

# Legal Developments in Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia

DR. IGNAZ STEGMILLER\*

---

## Abstract

For the first time in the history of international criminal justice, victims of mass crimes have been granted the status of so-called ‘civil parties’ at the Extraordinary Chambers in the Courts of Cambodia (ECCC). This status grants them – at least theoretically – the right to participate in the proceedings as a formal party with broad participatory rights similar to those of the defence and the prosecution. While the ECCC is exemplary in how it has addressed the issue of victims’ participation, practical necessities and judicial skepticism have led to significant changes in the civil party mechanism and continuously constrained participatory rights. First, changes in the ECCC’s Internal Rules have significantly altered the original civil party mechanism and led to a form of victim participation similar to the one practised at the International Criminal Court (ICC), thus departing from the true meaning of a *partie civile*. Judicial decisions by the ECCC’s judges, as well as changes in the Internal Rules, have abrogated the strong civil party mechanism that was originally anticipated in Cambodian criminal procedure law. Second, the practical challenges surrounding victim participation have been enormous. The Court itself was struggling due to lack of funding and lack of prioritization of a meaningful outreach program for victims and civil parties. The ECCC’s Public Affairs Section (PAS) and the Victims Support Section (VSS) held the responsibility of reaching out to the general Cambodian population. However, it was Cambodian NGOs that ultimately established a collaborative outreach system and collected more than 8,000 Victim Information Forms (VIFs). All these efforts notwithstanding, only political willingness and a Cambodian discussion of how to deal with the vast number of perpetrators beyond a handful of criminal trials, can lead to a process of coming to terms with one’s past.

## Key words

Cambodia; civil parties; ECCC; legal developments; victim participation

## I. INTRODUCTION

The ECCC is a so-called hybrid tribunal, co-founded by the United Nations and the Cambodian government by a bilateral agreement.<sup>1</sup> The ECCC was created in 2003

---

\* Ignaz Stegmiller holds a doctoral degree in international criminal law from the Georg-August University of Göttingen, and is currently working as the Coordinator for International Programs at the Law School of the University of Giessen, see <http://fbor-intlaw.recht.uni-giessen.de/ueber-uns/team/ignaz.stegmiller@recht.uni-giessen.de>. I would like to thank Silke Studzinsky for fruitful comments and a revision of this text.

<sup>1</sup> Agreement between the United Nations and the Royal Government of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, 6 June 2003, see <<http://www.eccc.gov.kh/en/document/legal/agreement>> (last visited 18 October 2013).

to bring to trial (i) senior leaders of Democratic Kampuchea and (ii) those who were most responsible for the serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions that it recognized, committed during the period from 17 April 1975 to 6 January 1979.<sup>2</sup> Its jurisdictional mandate is constrained by these personal, territorial, and temporal parameters. Moreover, its subject-matter jurisdiction is limited to selected international crimes (genocide; crimes against humanity; war crimes; and destruction of cultural property), as well as some crimes under Cambodian law (murder; torture; and religious persecution).

The ECCC has been dealing with four cases: Case 001 (completed), Case 002, Case 003, and Case 004. This article focuses mainly on the legal developments in relation to victim participation in Cases 001 and 002, and on how civil party participation has been continuously undermined. As it has encountered each case, the Court has faced allegations of political interference, the most serious of which have been in relation to Cases 003 and 004 and a media battle between the (national and international) co-investigating judges.<sup>3</sup> In these two cases the identities of the suspects remain under seal, and there has been very little progress for several years, although a new investigating judge has finally been sworn in.<sup>4</sup> Given the limited legal progress and the early stage of these cases, they will not be included in this article.

Case 002 is factually and legally complex and involves two accused named Nuon Chea and Khieu Samphan.<sup>5</sup> The formerly co-accused Ieng Thirith was released after a decision by the trial chamber finding her unfit to stand trial,<sup>6</sup> and proceedings against the formerly co-accused Ieng Sary were terminated on 14 March 2013, following his death the same day.<sup>7</sup> In Case 002, a total of 3,866 victims were admitted as civil parties,<sup>8</sup> and, due to this high number, the judges designed a new concept of victim

2 Art 2 (new) of The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, 27 October 2004 (NS/RKM/1004/006), see <<http://www.eccc.gov.kh/en/document/legal/law-on-eccc>> (last visited 18 October 2013).

3 For a comprehensive report see 'The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia', *Open Society Justice Initiative* (OSJI), October 2012, <<http://www.soros.org/publications/future-cases-003-and-004-extraordinary-chambers-courts-cambodia>> (last visited 18 October 2013); see also the Press Releases by the Cambodian Human Rights Action Committee (CHRAC), <[http://www.chrac.org/eng/index.php?page=chrac\\_press\\_releases](http://www.chrac.org/eng/index.php?page=chrac_press_releases)> (last visited 18 October 2013). On the ECCC's perception, see J. Wallace, 'Justice in the Dock at Khmer Rouge Trials', *Al Jazeera*, 30 September 2012 <<http://www.aljazeera.com/indepth/features/2012/09/2012925141556917463.html>> (last visited 18 October 2013); see also D. Gillison, 'Extraordinary Injustice', *The Investigative Fund*, 27 February 2012, <[http://www.theinvestigativefund.org/investigations/international/1612/extraordinary\\_injustice/](http://www.theinvestigativefund.org/investigations/international/1612/extraordinary_injustice/)> (last visited 18 October 2013).

4 Judge Mark Brian Harmon was sworn in on 26 October 2012, see <<http://www.eccc.gov.kh/en/articles/mark-harmon-sworn-international-co-investigating-judge>> (last visited 18 October 2013), and there may finally be some movement with these cases. See further <<http://www.eccc.gov.kh/en/case/topic/98>>.

5 For more information on the ongoing trial see <<http://www.eccc.gov.kh/en/case/topic/2>> (last visited 18 October 2013).

