



FIDH-ADHOC-LICADHO COMMENTS ON VICTIM PARTICIPATION AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)

Introduction

FIDH, ADHOC and LICADHO have drafted this memorandum aiming to provide input to the upcoming ECCC Plenary Session of Judicial Officers on the issue of organising the participation of civil parties in proceedings with a special focus on Case 002. In this context FIDH, ADHOC and LICADHO's primary concern is to ensure that victims of crimes within the jurisdiction of the ECCC are granted with an effective and adequate participation in the proceedings according to Cambodian Law and international standards, as set out in Rule 23 of the ECCC Internal Rules, which establishes the purposes of a civil party action to:

- “a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
- b) Allow Victims to seek collective and moral reparations as provided in this Rule.”

The nature of the crimes currently before the ECCC is such that an important number of victims were affected. Whilst this may cause procedural and administrative challenges, given the nature of the crimes and the large number of victims, the ECCC should provide an adequate response, in accordance with the procedural rights of victims recognised in the Law on the Establishment of the Extraordinary Chambers and the Internal Rules.

In this regard, FIDH, ADHOC and LICADHO recall the importance of the United Nations Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly on December 16, 2005, and more specifically their provisions on access to justice. According to these principles, the views and concerns of victims should be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

FIDH, ADHOC and LICADHO are aware of the positions taken by certain judges to be submitted to the Plenary Session, asking to limit the rights of the victims to participate in the judicial proceedings of the Court. The victims should not bear the burden of the dysfunction that may have appeared during the trial of Case 001. In Case 002 the Court should base its decision taking into account victims rights and set up the common legal representation system in the interest of justice.

Therefore, the FIDH, ADHOC and LICADHO would like to recall the importance of Victims participation before the ECCC and the necessity to define clearly Civil Party's common representation and scope of action.

I. Participation for Civil Parties

Internal Rule 23 of the ECCC sets the legal framework of the civil parties by allowing them to participate in criminal proceedings against those responsible for crimes by supporting the prosecution and by allowing victims to seek collective and moral reparations¹.

The Victim's Unit helps the Civil Parties to participate and file complaints but faces serious difficulties in its attempt to comply with its mandate, including the *prima facie* processing of Civil Parties applications. However, the limited financial and human resources available, during its first stage of functioning constituted the principal obstacle. This lack of resources should not be a pretext to limit the victim's access to information and to the procedure.

FIDH, ADHOC and LICADHO welcome the proposal of Rule 12 *bis* to extend the Victim's Unit mandate and to define more concretely its outreach as it allows a better coordination of victim's claims and a more appropriate support.

Further, regarding Civil Parties participation in Court we note that the proposal to amend Rule 23 (5) related to Rule 88 (4) needs to be clarified. It seems that Civil Parties shall testify like witnesses, under oath. This does not belong to Civil Parties statute under ECCC applicable law. Civil Parties are parties similar to the defence and therefore should have the same rights. They should not have a hybrid status that would hamper the exercise of their rights as a party at trial.

While Civil Party participation should not be the only element of concern there is a need to find the best model to maximize the participation as well as the time and resources of the Court.

II. Legal representation

The large number of victims and victim associations willing to participate may require a representative, who would be selected from legal representatives of Civil Parties, who would be expected to communicate with the Court, and coordinate arguments of the legal representatives to avoid repetition of arguments and unnecessary delays in the proceedings. Civil Parties could be commonly represented by their own will or if requested by the judges. In this regard, the creation of a figure for the common representation figure is envisaged in the Internal Rules of the ECCC, which calls to the agreement of the Civil Parties to group themselves and choose a common representative.²

Consolidated groups (Rule 23(2)):

FIDH, ADHOC and LICADHO have taken note that there is a proposal to group Civil Parties in a consolidated group and be represented by a Lead Co-Lawyer. This means that those groups will be representing identical interests. The leading Co-Lawyers will be two persons, one international and one national.

¹ See also Practice Direction 02/2007/Rev.1, Article 3 "Any victim of a crime coming within the jurisdiction of the ECCC may join the proceedings as a civil party in a case concerning that crime." "3. Victims may only apply to be joined as civil parties to a case if the case is under investigation by the Co-Investigating Judges and up until the opening of proceedings in that case before the Trial Chamber."

² See **Rule 23(8)(d)** "8. A group of Civil Parties may choose to be represented by a common lawyer drawn from the list held by the Victims Unit. [...] d) The Co-Investigating judges or the Chambers and the Victims Unit shall take all reasonable steps to ensure that in the selection of common lawyers, the distinct interests of each of the Civil Parties are represented and that any conflict of interest is avoided [...]"

