

The right of the Civil Parties to participate v. the right of the Accused to a fair and expeditious trial: challenges at the ECCC?

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On 27 November 2009, 30 years after the fall of the Khmer Rouge regime, the first trial at the Extraordinary Chambers in the Courts of Cambodia (ECCC) against a senior Khmer Rouge official came to a close.¹ The judgement in that case is scheduled to be rendered on 26 July 2010. It will mark not only the first case of the ECCC, but the first internationalized case where victims (Civil Parties) have actively participated in trial proceedings. The ECCC is not an international court, in the sense the International Criminal Court (ICC) is. Rather, it is what is known as a “hybrid court”. It applies a mixture of international and domestic law, before a mixed bench of international and domestic judges. This is in contrast to the ICC or *ad hoc* tribunals for the former Yugoslavia and Rwanda, which comprise only international judges and apply only international or treaty law. The reflection of Cambodian law,² (itself based on French law) in the procedural rules of the Court resulted in a variety of unique procedural innovations. One of the distinguishing features of the ECCC is the inclusion of the victims of the Khmer Rouge as parties with equal status to that conferred on the Prosecution and Defence. While an important step in the area of victim rights, the inclusion of Civil Parties in the criminal proceedings at the ECCC did raise important questions regarding the balance to be made between the right of victim’s to participate and the right of the defendant to a fair and expeditious trial. The ECCC has already undertaken various measures to address potential conflicts in future trials, but should caution to do so at the expense of either of the parties.

The purpose of the Civil Party participation at the ECCC is two-fold: (1) to support the prosecution during the criminal proceedings, and (2) to seek collective and moral reparations.³ The exact scope and application of the civil party participation, however, has been the subject of constant controversy, particularly surrounding the phrase, “supporting the prosecution.” The international Co-Counsel for the Accused, François Roux, time and again raised the objection that the Civil Parties are not intended to constitute “second prosecutors,”⁴ instead requesting the Trial Chamber to interpret the Internal Rules in a restrictive manner. The tension between the rights of the victim to participate and the rights of the defendant to a fair and expeditious trial came to the fore during the *Duch* trial. This is only likely to intensify with the start of proceedings against the four other defendants currently in custody at the ECCC and where an estimated 3,000 victims are seeking to qualify as Civil Parties.⁵

¹ *Prosecutor v. Kaing Guek eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC.

² Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the period of the Democratic Kampuchea [hereinafter “the Agreement”], 6 June 2003, Art. 12.

³ Extraordinary Chambers in the Courts of Cambodia (ECCC), Internal Rule 23(1), as revised on 9 February 2010.

⁴ See e.g., Transcript (Public), *Duch*, 22 June 2009, at 92.

⁵ In addition to Kaing Guek Eav, alias Duch, the ECCC currently has in custody Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Tirth.

One of the fundamental pillars of the ECCC architecture is that proceedings shall “be fair and adversarial and preserve a balance between the rights of the parties.”⁶ The Internal Rules, which have been revised since the close of the *Duch* trial, attempt to address the tension between the rights of the victims and the defendant. It has sought to do this, in part, by providing for the participation of one collective group of civil parties during the trial stage, represented by Lead Co-Counsel, rather than numerous individual groups led by a multitude of counsel.⁷ This change is expected to significantly lessen the amount of time spent on questioning witnesses and introducing evidence, thereby reducing the length of the proceedings. Although this amendment seeks to reduce unnecessary delay,⁸ it does not address objections raised by the Defence regarding the actual *scope* of the Civil Party participation. As the Internal Rules provide only skeleton guidance on how to balance the respective rights of the parties (Prosecution, Defence and Civil Parties), it has fallen to the judges to determine the precise contours of Civil Party participation. It is likely that this will remain the case as the ECCC progresses to its second trial.

