembly<sup>17</sup> has, repeatedly<sup>18</sup>, modified the Internal Rules to address these challenges (2), the decision of the Trial Chamber to sever the proceedings in Case 002 appears – *de facto* - to have had a substantive impact on the extent of Civil Party participation in the trial (3).

### **1) The challenge of adapting the Civil Party system to the specificity of the ECCC**

This challenge is twofold: on the one hand, to ensure the compatibility of the system with the principles of the right to a fair trial (a) and, on the other hand, to resolve real practical challenges (b).

#### *a) The challenge of maintaining a balance between the right of victims to participate and that of the accused to a fair trial*

As recalled by Judge Lavergne, an international Trial Chamber Judge, dissenting against a decision on the right of Civil Party lawyers to intervene in the sentencing hearing,<sup>19</sup> the ECCC must guarantee the balance between, on the one hand, the requirements of a “*fair and expeditious trial, with respect for the rights of the defence,*” and, on the other hand, “*the right of victims to participate in such a trial, and inter alia to contribute to the fight against impunity for perpetrators of the most serious crimes.*”

17. ECCC Internal Rule 18 provides that the Ordinary Plenary Assembly meets at least once every six months and brings together the Co-Investigating Judges, the Chambers Judges and their deputies, the Co-Prosecutors, the Director of the Defence Support Section, the Director of the Victims Unit and the Director and Deputy Director of the Office of Administration.

18. At the time of writing, the Internal Rules had been revised eight times, the most important for Civil Parties being that of February 2010.

19. Case 001-E72/3, Trial Chamber, *Decision on Motion for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing*, Dissenting Opinion of Judge Lavergne, 8 October 2009.

In addition, in an institution where the majority of the international judiciary is from the common law system,<sup>20</sup> where victims do not participate as parties to the proceedings, the role of the victims raised the question of a possible breach of the principle of equality of arms, under which an accused should face only one prosecuting party.

In a decision dated 8 October 2009, the Trial Chamber echoed these concerns and clarified the role of Civil Parties: “*the accused’s right to a fair trial in criminal proceedings includes the right to face one prosecuting authority only. Accordingly, and while the Civil Parties have the right to support or assist the Prosecution, their role within the trial must not, in effect, transform them into additional prosecutors.*”<sup>21</sup>

### ***b) The practical challenges***

In his dissenting opinion, Judge Lavergne listed five major challenges that require adjustments to the Civil Party participation system:

- The “*ECCC mandate is necessarily limited in time*”, which does not sit well with a mass of individual claims;
- The Extraordinary Chambers do not have “*a trust fund*”<sup>22</sup> and potentially significant multiple financial convictions have no meaning if they are pronounced against accused whose indigence makes potential execution difficult, if not illusory;
- Proof of “*mass crimes is different from proof of thousands of individual crimes,*” especially in the context of past crimes, and the disappearance or disorganization of the state administration;
- The conduct of the trial in a “*reasonable time is incompatible with the involvement of large numbers of individual Civil Parties*” who are not represented by a lawyer; representing victims, even by a lawyer, requires collective organization;
- The rights granted to a Civil Party are very wide and it is important to ensure that those who claim to exercise them at trial are qualified to do so, which requires “*ascertaining the admissibility of*” a potentially large number of applications.<sup>23</sup>

## **2) Deep systemic changes were deemed necessary in the light of the experience of Case 001 and the approaching trial in Case 002**

### ***a) The chequered results of the experience in Case 001***

The possibility for Civil Parties and their lawyers to act with few restrictions at trial in Case 001 created a real need to adapt the rules.

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20. Regardless of whether their experience as lawyers is at the national level or within international courts, also deeply inspired by the common law tradition.

21. Case 001-E72/3, Trial Chamber, *Decision on Motion for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing*, para. 26.

22. Numerous NGOs and victims’ associations mobilized for the ECCC Internal Rules to include the establishment of a trust fund for victims but it was not done, mainly for financial reasons.

23. Case 001-E72/3, Trial Chamber, *Decision on Motion for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing*, Dissenting Opinion of Judge Lavergne, 8 October 2009.

As one of the lawyers for the Civil Parties in Case 001 pointed out, “A few weeks into the Duch trial it became apparent that the process of allowing each party to the proceedings, including every Civil Party group, to pose unlimited questions to witnesses, including experts and the Accused, considerably lengthened the duration of the proceedings”.<sup>24</sup>

Thus, although the Chamber originally considered that the Civil Parties had the right to ask any questions to the witnesses “*in support of the prosecution*” to the extent that they were neither too long nor lacked relevance, it gradually limited the capacity of the lawyers to intervene in Case 001.<sup>25</sup>

In addition to this mixed record, the magnitude of Case 002 (four accused instead of one in Case 001), the number of admitted Civil Parties (almost 4,000 instead of 90) and legal representation teams (10 instead of 4), made adaptation of the procedure inevitable.

In **February 2010**, at the ECCC Plenary Assembly’s seventh session, a number of amendments were “*designed to ensure effective and streamlined Civil Party participation in ECCC proceedings.*”<sup>26</sup>

Noting that existing procedures under Cambodian penal law “*are not designed to deal with individualized participation by victims on this scale*”, the new system was intended to “*balance the rights of all parties, to safeguard the ability of the ECCC to achieve its mandate while maintaining Civil Party participation, and to enhance the quality of Civil Party representation.*”<sup>27</sup>

***b) The introduction of a distinction between Civil Party participation during the investigation and trial stages***

During its Seventh session, the ECCC Plenary distinguished between Civil Party participation during the preparatory phase (*i.e.* the judicial investigation) and the trial phase.

During the **preparatory phase**, the Civil Parties participate *individually* in ECCC proceedings and must be represented by counsel.

However, once a case **comes to trial**, the Civil Parties only form one group whose interests are represented by the Lead Co-Lawyers for Civil Parties.<sup>28</sup> At this point, the Civil Party lawyers assist the Lead Co-Lawyers and act as the contact persons for each Civil Party.

Accordingly, the Civil Parties no longer participate individually at trial due to the personal injury they have suffered, but form a ***collective of Civil Parties***, also called the ***consolidated group***, whose interests are represented at trial by a made to measure figure, the Civil Party Lead Co-Lawyers, who coordinate the action undertaken by the Civil Party lawyers. Moreover, the Extraordinary Chambers may only award moral and collective reparations.<sup>29</sup>

During this major revision, the Plenary Assembly redrafted the model for Civil Party participation before the ECCC, as follows:

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24. Alain Werner and Danielle Rudy, “Civil Party Representation at the ECCC: Sounding the retreat in international criminal law?”, *Northwestern Journal of International Human Rights*, Volume 8, Issue 3 (Summer 2010).

25. Trial of Kaing Guek Eav, transcripts for 22 June 2009, para. 98.

26. ECCC Press Release, *7th Plenary Session of the ECCC Concludes*, 9 February 2010: [http://www.eccc.gov.kh/sites/default/files/media/Press\\_Release\\_Conclusion\\_7th\\_Plenary\\_Session\\_\(ENG\).pdf](http://www.eccc.gov.kh/sites/default/files/media/Press_Release_Conclusion_7th_Plenary_Session_(ENG).pdf)

27. Abovementioned ECCC Press Release.

28. For more details on the Lead Co-Lawyers, see Part II on the legal representation of Civil Parties before the ECCC.

29. ECCC Internal Rule 12.

- The *admissibility* of Civil Party applications is decided on a case-by-case basis during the judicial investigation stage, rather than in the course of the trial;
- *Legal representation* is individual and compulsory: each Civil Party must be represented by counsel before the end of the judicial investigation;
- *Participation* is dual: individual at the preparatory stage, collective at trial through the group of Civil Parties;
- The *right to reparation* is only collective, leading to collective and moral reparations.

We will return to each of these developments in the following sections of the report.

### **3) A system affected by the severance of proceedings decided by the Trial Chamber?**

On **22 December 2011**, the Trial Chamber decided to sever the proceedings in Case 002 and divide it into several sub-cases relating to distinct factual allegations and legal issues.

The first sub-trial aims to:

- establish the roles played by the accused in all of the policies covered by the closing order, thus forming the basis for the charges to be examined in the future trials; and
- try the alleged crimes of forced population transfer phases 1 and 2.<sup>30</sup>

The consequences for Civil Parties are numerous and raise a number of important issues that have not yet been resolved:

- What fate will befall the Civil Parties whose harm is not related to population transfer phases 1 and 2?
- Will the Civil Parties who are not involved in phases 1 and 2 of population transfer be included in the consolidated group represented at hearings during the first sub-trial? Should the consolidated group also be severed to match the contours of the new more limited trial?

The Trial Chamber does not appear to make much of these questions since it has already taken care to state in its severance decision:

*“Under the applicable legal framework, Civil Parties no longer participate individually on the basis of their particular harm suffered, but instead comprise a consolidated group whose collective interests are represented by the Civil Party Lead Co-Lawyers during the trial stage and beyond. Limiting the scope of facts to be tried during the first trial accordingly has no impact on the nature of Civil Party participation at trial, and their formulation of reparations claims made on their behalf by the Lead Co-Lawyers.”*<sup>31</sup>

At the time of writing, the Chamber has drawn no practical consequences from the severance concerning the possible participation by, or reparation for, Civil Parties whose damage does not come within the crimes alleged in the first sub-trial.

30. To recap, “forced population transfer phase I” concerns the evacuation of Phnom Penh on 17 April 1975, and “forced population transfer II” covers transfers to the North and North West zones between April 1975 and 1977.

31. Case 002-E124, Trial Chamber, *Severance Order pursuant to Internal Rule 89ter*, 22 September 2011, para. 8.

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As stated in introduction, the victim (*i.e.* a natural person or legal entity who considers himself to have suffered harm caused by a crime within the jurisdiction of the ECCC)<sup>32</sup> may participate in two ways:

- as **complainants**, by filing complaints with the Co-Prosecutors, who decide whether or not to prosecute. This choice does not give rise to any individual right of the victim to participate in the proceedings;<sup>33</sup>
- by choosing to become **Civil Parties** via an application to the Co-Investigating Judges; thus becoming veritable parties to the proceedings alongside the Prosecutors and the charged persons / Accused.

The applicant can only become a Civil Party if the application is declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber (*Part I*).

The Civil Party must be represented by a lawyer (*Part II*); he or she has the right to participate in the entire judicial process (*Part III*), ultimately to obtain collective and moral reparation (*Part IV*).

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32. ECCC Internal Rules, Glossary.

33. See ECCC Internal Rule 49: Exercising Public Action

*“1. Prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint.*

*2. The Co-Prosecutors shall receive and consider all written complaints or information alleging commission of crimes within the jurisdiction of the ECCC. Such complaints or information may be lodged with the Co-Prosecutors by any person, organisation or other source who witnessed or was a victim of such alleged crimes, or who has knowledge of such alleged crimes.*

*3. A complaint referred to in this Rule may also be prepared and/or lodged on behalf of a Victim by a lawyer or Victims’ Association. Copies of all such written complaints shall be kept with the Office of Administration and may be translated into the working languages of the ECCC, as needed.*

*4. Such complaints shall not automatically initiate criminal prosecution, and the Co-Prosecutors shall decide, at their discretion, whether to reject the complaint, include the complaint in an ongoing preliminary investigation, conduct a new preliminary investigation or forward the complaint directly to the Co-Investigating Judges. The Co-Prosecutors shall inform the complainant of the decision as soon as possible and in any case not more than 60 (sixty) days after registration of the complaint.*

*5. A decision not to pursue a complaint shall not have the effect of res judicata. The Co-Prosecutors may change their decision at any time in which case the complainant shall be so informed as soon as possible and in any case not more than 30 (thirty) days from the decision.”*

# PART I

## Civil Party admissibility

In a system where victims can become true parties with a wide range of rights, and participate throughout the judicial proceedings, the issue of the admissibility of their applications is crucial.

It is essential to ensure that these individuals have standing to seek such status, and that their participation will thus contribute both to justice and the pursuit of their own interest in obtaining redress.

However, a certain confusion reigned at the initial stages, following the decision of the Co-Investigating Judges to leave communication on the scope of the investigation until very late, leaving the organizations responsible for identifying the victims and collecting their testimony in a detrimental blur (*I*).

Admissibility is now settled at the investigation stage (*II*), and is assessed in light of the relation between the harm suffered and the alleged crimes (*III*).

