

Public Comment on Proposed Changes to Civil Party Participation before the ECCC

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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 survivors as "civil parties" who were to be treated as full parties to the proceedings. Substantively, however, this scheme did not even survive the first trial intact.^[1] With an eye towards the second case, for which pre-trial proceedings are already underway, the Chambers are seeking 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 are doing this through the revision of the ECCC's Internal Rules governing civil parties. The Rules and Procedure Committee is set to discuss the draft Rules during the first week of December and, if accepted, the plenary will decide on adoption shortly thereafter.

According to an ECCC Plenary Session press release, the proposed rule changes will focus on "promot[ing] greater efficiency in trial management." Although almost all observers recognize that better civil party organization and management is essential for the much larger Case 002, the revised Rules should not be used as a Trojan horse, where in the name of judicial management, the rights of civil parties are undercut to such an extent that they could no longer in good faith be properly considered "parties" to the proceedings. In such an instance, to gut the role of civil parties and their lawyers while not acknowledging that fact would seriously undermine the very credibility of the Chambers itself.

Under Cambodian law and in other civil law jurisdictions, persons qualifying as "civil parties" are afforded certain minimum rights, rights that both survivors and their lawyers must also have before the ECCC. If the Chambers fail to retain these rights under the revised Rules, the ECCC will not only distort the precedential value of its survivor participation scheme for future internationalized tribunals, but also mislead the survivors about their role in the proceedings. This legal sleight of hand would be unconscionable as these participants are survivors of one of humanity's worst crimes.

The Legal Rights of Civil Parties

The ECCC is the first internationalized tribunal to explicitly provide for civil party participation. "Civil party" is a legal term of art. Although the basket of rights it includes 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. Notably, while the International Criminal Court (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. Additionally, the Special Tribunal for Lebanon, which is heavily influenced by civil law, provides that "[a]lthough [victims] do not have the same

right as the parties civiles (private complainants) of the civil law system – such as to seek compensation – they 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 witnesses, filing motions and briefs.”[2] Given that these international tribunals provide for survivor participation that intentionally does not rise to the level of civil party participation, it would seem only logical that the ECCC’s civil party participation scheme must at least provide survivors the rights contained in those lesser survivor participation schemes. However, as discussed below, there are concerns that with ECCC civil parties may in fact have fewer rights.

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. Additionally, the proceedings should proceed as expeditiously as possible. 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. 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.”

With the adoption of more restrictive civil party rules, there is a concern that the ECCC will pass that point. To combat these concerns, the revised Rules must at a minimum preserve the attorney-client relationship—and its attendant rights—while also continuing to guarantee the right of survivors to participate in the proceedings as “parties.” A failure to do either would so undermine the rights of survivor-participants that they could no longer properly be considered civil parties.

Attorney-Client Relationship

As parties to the proceedings, civil parties currently have a right under the Internal Rules to be represented by counsel. For this right to be robust and meaningful, it must continue to include the necessary 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. A failure to include these necessary elements in the revised Rules would so severely undermine the right to counsel as to leave serious questions as to whether the Chambers are paying anything more than mere lip service to this fundamental principle of the rule of law. According to the ECCC press release, beginning at the trial stage civil parties will be consolidated into a single group and the group’s interests as a whole will be represented by the co-lead counsel. It further states that civil party lawyers are to provide support to the co-lead counsel. Under this scheme, however, it is unclear who will represent the interests of individual civil parties. It is essential that civil party lawyers are not relegated to being glorified paralegals, confined to non-substantive tasks, and prohibited from advocating to the court behalf of their client. If this proves to be the case however, there must be a clear reciprocal relationship between the lead counsel and each civil party with clear language as to the co-lead counsel’s

obligation to the individual civil parties, and not just the consolidated group as a whole. For example, the ICC 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.”[3] Such language in the revised Rules would help allay concerns that the civil parties’ individual interests are being subjugated to the overall interests of the single consolidated group.