The Rule changes recently adopted by the Judges Plenary do not address the concerns raised by the Civil Party Lawyers regarding “equality of arms” or minimum levels of resources and support.⁹ It is hard to comprehend how the Civil Party Lawyers are supposed to adequately represent their clients, let alone “support the prosecution,” or else allegedly act as “second prosecutors” while working on a *pro bono* basis for the entire duration of the trial. It must be conceded that, while raised,¹⁰ the difficulties regarding the absence of funding presented by Civil Party Lawyers in this regard did not elicit much response from the Bench or Registry during the trial. The provision of two Lead Co-Lawyers (positions that are currently being recruited for) is primarily intended to bring about efficiency and coordinating advantages at trial. It constitutes a real attempt to give effect to the right of Civil Parties to meaningfully participate. Civil Parties retain the right, however, to participate in the investigative stage as well. No provision, support or coordination is provided in this regard. Certainly none was given to the Civil Parties in the *Duch* case. Even at trial, the duty of Civil Party Lawyers to their clients remains undiminished by the provision of Lead Co-Counsel. The modalities regarding how to reconcile the ethical and

⁶ Internal Rule 21(1)(a).

⁷ Internal Rule 23(5). During the trial stage of the *Duch* proceedings, the 94 Civil Parties were divided into 4 separate groups, each represented by a national and an international Co-Lawyer.

⁸ Internal Rule 12ter(1) provides that “[t]he Civil Party Lead Co-Lawyers shall ensure the effective organization of Civil Party representation during the trial stage and beyond, whilst balancing the rights of all parties and the need for an expeditious trial within the unique ECCC context.”

⁹ See e.g., Michelle Staggs Kelsall et al, *Lessons Learned from the Duch Trial; a Comprehensive Review of the First Case before the Extraordinary Chambers in the Courts of Cambodia*, December 2009, at 33. Contrary to the ECCC, the ICC provides the victims, who have a more narrow mandate than the Civil Parties, with equal compensation, resources and facilities as the Defence. Whilst the resources provided to victim representatives at the ICC may, arguably, go beyond what is strictly necessary so as to enable victim representatives to effectively discharge their responsibilities, the authors consider that the arrangements prevailing in Cambodia in case file number 1 to have been wholly insufficient. Without *pro bono* assistance provided by Civil Party Group 1, the assistance of the German Government and aid agencies (Civil Party Group 2), Avocat sans Frontiers (Civil Party Group 3) the Paris Bar Association (Civil Party Group number 4) it is unclear how the civil party groups could have possibly operated in a meaningful way at all. Put simply, a minimum level of resources are needed to render rights effective.

¹⁰ See e.g., Transcript (Public), *Duch*, 18 July 2009, at 8: the first author of this paper stated that “unlike ... [the defence and the prosecution], there has not been any financial assistance from the Court for Civil Party participation. This cannot, in my respectful submission, be lightly glossed-over because it is a principal of international human rights law, in my respectful submission, that all rights are to be rendered practical and effective, not theoretical and illusory.”

professional obligations under the revised rules will, no doubt, be worked out on a practical level in due course and may, indeed, require the Trial Chamber to intervene and settle disputes or uncertainties.

Ad Hoc and International Tribunals

The practice of allowing victims to attach their civil claim to criminal proceedings is not a novel concept in national jurisdictions, particularly in civil law countries. This practice is also firmly rooted in the Cambodian Code of Criminal Procedure.¹¹ Victim participation is becoming an equally prevalent phenomenon on the international level, as evidenced by the establishment of specialised Victims Sections at the International Criminal Court (ICC) and the Special Tribunal for Lebanon (STL).¹² At the ICC, victims are provided with representation and allowed to “express their views and concerns” at the discretion of the Court, provided it does not impede upon “the rights of the accused to a fair and impartial trial.”¹³ Notwithstanding this “black letter” right to participate, the ICC is grappling with questions surrounding the actual role of the victims in the criminal process. To date, clarification is being given by the judges, in response to particular problems and issues raised in particular cases. The alternate course would have been to provide a clearer procedural framework in the Rules of Procedure and Evidence itself.¹⁴ This would have had the advantage of certainty, but perhaps, the disadvantage of fettering the ability of the judiciary to shape the parameters of participation in a real life setting of an international trial. Caution remains the watchword as the ICC navigates its way through these issues.

