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**Victim Participation at the Extraordinary Chambers in the  
Courts of Cambodia: Challenges to the Civil Party Framework  
and Lessons for the Future**

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***Abstract***

*This paper examines the victim participation framework at the Extraordinary Chambers in the Courts of Cambodia (ECCC or Court), established to deal with crimes during the Khmer Rouge regime. The background which has led to the creation of the ECCC will be explained, before the paper will look at the way the Court is structured to include civil parties. The Court has consistently limited the civil parties' role since its establishment and these limitations and the justifications are outlined in the paper. Solutions in the context of the ECCC are then considered, although due to the political environment, no changes in favour of victim rights are likely. Future models are considered, with the benefits of a Truth and Conciliation Commission's analysed by looking at Sierra Leone and East Timor, as examples of successful frameworks where both a Court and a Truth and Reconciliation Commission proceeded simultaneously. This paper concludes that although every situation requiring a judicial response will be different, the option of having both a Court and a Truth and Reconciliation Commission can fulfil multiple victim needs.*

***Key Words***

ECCC – Khmer Rouge Tribunal – Victim Participation – International Tribunals – Civil Parties

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## *I Introduction*

They were our parents, our children, our relatives, our colleagues and our friends. Those of us who survived have lived for a quarter of a century bearing pain and grief for those we lost and being haunted by the nightmare of our own experiences.

-Prime Minister of the Royal Government of Cambodia, Hun Sen.<sup>1</sup>

The Khmer Rouge, under the leadership of Pol Pot, ruled Cambodia between 1975 and 1979. The stories which flowed from the country and out to the world through articles, books, reports and eventually movies depict a time of horror and heartbreak that for most of us is unimaginable. After difficult negotiations, the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (the ECCC or Court) finally came into being in 2005. A hybrid court, its structure is based on the Cambodian judicial system which, in turn, is based on the French civil law system, allocating victims a significant role in the proceedings through the mechanism of civil parties.

Despite its flexible victim participation framework, it soon became obvious that difficulties would not allow the framework to work in the way that it was originally intended. The flexibility and scope of participation has now been dramatically reduced. This is largely due to the conflicting principles of the right of the defendant to a fair trial and the importance of efficient justice. These decisions have significantly compromised the effectiveness of the victim participation framework and the purposes for which it was established. It is of great importance for the future of the ECCC and potential future ad-hoc criminal tribunals that lessons are learnt from the experience of the ECCC with victim participation. It is argued that when assessing how victims should participate in a trial process, the existing legal framework, the situation which the tribunal will respond to and other factors such as necessity of speed and the number of victims, must be taken into account. A consideration which should always be present is aiming to provide a forum for

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<sup>1</sup> *An Introduction to the Khmer Rouge Trials* (5th ed, Secretariat of the Royal Government Task Force, Phnom Penh, 2004) at 1.

victims to tell their story and play a part in the justice process. This may be through the trial, or where this is not appropriate or possible, truth and reconciliation commissions can be an effective alternative forum to promote national reconciliation and truth finding without interfering with the court process. In terms of tribunals themselves, more clarity and definition must be given to the victim's role from the start. It is unavoidable that in some situations where victim numbers are large such as in Cambodia, their role will have to be highly regulated and limited due to principles of defendants' rights and efficient justice. Due to this, it is important that victim's roles are clearly defined from the beginning and that decision is clearly communicated to the victims.

This paper will first consider the context which has led to the need for the Court before explaining the ways in which victims participate at the Court and at other international criminal tribunals. After briefly looking at the role of outreach, the paper will assess the limitations and modifications which have limited the role of civil parties at the Court. These limitations will then be assessed against the important legal principles which have led to them, before looking at options for the ECCC and future tribunals.

The two trials which have been conducted to date will be the focus of this paper. Two trials remain in the investigative stage of the process and it is unclear whether they will ever proceed to the trial stages, making them largely unhelpful in assessing the existing victim participation framework. It remains important to keep the two trials in mind, when considering future developments of the civil party framework.