A similar development has already appeared at the ICC. Indeed, the ICC Trial Chamber II in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* has resorted to a common legal representative system, grouping victims, originally represented by eight different lawyers, into two legal teams. One of the arguments used by the Court was that this group of victims had special characteristics, which allowed a single common representative to represent their interests. All victims in this case were affected by one particular attack. Therefore, the Chamber decided that at first hand no tensions were visible between them in terms of ethnicity, age, gender or the type of crimes they were allegedly the victims of.³ Moreover, the Trial Chamber left the door open to reassess the common legal representation if in the future any conflict of interests were raised⁴. Until now, this common legal representation modality has not been implemented fully since the trial has been suspended for reasons other than victims' participation. It is important to note also that a small group of victims in the same case was assigned another lawyer, because it was thought that their interests conflicted with those of the main group.⁵

FIDH, ADHOC and LICADHO agree with a representation that will improve the proceedings before the Court. However, it has to be considered that inside the group, there can be victims with different interests, points of view and positions, and that those points of view have to be expressed too to the Chambers. This is why FIDH, ADHOC and LICADHO submit that there should be a mechanism for victims with different interests to help them share their points of view with the judges and point out their different interests. This would allow victims to submit a claim with another interest even if they already belong to a consolidated group. Thus, this would respect the right of access to the Court. In this case, it is important to define more precisely the word “interest” of the group.

Regarding Rule 23 (4), the Co-Investigating Judges will have the possibility to “group unrepresented Civil Parties and nominate a lawyer to represent them, or assign them to existing groups”. This has to be defined more clearly. The current situation is not satisfying as unrepresented Civil Parties may belong to a group they do not correspond to, and that would not represent their interest.

Common representation (Rule 12 ter)

FIDH, ADHOC and LICADHO are not opposed to the principle of a lawyer who will be the victims' spokesperson before the Court, keeping in mind the right of the Civil Parties to be represented by a lawyer of their choice, which must be guaranteed, and that the freely chosen lawyer must be granted the ability to express his/her client's views at any time of the proceedings if their views are not considered by the common representative.

This representative will have to observe elementary rules to ensure the cooperation between the Lead Co Lawyers and the Civil Parties Lawyers: he/she will have to work in a spirit of complementarity with the other lawyers. The representative will have to ensure a coherent and organised representation before the Court (organising written requests or oral interventions). He/she will aim to facilitate the information's exchange between the legal representatives and the Court representatives.

³ See Paragraph 12 of the decision *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, Trial Chamber II, 22 July 2009, ICC-01/04-01/07.

⁴ See Paragraph 16 of the decision *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, Trial Chamber II, 22 July 2009, ICC-01/04-01/07.

⁵ See Paragraphs 12-13 of the decision *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Organisation of Common Legal Representation of Victims, Trial Chamber II, 22 July 2009, ICC-01/04-01/07.

In addition, assignments should be specified for example, following up technical problems in the implementation of the procedure (planning's preparation, documents submission, joint work with the Victim's Unit, sharing of speaking time...). All this must occur with the relevant Civil Parties Lawyer's agreement.

Any common legal representation system adopted by the ECCC should take into account that: a) victims are granted with the same rights as national level by Cambodian law; b) multiplicity of views should be able to be known to the Court; c) the system should aim to avoid duplication or repetition of same matters by Civil Parties' legal representatives; d) encourage the presentation of common written filings; and f) allow legal representatives to verify that his/her client's interests are well represented. Thus, as an example of common legal representation, the Civil Parties Lawyers should be allowed to speak during the closing hearing, if they have different views to express. The set-up of an adequately equipped and suitable support structure will be key for its success for any system adopted by the ECCC.

In addition, FIDH, ADHOC and LICADHO recall that victims associations play an important role in the common representation despite not being Civil Parties as such, and in the proceedings; they can help to represent their members. In order to be authorised they need to be recognised on the list under the Victims Unit. Once a victims association has been enlisted, the Unit might present the list to the victims wishing to be represented.⁶

Power of Attorney and presence at Trial (Rule 12 *ter* (3) (a))

The point concerning the power of Attorney must be defined more concretely. In the current situation, the establishment of the Lead Co-Counsel by the amendment of the Internal Rules would be mandatory as well as to reconsider the original "intuitu personae" mandate given by the client to his counsel.

Furthermore, the mandatory presence of the Lead Co-Counsel at trial (submission of "mémoire", control of legal arguments) breaks the independence of the lawyer and the right of victims to be represented by a lawyer of one's choice. It is impossible to imagine a Court created by the UN that would not respect those fundamental rights well established in international law. This would reduce victims' and lawyer's rights and must be avoided.