The revised Rules must also contain a mechanism for the raising or settlement of strategy disputes between a civil party lawyer and the co-lead counsel. Such disputes will inevitably arise between lawyers, in particular when they represent clients with different interests and goals. To provide no dispute resolution mechanism in the revised Rules would ignore the certainty that legitimate disagreements will arise. Notably, the ICC provides that if the common legal representative cannot “fairly and equally” represent the interests of one or more groups of victims, the common legal representative will inform the Trial Chamber “who will take appropriate measures and may, for example, appoint the Office of the 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.”[4]

Likewise, there must be an incentive for the ECCC co-lead counsel 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 co-lead counsel, there must be choices available beyond continuing on as a civil party lawyer despite this objection or quitting. Given that civil party lawyers, like all legal counsel, are obligated under national and international ethics codes to represent their client’s views and interests, this would put them in an impossible situation. Moreover, the rights of the civil parties themselves must be protected. Civil parties must also be allowed throughout the proceedings to hire counsel of their choosing, as well as fire their counsel, and determine the objectives and means of implementing those objectives. This is essential because many of the survivors in Case 002 come from different ethnic or religious backgrounds, may have experienced their injuries at different times, different locations and at the hands of different people, and are likely to have different objectives for their participation and desire differing forms of reparations. These varying and potentially divergent interests must be represented if there is to be true civil party participation under the revised ECCC Rules.

Right to Participation

Under the ECCC Internal Rules as originally drafted, once a civil party joins the proceedings, “the Victim becomes a party to the criminal proceedings.” As a result, the civil party is 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.” 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. In order to still be considered “parties” to the proceedings, these rights must remain intact.

Because the co-lead counsel are intended to take the lead in representing all civil parties, civil party rights most likely will have to be exercised through the co-lead counsel. This could render many of these rights illusory. For example, one of the key participatory rights afforded to civil parties in civil law jurisdictions around the world, including Cambodia, is the right to request

investigative action. Previously, this right could have been exercised through the civil party lawyers. It is now unclear what impact the creation of a co-lead counsel will have on this right but presumably it would have to be exercised through the co-lead counsel. However, the co-lead counsel are responsible for the interests of all survivors within the consolidated group. Thus, if one group of survivors wishes to request investigative action, but the co-lead counsel feels that this action could run counter to the overall strategy, then the co-lead counsel could refuse to request investigative action, undercutting the right entirely. Again, the presence of a dissent mechanism is vital to provide substance to the exercise of these rights.

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.” 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. 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. Although individual changes to the Rules may not be decisive, in combination with this recent decision, a revised Rules scheme that does not preserve such fundamental civil party rights as the right to request investigative action would suggest that ECCC “civil parties” are no longer “parties” to the proceedings.

Conclusion

If new civil party rules are adopted that do not preserve the attorney-client relationship and a genuine right for civil parties to act as “parties” in the proceedings, it is unclear what role, if any, survivors will continue to have before the ECCC. To preserve their meaningful role, as originally envisioned, the Chambers must ensure that it does not strip away too many civil party rights, all in the name of judicial management of the case. While the Chambers have every right to do this, if they are to end 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...the Court must explain to applicants that their participation rights have been eliminated.”^[5] Likewise, as stated by Youk Chhang, Director of the Documentation Center of Cambodia, in the September 2009 edition of *Searching for the Truth* Magazine, 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.

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

[1] See 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, 9 October 2009 (“[A] restrictive interpretation of rights of Civil Parties in proceedings before the ECCC is required.”).

[2] Special Tribunal for Lebanon, Statement from the STL President Judge Antonio Cassese, "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>.

[3] *Prosecutor v. Germain Katanga and Matheiu Ngudjolo Chui*, International Criminal Court Trial Chamber II, ¶ 13, 22 July 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.*

[4] *Katanga* at ¶ 16.

[5] Sarah Thomas & Terith Chy, "Including the Survivors in the Tribunal Process," in *On Trial: The Khmer Rouge Accountability Process*, John D. Ciorciari & Anne Heindel (eds.), at 286 (2009). *See also*: Letter from Youk Chhang to Susan Lamb, Senior Judicial Coordinator, on behalf of the Rules and Procedure Committee, August 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.").