## *II The Cambodian Context*

### *A The Khmer Rouge Regime*

In April 1975, the Communist Party of Kampuchea, commonly known as the Khmer Rouge, seized power and became the Government of Cambodia, under the political and

ideological leadership of Pol Pot.<sup>2</sup> The party sought a communist revolution, implementing policies to rid the country of perceived enemies of this objective, through widespread and violent campaigns of displacement, forced labour, arrests, tortures and executions.<sup>3</sup> The lack of comprehensive records makes it impossible to accurately predict the number of deaths, though historians estimate between 1.5 and 1.7 million deaths occurred during the three and a half years of rule.<sup>4</sup> That figure amounts to roughly 20 per cent of the population of Cambodia at the time the Khmer Rouge took power.<sup>5</sup> The Khmer Rouge regime ended due to a full scale invasion of Vietnamese forces; however, many leaders and members of the movement fled to the Cambodia-Thai border and continued an armed resistance.<sup>6</sup> This resistance ended in 1993, primarily due to the defection of Khmer Rouge guerrillas in response to offers of amnesty from prosecution by the Cambodian Government.<sup>7</sup> Among those offered amnesty in exchange for acknowledging the Cambodian Government was Ieng Sary, a highly ranked official during the Regime.<sup>8</sup> However, this amnesty proved to be ineffective against the hybrid tribunal, as Ieng Sary was one of four defendants in Case 002, though he died during the proceedings.<sup>9</sup>

### ***B The Years Following the Regime***

In the years following the Khmer Rouge rule, the Vietnamese installed a government in Cambodia, which included former Khmer Rouge soldiers who had defected to Vietnam during the war. This group included Hun Sen, a former Khmer Rouge Battalion Commander.<sup>10</sup> He began as Foreign Minister, but became Prime Minister of Cambodia in

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<sup>2</sup> Brian Tittmore “Evolving Dynamic of Intervention to End Atrocities and Securing Accountability for Gross Violations of Human Rights and the Implications of Non Intervention: The Lesson of Cambodia” (2000) 7 ILSA J Int’l & Comp L 447 at 448.

<sup>3</sup> Tittmore, above n 2, at 448.

<sup>4</sup> Sarah Williams “Genocide: The Cambodian Experience” (2005) 5 Int’l Crim L Rev 549 at 553.

<sup>5</sup> Williams, above n 4, at 553.

<sup>6</sup> Benny Widono “The Spectre of the Khmer Rouge over Cambodia” (2008) 45 UN Chronicle 25 at 25.

<sup>7</sup> Tittmore, above n 2, at 449.

<sup>8</sup> Daniel Donovan “Joint UN-Cambodia Efforts to Establish a Khmer Rouge Tribunal” (2003) 44 Harv Int’l LJ 551 at 556.

<sup>9</sup> Donovan, above n 8, at 560.

<sup>10</sup> Joel Brinkley “Justice Squandered: Cambodia’s Khmer Rouge Tribunal” (2013) 176 Wld Aff 41 at 41.

1998 and remains Prime Minister today.<sup>11</sup> Hun Sen, despite initially asking for help from the international community, has been viewed as largely uncooperative in the establishment of a joint tribunal with United Nations (UN) involvement.<sup>12</sup> This is most likely due to his Khmer Rouge links and a desire to protect himself and his colleagues from associations with the accused in the trials.<sup>13</sup> In addition to this there have been suggestions that China, an influential power in Cambodia which has supported the Khmer Rouge in the past, was opposed to a purely international tribunal, though China and Cambodia have both denied this.<sup>14</sup>

### *C Negotiations for a Criminal Tribunal*

The negotiations began for a joint tribunal between Cambodia and the UN with a letter written by Hun Sen to the Secretary General of the UN in 1997. The letter requested the assistance of the International Community and the UN in “bringing justice to those persons responsible for the genocide and/or crimes against humanity during the rule of the Khmer Rouge”.<sup>15</sup> A UN Working Group was established to determine the feasibility of bringing the leaders to justice and options for trials, finding that a predominantly international tribunal would be the most suitable option.<sup>16</sup> The UN Working Group Report focused very little on the role which victims would be afforded in the process, mentioning briefly the importance of reparations to the victims and discussing the viability of a Truth and Reconciliation Commission of some kind.<sup>17</sup> The report was rejected by Hun Sen, as was a following proposal due to his belief that the Cambodian legal system was capable of

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<sup>11</sup> Williams, above n 4, at 554.

<sup>12</sup> “Cambodia: Government Obstructs Khmer Rouge Court” (5 September 2013) Human Rights Watch <[www.hrw.org](http://www.hrw.org)>.

<sup>13</sup> Williams, above n 4, at 554.

<sup>14</sup> Alexandra Kent “Friction and Security at the Khmer Rouge Tribunal” (2013) 28 J of Social Issues in Southeast Asia 299 at 311.

<sup>15</sup> Williams, above n 4, at 557.

<sup>16</sup> Scott Luftglass “Crossroads in Cambodia: The United Nations’ Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge” (2004) 90 Va L Rev 893 at 895.