6 Decision Case 002, IENG Thirith, Decision of Reassessment of Accused IENG Thirith's Fitness to Stand Trial following Supreme Court Decision of 13 December 2011, Trial Chamber, 13 September 2012, E138/1/10, <[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138\\_I\\_10\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_I_10_EN.pdf)> (last visited 18 October 2013).

7 See <<http://www.eccc.gov.kh/en/indicted-person/ieng-sary>> (last visited 18 October 2013).

8 ECCC, 'Reaching Out to Newly Admitted Civil Parties', *The Court Report*, Issue 39, August 2011, at 1, and Court Report, Issue 38, July 2011, at 6, <<http://www.eccc.gov.kh/en/public-affair/publication>> (last visited 18 October 2013); Decision Case 002, IENG Sary/IENG Thirith/KHIEU Samphan/NUON Chea, Decision on

participation through a revision of the Internal Rules.<sup>9</sup> Section 2 of this article will deal with this revised scheme in more detail, as it is relevant for understanding the restrictions imposed on civil parties and their legal representatives or counsel, and the (inherent) limited possibilities within criminal trials to provide for ‘meaningful’ participation.<sup>10</sup>

Case 001 against Kaing Guek Eav, alias Duch, resulted in the ECCC’s first verdict by the trial chamber on 26 July 2010, when it handed down a 35-year sentence.<sup>11</sup> On 3 February 2012, the Supreme Court Chamber granted the appeal by the prosecution and increased the sentence to life imprisonment.<sup>12</sup> Without going into all the details of this judgment,<sup>13</sup> two issues are worthy of mention: (i) the case against Kaing Guek Eav, alias Duch, was the first trial in international criminal law in which victims were able to participate as civil parties,<sup>14</sup> and the term ‘civil party’ implicitly creates expectations of a more victim-centred approach with strong participatory rights; (ii) however, during the process, civil participatory rights were continuously curtailed – a trend that continued in Case 002 – and the requests for reparations were almost entirely rejected by the trial chamber, a finding that was upheld on appeal by the Supreme Court Chamber.<sup>15</sup>

Bearing in mind the limited scope of this article, we shall focus principally on victim’s participation in the legal setting of the ECCC. For this reason, section 2 of this article deals with civil party participation at the ECCC and its development

---

Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Pre-Trial Chamber, 24 June 2011, D404/2/4, at 60 et seq., <<http://www.eccc.gov.kh/en/document/court/decision-appeals-against-orders-co-investigating-judges-admissibility-civil-party-a-0>> (last visited 18 October 2013); see also N. Kirchenbauer et al., ‘Victims Participation before the Extraordinary Chambers in the Courts of Cambodia’, *Baseline Study of the Cambodian Human Rights and Development Association’s Civil Party Scheme for Case 002* (2013), <<http://www.ziviler-friedensdienst.org/de/publikation/baseline-study-cambodian-human-rights-and-development-associations-civil-party-scheme-case-002>> (last visited 18 October 2013), at 7 and 18.

- 9 See Rules 12, 12 *bis*, 12 *ter*, 23, 23 *bis*, 23 *ter*, 23 *quater*, and 23 *quinquies* of the Internal Rules (Rev. 8), 3 August 2011, <<http://www.eccc.gov.kh/en/document/legal/internal-Rules>> (last visited 18 October 2013). Critical of the new mechanism, S. Studzinsky, ‘Victim’s participation before the Extraordinary Chambers in the Courts of Cambodia’, (2011) 10 *Zeitschrift für Internationale Strafrechtsdogmatik*, 888, at 889–90; A. Werner and D. Rudy, ‘Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?’, (2010) 8 *Northwestern Journal of International Human Rights* 3, 301, at 306.
- 10 Meaningful participation encompasses (i) being properly and continuously informed, (ii) being enabled to take informed decisions, and (iii) getting involved by using the full range of participation rights. To achieve meaningful participation adequate resources are indispensable. Such participation is possible, see S. Studzinsky, ‘Participation Rights of Victims as Civil Parties and the Challenges of Their Implementation Before the Extraordinary Chambers in the Courts of Cambodia’ in T. Bonacker and C. Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse* (2013), 175, at 184 et seq.
- 11 Judgment Case 001, KAING Guek Eav alias Duch, Trial Chamber, 26 July 2012, E188, <<http://www.eccc.gov.kh/en/documents/court/judgement-case-001>> (last visited 18 October 2013).
- 12 Appeal Judgment Case 001, KAING Guek Eav alias Duch, Supreme Court Chamber, 3 February 2012, F28, <<http://www.eccc.gov.kh/en/document/court/case-001-appeal-judgement>> (last visited 18 October 2013).
- 13 It is worthy to note that that all parties (accused, prosecution, and civil parties) appealed. The accused made a challenge against the jurisdiction of the ECCC, the prosecution appealed for increasing the sentence and for altering his conviction for crimes against humanity, and the civil parties appealed against the rejection of numerous civil party applications and also requested reparations that had been denied by the Trial Chamber.
- 14 90 applicants participated in the trial and were granted civil party status or interim civil party status by the Trial Chamber. Later the Trial Chamber rejected 24 civil parties within its judgment. On appeal 10 more individuals were admitted by the Supreme Court Chamber, see Appeal Judgment Case 001, *supra* note 12, paras. 535 et seq.; in more detail, Studzinsky, *supra* note 9, at 887–8; ADHOC Baseline Study, *supra* note 8, at 3–4.
- 15 Appeal Judgment Case 001, *supra* note 12, paras. 630 et seq., para. 717.

in the aforementioned Cases 001 and 002, and Section 3 presents a brief overview of the implementation of civil party participation through NGO activities. Based on the description of victim participation in the legal arena of the ECCC and touching upon non-legal options, the article concludes by raising questions relating to the benefit of victim participation and its future (section 4).