### **I – THE GAP BETWEEN THE WORK OF IDENTIFYING AND ASSISTING VICTIMS AND THE SCOPE OF INVESTIGATIONS: THE DETRIMENTAL EFFECTS OF THE BELATED ANNOUNCEMENT OF THE SCOPE OF THE INVESTIGATION**

#### **1) The job of identifying and assisting victims is conducted by intermediary organizations**

Direct support for victims in collecting their stories and assisting them in their decision to participate in the proceedings is a cornerstone in constructing a victim participation system. If misdirected, the system as a whole may be weakened.

In this case, the policy of victim support was not coordinated by the ECCC's own services, but was conducted primarily through intermediary organizations.

82% of the Civil Party applications were filed with the assistance of intermediaries, either associations or non-governmental organizations, including more than half by one of the FIDH member organizations in Cambodia, the Cambodian Human Rights and Development Association (ADHOC).<sup>34</sup>

#### **2) Working “blind”**

The judicial investigation before the ECCC is confidential, *i.e.* any person involved is bound to confidentiality.

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34. Case 002-D427, *Closing Order*, 15 September 2010, paras. 10 and following.

This confidentiality is not absolute, and the Internal Rules allow the Co-Investigating Judges to provide such information relating to pending cases as “*they deem essential to keep the public informed of the proceedings.*”<sup>35</sup>

However, it was not until 5 November 2009, more than two years after the opening of the investigation, that the Co-Investigating Judges publicly defined the scope of the investigation in Case 002 to keep the public informed and “*in order to assist any members of the public who wish to apply to become a Civil Party.*”<sup>36</sup>

There were concrete consequences of this late announcement: the intermediary organizations responsible for identifying victims throughout Cambodia did their work of approaching victims and collecting evidence “blind”, with the risk of forwarding applications that fell outside the scope of the investigation.

### **3) Confusion between “complainant” and “Civil Party” status as a consequence of the existence of a single victim information form**

The confidential nature of the investigation also had an impact on the choice made by the victims between the two possible statuses: *complainant* or *Civil Party*.

The first step for anyone who wants to participate is to fill out a “victim information form.”<sup>37</sup> This form has four parts:

- Part A: Personal information about the victim;
- Part B: Information about the alleged crime(s);
- Part C: The Civil Party application, which states “*You should only complete this Part if you wish to be joined as a Civil Party to a judicial investigation.*” A box recalls that “*in order for Civil Party action to be admissible, the injury must be: a) physical, material or psychological; b) the direct consequence of the offence, personal and have actually come into being.*”;
- Part D: Signatures: the victim must clearly indicate whether he or she wishes to participate in the proceedings before the ECCC as a witness, complainant or Civil Party (checkbox for each of the three possibilities).

The fact that many of these forms had already been filed before the scope of the investigation was made public made the choice between the radically different statuses of Civil Party or complainant difficult if not inoperative.

It may safely be assumed that many victims applied as Civil Parties because neither they nor the intermediary organizations assisting them could be certain that the alleged harm related to crimes under investigation.

In addition, the work of “filling in” the form faced very practical problems: for example, the words “complainant” and “Civil Party” are often translated by one and the same word in Khmer.

The number of victims thus opting for Civil Party status was very high and the Office of the Co-Investigating Judges was faced with a real legal and practical challenge.

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35. ECCC Internal Rule 56(2)(a).

36. Public Statement of the Office of Co-Investigating Judges, 5 November 2009: [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_Press\\_Release\\_5\\_Nov\\_2009\\_Eng\\_0.pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_Press_Release_5_Nov_2009_Eng_0.pdf)

37. The form is available on the ECCC website (in French, Khmer and English): <http://vss.eccc.gov.kh/en/documentation/form>



#### **4) The diversity of Civil Parties admitted in Case 002**

Although the Civil Parties in Case 001 were direct or indirect victims of crimes committed at the S-21 security centre, the diversity and number of Civil Parties admitted in Case 002 requires comment.

During the investigation, the Victim Support Section sent the Co-Investigating Judges 4,128 Civil Party applications.

Nearly 40% of the applicants reside in the provinces of Kampot, Kampong Cham, Kandal and Kampong Speu. 133 applicants live abroad, mainly in the United States and France. Over 60% of all the applicants are women. Half of them were between the ages of 18 and 35 on 17 April 1975, and over a third were minors. 24 were actually born after the end of the Democratic Kampuchea regime.

Subsequently, 104 applicants indicated that they preferred to change status and remain simple complainants; 11 applicants withdrew their application entirely, and it was discovered that 19 duplicate Civil Party applications had been submitted and 6 Civil Party applications have since been re-submitted at the request of the victims.<sup>38</sup>

The Co-Investigating Judges were thus required to rule on the admissibility of 3,988 Civil Party applications pursuant to Internal Rules 23 and 23*bis*. At that time they found that 18 applicants had died after applying.

## **II – ADMISSIBILITY IS NOW ASSESSED DURING THE JUDICIAL INVESTIGATION: THE NEED TO TAKE ACCOUNT OF THE EXPECTATIONS OF VICTIMS AFTER THE DISAPPOINTMENT GENERATED BY CASE 001**

Case 001 highlighted the need to take account of the expectations of Civil Parties in the timing of examination of the admissibility of their applications.

Indeed, in Case 001, nearly a third of the Civil Parties were declared inadmissible by the Trial Chamber, several years after their preliminary admission by the Co-Investigating Judges; thus creating genuine misunderstanding among the victims, especially since they had been treated as Civil Parties throughout the proceedings, with the same participatory rights as the others.<sup>39</sup>

In a case where there were very few direct victims (*i.e.* the survivors of S-21), the discussion was mainly focused on so-called “indirect victims”, especially the harm alleged by members of the extended family of a victim.

The Chamber considered that, in exceptional circumstances, their loss could be considered a direct and demonstrable consequence of the crime if the Civil Parties were able to prove “both the alleged kinship and the existence of circumstances giving rise to special bonds of affection or dependence on the deceased.”<sup>40</sup>

38. Case No. 002-D427, *Closing Order*, 15 September 2010, paras. 10 and following.

39. See in particular Silke Studzinsky, “Victim’s Participation before the Extraordinary Chambers in the Courts of Cambodia”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 10/2011, pages 887-891.

40. Case 001-E188, Trial Chamber, *Judgment of the Trial Chamber in Case 001 against Kaing Guek Eav alias Duch*, 26 July

In addition, Civil Parties who claimed to be victims because of the loss of a close relative at S-21 or S-24 had to prove that at least one member of their family had been the immediate victim of the crimes for which Kaing Guek Eav was convicted.

Thus, in a decision issued on 26 July 2010, the Trial Chamber only confirmed 64 of the 90 Civil Parties originally admitted in Case 001.<sup>41</sup>

In an appeal judgment dated 3 February 2012, the Chamber of the Supreme Court allowed the appeals of 10 out of the 22 Civil Parties whose claims had been rejected by the Trial Chamber. It noted that “[n]otwithstanding a lack of legal error on the part of the Trial Chamber, the Supreme Court Chamber nonetheless notes that there appears to have been a fundamental misunderstanding between the Trial Chamber and the Civil Party Appellants as to the merits and legal effect of the initial review of their applications.”<sup>42</sup>

In its decision, the Chamber of the Supreme Court recognized that the application process and final refusal to grant the appellants Civil Party status may have “*caused anguish and frustration at the futility of their practical and emotional investment in the proceedings.*”

Faced with the risk of many Civil Party applications in Case 002 being rejected after several years of proceedings, the Plenary Assembly decided to amend the Rules so that admissibility is determined at the end of the judicial investigation, by separate order, or on appeal to the Pre-Trial Chamber.

Determining the fate of Civil Party applications before the substantive hearings at trial has two advantages:

- It evacuates debate at trial on admissibility related issues, thus reducing the length of the hearings;
- And it avoids Civil Parties being involved throughout the proceedings before being ultimately found inadmissible to participate.

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2010, para. 643.

41. 93 Civil Parties were allowed to participate in the proceedings in Case 001. Three Civil Parties having withdrawn, the Trial Chamber had to decide on the admissibility and reparation requests of 90 Civil Parties.

42. Case No. 001-F26/3, *Summary of the judgment of the Chamber of the Supreme Court*, 3 February 2012, para. 59.

### III – ELIGIBILITY CRITERIA: THE INTERPRETATION BY THE CO-INVESTIGATING JUDGES OVERRULED BY THE PRE-TRIAL CHAMBER

Internal Rule 23 *bis* provides:

“1. In order for Civil Party action to be admissible, the Civil Party applicant shall:

a) be clearly identified; and

b) 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 upon which a claim of collective and moral reparation might be based. When considering the admissibility of the Civil Party application, **the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true.**”

This rule led to differing interpretations by the Co-Investigating Judges and the Pre-Trial Chamber.

The Co-Investigating Judges considered the admissibility criterion should be the link between the harm suffered and the underlying **material facts**, whereas the Pre-Trial Chamber overturned this approach, finding that the link should be made with the alleged **crimes**.

#### **1) The criterion applied during the judicial investigation: a direct link between the harm and the material facts alleged in the Introductory and Supplementary Submissions**

The Co-Investigating Judges ruled on the admissibility of the 3,988 Civil Party applications they received in Case 002 in separate orders.

2,123 Civil Parties were deemed admissible by the Co-Investigating Judges, who focused their search on the link between the harm and the material facts alleged in the Co-Prosecutors’ introductory and supplementary submissions, thus defining the scope of their investigation *in rem*.<sup>43</sup>

The Co-Investigating Judges handed down 25 separate orders between 25 August 2010 and 15 September 2010. None of them was appealed by the Co-Prosecutors or the Defence.<sup>44</sup>

In consideration of “*the need for coordination of outreach and legal representation for Civil Parties and complainants*”, the Co-Investigating Judges decided to issue admissibility orders based upon the current residence of applicants, as indicated on their application forms.

The Lead Co-Lawyers appealed to the Pre-Trial Chamber on behalf of all those victims whose Civil Party applications had been rejected by the Co-Investigating Judges.

43. Admissibility Orders.

44. All of the Civil Party applications that were ruled inadmissible were nevertheless kept on the case file as complaints, where they joined the 4,151 complaints already on file with the Co-Prosecutors.

## **2) The wider test applied by the Pre-Trial Chamber: the causal link between the harm and the *alleged crimes***

In its decision dated 24 June 2011,<sup>45</sup> the Pre-Trial Chamber (*inter alia* criticizing the late communication of the scope of the investigation by the Co-Investigating Judges) held that they had reviewed the Civil Party applications using the *wrong test* when only allowing those whose alleged harm resulted from the *facts* under investigation.

Adopting a strict reading of Internal Rule 23 *bis* (b) the Pre-Trial Chamber noted that causation should not be limited to the alleged facts (*i.e.* the material facts under investigation, confined to those sites where the crimes were committed), but to the *alleged crimes*, *i.e.* the legal characterisation of these facts that “*include crimes which represent mass atrocities allegedly committed by the Charged Persons by acting in a joint criminal enterprise together and with others against the population and throughout the country.*”<sup>46</sup>

The Pre-Trial Chamber finally declared 1,728 additional Civil Parties admissible.

Conscious of the large number of Civil Parties now allowed, the Chamber went to great pains to recall in its decision of 24 June 2011 that “*the moral and collective nature of representation before the Trial Chamber at trial before ECCC do not support any concerns that a possible admission of a larger number of people as Civil Parties may have an adverse effect on the rights of the accused.*”<sup>47</sup>

The total number of Civil Parties admitted in Case 002 is **3,866**.

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45. Case No. 002-D404/2/4, Trial Chamber, *Decision on appeals against the orders of the Co-Investigating Judges on the admissibility of Civil Party applications*, 24 June 2011.

46. Abovementioned decision, para. 42.

47. Abovementioned decision, para. 97.

# Actors supporting Civil Parties

## **The ECCC Victims Support Section**

The main tasks of the Victims Support Section are as follows:<sup>48</sup>

- Under the supervision of the Co-Prosecutors, assist Victims in lodging complaints;
- Under the supervision of the Co-Investigating Judges, assist victims in submitting Civil Party applications;
- Maintain a list of foreign and national lawyers registered with the Cambodian Bar Association;
- Administer applications for admission to the list of Victims' Associations approved to act on behalf of Civil Parties before the ECCC;
- Provide general information to victims, including Civil Parties;
- Assist and support Civil Party and complainants' attendance in court proceedings;
- In consultation with the Civil Party Lead Co-Lawyers and the Public Affairs Section, where appropriate, undertake outreach activities related to Victims, including Civil Parties.

