



RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark
www.lawrecord.com

Volume 38

2010-2011

VICTIMS ONCE AGAIN? CIVIL PARTY PARTICIPATION BEFORE THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Andrew F. Diamond, Esq.¹

INTRODUCTION

The Extraordinary Chambers in the Courts of Cambodia's (ECCC) scheme for survivor participation has been hailed as groundbreaking and unprecedented, due in large part to the recognition of certain survivors² as "civil parties" who were to be treated as full parties to the proceedings. Unlike the International Criminal Court (ICC) or various ad hoc international war crimes tribunals such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which purposefully circumscribe the role of survivors in their proceedings, the ECCC was "designed to allow victims a more robust, substantive role in the tribunal than any predecessor institution in modern international criminal law."³

This may be—in part or in full—due to the sheer number of survivors that are potentially eligible for consideration by the Chambers as "civil parties." During the vicious reign of the Khmer

¹ The author is an attorney focusing on commercial litigation with the New York office of Venable LLP. During the fall of 2009, he worked as a legal associate at the Documentation Center of Cambodia (DC-Cam), where he participated in meetings between the ECCC and civil society regarding the changes to the Court's Internal Rules that are the subject of this paper. He would like to thank Youk Chhang, Anne Heindel and Randle DeFalco for their support and comments on previous drafts of this article. Any errors contained herein, however, are the author's alone.

² Although most commonly referred to as "victims" both generally and with respect to civil parties before the ECCC, this article exclusively refers to individuals before the ECCC as "survivors." The reason for this is as simple as the gruesome history of the Khmer Rouge is complex: while a vast majority of persons eligible to be considered civil parties are indeed victims in the truest sense of the word, there are some individuals equally eligible who are former Khmer Rouge officers or cadre. To refer to former Khmer Rouge cadre that, for example, worked at one of the 196 prison detention centers as "victims" would do a great disservice to those who needlessly and innocently suffered at that hands of one of history's most deplorable regimes.

³ James Blair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 U. HAW. L. REV. 507, 508 (Summer 2009).

Rouge from April 17, 1975 to January 6, 1979, as many as two million people died out of an estimated population of 8 million.⁴ As succinctly stated by the journalist Elizabeth Becker:

Few people, however, have suffered such a bitter counterpoint to their dreams as Cambodians did once their [civil] war ended. From the first day of victory, the Cambodian communists known as the Khmer Rouge enforced a revolution of unprecedented terror and destruction. The outlines are generally known: how the capital city and towns were emptied and everyone sent to the fields; how the cream of the old society was systematically hunted down and often killed; how there was scant food, poor shelter, and no relief from a punishing work schedule; how the population was ruled by terror; and how punishment by torture and death became routine.⁵

The ECCC was established to mete out justice and establish truth regarding these very atrocities. Specifically, the ECCC's jurisdictional mandate is to bring "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 from 17 April 1975 to 6 January 1979."⁶

Because a full treatment of the atrocities committed by the Khmer Rouge is not possible here,⁷ this article instead aims to concentrate exclusively on the survivors, of which there are an estimated 5 million still living.⁸ As originally stated in the ECCC's Internal Rules, "[i]n order for Civil Party action to be admissible, the injury must be: a) physical, material or psychological; and b) the direct consequence of the offence, personal and have actually come into being."⁹ Being officially joined as a civil party before the ECCC provides those individuals with certain rights as enumerated in the Internal Rules, allowing them to fulfill the stated "purpose" of a civil party action before the ECCC, which is 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 [Rule 23]."¹⁰

⁴ ELIZABETH BECKER, WHEN THE WAR WAS OVER 1 (1998); William Shawcross, *Cambodia and the Perils of Humanitarian Intervention*, DISSENT, Spring 2002, at 48.

⁵ BECKER, *supra* note 4, at XIII.

⁶ Extraordinary Chambers in the Courts of Cambodia, Internal Rules preamble (Rev. 5, Feb. 9, 2010) [hereinafter "Internal Rules Rev. 5"].

⁷ Such recitations have been done quite well by others. See, e.g., BECKER, *supra* note 4; PETER MAGUIRE, FACING DEATH IN CAMBODIA (Columbia University Press; 2nd ed. 2005); LOUNG UNG, FIRST THEY KILLED MY FATHER (Harper Collins 2000). For an interesting look at the U.N.-backed peace process in Cambodia during the 1990s, see SAMANTHA POWER, CHASING THE FLAME: ONE MAN'S FIGHT TO SAVE THE WORLD (Penguin 2008).

⁸ Youk Chhang, *Sad Situation for Civil Parties*, PHNOM PENH POST, Oct. 1, 2009 (noting that "any serious attempt to include victims in the [civil party] process would have resulted in submission to the ECCC Victims Unit of at least 1 million complaints . . .").

⁹ Extraordinary Chambers in the Courts of Cambodia, Internal Rule 23(2) (Rev. 4, Sep. 11, 2009) [hereinafter "Internal Rules Rev. 4"].

¹⁰ Internal Rules Rev. 4, *supra* note 9, at 23(1).

Case 001, which involved the prosecution of Kaing Guek Eav, aka “Duch,” who ran the notorious detention and torture center S-21, saw 93 civil parties involved in the proceedings.¹¹ On July 26, 2010, Duch was found guilty of crimes against humanity and war crimes, including torture and murder, and was sentenced to 35 years in prison, reduced to 19 years after taking into account time served and his illegal detention in a military prison.¹² Case 002 involves the prosecution of the four highest-ranking leaders of the Khmer Rouge still alive today—Khieu Samphan, who was the head of state of Democratic Kampuchea; Nuon Chea, known as “Brother No. 2;” Ieng Sary, who was the foreign minister; and Ieng Thirith, who was the minister of social welfare and is Ieng Sary’s wife.¹³ In September 2010, the four were formally indicted and charged with crimes against humanity, war crimes, genocide, and murder.¹⁴ As stated by Alex Hinton, Executive Director of the Center for the Study of Genocide, Conflict Resolution and Human Rights at Rutgers University, “[t]here is no doubt that the second trial of the most senior leaders is of the most significance,” while another observer has predicted that Case 002 will be “significantly more difficult, complex, and legally challenging.”¹⁵