## 2. THE LEGAL BASIS FOR CIVIL PARTY PARTICIPATION

The ECCC foresees that victims can participate as civil parties, granting them full rights in Rule 23 of the Internal Rules.<sup>16</sup> As the ECCC is integrated into the Cambodian court structure, the Rules regarding civil party participation of the Cambodian Criminal Procedure Code should apply first, and the Rules are thought to complement this procedure and fill in the gaps.<sup>17</sup> However, the Pre-Trial Chamber reversed this order and held that the Internal Rules constitute ‘the primary instrument to which reference should be made in determining procedures before the ECCC’.<sup>18</sup> At the outset, it should be noted that Rule 23<sup>19</sup> broadly states that the purpose of civil party action is to participate in criminal proceedings by supporting the prosecution, and that victims can seek collective and moral reparations. A first version of Rule 12 further regulated that a Victim Unit (VU) assists the victims in submitting civil party applications. In the meantime, these rudimentary Rules were revised eight times by the Judges,<sup>20</sup> and have led to a whole compilation of Rules (12, 12 *bis*, 12

16 Internal Rules refers to the ECCC Internal Rules. Hereinafter, all Rules within this article without further indication are those of the ECCC Internal Rules, Revision 8, *supra* note 9.

17 Code of Criminal Procedure of the Kingdom of Cambodia, Khmer – English Translation, September 2008, <[http://cambodia.ohchr.org/klc\\_pages/KLC\\_files/section\\_011/S11\\_CriminalProcedureCode2007E.pdf](http://cambodia.ohchr.org/klc_pages/KLC_files/section_011/S11_CriminalProcedureCode2007E.pdf)> (last visited 18 October 2013). Interestingly, the Cambodian Code of Criminal Procedure cannot be found on the homepage of the Court under ‘legal documents’ although it is the basis and first source according to Art. 12 of the Agreement on the ECCC and Arts. 20 new, 23 new and 33 new of the Law on the Establishment of the ECCC as amended, 27 October 2004, <[http://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf)> (last visited 18 October 2013). In this regard, Article 12 (1) of the Agreement on the ECCC (*supra* note 1) states:

The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, and if the existing procedures do 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.

18 Decision Case 002, Decision against Nuon Chea’s Appeal against Order Refusing Request for Annulment, Pre-Trial Chamber, 26 August 2008, paras. 14–15, <<http://www.eccc.gov.kh/en/document/court/decision-nuon-chea-appeal-against-order-refusing-request-annulment>> (last visited 18 October 2013). An appeal against this decision was not successful, see Civil Party Co-Lawyers’ Joint Request for Reconsideration of the Pre-Trial Chamber’s Assessment of the Legal Status of the Internal Rules in the Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, 13 October 2008, <<http://www.eccc.gov.kh/en/documents/court/civil-party-co-lawyers-joint-request-reconsideration-pre-trial-chambers-assessment-1>> (last visited 18 October 2013).

19 Internal Rules, original version as of 12 June 2007.

20 Revisions of the Internal Rules take place at all international(ized) tribunals and derive from a common law understanding as ordinary procedural provisions governing the internal work process. For the sake of efficiency and speeding up the proceedings, they can be amended by a plenary of the judges. For example, the International Criminal Tribunal for the Former Yugoslavia revised its Rules of Procedure and Evidence over 40 times. However, there must be a certain degree of consistency and fundamental procedural rights cannot be abrogated.

ter, 23, 23 *bis*, 23 *ter*, 23 *quater*, and 23 *quinquies*).<sup>21</sup> Further, the ECCC limited the participatory rights through jurisprudence. The ECCC's legal developments can thus be circumscribed by two tendencies: increasing normative regulation and juridical restraint.

With regard to civil party participation in practice, three important domains can be distinguished: (i) admissibility criteria and procedure, (ii) participatory rights in the trial proceedings, and (iii) the right to reparation(s). This article will only touch briefly upon admissibility and then focus on participatory rights and civil party representation. Although the issue of reparations would definitely have been worth addressing, it would exceed the scope of this contribution.

The criteria for the admissibility of civil parties as spelled out in Rule 23 *bis* (1),<sup>22</sup> and include the following elements: the existence of a causal link between the charged crimes and the injury<sup>23</sup>; injury; proof of identification; and the level of proof ('more likely than not to be true').<sup>24</sup>

Injury must be personal, but not necessarily direct, and the 'very nature of the societal and cultural context at the time when the alleged crimes occurred requires another and wider consideration of the matter of victimization'.<sup>25</sup> In general, the Rules for admissibility have evolved over time alongside the trials, and were rather unclear at the beginning and, in addition, were applied differently by the Office of the Co-Investigating Judges, the Pre-Trial Chamber, and the Trial Chamber.

Coming to the essential participatory rights, earlier in trial proceedings the Pre-Trial Chamber had interpreted Rule 23 (1) as providing for participation 'in all stages of criminal proceedings' and that civil parties have 'active rights to participate starting from the investigating stage of the proceedings'.<sup>26</sup> On the basis of this

21 The amendments of the Internal Rules are problematic because the preamble of the Rules reiterates that their purpose is to *consolidate* applicable Cambodian procedure for procedures before the ECCC. Through the amendments of the rules, the judges supposedly abrogated existing Cambodian procedures and developed a new system of victim participation that departs from the existing – and preceding! – Cambodian system of civil party participation.

22 Rule 23 *bis* (1) reads:

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.

23 In an earlier version of the Internal Rules this link was not required. It was only required to suffer harm from a crime under the jurisdiction of the court, which is a much broader requirement.

24 Decision Case 002, Decision of Appeals against Orders of the Co-investigating Judges on the Admissibility of Civil Party Applications, Pre-Trial Chamber, 24 June 2011, paras. 56–7, <[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D404\\_2\\_4\\_EN-1.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D404_2_4_EN-1.PDF)> (last visited 18 October 2013).

