



CIVIL PARTY PARTICIPATION AT ECCC: OVERVIEW

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The trial of Kaing Guek Eav (alias Duch) at the Extraordinary Chambers in the Courts of Cambodia (ECCC) is ground-breaking in many respects, as he is the first Khmer Rouge leader to appear before the court and the Cambodian people to account for crimes committed during the period of Democratic Kampuchea. But perhaps the most ground-breaking aspect of the ECCC is the participation of victims as civil parties. The ECCC is the first international tribunal to provide for such comprehensive participation of victims in official criminal proceedings. Much attention is being paid to the current model of civil party participation, because any changes to this model will not only affect victim participation in future cases at the ECCC, but will likely have a broader impact, influencing the way victims are treated before the International Criminal Court and other international tribunals where atrocity crimes (genocide, crimes against humanity, and war crimes) are prosecuted.

Statutory Basis of Civil Party Participation

Civil party, or victim, participation in criminal proceedings is a concept that is foreign to many lawyers from common-law systems such as the United States. In common law systems, a criminal trial is held independently from a civil trial where the victim of a crime seeks damages from the alleged perpetrator. Moreover, the victim must only prove his case by a preponderance of the evidence in a civil trial as opposed to the stricter burden of proof in a criminal trial, where the prosecutor must prove his case beyond a reasonable doubt. This often leads to a somewhat illogical situation where a victim can succeed in a civil suit and be awarded monetary compensation while the defendant is at the same time acquitted of the crime brought against him in the criminal trial. (Perhaps the most famous example of such a result in the United States involved the civil and criminal trials against O.J. Simpson for the 1994 murders of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman).

Unlike common law systems where a victim of a crime must pursue compensation in a civil rather than criminal trial, civil law systems allow a victim of a crime to be joined in the criminal proceedings, where the court can award the victim compensation. Furthermore, the civil party retains many procedural rights and a substantive role in the criminal proceedings. Indeed, the ECCC procedural law is based upon Cambodian law

which is itself heavily influenced by the French civil law system. The statutory rights for victims to participate in the criminal proceedings are found in the Internal Rules which form the authoritative source of procedural law at the ECCC.

Interestingly, there are hardly any provisions in either the ECCC Law or the Agreement between the United Nations and the Royal Government of Cambodia on the Establishment of the ECCC that address the rights or needs of victims. Ambassador David Scheffer, one of the leading architects of the Cambodia tribunal, explained that "during the 1990's and the most intensive stage of negotiations for the law on the ECCC, there was almost no discussion about victims' rights. While at first blush this may seem odd, one might nevertheless imply a right of civil parties to participate given the considerable body of rights for civil actions afforded victims in criminal trials under Cambodian criminal procedure law. But the heavy lifting on victims' rights awaited the drafting of the Internal Rules by the judges, which was preceded by several intensive studies by experts and non-governmental organizations of what could and should be addressed in those rules for the victims."

Under the Internal Rules, any person who suffered a physical, material, or psychological injury as a direct consequence of the offense is entitled to participate as a civil party. As civil parties, victims are entitled to participate in the criminal proceedings against the accused person by supporting the prosecution. This participation includes a full presence during both the trial phase as well as the pre-trial phase when the case is being reviewed by the Co-Investigating Judges. For example, a civil party can request that a Co-Investigating Judge take action that is necessary for the conduct of the investigation.

Civil parties may also seek collective and moral reparations. The court can award "any appropriate and comparable forms of reparation." On September 17, 2009, the four civil party groups in the Duch case made their submission for reparations which included: (1) compilation and dissemination of apologetic statements made by Duch, (2) access to free medical and psychological care, (3) funding of educational programs to inform the public about crimes that took place during the Khmer Rouge regime, (4) erection of memorials to commemorate victims, and (6) publication of the names of all the civil parties in the final judgment. Under the Internal Rules, all of the reparations are to be borne by the accused. However, in their pleading, the civil parties argued that if the accused cannot bear the costs of the reparations, then the court should ensure that the Government of Cambodia or the Victims Unit carry out the awards (even though no such provisions exist in the Internal Rules). Ultimately, it will be up to the judges to determine if the reparations requested are appropriate and whether the court can compel another body to carry out the award if Duch cannot bear the costs.

Civil Party Participation in Action

While the Internal Rules provide the statutory basis of civil party participation, they are relatively broad, so specific rules regulating civil party participation are necessarily informed by court practice. Since the beginning of the Duch trial, the precise parameters of such participation have been a work in progress as the court continually dealt with

issues relating to the civil parties, such as: (1) how to manage the presence of the many civil parties and their four groups of national and international lawyers, (2) the defense challenge of 24 civil party applications as the trial was coming to a close, and (3) the decision by the Trial Chamber not to permit civil parties to make pleadings on the sentence or to question character witnesses, and the ensuing civil party boycott.