While it is true that “[t]he victims of [the Khmer Rouge] revolution understood least of all”¹⁶ what happened to them and why, it is equally true that “[e]very victim of the Khmer Rouge holds a piece of truth about that dark period and their involvement will greatly increase the ability of the ECCC to create a comprehensive and accurate picture of the period.”¹⁷ It is for this reason that Case 002 has been described as “the most political and historically important,” as it “could provide long-awaited answers to questions that many Cambodians have had regarding” the Khmer Rouge regime, as well as “offer[ing] an important chance to uncover and analyze how Khmer Rouge leaders made decisions that caused the deaths of nearly 2 million Cambodians.”¹⁸ To date, more than 4,000 civil party applications have been received by the ECCC Victims Unit from survivors wanting to participate in the ECCC’s vaunted enhanced survivor participation scheme.¹⁹

Substantively, however, this scheme of enhanced survivor participation no longer exists, as it did not even survive the first trial intact. During the proceedings for Case 001 and the pre-trial proceedings for Case 002, a series of decisions restricted the rights of civil parties before the ECCC, most notably eliminating outright the right of civil parties to participate in sentencing proceedings and severely undermining their right to cross-examine certain witnesses.²⁰ Indeed, the ECCC Trial

¹¹ Chhang, *supra* note 8, at 1.

¹² Seth Mydans, *Khmer Rouge Figure Found Guilty of War Crimes*, N.Y. TIMES, July 25, 2010; Robin McDowell, *Khmer Rouge’s Chief Jailer Guilty of War Crimes*, WASH. TIMES, July 26, 2010.

¹³ Seth Mydans, *Khmer Rouge Leaders Indicted*, N.Y. TIMES, Sep. 16, 2010.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ BECKER, *supra* note 4, at 1.

¹⁷ Kate Yesberg, *Accessing Justice Through Victim Participation at the Khmer Rouge Tribunal*, 40 VICT. U. WELLINGTON L. REV. 555, 563 (2009).

¹⁸ Youk Chhang, *Khmer Rouge Trials Offer Chance to Gain Insight*, PHNOM PENH POST, Dec. 8, 2009.

¹⁹ James O’Toole, *Victims to Play Simpler Role at KRT*, PHNOM PENH POST, Feb. 10, 2010; James O’Toole, *KRT Plans Rule Changes*, PHNOM PENH POST, Feb. 3, 2010. This high number of civil party applications prompted ECCC Trial Chamber Judge Silva Cartwright to state that they “greatly exceed the capacity of the trial chamber to involve [civil parties] individually.”

²⁰ See, e.g., ECCC Trial Chamber, *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*, Oct. 9, 2009; ECCC Pre-Trial Chamber, *Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person*, Aug. 28, 2008.

Chamber (“the Chambers”) even went so far as to state that “a restrictive interpretation of rights of Civil Parties in proceedings before the ECCC is required.”²¹ With an eye towards the second case for which pre-trial proceedings are already underway and which is expected to begin in earnest in mid to late-2011, the Chambers has sought to further restrict the role of civil parties and their lawyers, particularly in light of the large number of survivors seeking civil party status. They have done this most significantly through the February 9, 2010 revision of the ECCC’s Internal Rules governing civil parties.²² As stated by the Chambers itself, “[d]ue to the high numbers of Civil Party applications received in relation to Case 002 and the complexity of the case, there is a need to streamline and consolidate Civil Party participation.”²³

The overarching purpose of the Internal Rules “is to consolidate applicable Cambodian procedure for proceedings before the ECCC . . . and to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.”²⁴ The February 2010 rule changes were heavily focused on the Chambers’ quest for judicial management,²⁵ focusing on participants’ responsibilities to the ECCC itself.²⁶ Although almost all observers recognize that better civil party organization and management is essential for the much larger Case 002, the revised Rules undercut the rights of civil parties to such an extent that to continue to call them by this name may seriously undermine the very credibility of the Chambers itself.

The February 2010 rule changes can only be described as a Trojan horse—made in the name of judicial efficiency, the changes have gutted the role of the civil parties and their lawyers to the point where it is disingenuous to continue to refer to these “participants” as civil parties. Under Cambodian law and in other civil law jurisdictions, persons qualifying as “civil parties” are afforded certain minimum rights, rights that neither survivors nor their lawyers now have before the ECCC. By failing to acknowledge that, under the revised Internal Rules, civil parties are no longer “parties” to the proceedings, the ECCC not only risks distorting the precedential value of its survivor participation scheme for future internationalized tribunals, but also misleads the survivors about their role in the proceedings. What is left is a façade that the Chambers continue to present to the public in the hope that the world—and particularly the survivors themselves—will not realize how hollow the original promise has become. This legal sleight of hand is made all the worse when it is recalled that these participants are survivors of one of humanity’s worst crimes.

SURVIVOR PARTICIPATION SCHEMES IN INTERNATIONAL CRIMINAL LAW

“Civil party” is a legal term of art. As discussed above, the stated purpose of the Internal Rules is to “consolidate applicable Cambodian procedure for proceedings before the ECCC” if

²¹ ECCC Trial Chamber, *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*, ¶ 13, Oct. 9, 2009.

²² Internal Rules Rev. 5, *supra* note 6.

²³ James O’Toole, *Civil Party Reforms at KRT*, PHNOM PENH POST, Jan. 29, 2010, *available at* <http://khemniz.blogspot.com/2010/01/civil-party-reforms-at-krt.htm>.

²⁴ Internal Rules Rev. 5, *supra* note 6, at preamble.

²⁵ Internal Rules Rev. 5, *supra* note 6, at 21(4); O’Toole, *supra* note 23.