25 Decision Case 002, *supra* note 24, para. 86. The Office of the Co-Investigating Judges had earlier taken a narrow approach and rejected 48 per cent of civil party applications in Case 002, but the Pre-Trial Chamber overruled this standard and took the quoted broader approach. See also S. Studzinsky, 'Das ECCC und die Nebenklage-Hoffnungen und Enttäuschungen', in A. Goeb (ed.), *Das Kambodscha-Drama - Menschheitsverbrechen im Khmer Rouge-Staat und der Prozess der späten Sühne* (2013), at 10 et seq.

26 Decision Case 002, Decision of Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, 20 March 2008, C11/53, para. 36, <<http://www.eccc.gov.kh/en/documents/court/ptc-decision-civil-party-participation-provisional-detention-appeals>> (last visited 18 October 2013). Contrary to this, advising against

statement expressed by the Pre-Trial Chamber and, given the broad phrasing of Rule 23, one would expect strong rights for civil parties to engage in proceedings. However, once the number of civil parties increased, mechanisms were adopted to ‘streamline’ – in the words of the judges – their participation. Civil parties cannot address the Chamber directly during the trial stage anymore, but must be represented by lawyers, with their rights exercised only through their lawyers.<sup>27</sup> In Cases 001 and 002, civil parties were excluded from the opening statement or brief preliminary remarks respectively,<sup>28</sup> and in Case 001 they were also denied the opportunity to make any submissions relevant to sentencing.<sup>29</sup> In the latter decision, the Trial Chamber excluded civil parties *proprio motu* from questioning character witnesses, the accused, and experts who had examined the accused.<sup>30</sup> Most importantly, the amended version of Rule 23 (3) of the ECCC’s Internal Rules states that civil parties can only participate as a ‘consolidated group’ once the trial stage is reached, and that civil party lead co-lawyers (CP-LCL) organize this group in accordance with Rule 12 *ter*. The new representation scheme thus introduces two novel concepts: (i) one consolidated group of civil parties, and (ii) lead co-lawyers that shall not only co-ordinate the representation of civil parties, but also represent the interests of the consolidated group although they have no powers of attorney.<sup>31</sup>

---

civil party participation during the hearing of provisional detention, Amicus Brief Case 002, Amicus Brief by Christoph Safferling on the Issue of Civil Party Participation, Pre-Trial Chamber, 20 February 2008, C11/39, <[http://www.eccc.gov.kh/sites/default/files/documents/court/doc/Amicus\\_Christoph\\_Safferling\\_C11\\_39\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/court/doc/Amicus_Christoph_Safferling_C11_39_EN.pdf)> (last visited 18 October 2013).

27 Rule 23 *ter* (1) and (2).

28 Rule 89 *bis* (2) foresees opening statements by the co-prosecutors and a response by the accused. This Rule deviates from the Cambodian Procedure Code, which does not mention any opening statement, in accordance with civil law practice. The requests of civil parties to be allowed to make an opening statement in Case 001 and to submit preliminary remarks in Case 002 were rejected. The Trial Chamber ruled that this is because civil parties are not mentioned in Rule 89 *bis*, nor in the Cambodian Procedure Code, omitting that, according to domestic law, no party has the right to an opening statement. With regard to Case 001, see Decision on the Request of the Co-lawyers for Civil Parties Group 2 to Make an Opening Statement during the Substantive Hearing, 27 March 2009, E23/4, <<http://www.eccc.gov.kh/en/documents/court/decision-request-co-lawyers-civil-parties-group-2-make-opening-statement-during-subs>> (last visited 18 October 2013). The – publically available – request can presently not be found on the website of the ECCC, but a copy is on file with the author: Urgent request of Co-Lawyers for Civil Parties Concerning their Right to Submit an Opening Statement during the Substantive Hearing, 16 March 2009, 001/18-07-2007-ECCC/TC. Further, with regard to Case 002, see Lead-Co-lawyers’ and Civil Party Lawyers’ Request to Make Brief Preliminary Remarks on behalf of Civil Parties after Co-prosecutors’ Opening Statement, 2 November 2011, E131/4, <<http://www.eccc.gov.kh/en/document/court/lead-co-lawyers%E2%80%99-and-civil-party-lawyers%E2%80%99-request-make-brief-preliminary-remarks-beha>> (last visited 18 October 2013); Trial Chamber response to Lead Co-lawyers and Civil Party Lawyers’ Request to Make Brief Preliminary Remarks on Behalf of Civil Parties (E131/4), 15 November 2011, E131/4/1, <<http://www.eccc.gov.kh/en/document/court/trial-chamber-response-lead-co-lawyers-and-civil-party-lawyers%E2%80%99-request-make-brief-pr>> (last visited 18 October 2013). It should be noted that at the ICC victims ‘may’ submit an opening statement in accordance with the ICC Rules of Procedure and Evidence.

29 Decision Case 001, Decision on Civil Party Co-Lawyers’ Joint Request 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, Trial Chamber, 9 October 2009, E72/3.

30 Decision Case 001, *supra* note 29, paras. 40 and 48; see also para. 25: ‘(...) does not confer a general right of equal participation with the Co-Prosecutors’, <[http://www.eccc.gov.kh/sites/default/files/documents/court/doc/E72\\_3\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/court/doc/E72_3_EN.pdf)> (last visited 18 October 2013).

31 As a third novel concept, one single claim for collective and moral reparations was introduced by Rule 23 (3) clause 3, 23 *quinquies*.