Judge Pikis, in a concurring opinion of the Appeals Chamber at the ICC, addressed the tension between the rights and role of victims in criminal proceedings, and the rights of a suspect or accused by declaring that the “[e]quality of arms is another element of a fair trial, which in the context of the [Rome] Statute, putting the burden of proof on the Prosecutor, means that the defendant cannot be required to confront more than one accuser.”¹⁵ In doing this, there are certainly echoes of sentiments expressed by Maitre Roux in the *Duch* trial. While the Rome Statute requires the Judges to give priority to the rights of the accused where there is a conflict between such rights and those of victim representatives, the case law emanating from the ICC is still evolving. At least one commentator has noted that there remains an inconsistency between the Chambers that has led to different treatment of accused (and victims) depending upon the Chamber before whom they appear.¹⁶

¹¹ Cambodian Code of Criminal Procedure [hereinafter “CCCP”], Art. 326.

¹² At the ICC, for example there is a Victims and Witnesses Unit (protection); Victim Participation and Reparation Section (processes applications); Office of Public Counsel for Victims (legal advice and representation); and privately retained victim’s lawyers that may appear to represent recognized victims.

¹³ Art. 68(3) ICC St. The Special Tribunal for Lebanon similarly envisions a broad participatory scheme for victims, allowing them to call witness, tender evidence and file motions and briefs, as provided by Rule 87(B) STL RPE.

¹⁴ S. Zappalà, *The Rights of Victims v. The Rights of the Accused*, 8 J. Int’l Crim. Just. 137, March 2010, at 141-142.

¹⁵ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 OA8, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, (June 13, 2007) (Pikis, J., concurring), para. 19.

¹⁶ S. Zappalà, at 142. See also Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-112 (Dec. 19, 2007) [hereinafter Decision on Prosecution’s application for Leave to Appeal], para. 27.

Future of the ECCC

The Trial Chamber at the ECCC seems to have reversed its initial stance towards the participation of the Civil Parties,¹⁷ and is instead adopting an increasingly restrictive approach in a manner more akin to that applicable under the different ICC regime.¹⁸ While the Internal Rules provided a basis for a broad form of participation, the Trial Chamber is moving towards participation based upon their “personal interest.”¹⁹ This is an attempt to prevent unnecessary conflicts between the Civil Parties and the Accused.²⁰ As previously noted, the Judges Plenary has focused primarily on revising the Internal Rules with the aim of shortening the length of the proceedings and managing the trial process. That said, the precise scope and practical modalities of Civil Party participation still have to be determined by the Judges under the new revised Rules. This creates legal uncertainty, potentially prejudicial to both Accused persons and Civil Parties, who may be in danger of commencing a process unsure of the extent and framework within which the Civil Parties will be allowed to operate.

By revising the Internal Rules to streamline the proceedings, the Plenary may also have inadvertently created new conflicts between the parties. The Internal Rules, for example, were amended to bring the final determination of the Civil Party applications within the mandate of the Investigating Judges, at the time of the issuance of the closing order.²¹ The Civil Parties and the Defence both have the option to file an expedited appeal to the final determination within ten days of the decision, with no possibility of extension.²² While this Rule was amended to avoid delay in the trial proceedings, the short time frame makes it rather difficult for Civil Party Lawyers to confer with their clients in a meaningful manner in order to decide the merits of an appeal and its scope. Applicants, who may apply for Civil Party status until two weeks before the close of the investigations, may also find themselves in the awkward position of having to demonstrate that the harm suffered is “directly linked to one or more factual situations that form the basis of the ongoing judicial investigation,”²³ without having adequate information at that stage about the actual “ongoing judicial investigation.”²⁴ The Defence Support Section of the ECCC has also voiced its concern that it will not have the time to prepare adequate appeals against the large volume of applications. As the Section stated:

¹⁷ See e.g., Transcript (Public), Duch, 22 June 2009, at 98. In response to the objection by Maitre Roux that the Civil Parties were acting as ‘second prosecutors by extracting inculpatory evidence, the President of the Trial Chamber held that the Chamber “allows the questioning of the civil parties’ lawyers in order to support the prosecution,” provided they are not “long-winded,” “repetitious” or “irrelevant.”