²⁶ *See, e.g.*, Internal Rules Rev. 5, *supra* note 6, at 12 *ter* (2).

present.²⁷ Under the Cambodian Code of Criminal Procedure (“the Code”), victims of an offense are allowed to bring, as civil parties, an action “to seek compensation for [their] injuries.”²⁸ The Code:

. . . provides civil parties with a set of rights, including the rights: to be represented by a lawyer (Article 150); to request investigative action by the investigating judge (Article 134); to participate during the investigation (Articles 137-138); to summon witnesses (Article 298); to object to hearing testimony of a particular witness (if such testimony is not helpful in ascertaining the truth) (Article 327); to question the accused and witnesses (Articles 153 and 325); to introduce evidence (Article 334); and to make a closing statement. (Article 335).²⁹

Although the basket of rights varies among jurisdictions, a tribunal cannot just declare certain victims to be “civil parties” in the proceedings while not affording them the concomitant rights that accompany this role. The Rome Statute, which established the ICC, “is the first international criminal justice mechanism to provide for direct and active participation of victims in its proceedings.”³⁰ Notably, while the ICC provides for enhanced victim participation, its scheme purposefully does not rise to the level of civil party participation, as victims before the ICC are not recognized as parties to the proceedings.³¹ Article 68(3) of the Rome Statute, which “constitutes the foundational provision for victim participation” before the ICC,³² states that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.³³

²⁷ Internal Rules Rev. 5, *supra* note 6, at preamble.

²⁸ Cambodian Code of Criminal Procedure, art. 2, available at <http://www.cdpcambodia.org/soclaw.asp>; see also, Sarah Thomas & Terith Chy, *Including The Survivors In The Tribunal Process*, in ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 217 (John D. Ciorciari & Anne Heindel, eds., 2009).

²⁹ Thomas & Chy, *supra* note 28, at 291 n.52.

³⁰ Yesberg *supra* note 17, at 567.

³¹ Karen Corrie, *Victims' Participation and Defendants' Due Process Rights: Compatible Regimes at the International Criminal Court*, 17-18, American Non-Governmental Organization Coalition for the ICC, Jan. 10, 2007; see also, War Crimes Research Office at the Washington College of Law, American University, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT, Nov. 30, 2007 [hereinafter “War Crimes Research Office”].

³² War Crimes Research Office, *supra* note 31, at 18.

³³ Rome Statute of the International Criminal Court, adopted on July 17, 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, entered into force July 1, 2002, U.N. Doc A/CONF.183/9, art. 68(3) [hereinafter “Rome Statute”]. See also Rome Statute, art. 15(3) (“If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.”); Rome Statute, art. 19(3) (“The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as

Article 68(3), thus, “establishes a general right of victims whose personal interests are affected to present their ‘views and concerns’ to the ICC,”³⁴ particularly “towards the end of a trial, where victims are allowed to initiate hearings on the questions of reparations.”³⁵ However, “the rights of victims are far more limited during the rest of the proceedings,” as “a determination that a victim qualifies under Article 68(3) does not guarantee victims a meaningful right to participate in the trial itself.”³⁶ Indeed, the drafters of the Rome Statute “placed certain express limitations –over and above the requirements of Article 68(3) – on the timing and scope of victims’ role in the ICC proceedings.”³⁷ For example, “ICC rules require victims’ lawyers to apply for permission to question witnesses,” while the Court “may also choose to limit the manner and order in which victims may present these questions.”³⁸ Additionally, “by contrast to certain civil law jurisdictions, victims participating before the ICC do not have an automatic right to access Prosecution or Defence evidence or to call their own witnesses.”³⁹ As a result of these limitations on survivor participation, “victims before the ICC do not gain the status of fully participating third parties at any phase of the investigation or proceedings.”⁴⁰

The Special Tribunal for Lebanon also provides for an enhanced survivor participation scheme that, while robust, does not allow for survivor participation as civil parties. The Tribunal, similar to the ECCC, is heavily influenced by civil law.⁴¹ It seeks to “protect[] the rights of victims whose personal interests are affected, and while not recognizing them as ‘*parties civiles*,’ it permits their views and concerns to be presented and considered at all stages of the proceedings.”⁴² Instead, victims “may exercise a number of procedural rights (for instance, receiving documents filed by the Parties, calling witnesses upon authorization of a Chamber, examining and cross-examining

victims, may also submit observations to the Court.”); International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (2002), Rule 93.

³⁴ War Crimes Research Office, *supra* note 31, at 2.

³⁵ Blair, *supra* note 3, at 512.

³⁶ *Id.* at 513.

³⁷ War Crimes Research Office, *supra* note 31, at 3. *See also* Blair at 507-08 (The ICC “requires victims to justify their right to participate at each successive stage.”).

³⁸ Blair, *supra* note 3, at 513.

³⁹ War Crimes Research Office, *supra* note 31, at 31. *See also id.* at 31-32:

Another difference between victim participation under the Rome Statute and the rights given to victims in some civil law systems is that, in the ICC context, victims do not have the express right to initiate an investigation, or to compel the Prosecutor to pursue any suspect or crime. In fact, the drafters of the Rome Statute and ICC Rules intentionally limited the scope of victim participation during specific stages of the investigation phase of the Court’s operations, where concerns of efficiency and/or fairness may be heightened.

⁴⁰ Corrie, *supra* note 31, at 17-18. *See also* Blair, *supra* note 3, at 513-14 (“In effect, the ICC rules provide a mechanism for filtering and sanitizing victims’ participation in the interest of justice rather than for facilitating justice in the interest of victims.”).

⁴¹ United Nations Security Council, *Report of the Secretary-General on the establishment of a special tribunal for Lebanon*, ¶ 9 U.N. Doc. S/2006/893, (Nov. 15, 2006) (“With the exception of the Extraordinary Chambers in the Courts of Cambodia, the conduct of the trial process as reflected in the constituent instruments of all other United Nations-based or assisted tribunals has included more common law elements.”).