Two successive plenary sessions modified the Rules in November 2009. In the light of the first trial, the judges deemed changes necessary to promote more expeditious trial proceedings:

These modifications are designed to meet the requirements of trials of mass crimes and the specific Cambodian context and to ensure that ECCC proceedings respond more fully to the needs of victims. They will also promote greater efficiency in trial management and the ability of the ECCC to reach a verdict in any future trials.<sup>32</sup>

The judges' aim was apparently to speed up the trial in Case 002 when they developed these legal innovations. However, the amended Rules are contradictory to some extent and it remains unclear what exact role the CP-LCLs should play. Rule 12 *ter*(1) and (3) refers to the organization and co-ordination of representation, while later, in Rule 12 *ter*(5), the core function is 'representing the interests of the consolidated group'. In reality, the CP-LCLs go beyond co-ordination and refer to their 'ultimate responsibility' to represent the consolidated group under Rule 12 *ter*(5)(b). Another aspect concerns disputes that will surely arise given the high number and divergent interests of civil parties, civil party lawyers<sup>33</sup> and the LCLs. Rule 12 *ter*(3) leaves the consultation process to 'internal procedures' to be determined by the CP-LCLs, but there is a lacuna in the Rules concerning the settlement of disputes between the CP-LCLs and civil party lawyers.<sup>34</sup> A formal complaint procedure for civil party lawyers against decisions taken by the CP-LCLs should have been provided for in the Rules.

The 'consolidated group' is also not further specified. With respect to individual rights, it will be interesting to see how the Trial Chamber deals with the participatory rights of a whole group. By giving the ultimate responsibility to CP-LCLs and, at the same time, excluding the legitimate civil party lawyers from having a standing before the Trial Chamber, only CP-LCL submissions and views are accepted and allowed. While grouping according to common interests and goals is in general a sound idea, the tension between individual rights of a civil party represented by its chosen counsel *vis-à-vis* the consolidated group represented by the LCLs has not been solved by the Rules. It is questionable whether almost 3,866 victims can be reduced to one common voice. The judges supposedly exceeded the limits of finding a fair balance between the rights of the accused to an expeditious trial and the victims' rights to meaningful participation, if victims are required to be grouped in only one consolidated group.<sup>35</sup> In trials of mass crimes, alternative ways of representation are

32 'Sixth ECCC Plenary Session Concludes', *ECCC Press Release*, 11 September 2009, <[http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_Plenary\\_11\\_Sep\\_2009\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_Plenary_11_Sep_2009_Eng.pdf)> (last visited 18 October 2013); further R. Petit and A. Ahmed, 'A Review of the Jurisprudence of the Khmer Rouge Tribunal', (2010) 8 *Northwestern Journal of International Human Rights* 2, 165, at 174.

33 At present, there are 39 different civil party lawyers.

34 In a similar vein already Werner and Rudy, *supra* note 9, at 306; see also FIDH, A New Scheme for Civil Party Representation before the ECCC: Victims to Bear the Highest Burden in Implementing the Need for an Expeditious Trial, 3 March 2010, <<http://www.fidh.org/A-new-scheme-for-Civil-Party>> (last visited 18 October 2013).

35 In contrast, civil parties in Case 001 were grouped by the Trial Chamber into four different groups according to different legal representatives. Moreover, there were only 93 civil party applicants in Case 001, whereas Case 002 requires the grouping of 3,866 civil parties.

necessary, and organizing victims' groups might be the only feasible way in terms of trial management. But there should be room for divergent views among victims. Unification as one group under constraint and the objective to speak with one voice derive from a too narrow understanding of the role of victims in the courtroom, focusing only on efficiency and expeditious trials. Diverse voices of victims should be heard and respected, and a consensus is not always possible.<sup>36</sup>

Moreover, the role of the LCLs should focus on organization, coordination, and advocacy for the civil parties. There is no client-attorney relationship between the LCLs and the individual civil parties who have chosen and mandated their personal counsel. As mentioned above, representation mechanisms are inevitable for trial management, but they cannot be too restrictive. Therefore, the judges should have allowed civil party lawyers and civil parties to address the Chamber directly under certain conditions. In this regard, it is worth noting that the ICC has taken a different approach and allows victims to appear in person following the procedures under Rule 89 of the ICC Rules of Procedure and Evidence as distinguished by participation through a common legal representative.<sup>37</sup> The ICC judges emphasized that the ICC Statute envisages both direct individual participation and participation through a common legal representative.<sup>38</sup> However, this decision also raises legal and practical concerns as it deviates from other ICC cases and from individual participation. Moreover, the decision lacks clear criteria for categorizing victims, and the procedures set forth in Rules 85 and 89 through the alternative procedure of two victim categories are abrogated.<sup>39</sup>

In conclusion, neither civil party participation at the ECCC nor victim participation at the ICC is a full success story yet, as practical and legal questions remain unresolved. The participatory rights of the consolidated group in Case 002 are even more questionable since the Trial Chamber split the trial into sections of the indictment through its severance order.<sup>40</sup> Only two forced transfers and one killing site are dealt with in Case 002/01, which reduces the civil parties who are eligible in this section to no more than 974. In accordance with the Rules the remaining approximately 70% or so are not allowed to participate with full rights in Case 002/01 as they cannot demonstrate a link between their injury or harm suffered and the crimes or charges at stake. Nevertheless, and against the Rules, the Trial Chamber allowed all

36 Similarly, M. Mohan, 'The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal', (2009) 9 *International Criminal Law Review* 1, at 26 et seq.

37 'Q & A – The Landmark ICC Decision on Victim's Representation and Participation in the Kenya Cases, Redress, 18 October 2012, <<http://www.vrwg.org/home/home/post/39-q-a—the-landmark-icc-decision-on-victims-representation-and-participation-in-the-kenya-cases/>> (last visited 18 October 2013).

38 *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Situation in the Republic of Kenya, Decision on Victims' Representation and Participation, Trial Chamber V, 3.10.2012, ICC-01/09-02/11-498, para. 25, <<http://www.icc-cpi.int/NR/exeres/BDF9BAD9-04F9-4ED2-9E5D-174FF143BC5A.htm>> (last visited 18 October 2013).