The Victim Support Section also has an important role in the implementation of reparations:

- it works in co-operation with the Lead Co-Lawyers, and, where appropriate, in liaison with governmental and non-governmental organisations, to identify, design and later implement reparation projects;
- it is responsible for the development and implementation of non-judicial programs and measures addressing the broader interests of victims. Such programs may, where appropriate, be developed and implemented in collaboration with governmental and non-governmental organisations external to the ECCC.

## **The Lead Co-Lawyers Section**

The Lead Co-Lawyers Section is an independent entity. It includes:

- the Civil Party Lead Co-Lawyers
- the staff assisting them.

## **The Civil Party Lead Co-Lawyers**

The Lead Co-Lawyers include a Cambodian lawyer and an international lawyer, chosen and funded by the ECCC.

Their duties begin when the Trial Chamber is seized of a matter and include, at trial and at any subsequent stage:

- representing the interests of the consolidated group of Civil Parties;
- ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of Civil Parties.

## **Civil Party lawyers**

Victims wishing to become Civil Parties before the ECCC may be represented by a Cambodian lawyer alone or in conjunction with an international co-lawyer.<sup>49</sup>

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48. ECCC Internal Rule 12 *bis*.

49. See Part II on the representation of Civil Parties before the ECCC.

# PART II

## The representation of Civil Parties before the ECCC

Civil Parties can participate directly in pre-trial proceedings, however the amended ECCC Internal Rules require them to be represented by a lawyer once the Closing Order is issued (*I*).

From that moment on, their rights are exercised through their lawyer(s). Each Civil Party must be represented by at least one Cambodian lawyer, either alone or in tandem with one or more international lawyers who are admitted to the ECCC list of qualified lawyers, according to criteria established by the Internal Rules (*II*).

Unlike the defence lawyers for the accused, there is no system of legal aid for Civil Parties (*III*), who are represented by groups of lawyers, often backed by non-governmental organizations (*IV*).

Since the establishment of the “consolidated group” of Civil Parties and the appointment of the Lead Co-Lawyers, the question whether the existing system of Civil Party representation is complementary or subsidiary has not been resolved (*V*).

### **I – FROM OPTIONAL TO COMPULSORY LEGAL REPRESENTATION AT THE END OF THE JUDICIAL INVESTIGATION**

Up until early 2010, Civil Parties had a simple *entitlement* to be represented by a lawyer. However, the lessons from Case 001 and the large number of Civil Parties participating at trial in Case 002 led the Plenary to revise the Internal Rules on 9 February 2010.

ECCC Internal Rule 23 *ter* now makes a distinction:

- At the investigation stage, Civil Parties have simply the *right* to be represented by counsel;
- From the issue of the Closing Order, a Civil Party wishing to participate in the proceedings *must* be represented by a lawyer.

This binding rule implies that if legal representation ends, a Civil Party wishing to continue to participate in the proceedings must instruct another lawyer.

Where necessary, the ECCC judicial body seized of the Case (the Co-Investigating Judges or the Trial Chamber) may order a Civil Party to join an existing group of Civil Parties, already jointly represented by one or more lawyers.

## **II – “MIXED” LEGAL REPRESENTATION WITH ADMISSION CRITERIA DEFINED BY THE ECCC INTERNAL RULES**

### **1) Mixed representation**

Before the ECCC, victims wishing to become Civil Parties can be represented by a Cambodian lawyer acting alone or in cooperation with an international co-lawyer appointed in addition to the Cambodian lawyer.

The following provisions apply at all stages of the proceedings before the ECCC:

- The Cambodian lawyer requests the accreditation of the foreign lawyer at the time of the first presentation of the latter before each judicial body of the ECCC. Subsequently, the foreign lawyers enjoy the same rights and privileges as Cambodian lawyers before the ECCC;
- The Cambodian lawyer has the right to speak first.

### **2) The criteria for admission of lawyers authorized to represent Civil Parties**

#### *a) For Cambodian lawyers*

The criteria for admission to the list of Cambodian lawyers are:

- being a member of the Bar Association of the Kingdom of Cambodia (BAKC);
- having established competence in criminal law and procedure at the international or national level.

#### *b) For foreign lawyers*

Foreign lawyers wishing to represent Civil Parties must meet a number of criteria to be included in the list of lawyers maintained by the Victim Support Section. They are:

- be a current member of the bar in a United Nations Member State;
- have a degree in law or an equivalent legal or professional qualification;
- be fluent in Khmer, French or English.
- have established competence in criminal law and procedure at the international or national level;
- have working experience in criminal proceedings, as a lawyer, judge or prosecutor, or in some other capacity
- not have been convicted of a serious criminal or disciplinary offence considered by their professional association to be incompatible with acting as a defence lawyer
- be admitted to the bar in Cambodia.

## **III – REPRESENTATION IS MAINLY PROVIDED BY *PRO BONO* LAWYERS APART FROM ONE COURT FUNDED TEAM**

### **1) Representation is mainly provided by *pro bono* lawyers: the detrimental effects of the absence of legal aid for Civil Parties**

Although the ECCC Internal Rules provide for systematic legal aid to indigent defendants,<sup>50</sup> and even though legal aid for victims has been requested by numerous human rights associations, including FIDH, there is currently no system of legal aid for Civil Parties.

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50. ECCC Internal Rule 22(b).

The lawyers act almost exclusively on a *pro bono* basis, either individually or (more frequently) on behalf of a non-governmental organization, most of which were previously involved in outreach and awareness activities for victims, that has retained the lawyers.

This lack of legal aid is severely detrimental, especially since some teams represent hundreds of clients spread all across Cambodia.

Without the financial support of NGOs, the representation mission would *de facto* impossible.

**2) A breach of equality in the representation of Civil Parties: the financing of one team of lawyers by the ECCC, composed only of Cambodian lawyers**

Whereas the majority of Civil Party lawyers work *pro bono*, one team of lawyers, composed only of Cambodian lawyers, is funded by the ECCC. This situation derives from the revision of the Internal Rules in February 2010 to introduce compulsory legal representation.

In Case 002, only 3,201 of the 3,990 Civil Parties admitted during the investigation had given valid powers of attorney designating Cambodian (and international) lawyers to represent them.

At the close of the investigation in Case 002 (given that all Civil Parties must be represented at this stage) the Co-Investigating Judges had to arrange legal representation for all those Civil Parties that were not yet represented.

Invited to provide its views, the Victims Unit (since renamed the Victim Support Section) responded by requesting the Co-Investigating Judges to consider inter alia the following issues:

- take no action to disturb existing groups or selections of lawyers;
- proceed on a basis that provincially-oriented representation is best likely to address the remaining difficulties in legal representation;
- direct Civil Party lawyers and the Victim Support Section, working in conjunction, to continue to identify and contact unrepresented individuals falling within existing teams’ expressed willingness and abilities to absorb more clients, with a view to procuring formal client authority.<sup>51</sup>

Following the recommendations of the Victim Support Section and taking account of the nature of the intervention of *pro bono* lawyers, the Co-Investigating Judges contacted the existing teams to see if they were ready and able to represent a larger number of Civil Parties.<sup>52</sup>

Most teams volunteered to represent more Civil Parties in connection with their chosen “theme”.

Meanwhile, on 11 June 2010, a victims’ association, the Association of Victims of the Khmer Rouge in Cambodia (AVKRC) was recognized as an association of victims pursuant to Rule 23 *ter* of the Internal Rules.<sup>53</sup>

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51. Case No. 002-D289/1, Issues of grouping of Civil Parties and Civil Party applications for purposes of legal representation, 10 January 2011, confidential, par. 24.

52. Case No. 002-D337/6, Inter-Office Memorandum to the Co-Investigating Judges on request by Civil Party lawyers for an extension of time to file additional information concerning Civil Parties, 29 April 2010.

53. Case No. 002-D337/8.1, Victims Support Section’s Letter of Recognition.



Furthermore, the Victim Support Section engaged a team of Cambodian lawyers to represent Civil Parties who could not be classed in the existing teams, as authorized by Internal Rule 12.<sup>54</sup>

Thus, on 2 August 2010, the Co-Investigating Judges issued an order organizing the representation of the 799 unrepresented Civil Parties.<sup>55</sup> They confirmed that:

- 81 Civil Parties would be represented by the Association of Victims of the Khmer Rouge in Cambodia (AVKRC);
- 139 Civil Parties would be divided among pre-existing teams.<sup>56</sup>

By the same order, they designated the ECCC team of lawyers to represent the remaining 569 Civil Parties.

This is the only team to be funded by the Court, as the lawyers are paid from the Court’s “national” budget.

It is unfortunate that this team - originally intended to be “mixed” including an international component - consists only of Cambodian lawyers, following the disinvestment of the UN on the issue of legal representation for victims.

#### **IV – REPRESENTATION ORGANIZED BY GROUPS, MAINLY LINKED TO NGOs**

Although the Internal Rules provide for the creation and registration of victims associations, through which a group of victims may choose to exercise their civil action, this possibility has not attracted much interest.<sup>57</sup> As mentioned above, only one victim association has been established: the Association of Victims of the Khmer Rouge in Cambodia (AVKRC), which brings together 81 Civil Parties.

Most Civil Parties have rather joined loose “groups”, as permitted by the Internal Rules. They can thus be represented by a common lawyer chosen from the list compiled by the Victims Support Section.<sup>58</sup>

Although such grouping may be organised on a voluntary basis, the Internal Rules allow the Judges to organize common representation themselves.<sup>59</sup>

Since a modification of the Internal Rules on 3 August 2011, the Co-Investigating Judges can now require Civil Parties to regroup and choose a common lawyer within a set time, when the interests of justice require it.

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54. Internal Rule 12 provides that “*the Administration Office may enter into contracts with Civil Party lawyers.*”

55. Case No. 002-D337/10, *Order on the Organisation of Civil Party Legal Representation under Rule 23 ter of the Rules*, 2 August 2010.

56. Above-mentioned Order, Appendix C.

57. ECCC Internal Rule 23 *quater*.

58. ECCC Internal Rule 23 *ter*.

59. ECCC Internal Rule 23 *ter*.

### **1) Legal representation in Case 001**

In Case 001, 93 Civil Parties were admitted to participate in the proceedings.

All were represented by at least one Cambodian lawyer and organized into four groups.

Three groups were formed by NGOs that instructed lawyers to represent the victims they had already identified: DC-CAM, CDP-ADHOC and ASF. A team of individual lawyers - the "Paris team" - also intervened and accounted for a smaller number of clients.

### **2) Legal representation in Case 002**

There are currently 11 teams representing a widely varying number of Civil Parties in Case 002, all with one or more international and Cambodian lawyers:

- The "ECCC" team represents 1,174 Civil Parties
- The "ASF France" team represents 1,130 Civil Parties
- The "Mohan" team represents 133 Civil Parties
- The "CDP-LAC" team represents 588 Civil Parties
- The "CJA" team represents 43 Civil Parties
- The "AKRVC" team represents 82 Civil Parties
- The "FIDH" team represents 10 Civil Parties
- The "Nguyen" team represents 82 Civil Parties
- The "Justice for Cambodia" team represents 51 Civil Parties
- The "Auboin" team represents 18 Civil Parties
- The "Maat" team represents 560 Civil Parties.

As in Case 001, these teams were originally established around pre-existing NGOs that retained them, but some have also become specialized in specific themes. In this regard it may be noted that:

- The "Mohan" team primarily represents Civil Parties related to Khmer Krom issues;
- The "Nguyen" team is mainly concerned with Civil Parties related to genocide against the Vietnamese;
- The "Maat" team is primarily concerned with Civil Parties raising issues of genocide against the Cham;
- The "CDP LAC" team represents many Civil Parties concerned with the issue of forced marriages;
- The "CJA" and "FIDH" teams only represent Civil Parties from the Cambodian diaspora, in the United States and France respectively.

## **V – THE CHALLENGES OF LEGAL REPRESENTATION: RECONCILING THE REPRESENTATION OF CIVIL PARTIES AND THE CONSOLIDATED GROUP OF CIVIL PARTIES**

During revision of the Internal Rules in February 2010, the ECCC Plenary Assembly decided to establish the function of Civil Party Lead Co-Lawyers, responsible for representing the interests of the “consolidated group” or “collective” of Civil Parties. The two Lead Co-Lawyers, one international and one Cambodian, are selected and funded by the ECCC, and work with the support of the Civil Party lawyers appointed by the victims.<sup>60</sup>

This raises a simple but legally complex question: who are now the real parties at trial? The Civil Parties, as individuals represented individually by lawyers duly authorized by them, or the “consolidated group” of Civil Parties whose interests are represented by the Lead Co-Lawyers, who have received no mandate to act in the name of the individual Civil Parties?