⁴² *Id.* at ¶ 31.

witnesses, filing motions and briefs),”⁴³ and may “play a significant role in sentencing proceedings by assisting the Bench in assessing the personal impact of the crimes on them. (Rule 87(C)).”⁴⁴ Yet, despite these enhanced rights, survivors participating in proceedings before the Special Tribunal for Lebanon “do not have the same rights as the parties civiles (private complainants) of the civil law system.”⁴⁵

While the ICC and Special Tribunal for Lebanon do provide for enhanced survivor participation, ad hoc war crimes tribunals such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) are worth mentioning in the survivor participation context only for the sake of completeness. Indeed, as has been noted:

[n]either the ICTY nor the ICTR . . . allow victims to participate as anything more than witnesses for the prosecution. Both of these tribunals relegate victims who seek reparations to the domestic courts, specifically refusing to allow them a more far-reaching role in the international criminal prosecution. This limited role cannot fully establish the historical record, and often leaves victims feeling unsatisfied.⁴⁶

Yet, despite the blatant inadequacies of the victim participation schemes of the ICTY and ICTR, “the trend in international law is towards recognizing the rights of victims to seek reparations and remedies for violations of human rights and humanitarian law.”⁴⁷ Given that these international criminal courts and tribunals provide for survivor participation that intentionally does not rise to the level of civil party participation, it is only logical that the ECCC’s civil party participation scheme must at least provide survivors the rights contained in those lesser survivor participation schemes, if not more. This is especially true when it is considered that the ECCC has been routinely lauded for “provid[ing] for the most extensive participation of victims in its proceedings” of any international criminal tribunal.⁴⁸ However, as discussed below, with the February 2010 rule changes, coupled with previous rulings by the Chambers, the ECCC now may in fact provide fewer rights to survivors than other tribunals that admittedly do not provide for civil party status for its victims.

Of the various international criminal courts and tribunals in existence, the ECCC is the first one “to be based entirely on the civil law system.”⁴⁹ The ECCC also incorporates international law, as “[t]he Extraordinary Chambers are domestic Cambodian courts with international features, in particular in terms of the composition and applicable law.”⁵⁰ The resulting hybrid nature of the

⁴³ Statement from Judge Antonio Cassese, Special Tribunal for Lebanon President, on Adoption of the Legal Instruments Governing the Organization and the Functioning of the Special Tribunal for Lebanon, ¶ 3, available at <http://www.stl-tsl.org/sid/59>.

⁴⁴ Special Tribunal for Lebanon, Explanatory Memorandum by the Tribunal’s President, “Rules of Procedure and Evidence,” ¶ 16, June 10, 2009, available at http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/Explanatory_memorandum_En.pdf.

⁴⁵ See Statement from Judge Antonio Cassese, *supra* note 43.

⁴⁶ Blair, *supra* note 3, at 511. See also, Yesberg, *supra* note 17, at 562 (“[T]he ICTY and ICTR do not provide for victim participation beyond appearing as witnesses.”).

⁴⁷ Blair, *supra* note 3, at 511.

⁴⁸ Yesberg, *supra* note 17, at 562.

⁴⁹ Blair, *supra* note 3, at 520.

⁵⁰ Liesbeth Zegveld, *Victims’ Reparations Claims and International Criminal Courts*, 8 J. INT’L CRIM. JUST. 79, 90 (2010). See also Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Persecution of Crimes

Chambers means that the ECCC “draws upon Cambodia’s civil law system to allow victims to join as civil parties.”⁵¹

As such, under the ECCC’s originally enacted survivor participation scheme contained in the pages of the Internal Rules prior to the February 2010 revisions, survivors admitted as civil parties before the Chambers were to:

- a) . . . become[] a party to the criminal proceedings. The Civil Party can no longer be questioned as a simple witness in the same case and . . . may only be interviewed under the same conditions as a Charged Person or Accused.
- b) The Chambers shall not hand down judgment on a Civil Party action that is in contradiction with their judgment on public prosecution of the same case; and
- c) The Co-Investigating Judges and the Chambers may afford to Civil Parties the protection measures set out in Rule 29.⁵²

They were to be:

full parties to the proceedings . . . granted many of the same rights as the accused. Civil parties have the right to be represented by a lawyer. They may appeal against orders of the Co-Investigating Judges and the Trial Chamber, make applications to the Chambers, call witnesses, and make opening and closing statements.⁵³

This approach was viewed to have many benefits both to the survivors and the Chambers itself:

[B]y directly engaging those most affected by the alleged crimes of the accused[,] this not only improves the court’s access to evidence, but it helps to increase its legitimacy in the eyes of the local population by empowering victims to confront their accused tormentors and to describe publicly the harm they suffered.⁵⁴

This has the obvious related benefit of “support[ing] the truth-finding efforts of the prosecution.”⁵⁵ These analyses of the ECCC civil party system all took place prior to the February 2010 revisions to the ECCC Internal Rules that once and for all ended any doubt as to whether survivors before the Chambers were still in fact “civil parties” in anything but name. And yet, despite the temporal

Committed During the Period of Democratic Kampuchea, art. 33 (new) (Oct. 27, 2004), NS/RKM/1004/006; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art. 12, 2003.

⁵¹ Blair, *supra* note 3, at 508.

⁵² Internal Rules Rev. 4, *supra* note 9, at 23(6).

⁵³ Yesberg, *supra* note 17, at 567-68 (citations omitted); *see also* Thomas & Chy, *supra* note 28, at 246.

⁵⁴ Blair, *supra* note 3, at 509.