<sup>17</sup> *Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135 A/53/850* (1999) at [202], [212]; Elisa Hoven, Mareike Feiler and Saskia Scheibel *Victims in Trials of Mass Crimes: A Multi-Perspective Study of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia* (Institution for International Peace and Security Law, Cologne, 2013) at 14.

holding the trials.<sup>18</sup> Cambodia in turn put forward a proposal, which was rejected by the UN by reason of Cambodia's failure to compromise on basic issues of international law.<sup>19</sup> Talks came to a standstill until Hun Sen again called for help, which resulted in the March Agreement of 2003, instructing the development of a joint tribunal.<sup>20</sup> At the time of the March Agreement, the international community was attracted to the joint or 'hybrid' court, putting in place hybrid tribunals in Sierra Leone, East Timor and Cambodia.<sup>21</sup> This was due to the cost of international tribunals and the "tribunal fatigue" as a resulting of the "lack-lustre" performances of the tribunals in Yugoslavia and Rwanda and uncertainties surrounding the ICC.<sup>22</sup> The March Agreement attracted criticism in regard to the combination of international judicial participation and domestic judicial establishment, which was criticised as lacking the safeguards of an international tribunal. The majority that the domestic judges were to hold was a particular concern, though this was mitigated by a "supermajority" requirement in each chamber.<sup>23</sup> The March agreement was further criticised for the significant burden it placed on the underdeveloped Cambodian legal system and the power it awarded to the Cambodian government, which suffers from a history of "systematic corruption".<sup>24</sup>

#### ***D The Extraordinary Chambers in the Court of Cambodia (The ECCC)***

The agreement establishing the Court formally came into force in 2005, with several features making it a "unique experience in international justice".<sup>25</sup> The Court is known as a hybrid tribunal, with elements of both national and international adjudication.<sup>26</sup> The Court

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<sup>18</sup> Kathryn Klein "Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia" (2006) 4 North Western J of Int'l HR 549 at [16].

<sup>19</sup> Luftglass, above n 16, at 895.

<sup>20</sup> Brinkley, above n 10, at 42.

<sup>21</sup> Alberto Costi "Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations" (2006) 22 NZULR 213 at 225.

<sup>22</sup> Costi, above n 21, at 225.

<sup>23</sup> Williams, above n 4, at 559; John Ciorciari and Anne Heindel "Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal" (2014) 35 Mich J Int'l L 369 at 393.

<sup>24</sup> Williams, above n 4, at 560.

<sup>25</sup> Andrew Cayley "Prosecuting Mass Atrocities at the Extraordinary Chambers in the Courts of Cambodia" (2012) 11 Wash U Global Stud L Rev 445 at 445.

<sup>26</sup> Seeta Scully "Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia" (2011) 13 APLPJ 300 at 318.



is the first internationalised court to consist of a majority of judges from the affected nation, giving the national judges a majority in each chamber which remained important to Cambodia throughout the negotiation and establishment process.<sup>27</sup> Cambodia's colonial ties with France mean its judicial system is based on the civil law model. This resulted in a high level of victim participation which allowed on paper, victims to be civil parties to the claim.<sup>28</sup>

The court's process begins with an investigation by the co-prosecutors, which consist of one Cambodian prosecutor and one international prosecutor, who identify crimes, suspects and evidence.<sup>29</sup> The prosecutors then transmit an introduction summary to the co-investigating judges, consisting of one Cambodian and one international judge.<sup>30</sup> They then carry out a detailed judicial investigation of the allegations made in the introduction summary, before either dismissing the claim or submitting a closing order, which is the equivalent to an indictment in the common law system.<sup>31</sup> Once this is made, the parties may appeal in the pre-trial chamber, which is constituted by three Cambodian Judges and two international judges, as is the trial chamber.<sup>32</sup> Once this closing order is settled by the pre-trial chamber it is transferred to the trial chamber where the trial of the suspect will take place.<sup>33</sup> Upon judgment of the trial chamber, the parties may appeal to the supreme court chamber, consisting of four Cambodian judges and three international judges, which rules with finality.<sup>34</sup> To date, two trials have been conducted, one trial is about to begin, and two other cases remain with the co-investigating judges.<sup>35</sup>

The importance of establishing the ECCC is clear in Article 52 of the Cambodian Constitution, which requires Cambodia to “adopt the policy of national reconciliation to

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<sup>27</sup> Cayley, above n 25, at 445.

<sup>28</sup> For the number of civil parties for each case, see Appendix II.

<sup>29</sup> Internal Rules of the ECCC 2007 (Cambodia), r 50.