How may we reconcile the rules relating to individual representation (the Internal Rules require all Civil Parties to be represented by a lawyer) and those related to participation (the Civil Party lawyers must bow to the Lead Co-Lawyers, who are the only representatives of the interests of the whole)?

FIDH, ADHOC and LICADHO had already raised the issue of representing the interests of the consolidated group of Civil Parties in comments on the proposed amendments to the ECCC Internal Rules for the participation of victims, before the February 2010 session of the ECCC Plenary Assembly: the interests of the Civil Parties are wide ranging and may sometimes be in conflict within the consolidated group, raising the need to establish a mechanism to resolve potential conflicts of interest.<sup>61</sup>

### **1) The new system is complementary rather than subsidiary**

When the Trial Chamber issued a memorandum planning to replace the names of Civil Party lawyers from Trial Chamber legal documents with those of the two Lead Co-Lawyers, the latter clarified their position:

*“The ECCC legal framework shows the real and consistent coexistence of the notions of individual Civil Party representation and representation of the interests of the consolidated group of Civil Parties. **The system in place is essentially complementary and not subsidiary.**”<sup>62</sup>*

Indeed, Internal Rule 23<sup>ter</sup> (2) specifies that when Civil Parties are represented by lawyers, their rights are exercised through the lawyer. It could therefore be inferred from the Internal Rules that a lawyer who represents a Civil Party is obliged to delegate the duty of representation to the Lead Co-Lawyers.

At the same time, such a delegation of representation is not possible under the legal framework of the ECCC, since Rule 23 <sup>ter</sup> (1) clearly states that:

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60. ECCC Internal Rule 12 <sup>ter</sup>.

61. See FIDH-ADHOC-LICADHO, Comments on victim participation at the Extraordinary Chambers in the Courts of Cambodia (ECCC), January 2010: <http://fidh.org/FIDH-ADHOC-LICADHO-Comments-on>

62. Case No. 002-E128, *Civil Party Lead Co-Lawyers’ request regarding the names of Civil Party Lawyers*, 7 October 2011.

*“Where representation ceases, and the Civil Party wishes to continue participation in proceedings, the Civil Party shall **engage alternative counsel**. Where necessary, the relevant judicial body of the ECCC may direct the Civil Party to join an existing Civil Party group.”*

This statement indicates unequivocally that the lawyer retained by the Civil Party remains at all times the person in charge of the individual exercise of his rights during the proceedings.

However, the Trial Chamber has remained deaf to these arguments, and its action continues to mention only the name of the Lead Co-Lawyers at the expense of the Civil Party lawyers.

## **2) Cooperation between the Lead Co-Lawyers and the Civil Party Lawyers**

In August 2011, the Lead Co-Lawyers adopted internal regulations on coordination with Civil Party lawyers, after conducting a consultation process with those concerned, in which it is noted that, in order to ensure effective representation of Civil Parties, the primary duty of the Lead Co-Lawyers is to consult Civil Party lawyers and strive to reach a consensus to coordinate representation of Civil Parties at trial.<sup>63</sup>

The Civil Party lawyers retain primary responsibility vis-à-vis their clients<sup>64</sup> whereas the Lead Co-Lawyers retain ultimate responsibility for overall advocacy, strategy and presentation of the interests of the collective of Civil Parties.<sup>65</sup>

A voting procedure is provided in case of disagreement between the Lead Co-Lawyers and Civil Party lawyers on *“an important question of law or policy.”*<sup>66</sup> To date, no such question has been put to a vote.

Each team has one vote, except for the Cambodian team of lawyers funded by the ECCC and the Lawyers Without Borders team (ASF), which each have two votes because of the number of clients they represent.<sup>67</sup>

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63. Art. 1(2) of the Lead Co-Lawyers and Civil Party lawyers Administrative Internal Regulations, August 2011.

64. Art.1(4) of the aforementioned Internal Regulations.

65. Art.1(5) of the aforementioned Internal Regulations.

66. Art. 6(1) of the aforementioned Internal Regulations.

67. Annex II to the aforementioned Internal Regulations.

# PART III

## The participation of Civil Parties before the ECCC

Civil Parties participate in the proceedings in support of the prosecution of persons responsible for crimes within the jurisdiction of the ECCC.<sup>68</sup>

To this end, they have a number of *rights*,<sup>69</sup> which enable them to participate both in the judicial investigation (*I*), during the pre-trial preparatory phase (*II*) and at trial (*III*).

These rights are either granted expressly to Civil Parties or attributed to all “parties” without distinction.<sup>70</sup>

Although the Internal Rules enshrine these rights, the Trial Chamber has taken several decisions that frame or even restrict their exercise (*IV*).

### I – PARTICIPATION IN THE INVESTIGATION PHASE

The extent of Civil Party rights cannot be understood without a brief appraisal of the characteristics of proceedings during the judicial investigation (*I*).

Although Civil Parties do not have the right to initiate public action through their application (*2*), they nevertheless have the right to request the Judges to perform a number of investigative acts (*3*), participate in provisional detention hearings (*4*) and enjoy the rights normally granted to all parties during the investigation phase (*5*).

#### 1) The judicial investigation: a specificity of the ECCC

There are major differences between the procedure applicable before the ECCC and other international or hybrid tribunals, based on common law systems, especially as regards the judicial investigation.

Indeed, under Cambodian law, which adopted the French concept of the investigating judge, pre-trial investigations are mainly carried out not by the parties (prosecutors and defence), but by two Co-Investigating Judges, one national and one international.

They are charged with collecting sufficient evidence to determine whether the facts referred to them in the Co-Prosecutor’s Introductory Submission constitute crimes within the jurisdiction of the ECCC, on the one hand, and whether the person(s) under investigation should be sent for trial before the Trial Chamber, on the other.

68. ECCC Internal Rule 23.

69. It should be noted that, like the other parties, Civil Parties have the right to request disqualification of Judges.

70. The glossary appended to the Internal Rules indicates that the word “Party” refers to the Co-Prosecutors, the charged persons / Accused and Civil Parties.

Thus, unlike common law systems, where evidence and arguments are presented directly to the court by the parties at trial, all the documents gathered during the judicial investigation and placed on the case file by the Co-Investigating Judges constitute the basis for the proceedings before the Trial Chamber.

In principle, proceedings during the investigation phase are written and confidential. The latter principle aims to safeguard the rights and interests of the parties, and more particularly:

- respect the presumption of innocence of suspects and charged persons;
- allow protection of the identity of witnesses and victims, if necessary;
- contribute to the efficient conduct of the investigation.

In practice, this means that any person participating in the proceedings is required to maintain confidentiality, and that all documents and information in the case file are confidential, even where a document only confirms a known fact.

Civil Parties, like the other parties, have a number of rights to participate during this crucial phase of the proceedings.

## **2) Before the ECCC, the Civil Parties cannot trigger public action through their applications**

### ***a) The applicable rules***

At the ECCC, unlike under Cambodian criminal procedure, victims cannot launch public action simply by applying to become a Civil Party: they may only apply to join an on-going investigation, and cannot extend the investigation beyond the *in rem* referral to the Co-Investigating Judges as defined by the Co-Prosecutors.

The Internal Rules state that “*the Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.*”<sup>71</sup> If new facts are brought to the knowledge of the Co-Investigating Judges during the investigation, including through the filing of new Civil Party applications, they must inform the Co-Prosecutors, unless these new facts are merely aggravating circumstances of matters referred to in a previous submission. If no supplementary submission is issued, the Co-Investigating Judges have no authority to investigate the new developments.

### ***b) In practice***

It is difficult to measure the full impact of Civil Party filings during the judicial investigation.

However, at least two supplementary submissions were received after the transmission of a Civil Party request by the Co-Investigating Judges concerning allegations not yet covered by the scope of the investigation.

On 26 March 2008, a supplementary submission was received regarding a security centre in the North zone following Civil Party applications relating to crimes committed in the course of the activities of the security centre during the period of Democratic Kampuchea.<sup>72</sup>

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71. ECCC Internal Rule 55.

72. Case No. 002-D83, *Supplementary Submission by the Co-Prosecutors concerning the North Zone security centre*, 26 March 2008.

On 30 April 2009, a supplementary submission was filed concerning forced marriages and non-consensual sexual relations alleged in four applications filed by Civil Parties before the Co-Investigating Judges.<sup>73</sup>

### **3) The right of Civil Parties to request the Co-Investigating Judges to conduct investigative action**

#### ***a) The applicable law***

The Civil Parties have the right to request hearings, interviews, confrontations, site investigations and expert reports.<sup>74</sup>

They also have the right to appeal against any order refusing such a request.<sup>75</sup>

#### ***b) Practical Examples***

During the investigation phase of Case 002, the Civil Parties filed a number of requests for action concerning:

- forced marriages and sexual crimes, including a request to hear Civil Parties and witnesses;<sup>76</sup>
- the crime of genocide against Khmer nationals, including a request for the appointment of an independent expert to examine the facts and determine whether the crime of genocide against the Khmer national group may be retained against the charged persons;<sup>77</sup>
- genocide against the Khmer Krom and Vietnamese;<sup>78</sup>
- the crime of enforced disappearance, including a request to hear former Khmer Rouge cadre;<sup>79</sup>
- property belonging to the charged persons, including a request to conduct a thorough investigation of any assets which they may hold in Cambodia or abroad.<sup>80</sup> This request was rejected as not being within the scope of the investigation.<sup>81</sup>

Although several requests were formally accepted, it is difficult to assess the actual effect on the work of the Co-Investigating Judges.

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73. Case No. 002-D146/3, *Co-Prosecutors' Response to the Forwarding Order of the Co-Investigating Judges*, 30 April 2009.  
74. ECCC Internal Rule 59(5): "At any time during an investigation, the Civil Party may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. The request shall be made in writing with a statement of factual reasons for the request. If the Co-Investigating Judges do not grant the request, they shall issue a rejection order as soon as possible, and in any event, before the end of investigation. The rejection order shall state the factual reasons for rejection. The Civil Party shall immediately be notified of the rejection order, and may appeal to the Pre-Trial Chamber."

75. ECCC Internal Rule 66(3): "All the parties may, within 30 (thirty) days from notice of such order, file appeals to the Pre-Trial Chamber. The parties may, in the presence of their lawyer, or where the lawyer has been summoned in due form, waive their right to appeal."

76. See *Fourth request for investigative action by the co-lawyers for civil parties on forced marriages and sexual crimes*, 4 Dec 2009, confidential.

77. See *Sixth request for investigative action filed by the Co-Lawyers for Civil Parties concerning the crime of genocide against Khmer nationals*, 4 February 2010, confidential.

78. See in this regard, the requests for additional investigative action regarding genocide of the Khmer Krom and Vietnamese filed by the Civil Parties on 3 December 2009, confidential.

79. See in this regard the requests for investigative action filed by the Co-Lawyers for Civil Parties concerning the crime of enforced disappearance on 30 June 2009, confidential.

80. See in this regard, the request for action on property belonging to charged persons, 12 August 2009, confidential.

81. OCIJ, Order on request by Civil Parties to take evidence on all property belonging to the charged persons, 1 March 2010, confidential.

Indeed, the completion of the investigation, at short notice for a case of such magnitude - three years - often seems to have been the main factor determining *de facto* the decision to accept or, more often, reject requests for action by the parties in general.<sup>82</sup>

Even though the real impact of these requests is difficult to measure, it remains that the possibility for Civil Parties to influence the scope of the investigation through requests for action remains one of the most interesting developments in the status of Civil Parties before the ECCC.

#### **4) The right to participate in detention hearings**

The right of Civil Parties to participate in detention hearings was raised during a hearing of the Pre-Trial Chamber in Case 002.

The Chamber was hearing an appeal by the Nuon Chea defence against an order extending his detention.<sup>83</sup> Duly notified of the hearing date, the Civil Party lawyers invoked the right to participate in the debates.<sup>84</sup>

The Defence objected to the participation of Civil Parties in the proceedings on the basis that, in the absence of any statutory provision, they should only be able to participate in substantive debate, and not in discussion of detention issues.

At the invitation of the Chamber, REDRESS, FIDH and ASF filed an *amicus curiae* in support of the Civil Party request.<sup>85</sup>

In the end, the Pre-Trial Chamber found that Civil Parties had the right to participate in detention hearings, in order to make observations, and that their participation was not in contradiction with the right of the accused to a fair trial.