⁵⁵ Yesberg, *supra* note 17, at 568. Other, more speculative benefits have been raised. *See, e.g.*, Blair, *supra* note 3, at 515 (“[C]ivil parties could play a decisive role in ensuring the fairness and impartiality of the proceedings at the ECCC, thus adding to the tribunal’s perceived legitimacy, both among the Cambodian people and in the international community.”).

limitation on these analyses, the authors were still pragmatic enough to realize the “fragile”⁵⁶ nature of these civil party rights, given they had already “been somewhat curtailed.”⁵⁷

Accepting the assumption that the ECCC Internal Rules as originally drafted did in fact provide for genuine civil party participation despite the absence of a mechanism for individual reparations,⁵⁸ the revised Rules no longer contain the bundle of rights for survivor-participants necessary to be properly considered “civil parties” in anything but name. Admittedly, the rights of civil parties—and more broadly, survivors—do not exist in a vacuum. In criminal proceedings, the court must balance survivors’ rights with the need for a fair trial that preserves the rights of the accused.⁵⁹ Additionally, the proceedings should proceed as expeditiously as possible, particularly with respect to the ECCC as the accused are all of advanced age.⁶⁰ These three competing interests often operate in tension with each other, where the expansion of one interest serves to restrict another. This is especially true for the ECCC, as it oversees proceedings potentially involving thousands of civil parties.⁶¹ The ongoing tension between these competing interests that have led to departures from Cambodian practice prompted Judge Lavergne to ask, “[h]ow far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of Civil Parties before the ECCC and the purpose of the trial as a whole, characterized by the coexistence of two interrelated actions, namely criminal and civil actions.”⁶²

With the adoption of the revised Internal Rules on February 9, 2010, the ECCC passed that point and survivor-participants can no longer properly be considered civil parties. Specifically, the ECCC’s current scheme raises serious doubts about the preservation of the attorney-client

⁵⁶ Yesberg, *supra* note 17, at 579.

⁵⁷ Blair, *supra* note 3, at 526.

⁵⁸ The ability to obtain individual reparations is viewed as one of the key rights of a civil party. However, even as originally drafted, the ECCC Internal Rules only provided for the ability of survivors “to seek collective and moral reparations.” (Internal Rule 23(1)(b) (June 12, 2007), available at http://www.eccc.gov.kh/english/internal_rules.aspx). As such, there have always been well-founded doubts about the ability or likelihood of civil parties receiving reparations from the Accused parties. Therefore, this right has been recognized as the weakest among the bundle of rights afforded civil parties before the ECCC, and will therefore only be discussed in passing. For a more complete examination of the reparations issue as it relates to Cambodia and the ECCC, see Hao Duy Phan, *Reparations to Victims of Gross Human Rights Violations: The Case of Cambodia*, 4 E. ASIA L. REV. 277 (2009); see also, generally, Zegveld, *supra* note 50.

⁵⁹ Internal Rules Rev. 5, *supra* note 6, at 21(1)(a) (“ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”); See also Internal Rules Rev. 5, *supra* note 6, at 85(1) (“In consultation with the other judges, the President [of the Chambers] may exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth.”).

⁶⁰ Of the four senior leaders of the Khmer Rouge set to stand trial in Case 002, Nuon Chea and Ieng Sary are both 84 years old; Khieu Samphan is 79; and Ieng Thirith is 78. Douglas Gillison, *Tribunal Indicts Four in Cambodian Genocide*, TIME, Sept. 19, 2010, at 1. See also, Chhang, *supra* note 8 (“As has been known to all involved since the beginning, the suspects in detention are old and frail, and the ECCC has limited time and money and is therefore under pressure to reach judgment as quickly as possible.”).

⁶¹ 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 at Dissenting Opinion ¶ 3, Co-Prosecutors v. Kaing, No. 001/18-07-2007 (ECCC TRIAL CHAMBER Oct. 9, 2009) (“[I]t is incumbent upon the Chambers to maintain a balance between, on the one hand, the necessities 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 the perpetrators of the most serious crimes. Clearly, one of the main difficulties involved in the civil party system under Cambodian law is that it was not originally designed for the trial of mass crimes and that it undeniably raises a number of specific issues . . .”).

⁶² *Id.* at ¶ 4.

relationship and its attendant rights, and also severely undermines the right of survivors to participate in the proceedings as “parties.”

ATTORNEY-CLIENT RELATIONSHIP

As parties to the proceedings, civil parties originally had a right under the Internal Rules to be represented by counsel.⁶³ That right necessarily included the requisite elements of any attorney-client relationship: the right of the client to hire an attorney of his/her choice; the client’s right to fire his/her attorney; the obligation of the attorney to represent the client’s interests; and the authority of the client to determine the objectives of the legal representation and participate in deciding the means of carrying them out. However, under the revised Rules, all of these elements of the right to counsel have either been eliminated outright or so severely undermined as to leave serious questions as to whether the right to counsel is anything more than mere lip service to this fundamental principle of the rule of law.

The new legal counsel scheme ushered in by the revised Rules provides that during the pre-trial proceedings, a civil party has the right to be represented by counsel and may freely choose any lawyer who has registered with the Bar Association of the Kingdom of Cambodia.⁶⁴ “[O]nce the Trial Chamber is seised of the case,”⁶⁵ however, the civil parties “shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers as described in IR 12 *ter*. The Civil Party Lead Co-Lawyers are supported by the Civil Party Lawyers described in IR 12 *ter* (3).”⁶⁶ In this acknowledged hierarchy, the Civil Party Lawyers are only to provide “support” to the Civil Party Lead Co-Lawyers, which is limited to such tasks as “oral and written submissions, examination of their clients and witnesses and other procedural actions.”⁶⁷ In essence, civil party lawyers are to be glorified paralegals, relegated to preparing submissions when requested rather than their ethically obligated duty of advocating on behalf of their client.⁶⁸

This reality becomes readily apparent when it is recognized that the revised Rules provide that the “core functions of the Civil Party Lead Co-Lawyers” will include “[r]epresenting the interests of the consolidated group of Civil Parties” and “[u]ltimate responsibility to the court for the overall advocacy, strategy and in-court presentation of the interests of the consolidated group of

⁶³ Internal Rules Rev. 4, *supra* note 9, at 23(7).

⁶⁴ Internal Rules Rev. 5, *supra* note 6, at 23 *ter* (2)(a) (“Victims shall have the right freely to choose from amongst national lawyers and foreign lawyers who are registered with the BAKC [Bar Association of the Kingdom of Cambodia].”).

⁶⁵ Internal Rules Rev. 5, *supra* note 6, at 12 *ter* (4) (“The Civil Party Lead Co-Lawyers shall comprise a national and international lawyer, who are selected and funded by the ECCC, supported by such other staff as necessary. Their functions shall commence once the Trial Chamber is seised of the case.”).