<sup>30</sup> Internal Rules, r 53 (1).

<sup>31</sup> Internal Rules, r 67.

<sup>32</sup> Internal Rules, r 23 (3).

<sup>33</sup> Internal Rules, r 79.

<sup>34</sup> Internal Rules, r 104.

<sup>35</sup> For a list of the cases, see Appendix I.

ensure national unity”. However, as will be seen, there are questions about the extent to which the ECCC does this. Particularly the questionable political influence, the constant limiting of victim participation and the restricted personal jurisdiction means that the Court is limited in its ability to meet this requirement of the Constitution.<sup>36</sup> One author goes as far as to suggest that by not ensuring national reconciliation and unity, the ECCC is undermining and in breach of the Cambodian Constitution.<sup>37</sup> Reconciliation and truth will be important themes of this paper, when assessing the success of victim participation measures and of the court as a whole.

### *III Victim Participation in International Criminal Tribunals*

#### ***A Definition of Victim Participation***

At the ECCC, a victim is defined as “any person or legal entity who has suffered from physical, psychological, or material harm as a direct consequence of the crimes committed in Cambodia by the Democratic Kampuchea regime between 17 April 1975 and 6 January 1979 that are under the jurisdiction of the ECCC.”<sup>38</sup> Victim participation can be defined in four categories; control, consultation, information provision and expression.<sup>39</sup> The most relevant to this paper is expression which involves the Court giving victims the option of supplying information and expressing emotions.<sup>40</sup>

#### ***B Victim Participation at other Criminal Trials***

International tribunals have often give victims a comparatively smaller role in the proceedings than was originally given to victims at the ECCC. At the Special Tribunal for Lebanon, victim participation is encouraged though significant limits are placed on their involvement. Victims are not permitted to be involved in pre-trial investigation or sentencing and may only intervene in proceedings where authorised by the pre-trial

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<sup>36</sup> The Constitution of the Kingdom of Cambodia 1993 (Cambodia), art 52.

<sup>37</sup> Tessa Capeloto “Reconciliation in the Wake of Tragedy: Cambodia’s Extraordinary Chambers Undermines the Cambodian Constitution” 17 Pac Rim L & Pol’y J 103 at 111.

<sup>38</sup> Internal Rules, r 23 (2).

<sup>39</sup> Jo-Anne Wemmers “Victim Participation and Therapeutic Jurisprudence” (2008) 3 Victims & Offenders 165 at 167.

<sup>40</sup> Wemmers, above n 39, at 167.

judges.<sup>41</sup> Additionally, they may be required to be represented by a single joint legal representative on behalf of all victims.<sup>42</sup> In contrast, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) granted no rights to victims in proceedings, other than testifying as witnesses.<sup>43</sup>

The International Criminal Court (ICC) allows victim participation at a stage in the proceedings that the Court considers appropriate, where the personal interests of the victim are affected.<sup>44</sup> The participation, where allowed by the Court, must be carried out in accordance with the ICC rules and the manner in which victims may present their views must not be prejudicial to the defendant's right to a fair trial.<sup>45</sup> An example of victims participating in ICC proceedings is *Lubanga*, the first case to come to legal judgment at the court.<sup>46</sup> *Lubanga* broadly concerned child soldiers in the Democratic Republic of Congo and Thomas Lubanga's recruitment of children under the age of 15 to act as soldiers. These children were subject to harsh training regimes, severe punishment and forced to actively participate in hostilities.<sup>47</sup> It was decided by the Court that victims were permitted to make opening and closing statements, though due to the victims participating anonymously, they would not be able to add any facts to evidence or to question witnesses.<sup>48</sup> Criticism of victim involvement in the trial has focused on the lack of formal address to the views and concerns which victims raised during the proceedings and, as at the ECCC, there were

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<sup>41</sup> Jerome de Hemptinne "Challenges Raised by Victim Participation in the Proceedings of the Special Tribunal for Lebanon" (2010) 8 JICJ 165 at 166.

<sup>42</sup> de Hemptinne, above n 41, at 166.

<sup>43</sup> Matthew Gillett "Victim Participation at the International Criminal Court" (2009) 16 Aust ILJ 29 at 30; Ruth Mackenzie and others *The Manual on International Courts and Tribunals* (2nd ed, Oxford University Press, Oxford, 2010) at 32.

<sup>44</sup> The Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002), Article 86 (3).

<sup>45</sup> Article 86 (3).

<sup>46</sup> Claire Garbett "The Truth and the Trial: Victim Participation, Restorative Justice and the International Criminal Court" (2013) 16 Contemporary Justice Rev 193 at 194.