#### **5) Other rights during the judicial investigation**

Civil Parties also have the following rights in common with the other parties:

- access to the case file and the right to request copies;<sup>86</sup>
- the right to service of decisions of the Co-Investigating Judges and Chambers;<sup>87</sup>
- the right to be interviewed by the Co-Investigating Judges;<sup>88</sup>

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82. Questioned on this point during a public debate organized by FIDH in June 2012, the former Co-Investigating Judge, Marcel Lemonde, in charge of the investigation of Cases 001 and 002 confirmed this time constraint and indicated that Civil Party requests did not really influence the scope of the investigation or its priorities: debate organized by FIDH after showing a documentary entitled “A simple matter of justice,” 8 June 2012, FEMIS, Paris.

83. Decision on Civil Party participation in detention appeals, 20 March 2008.

84. ECCC Internal Rule 77(3)(c): “*The Greffier of the Chamber shall notify the Co-Investigating Judges, the parties and their lawyers of the hearing date or the decision to proceed on the basis of written submissions only.*”

85. See the REDRESS, FIDH and ASF amicus on the question of the participation of victims as Civil Parties, including during detention hearings, dated 21 February 2008, at [http://www.fidh.org/IMG/pdf/ECCC\\_Amicus\\_REDRESS\\_FIDH\\_ASF\\_21\\_feb\\_08.pdf](http://www.fidh.org/IMG/pdf/ECCC_Amicus_REDRESS_FIDH_ASF_21_feb_08.pdf)

86. ECCC Internal Rule 55(6): “*The Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC.*”

87. ECCC Internal Rule 46(1): “*All orders of the Co-Investigating Judges or the Chambers shall be notified to the parties or their lawyers, if any, either orally or at their last known address, by the Greffier, the Judicial Police or any authorised officer of the ECCC, using any appropriate means. A person in detention shall be notified either orally or through the head of the detention facility.*”

88. ECCC Internal Rule 59(1): “*The Co-Investigating Judges may interview a Civil Party. When a Civil Party has a lawyer, the Co-Investigating Judges shall summon the lawyer at least 5 (five) days before the interview takes place. During that period, the lawyer may consult the case file.*”



- the right of Civil Party lawyers to ask questions during confrontations organized by the Co-Investigating Judges;<sup>89</sup>
- the right of Civil Parties to appeal most orders of the Co-Investigating Judges;<sup>90</sup>
- the right to raise procedural defects;<sup>91</sup>
- the right to be notified of the end of the investigation and to make observations thereon.<sup>92</sup>

## II – The rights of Civil Parties during preparation for trial

During preparation for trial, after the closing of the judicial investigation, it is the “consolidated” or “collective” group of Civil Parties that becomes the central figure, rather than the Civil Parties taken individually.

### 1) The right to request the hearing of witnesses and Civil Parties

The Internal Rules provide that the consolidated group of Civil Parties has the right to request that witnesses be summonsed and that the Civil Parties themselves be heard at trial.<sup>93</sup>

In a “normal” trial combining civil and criminal proceedings, in which the Civil Parties are present or represented at hearings, they generally testify to the facts where they are direct victims or were witnesses and are later heard separately concerning the harm they suffered.

The large number of Civil Parties in Case 002 makes it materially impossible to hear all of them individually.

At the time of writing, it is clear that the Trial Chamber only wants to hear those Civil Parties whose testimony will be vital and relevant.

89. ECCC Internal Rule 58(5): “In the case of a confrontation, the Co-Prosecutors and the lawyers for the other parties may ask questions, with the permission of the Co-Investigating Judges. If the Co-Investigating Judges refuse to permit a question, the refusal shall be noted in the written record of the interview.”

90. ECCC Internal Rule 74(4): “Civil Parties may appeal against the following orders by the Co-Investigating Judges:

- a) refusing requests for investigative action allowed under these Rules;
- b) declaring a Civil Party application inadmissible;
- c) refusing requests for the restitution of seized property;
- d) refusing requests for expert reports allowed under these IRs;
- e) refusing requests for further expert investigation allowed under these IRs;
- f) a Dismissal Order where the Co-Prosecutors have appealed;
- g) refusing an application to seize the Chamber for annulment of investigative action; or
- h) relating to protective measures.”

91. ECCC Internal Rule 76(2): “Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seize the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs.”

92. ECCC Internal Rule 66:

1. Where the Co-Investigating Judges consider that an investigation has been concluded, they shall notify all the parties and their lawyers. This decision shall be made public. The parties shall have 15 (fifteen) days to request further investigative action. They may waive such period.

2. Where the Co-Investigating Judges decide to reject such requests, they shall issue a reasoned order. Such order shall also reject any remaining requests, filed earlier in the investigation, which had not yet been ruled upon by the Co-Investigating Judges.

3. All the parties may, within 30 (thirty) days from notice of such order, file appeals to the Pre-Trial Chamber. The parties may, in the presence of their lawyer, or where the lawyer has been summonsed in due form, waive their right to appeal.”

93. ECCC Internal Rule 80(2): “Where the Accused and/or the consolidated group of Civil Parties wishes to summon any witnesses who are not on the list provided by the Co-Prosecutors, they shall submit an additional list, including a statement of any relationship referred to in Rule 24(2) to the Greffier of the Chamber within 15 (fifteen) days from notification of the list. The Greffier shall place such list on the case file and, subject to any protective measures, forward a copy of the list to the other parties.”

It already appears possible to make the following observations:

- Civil Parties providing evidence of the crimes and conduct of the accused will be heard personally;
- A selective, representative list of Civil Parties providing evidence of crimes covered by the first trial in Case 002 will be proposed by the Lead Co-Lawyers; although the Chamber may make a further selection;
- A selective, representative list of Civil Parties providing elements of testimony about their suffering and loss will be proposed by the Lead Co-Lawyers; although the Chamber may make a further selection.

## **2) The right to file a list of documents**

On 17 January 2011, the Trial Chamber ordered the parties “*to file documents in preparation for trial.*”<sup>94</sup>

On 19 April 2011, the Civil Parties filed a list of documents and evidence<sup>95</sup> to be produced in evidence pursuant to Internal Rule 87.

The Annexes to this list included *inter alia* an Appendix 7(a)(iii) containing an inventory of all the victim information forms and related documents.<sup>96</sup>

## **III – THE RIGHTS OF CIVIL PARTIES AT TRIAL**

During the trial, the Lead Co-Lawyers represent the collective interests of Civil Parties and have ultimate responsibility before the Court for issues relating to advocacy, strategy and presentation of the interests of the consolidated group.

The Civil Party lawyers assist the Lead Co-Lawyers but remain the point of contact for each of their clients.

### **1) The applicable law**

The Lead Co-Lawyers have a range of rights including:

- Presenting preliminary objections and respond to preliminary objections raised by the parties;<sup>97</sup>
- During the hearing, requesting the Chamber to summon or hear any witness or receive any new evidence they deem necessary for the manifestation of the truth;<sup>98</sup>

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94. Case No. 002-E9, *Order to file documents in preparation for trial*, 17 Jan. 2011.

95. Case No. 002-E9/32, *Civil Party Lead Co-Lawyers List of Documents and Exhibits (Annex 7 and 8)*, 19 April 2011.

96. On this point, see in particular, Chapter III (2) of Part III.

97. ECCC Internal Rule 89:

“1. A preliminary objection concerning:

a) the jurisdiction of the Chamber,

b) any issue which requires the termination of prosecution;

c) nullity of procedural acts made after the indictment is filed shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible.

2. The Chamber shall afford the other parties the opportunity to respond to the application.

3. The Chamber shall, as appropriate, issue its reasoned decision either immediately or at the same time as the judgment on the merits. The proceedings shall continue unless the Chamber issues immediately a decision which has the effect of terminating the proceedings.”

98. ECCC Internal Rule 87(4): “During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested

- Questioning the accused, witnesses and experts,<sup>99</sup> the order of appearance of the parties being decided by the President of the Chamber.<sup>100</sup> In this respect, a distinction must be made between witnesses / experts on the one hand and the Civil Parties themselves, on the other. The Chamber has clearly stated that as a rule the Civil Party lawyers conduct the examination in chief of *Civil Parties*. On this basis, the Lead Co-Lawyers have agreed that the foreign and national Civil Party lawyers themselves should be responsible for the conduct of the hearing of their own client(s). As regards *witnesses/experts*, the Chamber may delegate examination in chief to a party. At the time of writing, this authorization has always been exercised in favour of the Co-Prosecutors, even where a witness had been proposed by several parties.
- Making written submissions;<sup>101</sup>
- Making closing statements at the end of the case and, in certain cases, rebut.<sup>102</sup> It is important to note here that the Civil Party lawyers have no right to intervene at this stage, contrary to the practice introduced in Case 001. Now, only the Lead Co-Lawyers can do so;
- Appealing the verdict, provided that the Co-Prosecutors have also appealed;
- Appealing the decision on reparations.<sup>103</sup>

## **2) Civil Party participation through the submission of their applications at trial: the thorny issue of the probative value of Civil Party applications**

Each Civil Party application is a varied collection of documents sometimes running to more than a hundred pages in support of the allegations by the victims or their kin. A Civil Party application includes:

- a standard information form, that the Chamber appears to see as a “statement”;
  - an individual report in English by the Victim Support Section, including an English summary of the information contained in the application;
- and, in some cases:
- an additional information form;
  - a series of supporting documents as diverse as books, photographs, confessions from Tuol Sleng or other documents from the Democratic Kampuchea period.

Given the very limited number of Civil Parties who will actually be heard during the trial, this

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*testimony or evidence was not available before the opening of the trial.”*

99. ECCC Internal Rule 90(2): “*The Co-Prosecutors and all the other parties and their lawyers shall also have the right to question the Accused. All questions shall be asked with the permission of the President. Except for questions asked by the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber and in the order as determined by him.*”

100. ECCC Internal Rule 91bis: “*The President of the Trial Chamber shall determine the order in which the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused, the witnesses, experts and Civil Parties.*”

101. ECCC Internal Rule 92: “*The parties may, up until the closing statements, make written submissions as provided in the Practice Direction on filing of documents. The Greffier of the Chamber shall sign such written submissions and indicate the date of receipt, and place them on the case file.*”

102. ECCC Internal Rule 94(1):

“*1. After examining all the evidence, the President of the Chamber shall call successively upon the following persons to make their closing statements:*

*a. Civil Party Lead Co-Lawyers; ...*

*2. Civil Party Lead Co-Lawyers and the Co-Prosecutors may make rebuttal statements.”*

103. ECCC Internal Rule 105(1):

“*1. An appeal against the Trial Chamber judgment may be filed by:*

- a) The Co-Prosecutors; and*
- b) The Accused.*

*c) The Civil Parties may appeal the decision on reparations. Where the Co-Prosecutors have appealed, the Civil Parties may appeal the verdict. They may not appeal the sentence.”*

set of documents is often the only medium through which the testimony of the Civil Party will have an impact on the Chamber and the decision of the Judges.

At the time of writing, the Chamber has not yet ruled on this essential issue for the Civil Parties.

The Lead Co-Lawyers, supported *inter alia* by the FIDH team, have requested that all of the Civil Party applications, as statements of a party to the trial, be formally read into the record, the issue of their probative value being for the Chamber to decide at a later date.

### **3) The participation of the Lead Co-Lawyers and Civil Party lawyers in the hearings in Case 002: a delicate balance**

The Chamber appears to have gradually come to the conclusion that the reforms implemented in Case 002 have improved the organization of Civil Parties and their court appearances.

It recognizes the autonomous input of the Civil Party and Lead Co-Lawyers are allowed almost unlimited speaking time on each point raised at trial.

#### ***a) The division of labour between the Lead Co-Lawyers and Civil Party lawyers***

At the time of writing, the hearing work is distributed as follows in Case 002: once the list of witnesses is known, any of the Civil Party lawyers (international and/or national) may offer to be responsible for the hearing of one or more witnesses, in which case he or she becomes responsible for the preparation of the questions and pleading at trial.

Each witness or Civil Party is thus interrogated by one Cambodian and one international Civil Party lawyer.

It was also decided that, during the testimony of a witness, expert or Civil Party for whom the Lead Co-Lawyers are responsible, they have the primary duty to respond to procedural objections and raise objections against the questions of other parties.

The Lead Co-Lawyers may also examine witnesses and intervene in priority on general procedural issues.

So far, the action of the Lead Co-Lawyers has focused on:

- the fundamental judicial role of the Co-Investigating Judges, particularly with regard to the written records of Civil Party interviews;
- the value of Civil Party applications, including justifying their use during hearings;
- the autonomous status of Civil Parties.