⁶⁶ Internal Rules Rev. 5, *supra* note 6, at 23(5). Note, however, that it is not the position of a Civil Party Lead Co-Lawyer itself that is cause for concern but the way the powers of the Civil Party Lead Co-Lawyer are structured. In many situations, the creation of a legal representative for survivors before internationalized tribunals may be an appropriate way to both preserve the rights of survivors while ensuring fair and expedited trial proceedings.

⁶⁷ Internal Rules Rev. 5, *supra* note 6, at 12 *ter* (6). The Rule further states that “[s]ubject to Rule 12 *ter* (5)(b), such support shall be mutually agreed between the Civil Party Lead Co-Lawyers and the concerned Civil Party lawyer. The Civil Party Lead Co-Lawyers shall coordinate actions by the Civil Party Lawyers understand by way of such support.”

⁶⁸ See ABA MODEL RULES OF PROF’L CONDUCT pmbL ¶ 2 (2004), *available* at <http://www.abanet.org/cpr/mrpc/preamble.html> (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

Civil Parties during the trial stage and beyond” but contain no obligation to individual civil parties.⁶⁹ This language is in stark contrast to that employed by the ICC, which has specifically stated that “[t]he common legal representative shall be responsible for *both* representing the common interests of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake.”⁷⁰

Notably, there is no actual mechanism in the revised Rules for the raising or settlement of genuine strategy disputes between a civil party lawyer and the Civil Party Lead Co-Lawyers.⁷¹ Such disputes will inevitably arise between lawyers, in particular when they represent clients with different interests and goals. The revised Internal Rules merely provide that:

The Civil Party Lead Co-Lawyers shall first and foremost seek the views of the Civil Party lawyers and endeavour to reach consensus in order to coordinate representation of Civil Parties at trial. Internal procedures shall be developed by the Civil Party Lead Co-Lawyers, in consultation with Civil Party Lawyers, for this purpose.⁷²

To provide no dispute resolution mechanism in the Rules ignores the certainty that disagreements will arise.⁷³ But to further state that the Civil Party Lead Co-Lawyers will devise the very internal procedures to resolve these disputes, when necessarily they are one of the parties to the dispute, is to put the wolf in charge of the hen house. It provides no incentive for the Civil Party Lead Co-Lawyers to take into account dissenting opinions from the civil party lawyers. If a civil party lawyer vehemently objects to a certain decision made by the Civil Party Lead Co-Lawyers, there are only two choices available: continue on as a civil party lawyer despite their objections or quit. Given that civil party lawyers are ethically obligated to represent their client’s views and interests,⁷⁴ this puts them in an impossible situation.

⁶⁹ Internal Rules Rev. 5, *supra* note 6.

⁷⁰ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Situation in the Democratic Republic of the Congo, ¶ 13, July 22, 2009 (emphasis added). Additionally, the ruling provides that “[t]he common legal representative shall be accountable to the victims as a group, who may petition the Registry in case of significant problems with the representative function of the common legal representative. If the problem cannot be resolved by the Registry, the latter shall inform the Chamber.” *Id.*

⁷¹ By contrast, rulings of the ICC provide that: “In case the common legal representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber. In case conflicting instructions are irreconcilable with representation by one common legal representative, and thus amount to a conflict of interest, the common legal representative shall inform the Chamber immediately, who will take appropriate measures and may, for example, appoint the Office of Public Counsel for the Victims to represent one group of victims with regard to the specific issue which gives rise to the conflict of interest.” *Id.* at ¶ 16.

⁷² Internal Rules Rev. 5, *supra* note 6, at 12 *ter* (3).

⁷³ In the instance of a potential conflict of interest, the failure to provide an appropriate mechanism for resolution may also present an ethical dilemma for the Victims Lead Co-Lawyers. *See, e.g.*, CODE OF ETHICS FOR LAWYERS LICENSED WITH THE BAR ASSOCIATION OF THE KINGDOM OF CAMBODIA, Art. 19 (“The lawyer may not advise, assist, represent, or defend multiple parties if a conflict of interest arises between them.”).

⁷⁴ The Code of Conduct for the ICC specifically applies to “legal representatives for victims and witnesses.” THE CODE OF PROFESSIONAL CONDUCT FOR COUNSEL APPEARING BEFORE THE INTERNATIONAL CRIMINAL COURT Article 14(2) (2005) (“When representing a client, counsel shall: (a) Abide by the client’s decisions concerning the objectives of his or her representation . . . and (b) Consult the client on the means by which the objectives of his or her representation are to be pursued.”); *see also* GENERAL PRINCIPLES FOR THE LEGAL PROFESSION Principle 5 (Int’l Bar Ass’n 2006) (“A lawyer shall treat the interests of his or her clients as paramount.”); MODEL RULES OF PROF’L CONDUCT pmb. ¶ 1 (“A lawyer, as a member of the legal profession, is a representative of clients . . .”).

Likewise, the rights of the civil parties themselves are severely curtailed under the revised Rules. While in the pre-trial proceedings civil parties are free to choose their counsel,⁷⁵ once the trial stage begins, they lose the power of choice over their representation. At trial and beyond, any civil party wishing to take part in the proceedings must be represented by the Civil Party Lead Co-Lawyers.⁷⁶ They have no choice in selecting their representation in the trial proceedings. Nevertheless, civil parties are not able to dismiss the Civil Party Lead Co-Lawyers if they are dissatisfied with how their interests are being represented.⁷⁷ The ECCC Rules specifically state that lawyers before the ECCC are subject to the “recognized standards and ethics of the legal profession.”⁷⁸ However, these revised restrictions appear to violate numerous codes of attorney conduct that highlight the client’s right to decide the objectives of representation and to hire and fire their attorney, including, for example, those of the Bar Association of the Kingdom of Cambodia,⁷⁹ the International Bar Association,⁸⁰ the American Bar Association,⁸¹ and the International Criminal Court.⁸² It has been found that ECCC civil parties in particular rely heavily upon their legal representation.⁸³ Indeed, two scholars “found that, in practice, civil parties rely entirely upon their lawyers to marshal their participation, as most lack the ability, means and/or time to follow the proceedings closely. Without legal representation, the vast majority of civil parties would not be able to participate meaningfully in the proceedings.”⁸⁴ As recognized by the ICC in the *Katanga* case, it is vital for a court to attach “the greatest importance to the requirement that the participation of

⁷⁵ Internal Rules Rev. 5, *supra* note 6, at 23 *ter* (1) (2). Rule 23 *ter* (2) provides that “[a]ny Victim participating in proceedings before the ECCC as a Civil Party has the right to be represented by a national lawyer, or a foreign lawyer in collaboration with a national lawyer” Rule 23 *ter* (1) states that “[f]rom the issuance of the Closing Order onwards, in order to participate in proceedings, Civil Parties shall at all times be represented by a Civil Party lawyer.”