Therefore, there is a need to set up a mechanism to allow Civil Parties' lawyers to act before the Court in the case that their client's rights, views or concerns are not presented adequately by the Lead Co-counsel. Only then, lawyers will be able to comply with the mandate directly given and accepted by victims as their clients.

III. Reparation

According to the ECCC Law, individual financial compensation will not be granted, but only "collective and moral reparations"⁷. Reparations will be granted to Civil Parties as a group, to the benefit of groups of victims or to Cambodian society.⁸

⁶ See **Rule 23(9)** "A group of Victims may also choose to organise their Civil Party action by becoming members of a Victims' Association" and Article 5 of the Practice Direction 02/2007.

⁷ See Internal Rules 23 (11).

⁸ http://www.eccc.gov.kh/english/victims_rights.aspx

Moreover, the reparations will have to be covered at the expenses of the persons convicted.⁹ Due to the great number of victims and the financial status of those currently under investigation or trial, this situation already indicates an important challenge.

Single claim for reparation:

A single claim for reparation is logical regarding the necessity to accelerate the procedure. But this single claim has to take into account that Civil Parties may have different desires and needs regarding reparation. Indeed, all the victims did not suffer the same type and degree of harm as a result of the different crimes committed during the Khmer Rouge Regime. That is why it is important that the single claim gives the possibility to include different requests for reparations in order to represent every victim's claim. Even if the reparations will be granted collectively, victims should have the right to express their views as to the type of reparations that will be closer to be a meaningful reparation modality, in order to assist the Judges when deciding upon reparations measures.

On the contrary, a single claim with a single request violates the right of Civil Parties to have access to the courts in order to represent their interests.

Furthermore, FIDH, ADHOC and LICADHO would like to emphasize that the presentation of the joint claim at the initial hearing is a violation of the right to obtain reparation. It should be possible to submit a request during the course of the trial, while Civil Parties have access to more information. FIDH, ADHOC and LICADHO repeat the necessity to extend the ability to submit a claim during the whole procedure.

Implementation of reparation orders:

Rule 23 *quater* of the Internal Rules states that victim reparation will be borne by convicted persons.¹⁰ FIDH, ADHOC and LICADHO call upon the ECCC to investigate fully the financial situation of each of the accused to be certain of their indigence, but also to amend Rule 23 to allow for voluntary contributions to surmount the lack of funds.¹¹

Due to the indigence of the accused, the finances required to support any reparation orders are not apparent. FIDH, ADHOC and LICADHO call for the amendment of Rule 23 to allow for voluntary contributions and for the creation of a Trust Fund, to enable the widest scope of reparations to be achieved after the ECCC has been dissolved.

This modality should encompass alternative reparation modalities, for example, moral reparation, including: building memorials, erecting statutes, establishing days of remembrance, promoting education especially to the young generation about the Khmer Rouge Regime period, collecting archives and allowing a public access to them, among others. FIDH, ADHOC and LICADHO suggest a wider development of those alternative ways of reparation and calls upon the international community and the government of Cambodia to support a wider scope of reparations for the victims of the crimes under the jurisdiction of the ECCC.

⁹ See Internal Rules 23 (11).

¹⁰ IR Rule 23.11

¹¹ This proposal has been also supported by national and international NGOs, and was a recommendation of the Conference held by the ECCC in November 2009 where FIDH was present..

IV. Conclusions

FIDH, ADHOC and LICADHO recognise that the Civil Party system was not necessarily designed to represent victims “en masse”, and that there is no clear precedent for the ECCC to follow in mandating for this allowance. Nonetheless, the challenge of victim participation was taken up by the ECCC from the very beginning and must be resolved and facilitated through creative and intelligent means and not at the expense of victims’ rights. To relent from progress when progress has been made, is simply unacceptable.

FIDH, ADHOC and LICADHO also recognise the need for coordination among lawyers and Civil Parties to facilitate the trials and to avoid limiting the rights of the accused, and acknowledges the proposal of the Lead Co-Counsel as an alternative if amended to be in accordance with victims’ rights and international standards. Therefore, FIDH, ADHOC and LICADHO would like to remind the Plenary that any system introduced or amended must respect the core rights of the figure of the Civil Party, as it is for the victims of the Khmer Rouge Regime that the trials are being conducted. If the remedy decided upon by the Court involves creating a single representative for all Civil Parties, this figure should be able to adequately transmit all views of the Civil Parties to the Court.

Having made a significant progression in international law, it would be regrettable if the ECCC would decrease the level of recognition of victims' rights in international criminal and human rights law with amendments that may sideline victim participation all together or nullify the exercise of their rights.