The Office of the Lead Co-Lawyers provides Civil Party lawyers with logistic support: help in the preparation of witnesses, keeping Civil Party lawyers informed of oral decisions taken by the Chamber, etc.

All pleadings filed are subjected to written consultation with the aim of finding a consensus between Civil Party lawyers.

#### ***b) A system in which the international Civil Party lawyers must find their place***

Although this system appears to address many of the criticisms levelled at the participation of Civil Party lawyers in the trial of Case 001, it is clear that the sheer scope of Case 002 raises specific challenges.

*– The length of the trial in Case 002 and the absence of legal aid makes the continued presence of international lawyers difficult*

Given the length of the trial and the *pro bono* nature of the work of almost all lawyers, no international Civil Party lawyers reside permanently in Cambodia.

Only the team from Lawyers Without Borders France (*Avocats sans frontières* - ASF) has implemented a rotation system whereby an international legal team is always present.

Thus, unlike Case 001, where the Civil Party lawyers thronged the benches of the courtroom, the participation of international lawyers in Case 002 is quite sparse.

The participation of Civil Party lawyers at trial requires the Chamber to communicate the list of witnesses in advance, including the timing of appearance, and that they be respected.

However, after almost a year of hearings, it is often extremely difficult to know the order of witnesses even a week in advance. Many international lawyers have thus come to Cambodia, believing they would take part in a hearing, only to find upon arrival that the hearing schedule had changed and that their presence was no longer required.

In addition, the health problems of the octogenarian accused weighs heavily on the scheduling and organisation of hearings.

This must be coupled with the fact that, apart from a national team of lawyers funded by the Extraordinary Chambers and the Lead Co-Lawyers, all the Civil Party lawyers involved are *pro bono*, in addition to their main activity, which complicates any effective, efficient presence.

The Chamber should at least be more proactive in planning its hearings to allow the international lawyers to contribute more meaningfully to the debates.

*– A real need for consistency and continuity in the work of representing Civil Parties at trial*

Such a long trial necessarily finds a routine through procedural practices and codes that only assiduous lawyers can master. In addition, the Chamber makes a lot of oral decisions, making it difficult to update lawyers residing abroad. The disconnection of lawyers who come from their country for a few days or weeks to attend the hearing of their client, or the witness for which they are responsible, is a real problem.

In fact, the daily work is undertaken by the Lead Co-Lawyers and their team members. They are the ones who have the institutional memory of the hearings, which is crucial given the principle of oral hearings.

The Civil Party lawyers have yet to find their place: how to ensure continuity in assistance

from the Civil Party lawyers, who now represent the interests of the consolidated group at hearings and not just their own clients?

Some complementarity is emerging, however, between the daily work of tracking the hearings, conducted by the Lead Co-Lawyers, and the more focused work of Civil Party lawyers who come to contribute at hearings based on their expertise and the interests of the clients they represent.

#### **IV – THE RESTRICTION OF THE RIGHTS OF CIVIL PARTIES IN THE JUDICIAL PRACTICE OF THE EXTRAORDINARY CHAMBERS**

The rights of Civil Parties have also been restricted through ECCC case law.

Three restrictions developed in Trial Chamber decisions, one in Case 001 (1) and the other two in Case 002, reflect a certain distrust of Civil Parties (2 and 3).

##### **1) The Trial Chamber has restricted the right of Civil Parties to question the accused concerning their personality and sentencing**

On 9 December 2009, handing down its decision on a request by the Civil Party lawyers to comment on sentencing issues,<sup>104</sup> the Trial Chamber stated its reading of Internal Rule 23(1), considering that “this provision must be interpreted restrictively, and does not confer a general right of equal participation with the Co-Prosecutors.”<sup>105</sup>

In his dissenting opinion cited above, Judge Lavergne rejected this restriction, noting that:

*“In a trial, the interest of justice is to bring about an understanding, not only of what crimes were actually committed, but also whether they were committed wilfully and why. In reality, legal proceedings are more than concerned with the answer to the sole question “what did he or she do?”; they are also concerned with the answer to the question “why did he or she do that?” This is a legitimate concern for all parties, including Civil Parties whose participation cannot be reduced to a simple discussion pertaining to the objective culpability of the accused. It is necessary to be able to understand what motivated criminal conduct, in particular for the purpose of avoiding its repetition. Also, this need to understand is even more crucial where the Crimes involved were too long left without answer, if not concealed.”<sup>106</sup>*

##### **2) The Trial Chamber denied the Civil Parties the right to make opening statements in the first sub-trial in Case 002**

While it is true that the Internal Rules do not expressly provide for the possibility for Civil Parties to make opening remarks,<sup>107</sup> the Chamber had the discretionary right to authorize it.

At the time, its stubborn refusal to allow the Lead Co-Lawyers the opportunity to make a brief opening statement, in which they could have accounted for the composition of the

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104. Case No. 001-E72/3, *Decision on Civil Party co-lawyers’ joint request for a ruling on the standing of Civil Party lawyers to make submissions on sentencing and directions concerning the questioning of the accused, experts and witnesses testifying on character*, 9 October 2009.

105. Case No. 001-E72/3, para. 25.

106. Case No. 001-E72/3, *Dissenting Opinion of Judge Lavergne*, 9 October 2009.

107. ECCC Internal Rule 89 bis (2): “Before any Accused is called for questioning, the Co-Prosecutors may make a brief opening statement of the charges against the Accused. The Accused or his/her lawyers may respond briefly.”

consolidated group, its commonalities and specificities, and more generally the expectations of Civil Parties before the commencement of the trial, created a certain hostility between the Chamber and Civil Parties.

In the first press release of its kind, the Civil Party lawyers and the international Lead Co-Lawyer strongly deplored the position of the Chamber and emphasized the symbolic value that their short intervention would have had.<sup>108</sup>

Given that the goal of national reconciliation is at the heart of the Civil Party participation scheme at the ECCC, the Chamber seems to have missed a unique opportunity to give victims the feeling that the proceedings before the ECCC actually took account of their concerns.

### **3) The Trial Chamber denied the Civil Party lawyers access to expert medical reports concerning the accused**

In response to requests from the Defence for three of the accused who claimed to suffer from health problems that could affect their participation in the trial, the Trial Chamber mandated an expert physician specializing in geriatric care to examine them and evaluate the reality of their health situations.

The appointed expert reported back before the initial hearing. By a memorandum dated 29 July 2011, the Trial Chamber appeared to defy the Civil Party lawyers by excluding them from the list of persons authorized to have access to medical reports concerning the accused, as a matter of principle.<sup>109</sup>

Recalling the new provisions relating to the consolidated group of Civil Parties, the Chamber considered:

*“... memorandum E62/3/10/1 neither to breach the rights of Civil Parties or their lawyers, to infringe the right of Civil Parties to be adequately represented in this context, or to be otherwise disproportionate. In view of the purpose of Civil Party action before the ECCC as “[p]articipat[ion] in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution”, nor is any breach of the principle of equality of arms entailed. The Request itself acknowledges (para. 18) the principal importance of respect for confidentiality, upon which the Trial Chamber’s earlier directive was partially based, in order to ensure privacy of medical information.”<sup>110</sup>*

Thus, in the name of the **“principal importance of respect for confidentiality”** the Chamber makes a decision reflecting a total lack of confidence in the Civil Party lawyers, despite their professional oath to respect confidentiality.

In a dissenting opinion, Judge Lavergne stated:

*“Restricting, as a matter of principle, access to Professor Campbell’s expert medical report by the Civil Party lawyers alone is logically indefensible on the sole ground that the case is at the*

108. Press Release by the Civil Party lawyers and international Lead Co-Lawyer: “Civil Parties silenced once again before the ECCC”, Phnom Penh, 16 November 2011.

109. Case No. 002-E62/3/10/4, *Decision on Lead Co-Lawyer’s “Urgent Request for the Trial Chamber to amend Memorandum E62/3/10 (formerly E106)” (E62/3/10/1)*, 29 July 2011.

110. Case No. 002-E62/3/10/4, *Decision on Lead Co-Lawyer’s “Urgent Request for the Trial Chamber to amend Memorandum E62/3/10 (formerly E106)” (E62/3/10/1)*, 29 July 2011.

*trial stage. These are indeed the same lawyers who were involved at the judicial investigation stage where their right to access this type of material was not all at issue. **The mere fact that the Trial Chamber has now been seised of the case file does not alter their ethical obligation to safeguard the confidentiality of any material to which they have access nor, for that matter, their responsibility vis-a-vis their clients, even though those clients now exercise their rights as a consolidated group under the coordination and ultimate responsibility of the Civil Party Lead Co-Lawyers.***"<sup>111</sup>

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In sum, the Civil Parties truly participate before the ECCC and the Internal Rules offer real potential.

Since the trial in Case 001 served as a laboratory for Civil Party participation at trial, the proceedings in Case 002 are advancing more smoothly and the presence of Lead Co-Lawyers and Civil Party lawyers does not appear to arouse the same level of suspicion.

This participation, the primary objective of which is to intervene "*against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution,*" also serves another purpose, to "*seek collective and moral reparations.*"<sup>112</sup>

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111. Case No. 002-E62/3/10/4.1, *Dissenting Opinion of Judge Jean-Marc Lavergne concerning the Trial Chamber decision in Memorandum E62/3/10/4*, 23 August 2011.

112. ECCC Internal Rule 23.



# PART IV

## The right of Civil Parties to reparation

The 1985 UN Declaration of Basic Principles for Victims of Crime and Abuse of Power introduced the concept of an individual right to compensation into international law<sup>113</sup>.

The right to reparation of victims of grave breaches of international law is also the main object of the UN Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law (the “Van Boven / Bassiouni Principles”) in 2005, under which victims are entitled to “adequate, effective and prompt reparation for harm suffered,” which must be “proportional to the gravity of the violation and the harm suffered.”<sup>114</sup> These measures may cover restitution (Principle 19), compensation (Principle 20), rehabilitation (Principle 21), satisfaction (Principle 22) and guarantees of non-repetition (Principle 23).

The UN Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (“Joinet / Orentlicher Principles”) also provide that “[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”<sup>115</sup>

This right is enshrined in the ECCC Internal Rules, which provide for a system of collective and moral reparation for Civil Party victims, excluding any individual redress, and providing for measures to be developed before the end of the trial, at the expense of the accused and/or funded by other means (I). Lessons can be learned from Case 001 (II) and have influenced how the issue of reparation has been addressed in the first trial of Case 002 (III).

### I – THE APPLICABLE LAW RELATING TO REPARATION

#### 1) Collective and moral reparation

Even though the ECCC statutes do not provide for the right of victims to reparation, the principle is included in the ECCC Internal Rules. As provided in Cambodian criminal law, Civil Parties have the right to seek damages as reparation for the harm suffered relating to the

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113. UN Declaration of Basic Principles for Victims of Crime and Abuse of Power, adopted by the General Assembly in resolution 40/34, 29 November 1985, Principles 4 and 8-13, <http://www2.ohchr.org/english/law/victims.htm>

114. UN Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law (“Van Boven / Bassiouni Principles”), adopted by the UN General Assembly Resolution 60/147, 16 December 2005, Principle 11(b), and Principles 14-23, <http://www2.ohchr.org/english/law/remedy.htm>.

115. UN Updated Set of principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. (“Joinet / Orentlicher Principles”), 8 February 2005, see in particular Principle 31, “Principle 31. Rights and duties arising out of the obligation to make reparation” <http://www.derechos.org/nizkor/impu/principles.html>

crimes being prosecuted. However, the ECCC Judges decided that no individual reparation would be granted, only collective and moral reparations being available to recognize the harm suffered by the victims admitted as Civil Parties due to the crimes committed by the accused.

Internal Rule 23quinquies(1) provides as follows:

*“1. If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. Collective and moral reparations for the purpose of these Rules are measures that:*  
*a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and*  
*b) provide benefits to the Civil Parties which address this harm.*  
*These benefits shall not take the form of monetary payments to Civil Parties.”*

## **2) The coexistence of reparation measures to be satisfied by the accused and measures financed by other means**

Due to uncertainty concerning the recovery by the victims of any reparations they may be awarded through “traditional” means (*i.e.* against the Accused), the Plenary Assembly of Judges amended the Internal Rules in September 2010 to establish a new method of reparation. After this reform, the proposed new measures do not require awarded damages to be borne by the Accused.

Internal Rule 23 *quinquies*<sup>116</sup> relating to civil interests, now provides for:

- collective and moral reparations;
- that may not take the form of monetary payments to Civil Parties; and
- must be presented in a single filing identifying the means of implementation of each specific project.