⁷⁶ Internal Rules Rev. 5, *supra* note 6, at 23(5) (“Civil Parties at the Trial stage and beyond shall comprise a single, consolidated group whose interests are represented by the Civil Party Lead Co-Lawyers as described in [Internal Rule] 12 *ter*.”). While somewhat unclear, it is only logical that the revised Rules dictate that survivors must provide the Civil Party Lead Co-Lawyers with a power of attorney or otherwise they cannot participate as civil parties in the proceedings before the ECCC.

⁷⁷ Conversely, civil parties may dismiss their Civil Party lawyers. *See* Internal Rules Rev. 5, *supra* note 6, at 23 *ter* (1) (“Where representation ceases, and the Civil Party wishes to continue participation in proceedings, the Civil Party shall engage alternative counsel.”).

⁷⁸ Internal Rules Rev. 5, *supra* note 6, at 23 *ter* (4)(a). The rule additionally states that lawyers before the ECCC “have an obligation to promote justice and the fair and effective conduct of proceedings.” *Id.*

⁷⁹ The Bar Association of the Kingdom of Cambodia’s Code of Ethics for Lawyers Licensed provides clients the right to discharge their attorney in Article 16 by stating that “If the lawyer accepts, he or she must see the assignment through to its completion unless discharged by the client.”

⁸⁰ GENERAL PRINCIPLES FOR THE LEGAL PROFESSION Principle 7 (Int’l Bar Ass’n 2006) (“A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice.”).

⁸¹ MODEL RULES OF PROF’L CONDUCT R. 1.2 (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.”). *See also*, Commentary to MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. ¶ 2 (“[T]he client may resolve the disagreement by discharging the lawyer.”), and ¶ 3 (“At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation The client may, however, revoke such authority at any time.”).

⁸² THE CODE OF PROFESSIONAL CONDUCT FOR COUNSEL APPEARING BEFORE THE INTERNATIONAL CRIMINAL COURT art. 18(3) (“Where counsel is discharged by the client, counsel may be discharged in accordance with the Regulations of the Court.”).

⁸³ Thomas & Chy, *supra* note 28, at 286 (“The Authors have found that victims have little interest in their specific legal rights; rather, they typically desire to be involved and to have their interests represented. If civil party participation is replaced by representation of victims’ collective interests, however, the Court must explain to applicants that their participation rights have been eliminated.”).

⁸⁴ Thomas & Chy, *supra* note 28, at 249.

victims, through their legal representatives, must be as meaningful as possible as opposed to being purely symbolic.”⁸⁵

The result here under the revised Internal Rules is beyond symbolism. The perversely logical result is that if civil parties believe that the Civil Party Lead Co-Lawyers are not representing their interests, their only true option is to withdraw entirely from the proceedings. This unconscionable result is amplified by the fact that many of the survivors in Case 002 come from different ethnic or religious backgrounds, may have experienced their injuries at different times, at different locations, at the hands of different people, and are likely to have different objectives for their participation, including differing preferences in the form of potential reparations.⁸⁶

RIGHT TO PARTICIPATION

Under the ECCC Internal Rules as originally drafted, once a civil party was joined to the proceedings, “the Victim be[came] a party to the criminal proceedings.”⁸⁷ As a result, the civil party was entitled to “[p]articipate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution,” as well as to seek “collective and moral reparations.”⁸⁸ This right to meaningfully participate in the proceedings as a party carries with it certain rights, such as the right to call, examine and cross-examine witnesses, to be questioned as an interested party, and to request investigative action, among others.

With the revised Rules, civil parties are no longer treated as “parties” to the trial proceedings. The revised Rules now merely provide a civil party to “individually become[] a party to the criminal proceedings in the pre-trial stage.”⁸⁹ There is no explicit provision in the revised Rules providing that civil parties will remain “parties” to the criminal proceedings during the trial phase, the most important phase of the proceedings. Furthermore, because civil party rights must be exercised through the Civil Party Lead Co-Lawyers under the revised Rules, many of these rights may prove to be illusory. For example, one of the key participatory rights afforded to civil parties in civil law jurisdictions around the world, including Cambodia,⁹⁰ is the right to request investigative action.⁹¹ Under the revised Rules, it is unclear if ECCC civil parties still have this right. Previously, it could

⁸⁵ *Katanga*, *supra* note 70, at ¶ 10(a) (“[I]t is of utmost importance that . . . there is real involvement by the victims in terms of instructing the legal representatives on how their interests should be represented.”).

⁸⁶ See, e.g., Kong Sothanarith, *Tribunal Narrows Victim Participation*, VOICE OF AMERICA, (May 13, 2010), <http://www.voanews.com/khmer-english/news/Tribunal-Narrows-Victim-Participation-93690934.html>.

⁸⁷ Internal Rules Rev. 4, *supra* note 9, at 23(6). This right is also guaranteed under the Cambodian Code of Criminal Procedure, Articles 137-138.