¹⁸ See e.g., *Prosecutor v. Kaing Guek eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, 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 [hereinafter “Sentencing Decision”], 9 October 2009. The Trial Chamber held that the Civil Parties Co-Lawyer’s are precluded from making submissions on the issue of sentencing and on the issue of the character of the Accused.

¹⁹ See, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07), Decision on the Set of Procedural Rights Attached to procedural Status of Victim at the Pre-Trial State of the Case, Pre-Trial Chamber I, 13 May 2008, nn. 80-81.

²⁰ Sentencing Decision.

²¹ Internal Rule 23bis(2) and (3).

²² Internal Rule 77bis.

²³ Press Release, The Co-Investigating Judges Release Information about Scope of Investigation in Case 002, November 5, 2009. Available at http://www.eccc.gov.kh/english/news.view.aspx?doc_id=322.

²⁴ Internal Rule 56(1). The investigatory stage is covered by the “rule of confidentiality,” which essentially limits the dissemination of information to the public regarding the ongoing investigations.

The amendments have removed any meaningful right for the accused to challenge the admissibility of civil party applications brought against them. Under the new regime, the defence will be deprived of any rights to challenge the admissibility of civil parties at trial. Instead, they will have only 10 days to appeal against the investigating judges' decisions on (approximately) 4,000 civil party applications. In other words, if an accused wants to exercise his 'right' to challenge the application of every civil party, he will need to file 400 appeals a day in two languages. According to international standards an accused's right to appeal must be practical and effective. In adopting these amendments, the Plenary has left the accused with a right that is merely theoretical.²⁵

The Internal Rules need to find a way to streamline the proceedings in an effective manner, without losing sight of the fundamental rights applicable to both defendant and victim. Although the length of the proceedings is an important aspect of the Defendant's right to a fair and expeditious trial, it cannot be resolved by abrogating, or unnecessarily impacting upon, the parties' right to appeal. All parties involved should be granted the opportunity to exercise their rights in an effective manner, without resorting to draconian measures that have the potential to undermine the very process it intends to bolster.

Conclusion

It is apparent that the amended Rules will require further honing in order to address ongoing conflicts that will arise between the parties. While it is imperative for the legitimacy and effectiveness of the ECCC to seek a fair balance between the rights of the Civil Parties to participate and right of the Accused to an expeditious trial, the ECCC should caution doing so at the expense of either of the parties. The Plenary has started to take steps to address the issues with respect to the length of the proceedings, but have yet to provide clarity regarding the actual role of the Civil Parties. Instead of placing the burden on the Chamber to determine the Civil Parties' role on a case-by-case basis during the proceedings – which leads to legal uncertainty for all parties involved – the Plenary should focus on providing a clearer procedural framework within which the Civil Parties can operate.

The participation of the victims at the ECCC serves an important function, both in terms of assisting in unearthing the truth and, it appears, in the process of national reconciliation. Contrary to what was asserted by the Defence during the *Duch* trial, the purpose of the Civil Party participation is not to seek vengeance: “[The Civil Parties] do not want blood. They want justice.”²⁶ While it is imperative to balance the rights of the Defendant against that of the victims and – in case of conflict – to give priority to the former, the Civil Parties were expressly included in the process of achieving justice in Cambodia. They are not considered poor relations or an

²⁵ Press Statement from the Defence Support Section on the Conclusion of the 7th ECCC Plenary Session, February 9, 2010 at [http://www.eccc.gov.kh/english/cabinet/press/148/DSS_Press_Release_Plenary8.2.10\(ENG\).pdf](http://www.eccc.gov.kh/english/cabinet/press/148/DSS_Press_Release_Plenary8.2.10(ENG).pdf).

²⁶ Transcript (Public), *Duch*, 18 February 2009, at 28 (responding to assertions by the Defence).

unwanted guest in the investigative and trial process. Rather, they must be treated as equal parties to the Prosecution and the Defence, as they are defined. It would be contrary to the spirit and the intent of the Rules to “stifle” their voices, or to unnecessarily restrict them in the “interests of justice”, after many have waited for that very justice for more than thirty years.²⁷

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²⁷ *Ibid.*