## **3) Measures designed and prepared “as the trial proceeds”**

Another feature of the reparations system by the Extraordinary Chambers is that it requires such projects to be planned and prepared well in advance, *i.e.* during the trial proceedings.

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116. ECCC Internal Rule 23 *quinquies*:

*“1. If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. Collective and moral reparations for the purpose of these Rules are measures that:*  
*a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and*  
*b) provide benefits to the Civil Parties which address this harm.*  
*These benefits shall not take the form of monetary payments to Civil Parties.*

2. *Reparations shall be requested in a single submission, which may seek a limited number of awards. This submission shall provide:*  
*a) a description of the awards sought;*  
*b) reasoned argument as to how they address the harm suffered and specify, where applicable, the Civil Party group within the consolidated group to which they pertain; and*  
*c) in relation to each award, the single, specific mode of implementation described in Rule 23quinquies(3)(a)-(b) sought.*

3. *In deciding the modes of implementation of the awards, the Chamber may, in respect of each award, either:*  
*a) order that the costs of the award shall be borne by the convicted person; or*  
*b) recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.”*

Indeed, as explained by the Trial Chamber, “[t]he 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.”<sup>117</sup>

The Chamber has already identified a number of elements:

- The establishment of a trust fund does not fall within the scope of reparations that may be ordered by the ECCC;
- Initiatives requiring government approval cannot be endorsed by the Trial Chamber as reparations, except “where it is clear that such measures have been approved or implemented by the Royal Government of Cambodia”;<sup>118</sup>
- The Chamber also recalls that the Lead Co-Lawyers must address “a number of practical issues” before some of the simplest measures may be implemented.<sup>119</sup>

Given the declared indigence of the accused, and the refusal of the ECCC to investigate their financial situation, FIDH, ADHOC and LICADHO have made a call, along with other organizations<sup>120</sup> for the establishment of voluntary contributions and the creation of a trust fund for victims<sup>121</sup> for the effective implementation of any reparation granted. Unfortunately this option has been definitively rejected by the ECCC.

The burden of effective implementation of reparations thus lies on the shoulders of the Civil Parties, through their lawyers and in collaboration with intermediary organizations, which must present turnkey projects.

## **II – THE EXPERIENCE IN CASE 001**

### **1) The Trial Chamber Judgment**

The Trial Chamber ruled on requests for reparation and decided<sup>122</sup> to include the name of the Civil Parties in the Judgment and proceed with the compilation and dissemination of all the excuses and statements of recognition of guilt made by Kaing Guek Eav (alias Duch) during the trial in Case 001.

All the other reparation claims were rejected on the grounds that they were not sufficiently precise or did not fall within the category of measures that the ECCC could grant to Civil Parties, to the extent that the convicted person alone could not bear the weight of reparation.

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117. Case No. 002-E125, *Initial specification of the substance of the awards that the Civil Party Lead Co-Lawyers intend to seek pursuant to Rule of Procedure 23quinquies(3)*, 23 September 2011.

118. See Memorandum 002-E125 above; the Chamber was referring to applications for citizenship for Vietnamese victims, the establishment of a day of remembrance etc.

119. See Memorandum 002-E125 above, the Chamber was making specific reference to requests to build stupas and memorials, to create educational programs about the history of Democratic Kampuchea etc.

120. This was one of the recommendations adopted at the conference on reparations for victims of the Khmer Rouge, organized by CHRAC and the ECCC Victims Unit in November 2008, also in collaboration with the FIDH; see the conference report published in May 2009, available (in English) at the following link: <http://www.chrac.org/eng/KRT%20NL%20June%202005-%20May%202008/Conference%20Report%20on%20Reparations%20for%20the%20Victims%20of%20the%20Khmer%20Rouge%20Regime.pdf>

121. See in particular the comments by FIDH, ADHOC and LICADHO on victim participation at the ECCC, January 2010: <http://fidh.org/FIDH-ADHOC-LICADHO-Comments-on>

122. Case No. 001, *Trial Judgment*, 26 July 2010, [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf)

This was confirmed on appeal:

*“The present case involves a convicted person who was found to be indigent. It is of primary importance to limit reparations to such awards that can realistically be implemented so as to avoid the issuance of orders that, in all probability, will never be enforced and would be confusing and frustrating for the victims. Hence, the Chamber will refrain from granting requests that would necessitate the financial means of KAING Guek Eav to be implemented.”*<sup>123</sup>

The Trial Chamber also found that a number of requests must be rejected because they would require a decision binding on the Cambodian government. This would be the case, for example, for requests for a State apology, the implementation of health care, the institution of a national day of remembrance or the decision to give public buildings the names of victims.

Other aspects of the applications were rejected due to lack of financial resources to ensure their implementation. This was the case, for example, for requests for the construction of memorials and requiring a payment to visit them. Requests to ensure that the Chamber ordered Kaing Guek Eav to write letters to the Government were also rejected on the grounds that the Chamber could not impose execution.

## **2) The appellate decision of the Chamber of the Supreme Court**

The lawyers of the 41 Civil Parties who appealed against the Trial Judgment requested that the rejected applications be admitted and that more “significant” reparation measures be granted.

As regards the Civil Party requests, the Chamber of the Supreme Court confirmed the decision of the Trial Chamber to place all the excuses and statements of responsibility made by Duch during the trial in Case 001 on the ECCC website. However, it rejected the other claims for reparations.

On 18 May 2012, three survivors of the S-21 security centre, Bou Meng, Chum Mey and Norng Chan Phal, and five other Civil Parties were the first to receive printed copies of the Judgment of the Supreme Court Chamber in Case 001 concerning Kaing Guek Eav, alias Duch. This event was held at the Tuol Sleng Genocide Museum in Phnom Penh. It marked the launch of the distribution of copies of the Judgment and the compilation of Duch’s apologies during his trial. Distribution, organized by the ECCC Public Affairs and Victim Support Sections, will take place throughout Cambodia.<sup>124</sup>

## **3) Ambiguities and contradictions in the decision on reparations in Case 001**

One of the issues raised by the experience in Case 001 is the lack of clarity concerning the standard of proof for Civil Parties in their claim for reparation. Neither the ECCC Internal Rules nor the Judges were able to explain the information that Civil Parties must provide to identify the reparation they are entitled to request.

It is also unfortunate that the ECCC took account of the indigence of the accused in their decision on the types of reparation measures available to victims. The indigence of the accused should not be a criterion determining the exclusion of appropriate redress for the victims of the most serious crimes.

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123. *Summary of the appellate decision of the Chamber of the Supreme Court in Case 001*, 3 February 2012, para. 67: <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/03022012Summary-Eng.pdf>

124. ECCC Court Report, May 2012, *Distribution of Appeal Judgment for Case 001 commences*, <http://www.eccc.gov.kh/en/publication/court-report-june-2012>

In their decision on reparations in Case 001, the ECCC Judges emptied “collective and moral” reparations of all meaning, by adopting minimalist measures indicating a narrow vision of this type of reparation, detached from international law and practice. Moreover, the Judges were unable to provide arguments for the acceptance or rejection of any specific remedy, nor explain their review of the harm suffered by the Civil Parties.

The ECCC must take these failings and lessons learned into account and demonstrate more imagination faced with the current trials, in order to provide true reparation to the victims for the loss and damage they suffered.

### **III – THE RIGHT TO REPARATION IN THE FIRST CASE 002 TRIAL**

#### **1) The right to reparation of the consolidated group: an open question since the severance order**

The Trial Chamber’s severance order in Case 002 specifies that, since there is no longer any individual participation “*on the basis of their particular harm suffered, ... limiting the scope of facts to be tried during the first trial accordingly has no impact on the nature of Civil Party participation at trial, and their formulation of reparations claims made on their behalf by the Lead Co-Lawyers ...*”<sup>125</sup>

It appears that the Chamber is moving towards an approach that would require Civil Parties to establish a single form of harm born out of one of the crimes covered by the first trial, which was indiscriminately suffered by “the collective of Civil Parties” as a whole, resulting in collective and moral reparations.

Following this reasoning, if all the Civil Parties are not necessarily individually victims of the events referred to in this first trial, the consolidated group would – as a whole – have suffered harm that should be repaired.

The only obligation would be to establish a link between the reparation project and the crimes for which the accused is convicted.

For example, in case of conviction of one or more of the accused in the first trial in Case 002, the reparation measure of creating of a day of remembrance or the establishment of a Memorial monument would necessarily have to show a connection with forcible transfer (through the choice of date, location, written content, etc.).

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125. Case No. 002-E124, cited above.

This interpretation appears to be shared by Elisabeth Simmoneau Fort, the international Lead Co-Lawyer, who has pointed out that:

*“[t]he history of Cambodia, including that of Democratic Kampuchea, has the peculiarity that the main target of the crimes and serious violations that occurred were the Cambodians themselves. **The concept of a collective of Civil Parties takes on another dimension in the challenge of seeking truth and reconciliation. It is precisely because the ECCC, through its judicial mandate, may lead to truth and reconciliation, that it is essential to overcome individual harm or rather transcend it to express a veritable, serious collective harm.**”*<sup>126</sup>

This approach would justify not rejecting some individual Civil Parties on the pretext that they have not personally suffered any harm *“as a result of the commission of the crimes for which the accused was convicted”*.

Although this debate remains open and no consensus has yet been reached, either among the Civil Party lawyers or between them and the Lead Co-Lawyers, it appears necessary to recall that – as regards judicial reparations – the criterion of the link between the harm suffered and the crimes for which the accused has been convicted should be maintained.

## **2) The process of consultation with Civil Parties**

As soon as the Co-Investigating Judges had handed down their order on admissibility of Civil Parties, counsel for the Civil Parties, the Victims Support Section and partner organizations launched an extensive process of consultation with Civil Parties on the most universally desired means of reparation.

16 projects were identified and presented during the hearings on initial indications of the nature of reparations that were held on 29 June and 19 October 2011.<sup>127</sup>

The following list presents the results of these consultations, a series of categorized measures starting with the project that received the most “votes”, being thus considered the most important for the Civil Parties:

### **Projects relating to commemoration:**

- Establishment of a national and international day of remembrance;
- Construction of stupas and/or religious or ecumenical monuments;
- Organization of ceremonies;
- Preservation of crime sites.

### **Projects relating to rehabilitation**

- Establishment of medical and psychological care mechanisms;
- Support for self-help groups.

### **Projects relating to documentation and education**

- Creation of an educational program on the history of the Khmer Rouge;

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126. Elisabeth Simonneau Fort, International Lead Co-Lawyer for Civil Parties, “The rights of victims before the Extraordinary Chambers in the Courts of Cambodia,” *Gazette du Palais*, 25 to 29 December 2011, page 27 (in French).

127. Case No. 002-E125/2, *Initial specification of the substance of the awards that the Civil Party Lead Co-Lawyers intend to seek*, hearing on 19 October 2011.

- Creation of documentation centres, museums, archives and libraries;
- Creation of a registry of victims or Kraing Meas (“Guestbook”);
- Publication of the Judgment;
- Creation of a Centre for the Advancement of Cambodian spirituality;
- Creation of a Centre devoted to Cham literature and culture.

#### **Other reparation projects**

- Creation of a compensation trust fund;
- Creation of a mechanism for monitoring and reporting on reparations;
- A project to facilitate the acquisition of Cambodian nationality;
- Vocational training for children from forced marriages.

The clear desire of the Lead Co-Lawyers is to recognize that projects should be materially, politically and legally feasible, yet they do not want to limit themselves *ab initio*, trying to imagine as many projects as possible, following the wishes of the Civil Parties.

It remains to be seen whether the Chamber will accept all of these projects as “judicial” reparations or whether some of them may be considered non-judicial measures.

### **3) The ability to offer non-judicial measures going beyond “Civil Parties” to benefit all “victims”**

Alongside the “judicial” reparation measures envisaged under Internal Rule 23 *quinquies* (3)(b), Rule 12 *bis* (3) entrusts the Victims Support Section with “*the development and implementation of non-judicial programs and measures addressing the broader interests of victims.*”<sup>128</sup>

The issue of articulating judicial reparation measures (ordered by the ECCC in connection with the conviction of the Accused) and non-judicial measures that may be developed in collaboration with external agencies and the ECCC in the absence of any conviction, raises many questions and has caused much discussion.

The experience of the ICC Trust Fund for Victims, which has jurisdiction both to implement judicial reparations orders (*i.e.* judicial reparation), and measures to assist victims (non-judicial measures), could be useful in helping to define non-judicial measures for victims.