⁸⁸ Internal Rules Rev. 4, *supra* note 9, at 23(1)(a-b). Also: ECCC Pre-Trial Chamber, “Decision on Civil Party Participation in Provisional Detention Appeals,” ¶ 49, 20 March 2008 (“[T]he Internal Rules provide that once admitted, a Civil Party may participate in all stages of the proceedings according to Internal Rule 23(4). There is no need to show any special interest in any stage of the proceeding . . .”); ECCC Trial Chamber, *supra* note 1, at ¶ 11 (“Civil Parties have the right to participate in proceedings against those responsible for crimes within the jurisdiction of the ECCC, by supporting the Prosecution.”).

⁸⁹ Internal Rules Rev. 5, *supra* note 6, at 23(3)(a).

⁹⁰ Cambodian Code of Criminal Procedure, art. 137-38; see also Thomas & Chy, *supra* note 28 at 291 n.52.

⁹¹ See Valerie Dervieux, *The French System*, in EUROPEAN CRIMINAL PROCEDURES, 453-54 (Mireille Delmas-Marty & J.R. Spencer, eds., 2002); Brigitte Pesquie, *The Belgian System*, in EUROPEAN CRIMINAL PROCEDURES, at 94-95 (Mireille Delmas-Marty & J.R. Spencer, eds., 2002); Emmanuel Ntoko Ngome, *The Civil Party in Criminal Trials: a comparative study-guide to the criminal procedure harmonization process in Cameroon*, at 119, 121 (Mar. 1995), available at: http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=22701&local_base=GEN01-MCG02.

have been exercised through the civil party lawyers.⁹² Now, under the revised Rules, presumably this right must be exercised through the Civil Party Lead Co-Lawyers.⁹³ However, the Civil Party Lead Co-Lawyers are responsible for the interests of all survivors within the consolidated group.⁹⁴ Thus, if one group of survivors wishes to request investigative action, but the Civil Party Lead Co-Lawyers feels that this action could run counter to the overall strategy, then the Civil Party Lead Co-Lawyers could refuse to request investigative action, rendering the right illusory. Again, the lack of any proper dissent mechanism further compounds the troubling implications of this development.

As Judge Lavergne noted in a dissenting opinion, civil parties in domestic jurisdictions “may participate throughout the legal proceedings, the common purpose of which is to ascertain the truth concerning the accused’s criminal responsibility, which might also be the basis of his or her civil responsibility.”⁹⁵ This dissent was to the mid-2009 decision by the Trial Chamber that eliminated outright the right of civil parties to participate in sentencing proceedings and severely undermined their right to cross-examine certain witnesses.⁹⁶ The ECCC so ruled despite the fact that both international tribunals that allow victims to participate in proceedings—though not as civil parties—provide victims with the right to participate in sentencing proceedings.⁹⁷

Although individually the changes to civil party rights may not be decisive, in combination, eliminating the rights of civil parties to participate meaningfully in the proceedings, including at the sentencing phase, to request investigative action, to cross-examine certain witnesses, and to be provided access to counsel who are able to represent their best interests clearly indicates that ECCC “civil parties” are no longer “parties” to the proceedings in any sense of the term.

CONCLUSION

Following the adoption of the revised Rules in February 2010, it is now unclear what meaningful role, if any, survivors continue to have in the proceedings before the ECCC. What is clear, however, is that these survivor-participants are no longer bona fide “civil parties” within the legal meaning of the term. Too many of their rights as “parties” have been stripped away in the name of judicial management of the case file. The Chambers has every right to do this, but in ending civil party participation, they should be honest with the survivors. As two observers have written, “[i]f civil party participation is replaced by representation of victims’ collective interests . . .

⁹² Internal Rules Rev. 4, *supra* note 9, at 55(10); Internal Rule 23(7)(i) (“When the Civil Party is represented by a lawyer, his or her rights are exercised through the lawyer.”).

⁹³ In the revised Rules, Internal Rule 55(10) still provides civil parties the right to request investigative action. However, as expressed in Internal Rule 23 *ter* 2(f) (Rev. 5) a civil party’s rights are to be exercised through “the lawyer,” without specifying which lawyer—the civil party lawyer or the Civil Party Lead Co-Lawyers.

⁹⁴ Internal Rules Rev. 5, *supra* note 6, at 12 *ter* 5(a) (“The core functions of the Civil Lead Co-Lawyers shall include: a. Representing the interests of the consolidated group of Civil Parties . . .”).

⁹⁵ Lavergne, *supra* note 61, at ¶ 6.

⁹⁶ ECCC Trial Chamber, *supra* note 20.

⁹⁷ See, e.g., Special Tribunal for Lebanon, Rules of Procedure and Evidence, ¶¶ 16, 19, 10 June 2009; *Katagna*, *supra* note 70, at ¶¶ 38-9; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC Trial Chamber I, ¶ 26, “Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims,” Sep. 16, 2009; see also, Lavergne, *supra* note 61, at ¶ 17 (“The decision denying Civil Parties the right to question certain witnesses and experts is therefore manifestly inconsistent with the adversarial principle according to which all evidence must be subjected to examination by all parties, as set forth in the Internal Rules.”).

the Court must explain to applicants that their participation rights have been eliminated.”⁹⁸ Likewise, as stated by Youk Chhang, Director of the Documentation Center of Cambodia:

It is true that many civil parties do not fully understand the meaning of the term “civil party” and the scope of their role in the proceedings; however, it would be disrespectful for the Court to hide behind this outreach failure. If the Court wants to limit civil party rights, it has an obligation to explain the full legal implications both to the public at large and to the applicants before a final plan is adopted.⁹⁹

Given the immense suffering and trauma experienced by these survivors, it is the very least the Chambers can do.

⁹⁸ Thomas & Chy, *supra* note 28, at 286. *See also*: Letter from Youk Chhang to Susan Lamb, Senior Judicial Coordinator, on behalf of the Rules and Procedure Committee, Aug. 26, 2009 (“If the Court substitutes a Victims’ Advocate approach for civil party participation, it has an obligation to explain the full legal implications both to the public at large and to the civil party applicants before a final plan is adopted.”).

⁹⁹ Youk Chhang, *Conducting a Legal Experiment at Victims’ Expense*, SEARCHING FOR THE TRUTH MAGAZINE, Sep. 2009.