39 T. Batchvarova, 'Comment on the Victims Decision of Trial Chamber V', 18 October 2012, <<http://humanrightsdoctorate.blogspot.de/2012/10/comment-on-victims-decision-of-trial.html>> (last visited 18 October 2013).

40 Order Case 002, Severance Order Pursuant to Internal Rule 89 *ter*, Trial Chamber, 22 September 2011, E124, <[http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124_EN.PDF)> (last visited 18 October 2013).

civil parties to participate in Case 002/01 as a consolidated group.<sup>41</sup> The effects will be that their ‘participation’ is merely symbolic and that reparation claims might not be possible for most civil parties because they cannot establish that they suffered harm from the severed charges.

It is not sincere to pretend to the civil parties that they can participate in a trial where those crimes from which they suffered are not dealt with.

To reach an intermediate conclusion, (i) the legal developments at the ECCC have led to victims’ participation *sui generis*, and (ii) calling the victims ‘civil parties’ is misleading as they no longer enjoy strong participatory rights. While civil parties are meant to be a full party to the proceedings, the Trial Chamber has practically limited their rights to a weaker type of victim participation.

### 3. CIVIL SOCIETY SUPPORT TO THE ECCC’S VICTIM PARTICIPATION REGIME

Three practical ways of participating in the ECCC’s proceedings are possible for victims: (i) through selection by the Trial Chamber to be a witness, (ii) by filing a complaint, and (iii) by applying to become a civil party.<sup>42</sup> Practice Directions by the ECCC clarified the participation procedure and contain a standardized Victim Information Form (VIF).<sup>43</sup> The mandate for assisting with the forms lies with the ECCC’s Victims Support Section (formerly Victims Unit).<sup>44</sup> The VIFs are processed within the VSS and transmitted to the appropriate office (Office of the Co-Prosecutors or the Co-Investigating Judges). As outlined in section 2 of this article above, legal representation is then organized by the ECCC in a scheme that has evolved over time. With more than 8,000 complaints and civil party applications received by the VSS,<sup>45</sup> the workload was enormous. Only with the support of civil society organizations and innovative support schemes on all levels, was it possible to establish co-ordinated civil party participation. However, it remains a challenge to regularly and properly inform a huge number of civil parties, but even more of a challenge to consult with them, get their informed instructions, and thus to get them involved.

It is practically impossible for all victims to participate in the courtroom in the same manner due to time constraints. Given their complexity, international criminal trials already take many years before a verdict is reached, and, thus, the development of a comprehensive system is necessitated. To provide an example, the Cambodian Human Rights and Development Association (ADHOC) made use of its nationwide structure and established a civil party representatives scheme to facilitate more

41 Order Case 002, *supra* note 40, para. 8.

42 C. Sperfeldt and W. Fitzgibbon (eds.), ‘Victim Participation in the Extraordinary Chamber in the Courts of Cambodia’, *First CHRAC Monitoring Report*, 26 November 2008, at 3 <[http://www.chrac.org/eng/index.php?page=chrac\\_reports](http://www.chrac.org/eng/index.php?page=chrac_reports)> (last visited 18 October 2013).

43 Practice Directions on Victim Participation, Rev. 1, 27 October 2008, <<http://www.eccc.gov.kh/en/document/legal/practice-directions>> (last visited 18 October 2013).

44 Rule 12 *bis* Internal Rules and Article 1.2 of the Practice Directions on Victim Participation.

45 J. Oeung and C. Sperfeldt (eds.), ‘Victim Participation in the Extraordinary Chamber in the Courts of Cambodia’, *Third CHRAC Monitoring Report*, 30 November 2010, at 3 <[http://www.chrac.org/eng/index.php?page=chrac\\_reports](http://www.chrac.org/eng/index.php?page=chrac_reports)> (last visited 18 October 2013).

active participation.<sup>46</sup> This mechanism anticipates 122 civil party representatives in different Cambodian regions. The representatives are designated 'focal persons' and ensure communication in two directions: first, they are more actively engaged in attending the court proceedings and are trained on legal matters on a regular basis. Second, they share their knowledge with the remaining civil parties in their region. The goal is to spread the information broadly and to engage and empower more civil parties.<sup>47</sup>

Without the NGOs' activities the civil party mechanism would not have been used by many victims and a large number – especially in the provinces – would not have been reached. NGOs informed the public about the court proceedings by the distribution of newsletters, other publications, radio shows, films, and community-based outreach events.<sup>48</sup> Besides outreach, NGOs also ensured the submission of civil party applications and assisted the victims throughout the process. In contrast, the activities by the ECCC/VSS only developed over time and were not in place at the beginning. There was initially insufficient funding, and victim support was established at a later stage.<sup>49</sup> NGO activities assisted in filling the gaps, and the main practical stages of the civil party participation process can be summarized as follows: outreach to potential civil parties; submission of civil party applications; processing of forms; finding legal representation; attending the trial; psychological support; and communication.<sup>50</sup> Other tribunals and the ICC can learn from the practical hurdles and should set up an all-embracing system for sufficient support. From a practical perspective, support requires sufficient funding and planned activities inside and outside the court(room). This demonstrates that victim participation is not limited to the courtroom, but non-judicial measures play a vital role, if not the most important role, in empowering victims. Only then can meaningful participation be achieved.

#### 4. CONCLUSION

The outcome of Case 001 and the new participation scheme of Case 002 mentioned above lead us to one fundamental question: is it possible to contribute to the reconciliation process through these trials, and how can victims be included in a meaningful way into these legalistic and much formalized procedures? Hand in hand with this leading question, we must think about the purposes of punishment and the different understandings of justice: are international criminal trials purely

46 ADHOC assists almost 50 per cent of the civil parties in Case 002 outside the courtroom, logistically and administratively, see ADHOC Baseline Study, *supra* note 8, at 8.