Given that this was the first tribunal to allow for such comprehensive participation of civil parties, the court ran into several challenges in managing the presence of the civil parties. First, the civil parties were split into four separate groups, each with one national and one international lawyer. Furthermore, the civil parties were not grouped together in any logical way (such as class of victim or type of injury). Instead the four different groups evolved from the fact that different intermediary organizations helped collect civil party applications and each wanted to represent their own group of victims separately. Not only did this create a problem of consistent representation, but it also had the unintended effect of unnecessarily prolonging the proceedings.

For example, civil parties are permitted to question many of the witnesses. This meant that at the ECCC, albeit rare, a witness could be questioned by 18 different lawyers before completing his testimony! (The witness could be questioned by the five judges, international and national co-prosecutors, eight civil party lawyers, the international and national defense lawyers, and sometimes even the lawyer of the witnesses.) While it is not fair to lay all the blame on the civil parties, at times they could have up to twice as many lawyers in the courtroom than the defense and prosecution put together. Furthermore, the lack of coordination among the groups often led to redundant questioning. The court responded by limiting the total time for civil party questioning (often allocating less time to the civil parties than to the prosecution and defense). Ultimately, all sides recognized that the four different groups of civil parties, divided in the way they were, was a problem and would not be tenable in the next case given the much larger number of expected civil parties.

The second major problem the court had to deal with was the defense challenge of 24 civil party applications as the trial was coming to a close. To be accepted as a civil party, a victim had to file a submission with the Victims Unit before the start of the trial, at which point it could be reviewed by the Co-Investigating Judges who could reject the application, through a reasoned written order subject to appeal. This process yielded upwards of 100 civil parties by the start of the trial. However, just weeks before the close of evidence, the Trial Chamber accepted the defense counsel's challenge of 24 civil parties on the grounds that insufficient evidence in the applications existed to prove their status as victims.

What ensued was a specific application-by-application query where it became clear that many of the applications were still incomplete either because the relevant documents had not been collected or simply because the relevant documents no longer existed. The entire exercise begged the question: How could a vetting process that included so many different parties – from the Victims Unit to the Co-Investigating Judges and ultimately to civil party lawyers, defense lawyers, and the Trial Chamber – yield such a high

percentage of deficient applications that were not challenged until the final weeks of the trial?

On the same day that the court heard defense challenges to civil party applications, the judges pronounced an oral decision that civil parties would not be permitted to make pleadings on sentencing. At the same time they heard hotly-contested arguments over whether or not civil parties should be permitted to question character witnesses. The civil parties argued, inter alia, that the Internal Rules provide for full participation of civil parties and draws no distinction between character and non-character witnesses. In its response, the defense relied in part on the oral decision announced earlier in the day, by arguing that character evidence goes directly to sentencing and has no relevance on the issue of guilt, pain and suffering of the civil parties, or the reparations they seek. At the end of the session, the Trial Chamber, by a majority vote of four to one (as was the case with the earlier procedural ruling), ruled that it would not allow civil parties to question character witnesses.



Civil parties in extreme shock and disappointment when told they could not question character witnesses

Before the start of the next trial session, the civil parties announced a boycott. They would not attend the trial during the remainder of character witness testimony. That day they travelled to the Tuol Sleng prison where they paid homage to the dead, but they could not hide the shock and disappointment expressed so vividly on their faces. The civil parties felt that their rights had been unduly restricted, and that the court was unwilling to hear what they perceived to be their legitimate complaints. In a

reasoned, written decision handed down almost a month and a half later, the Trial Chamber explained that the role of the civil parties was limited to seeking reparations and assisting the prosecution in proving guilt (the success of which is a necessary condition to obtaining reparations). Sentencing, and thus character evidence, was not related to reparations, and therefore fell within the exclusive purview of the prosecution.

Future Model of Civil Party Participation

In response to the many challenges presented by the full-fledged participation of civil parties during the Duch trial, the court convened its sixth plenary session where it agreed on key concepts for changes to the future of civil party participation. It decided that all civil parties will be consolidated into one single group that will make a single claim for collective and moral reparations. This consolidated group will be represented by lead Co-Lawyers, rather than multiple civil party lawyers. The plenary session also decided that all civil party applications must be received, and all challenges to those applications made, before the commencement of Case 2. To effectuate further changes to civil party

participation consistent with the general concepts agreed upon by the plenary session, another plenary session held late in January 2010 will likely consider the specific proposals and adopt specific changes to the Internal Rules relating to civil party participation.

Conclusion

In summary, while civil party participation was codified in the Internal Rules, the ideal model of victim participation is still a work in progress. The pure form of civil party participation as found in the Cambodian and French civil law systems is inadequate to fully address the unique elements attendant to trials of atrocity crimes. For example, a typical criminal trial involves no more than a few victims, but trials of atrocity crimes can have thousands of victims who elect to participate in the proceedings. This can place a heavy burden on the court and have the unintended effect of unnecessarily prolonging the proceedings, making it more difficult to achieve timely justice. However, despite early set-backs, the ECCC has elevated victims' rights to a level unforeseen in international tribunals and the court's continual refinement of its model of civil party participation will likely have a long-lasting impact on international tribunals that go far beyond the borders of Cambodia.