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128. ECCC Internal Rule 12 *bis*:

“2. *The Victims Support Section shall, in co-operation with the Lead Co-Lawyers, and, where appropriate, in liaison with governmental and non-governmental organisations, endeavour to identify, design and later implement projects envisaged by Rule 23quinquies (3)(b).*

3. *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, where appropriate, be developed and implemented in collaboration with governmental and non-governmental organisations external to the ECCC.*”

# CONCLUSION

While there is now a consensus that victims should participate, in one way or another, in trials dealing with mass crimes before hybrid or international courts, the ECCC experience allows a preliminary evaluation of the most complete system of victim participation, since it confers true party status, alongside the Prosecutor and the Accused, present at all stages of the judicial process.

Before the ECCC – as we have seen<sup>129</sup> – Civil Parties exercise an action whose purpose is both to:

- participate, in support of the prosecution, in the prosecution of those responsible for crimes within the jurisdiction of the ECCC (*public action*), and
- seek collective and moral reparations (*civil action*).

Of course the international community and the victims themselves have an interest in being granted this status (**I**). In addition, it now appear settled that – contrary to some early criticism at the time of establishment of the ECCC – this status is perfectly compatible with the principles of the right to a fair trial and the right to be tried within a reasonable time (**II**).

Although the assessment of the ECCC experience is currently imperfect (**III**), it has nevertheless indicated the essential components of any system of participation for the victims of international crimes before future hybrid or international courts (**IV**).

## **I – THE INTEREST IN ALLOWING VICTIMS TO EXERCISE THE STATUS OF “PARTIES” TO THE PROCEEDINGS**

For the victims to enter the courtroom, not as mere witnesses but as parties to criminal proceedings, there should be some clear added value in such participation with the same status as the Prosecutor and the Accused.

### **1) The interest for society and the international community**

This means of participation allows full respect for the entitlement of victims “*to access to the mechanisms of justice and prompt redress ... for the harm they have suffered*”, set out in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

In addition, most of the time the victims know the criminal acts intimately and their party status allows them to complement public action in search of the truth more directly than if they were mere witnesses.

The presence of victims in the proceedings as parties is also essential if the goal of national reconciliation, at the heart of the ECCC mandate, is to have a chance of being achieved.

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<sup>129</sup>. ECCC Internal Rule 23.



## 2) The interest for victims

Through their Civil Party status, victims can orientate the judicial investigation and the trial.<sup>130</sup>

In addition, victims have a direct interest in participating, in support of the prosecution, in the proceedings against those responsible, to the extent that the alleged crimes were the cause of their own harm, thus justifying the exercise of civil action for damages. Therefore, they have greater influence on respect for their right to access prompt reparation.

Since civil action is exercised in conjunction with the prosecution, the victims do not need to personally launch specific legal action to obtain reparation.

## II – THE COMPATIBILITY OF THE CIVIL PARTY SYSTEM WITH THE DEFENCE RIGHTS TO A FAIR AND EXPEDITIOUS TRIAL

The proceedings before the ECCC must preserve balance between the parties,<sup>131</sup> leading many players to oppose the right of the accused to a “*a fair and expeditious trial with respect for the rights of the Defence*” on the one hand, and, “*the right of victims to participate in such a trial and, inter alia, to contribute to the fight against impunity for the perpetrators of the most serious crimes*” on the other.<sup>132</sup>

Yet opposing these two categories of rights shows a profound ignorance of the interests of victims as Civil Parties in the proceedings.

It is important to reiterate unequivocally that:

- it is *always* in the interest of Civil Parties that Defence rights be totally and fully respected. The feeling of having seen justice done comes at this price;
- it is *always* in the interest of the Civil Parties that the trial be concluded in a reasonable time.

## III – THE REASONS FOR AN INTERIM MIXED RECORD

Three factors can already be identified that help explain the mixed results of the participation of victims as Civil Parties at the ECCC.

- **A real lack of anticipation of the practical and procedural consequences of victims participating as Civil Parties.** This has resulted in a considerable number of amendments to the ECCC Internal Rules, creating legal uncertainty for all parties, and reflecting a failure to consider the expectations of victims seeking to become Civil Parties. The amended rules introduced by the Plenary Assembly in February 2010 are indicative of this lack of anticipation. Despite the judicial investigation in Case 002 being closed and the case awaiting trial, it introduced a serious reform changing the terms of representation and participation of Civil Parties at trial. Now, the Civil Parties no longer participate individually

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130. As we have seen in the report, the issue of forced marriages and Cham genocide would not have received the same attention if the Civil Parties had not provided information to the Judges.

131. ECCC Internal Rule 21.

132. For a critique of this opposition, see Case No. 001-E72/3, *Decision on Civil Party co-lawyers' joint request for a ruling on the standing of Civil Party lawyers to make submissions on sentencing and directions concerning the questioning of the accused, experts and witnesses testifying on character*, Dissenting Opinion of Judge Lavergne, 9 October 2009.

at trial on the basis of the personal harm they have suffered, but form a consolidated group whose interests are represented at trial by “made to measure” figures, the Civil Party Lead Co-Lawyers, who are supposed to coordinate the action of all Civil Party lawyers.

– **The absence of legal aid for victims.**

– **A system that was poorly understood and promoted by lawyers from Anglo-Saxon legal tradition, a majority among the international staff of the ECCC.**

The reasons for these lacklustre results for each of the components of Civil Party participation: admissibility (1), representation (2), participation (3) and reparation (4), may be summarised as follows:

### **1) On admissibility related issues**

#### ***a) The late revelation of the scope of the investigation forced intermediary organizations responsible for identifying the victims to work “blind”***

There was serious disconnection between the work of identifying and supporting victims, carried out by intermediary organizations, and the scope of the investigation, which remained confidential for over two years.

A very large number of victims, guided by intermediary organizations, became Civil Parties without knowing whether the harm they alleged was related to the scope of the investigation.

Accordingly, the Office of the Co-Investigating Judges received a considerable number of Civil Party applications.

#### ***b) A lack of information to victims and articulation of the “complainant” status, not giving a specific right to participation, and the “Civil Party” status***

Victims wishing to participate in the proceedings must fill out a unique victim information form, in which they are asked - by checking a simple box - if they want to participate as a witness, complainant or Civil Party.

The lack of information on the differences between these three choices led many victims to opt for Civil Party status without being aware of the consequences of this procedural status.

#### ***c) Fuzzy, fluctuating eligibility criteria***

In a system where victims can become true parties, exercising numerous rights and participating throughout the judicial process, the question of the admissibility of their applications is crucial.

The Co-Investigating Judges considered that the admissibility criterion should be the link between the harm and the alleged material *facts*, whereas the Pre-Trial Chamber rejected this approach, requiring a link with the *crimes*.

Thus, while the Co-Investigating Judges admitted only 2123 Civil Parties, the Pre-Trial Chamber admitted nearly the double, despite the fact that not all of them can show any real link between their harm and the crimes investigated by the ECCC.

***d) Admissibility was originally appreciated too late, at the time of the trial judgment***

In Case 001, the admissibility of Civil Party applications was determined at the trial stage.

Thus, several years after filing their application with the Co-Investigating Judges, the Trial Chamber created genuine misunderstanding among the victims by finding more than a third of the Civil Party applications inadmissible.

Subsequently, in February 2010, the Plenary Assembly decided to amend the Internal Rules so that admissibility is decided at the end of the judicial investigation or, on appeal, by the Pre-Trial Chamber.

**2) On matters relating to legal representation**

***a) Legal representation only became mandatory in 2010, and only after completion of the investigation***

Until early 2010 the Civil Parties were simply *entitled* to be represented by a lawyer. However, the lessons from Case 001 and the large number of Civil Parties in Case 002 led the Plenary Assembly to amend the Internal Rules on 9 February 2010.

From this point, legal representation became mandatory after the completion of the judicial investigation.

It is important to remember that legal representation is essential, since lawyers act as intermediaries between the victim and the court. They play a fundamental role in explaining the proceedings to their clients and their presence is required to present the claims and expectations of the victims in a judicial perspective.

***b) Legal representation mostly provided by pro bono lawyers, in the absence of a legal aid system***

Legal representation is necessary, but must also be of sufficient quality and the lawyers should have the means to work in acceptable conditions.

However, experience has shown that it is extremely difficult for international lawyers, acting on a *pro bono* basis, to be based in Cambodia and / or remotely monitor the judicial proceedings in the long term.

***c) The mid-term recruitment of one team of Civil Party lawyers, consisting solely of Cambodian lawyers***

In order to provide legal representation for all unrepresented Civil Parties, the ECCC hired a team of lawyers in mid-2010, composed solely of Cambodians, following the disinvestment of the UN on the issue of legal representation of victims.

This is the only team funded by the Court, the lawyers being paid from the “national” budget.

Being only national, it is immune from any United Nations trusteeship, which creates a gap in equality in the legal representation of Civil Parties.

### 3) On participation related issues

#### *a) The mid-term creation of the “consolidated group” and the “Lead Co-Lawyers” figure separated representation from participation*

This reform led to serious interrogation and insecurity for the Civil Parties: who is actually a party at trial? The Civil Parties, as individuals, individually represented by duly authorized lawyers, or the “consolidated group” of Civil Parties whose interests are represented by Lead Co-Lawyers who have received no mandate from any Civil Party to act in their name?

It also led to questions about the “independence” of these co-lawyers “*selected and funded by the ECCC*”, taking their power from the ECCC Internal Rules rather than from mandates from Civil Parties.<sup>133</sup>

In addition, the problem of taking account of potential conflicts of interest between the Civil Parties remains a real challenge, since they now all find themselves subsumed into a “*consolidated group*”.

Finally, although the primary duty of the Civil Party Lead Co-Lawyers is to “*seek the views of the Civil Party lawyers and endeavour to reach consensus in order to coordinate representation of Civil Parties at trial*”,<sup>134</sup> a real difficulty lies in the fact that almost all the international lawyers are based abroad and only come to Cambodia sporadically. The implementation and compliance with real consultation procedures are therefore essential so that the duty to consult does not remain a dead letter, and the Lead Co-Lawyers - in fact - decide on strategic guidance alone.

#### *b) The restriction or lack of consideration for the rights of Civil Parties in the judicial practice of the Extraordinary Chambers*

Three restrictions developed through the decisions of the Trial Chamber show its distrust of Civil Parties:

- Restriction of the right of Civil Parties to ask the accused questions relating to their personality and sentencing;
- Refusal to allow Civil Parties to make opening statements in the first trial in Case 002;
- Denial of the Civil Party lawyers request for access to expert medical reports relating to the accused.

### 4) On reparation issues

The experience in Case 001 and the preliminary consequences drawn by the ECCC in Case 002 show the persistence of ambiguities and gaps in relation to reparations.

It is unacceptable that the indigence of the accused be taken into account to exclude claims for reparations against them. It is also unfortunate that a highly restrictive view of the meaning of “*collective and moral*” reparation has been adopted by the ECCC, and that the Judges did not give enough time and space to a full discussion of the harm suffered by the Civil Parties.

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133. ECCC Internal Rule 12 *ter* (2) and (4).

134. ECCC Internal Rule 12 *ter* (3).

It is also worrying that the Civil Parties are now required to present requests for “turnkey” reparations projects, that have received approval from the Royal Government of Cambodia and the promise of funds.

#### **IV – THE TEN CONDITIONS FOR GENUINE, EFFECTIVE AND EFFICIENT PARTICIPATION OF VICTIMS BEFORE HYBRID OR INTERNATIONAL COURTS**

While it is premature to make a final assessment of the participation system for Civil Parties before the ECCC, the first 4 years of experimentation reveals the outline within which any participation of victims should be structured in mass crimes trials before international or hybrid courts.

1. Coordination of outreach and support for victims with the judicial proceedings and in line with the scope of the investigations;
2. Strict admissibility criteria, based on a direct link between the alleged harm and the facts under investigation;
3. Existence of a true system of legal aid for victims;
4. Compulsory legal representation from the outset;
5. Guarantees of independence to the representatives of victims;
6. Organized legal representation - if necessary by the Chambers themselves - in consultation with the victims and their lawyers, and in accordance with their specific interests;
7. Guaranteed procedural rights for victims to participate actively and effectively in the prosecution of persons responsible for crimes within the jurisdiction of the Court at the investigation and judgment stages, including the possibility of producing evidence;
8. Guaranteed, organized participation at trial;
9. The right to request the sentencing of the accused to reparations, regardless of whether they are considered indigent;
10. The establishment of a trust fund for victims, enabling effective implementation of reparation measures for victims.



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