47 In more detail, ADHOC Baseline Study, *supra* note 8, at 9, 22 et seq.

48 An overview of most NGO activities is given by J. Oeung and S. T. Lach, 'An Overview of Civil Society Roles of Civil Society in the Process of Transitional Justice and Reconciliation in Cambodia', CHRAC, *Khmer Rouge Tribunal (KRT) Watch Bulletin*, Issue 1, April 2012, <[http://www.chrac.org/eng/index.php?page=chrac\\_reports](http://www.chrac.org/eng/index.php?page=chrac_reports)> (last visited 18 October 2013).

49 J. Herman, 'Reaching for Justice: The Participation of Victims at the Extraordinary Chambers in the Courts of Cambodia', Policy Paper No. 5, Center on Human Rights in Conflict (CHRC), September 2010, at 5, <<http://www.uel.ac.uk/chrc/publications/documents/CHRCReachingforJustice2010.pdf>> (last visited 18 October 2013).

50 CHRC Policy Paper No. 5, *supra* note 49, at 3–4.

*métiers légaux*, based on a retributive understanding of justice, or can we integrate other aspects, such as reconciliation?

The author of this article's hypothesis is that broad victim participation as parties in criminal trials is difficult to reconcile with the focus on perpetrators and proving their guilt beyond reasonable doubt. Moreover, some judicial actors (judges, prosecutors, defence, and civil party lawyers) within this legal arena have a specific, application-orientated understanding of justice, which affects their decisions and makes it very difficult to broaden the scope of criminal-law-based tribunals. Therefore, non-judicial mechanisms are always needed to complement trials, allowing, for example, for a greater visibility of victims.

Possibilities within trials are limited by the legal setting. As the main purpose of any criminal trial is the determination of the guilt of the accused and the goal to end impunity, trials have to be conducted in a timely manner, based on an evidentiary assessment. Judges have to strike the correct balance between safeguarding the rights of the accused and allowing victims to participate in the proceedings. Criminal tribunals necessarily have limitations due to various factors, such as their (i) budget, (ii) mandate, (iii) structure, (iv) jurisdiction, and (v) extrajudicial aspects (such as the background of personnel, political agenda, etc.).

Another important aspect concerns the narrow understanding of justice by key actors that operate the process, and it is difficult, if not impossible, to change their attitude. I will give two examples to illustrate how the ECCC has taken this path, excluding purposes of criminal trials other than retribution and expedient trials.

First, while a combination of retributive and restorative mechanisms is reflected in the court's design and procedural framework, including, for example, civil party participation with the aim of creating increased visibility and to realization of a common (international) standard for victim participation,<sup>51</sup> the judicial practice outlined above has taken a different avenue. Civil party participation at the ECCC has arrived at weak victim participation *sui generis*, limiting the rights of the civil parties significantly, and should not be labeled 'civil party' participation anymore.<sup>52</sup> One might agree with the Trial Chamber that some limitations are inherent to the nature of criminal proceedings,<sup>53</sup> but these should have been taken into account at the outset when designing civil party participation. Otherwise, high expectations are dashed, and changing the rules in the middle of the game creates the perception of injustice from the victims' point of view.

Second, it can be demonstrated by the Kaing Guek Eav sentence that retributive understandings of justice prevail in some criminal trial settings, and the benefit for

51 R. Jasini and V. Phan, 'Victim Participation at the Extraordinary Chambers in the Courts of Cambodia: Are Retributive and Restorative Principles Enhancing the Prospect of Justice?', (2011) 24 *Cambridge Review of International Affairs*, 3 379, at 385 and 387.

52 The term 'civil party participation' implies that the victim is a full party to the proceedings with extensive rights to make use of its participation through oral statements and filings. However, at the ECCC there has been a steady erosion of civil party participation and representation rights. See J. Wallace, 'Losing Civil Parties in Cambodia', Radio Netherlands Worldwide, 18 January 2012, <<http://www.cambodiatribunal.org/sites/default/files/news/Losing%20Civil%20Parties%20in%20Cambodia.pdf>> (last visited 18 October 2013).

53 Decision Case 002, *supra* note 30, para.13.

reconciliation is otherwise questionable. The accused received the highest possible sentence, whereby, from the author's point of view, considerable mitigating circumstances were not adequately taken into account.<sup>54</sup> With regard to the high sentence, it was the author's impression from attending the appeal verdict at the premises of the ECCC that the question of revenge dominated the public opinion and victims' perceptions,<sup>55</sup> as some civil parties were very disappointed with the first sentence handed down by the Trial Chamber, however others were satisfied.<sup>56</sup>

In contrast to these restrictive legal developments at the ECCC turning to retribution, efficiency and practical necessities as the governing purpose,

justice should not only address traditional retributive justice, i.e., punishment of the guilty, but should also provide a measure of restorative justice by, inter alia, allowing victims to participate in the proceedings and by providing compensation to victims for their injuries.<sup>57</sup>

As a matter of fact, the ECCC itself acknowledged that 'the inclusion of civil parties in proceedings is in recognition of the stated pursuit of national reconciliation'.<sup>58</sup>

- 
- 54 Appeal Judgment Case 001, *supra* note 12, paras. 355 et seq. In particular, the accused (i) cooperated with the ECCC and 'assisted in the pursuit of national reconciliation' (para. 366), (ii) and showed remorse (para. 369). While one might follow the argumentation of the Supreme Court Chamber in the regard that 'the mitigating impact of the foregoing factors is limited at best', and acknowledge the aggravating circumstances and magnitude of the crimes (para. 371), it is doubtful that the highest possible sentence is appropriate. Given the fact that the accused was also illegally detained by the Cambodian Military Court between 10 May 1999 and 30 July 2007, which the Trial Chamber took into account, reducing the sentence by five years, the message by the Supreme Court Chamber vis-à-vis human rights and illegal detention is not a positive one. Contrary, J. D. Ohlin, 'Cambodia Tribunal Increases Duch Sentence to Life, 6 February 2012, <<http://opiniojuris.org/2012/02/06/cambodia-tribunal-increases-duch-sentence-to-life>> (last visited 18 October 2013), and idem., 'Proportional Sentences at the ICTY', in B. Swart, G. Sluiter, and A. Zahar (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011), on whose retributive considerations and sentencing theory the Supreme Court Chamber partly relied. While I agree with Ohlin to the extent that ICL sentencing needs a coherent theory, this theory cannot be based *solely* on retribution, but must take into account utilitarian theories. Ohlin's one-sided approach leads to unbalanced, high sentences, as mitigating factors will not be taken into account and perpetrators – no matter whether they co-operate, show remorse, etc. and irrespective of their position and role – will always receive sentences at the very high end of the scale due to the core crimes they committed. Last, but not least, international criminal tribunals are not meant to punish perpetrators as revenge, but should assist in promoting international peace and collective security through rebuilding society and reconciliation. See further K. Ambos, 'On the Rationale of Punishment at the Domestic and International Level, in M. Henzelin and R. Roth (eds.), *Le Droit Pénal à L'Épreuve de L'Internationalisation* (2002), 305, at 312 et seq.
- 55 For similar experiences, regarding the first verdict of the Trial Chamber, see J. Tiller, 'The Challenges of Victim Participation in the Extraordinary Chambers in the Courts of Cambodia', 14 April 2011, <<http://cesice.upmf-grenoble.fr/manifestations/the-challenges-of-victim-participation-in-the-extraordinary-chambers-in-the-courts-of-cambodia-par-justine-tillier-133429.htm>> (last visited 18 October 2013); S. Mydans, 'Anger in Cambodia over Khmer Rouge Sentence', *New York Times*, 26 July 2010, <[http://www.nytimes.com/2010/07/27/world/asia/27cambodia.html?\\_r=0](http://www.nytimes.com/2010/07/27/world/asia/27cambodia.html?_r=0)> (last visited 18 October 2013).
- 56 Chum Mey, a successful civil party in Case 001, expressed his disappointment about the Trial Chamber's verdict: 'We are victims two times, once in the Khmer Rouge and now once again.' See Mydans, *supra* note 55; see also 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', Report OSJI, February 2012, at 7, <<http://www.soros.org/sites/default/files/cambodia-eccc-20120223.pdf>> (last visited 18 October 2013). In this context, it needs to be mentioned that Chum Mey himself was a low-level Khmer Rouge cadre. Many perpetrators later became victims themselves, and a clear distinction of categories, such as (i) perpetrator, as opposed to (ii) victim, is not that easy in the Cambodian context; see inter alia M. T. Ea and S. Sim, 'Victim and Perpetrators?', Testimony of Young Khmer Rouge Comrades', Documentation Center of Cambodia (2001). Other civil parties were more satisfied with the conviction, for example Vann Nath.
- 57 S. Sá Couto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?', 18 *Michigan Journal of Gender & Law*, 297, at 314.
- 58 Decision Case 002, *supra* note 26, para. 37; also Decision Case 002, *supra* note 24, para. 65.

Inclusion of a victim-centred approach to justice might leave a real legacy to victims.<sup>59</sup> However, the ECCC denied almost all reparations in Case 001 and continuously restricted the voices of victims in the courtroom. This trend has increased in Case 002 with the outlined representation scheme that leaves little room for visibility of civil parties. In the end, to put it in Sá Couto's words:

[T]hese proceedings remain criminal trials with significant time and logistical constraints, making it difficult to accommodate the desire of victims to tell their stories or to talk about their experiences on their own terms.<sup>60</sup>

For these reasons, victim participation within criminal trials cannot be the only solution. A comprehensive approach must embrace two layers: (i) the legal arena, bearing in mind the limited role civil parties can play in this setting, and (ii) the non-legal arena, taking into consideration the sociocultural setting. With regard to global justice, the ECCC leaves a positive legacy for civil parties insofar as it was one of the first international(ized) criminal courts that involved them as actors in the proceedings. Many voices of civil parties were heard and they could actively participate in Case 001. If international justice is regarded as a mechanism for peace and reconciliation, victims must be included as an actor. Yet, as outlined above, the ECCC cut back civil parties' rights, and was not able to find a balance between civil parties' demand for meaningful participation – as opposed to purely symbolic participation – and the rights of the accused and a fair and impartial trial. The ECCC, as well as other courts, must try to achieve such a balance, taking into consideration the following recommendations:

1. The Rules on participation and representation for victims have to be clear and consistent from the beginning and establishment of a court;
2. The representation scheme should be improved. In particular, the relationship between individual rights and group interest has to be defined and there should be possibilities for individuals to address the court directly and actively (under pre-defined legal conditions);
3. The system of a common representative<sup>61</sup> needs fine-tuning (selection process; relationship with mandated lawyers; dispute settlement mechanism); payment of adequate salaries for civil party lawyers;
4. Adequate financial support has to be allocated to the victims' section and to the lawyers, as well as to supporting NGOs (outreach); and
5. Alternative forums for victims outside the courtroom should be taken into account as complementary mechanisms<sup>62</sup> and their funding ought to be addressed as well.

<sup>59</sup> CHRC Policy Paper No. 5, *supra* note 49, at 8.

<sup>60</sup> Sá Couto, *supra* note 57, at 350.

<sup>61</sup> The ICC speaks of Common Legal Representative for Victims (CLR/V) and the ECCC speaks of civil party lead co-lawyers (CPLCL). Basically, both have the idea of one common representative who streamlines the applications and filings of victims.

<sup>62</sup> In the same vein, see Mohan, *supra* note 36, at 43.