<sup>47</sup> Lucia Catani "Victims at the International Criminal Court: Some Lessons Learned from the *Lubanga* Case" (2012) 10 JICJ 905 at 913.

<sup>48</sup> Bridie McAsey "Victim Participation at the International Criminal Court and its Impact on Procedural Fairness" (2011) 18 Aust ILJ 105 at 110.

concerns about compromising the rights of the accused.<sup>49</sup> Further, there are concerns that the judgment failed to address the harm caused to the victims or to identify how the victims participated and aided the trial and construction of the truth.<sup>50</sup> There is clearly still work to be done at the ICC to ensure that victim involvement in the trials is there for a purpose and is a positive experience for the victim.

### ***C The Importance of Outreach***

Although not the focus of this paper, an important element of ensuring that victim participation is successful, is outreach. Without outreach and knowledge of the ECCC, including victims in the process will be unsuccessful, as will the important object of showing Cambodia that justice has been done. This is particularly difficult in Cambodia where 85 per cent of the population lives rurally, without access to technology or news sources and a majority are illiterate.<sup>51</sup> In 2009, a nationwide study found that 85 per cent of Cambodians had little or no knowledge of the ECCC, a statistic which proves that the court is at risk of making very little contribution to national reconciliation.<sup>52</sup> The importance of outreach can also be illustrated through the successes and failures of other international tribunals. The ICTY and the ICTR did not establish outreach programmes until at least three years after their creation, with the effect that public perception was damaged and the people were not trusting of either tribunal.<sup>53</sup> In contrast, Sierra Leone established a comprehensive outreach unit from the beginning and worked hard to ensure education and outreach, which led to 79 per cent of people in Sierra Leone indicating in a survey that they understood the role of the Court.<sup>54</sup>

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<sup>49</sup> Garbett, above n 46, at 111.

<sup>50</sup> Garbett, above n 46, at 206.

<sup>51</sup> Norman Pentelovitch “Seeing Justice Done: Prioritizing Outreach at International Criminal Tribunals” (2007) 39 Geo J Int’l L 449 at 466.

<sup>52</sup> Pentelovitch, above n 51, at 467.

<sup>53</sup> Sara Darehshori “Lessons for Outreach from the Ad Hoc Tribunals, the Special Court for Sierra Leone, and the International Criminal Court” (2007) 14 New Eng J Int’l & Comp L 299 at 301.

<sup>54</sup> Pentelovitch, above n , at 461.

Efforts so far at the ECCC at outreach have so far been limited, with the role largely given to non-governmental organisations (NGOs).<sup>55</sup> One important programme which has been implemented by NGOs are monthly public forums, where members in the community come together to listen to speakers, ask questions and receive materials.<sup>56</sup> As will be discussed, this programme could be extended in the future to incorporate an element of informal truth telling, which could then combine the aims of outreach and national reconciliation.

#### ***D Victim Participation at the ECCC***

The two trials which have so far been conducted in the trial chamber have faced many difficulties, as is often the case with experimental court structures and procedures. One element of the trial which has faced significant difficulties is the way in which victims are able to participate. Victims may be involved in the judicial proceedings from the beginning of the investigation. The Internal Rules provide that public action may be taken by any person, organisation or other source who witnessed, or was a victim of such crimes, or who has knowledge of such crimes.<sup>57</sup> These people may complain to the co-prosecutors, who will decide at their discretion whether to reject the complaint, include it in an ongoing investigation or to conduct a new preliminary investigation.<sup>58</sup> This provides an opportunity to victims or the family of victims to make a claim which could contribute to a case against the defendant.

#### ***E Victims as Civil Parties***

The most important opportunity to participate for victims or relatives of them is as civil parties, which results in being recognised as party to the proceedings and being able to seek collective and moral reparations. The role of victims as civil parties in the ECCC is applied according to the Cambodian Criminal Procedure Code. The rationale for this is that the ECCC is integrated into the Cambodian court structure, aiding the judicial process and

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<sup>55</sup> Peter Manning “Governing Memory: Justice, Reconciliation and Outreach at the Extraordinary Chambers in the Courts of Cambodia” (2011) 5 Mem Studies 165 at 167.

<sup>56</sup> Pentelovitch, above n 51, at 467.

<sup>57</sup> Internal Rules, r 49 (2).

<sup>58</sup> Rule 49 (4).

creating a strong base for civil parties within the civil law framework.<sup>59</sup> The Internal Rules of the ECCC were designed to fill in the gaps in the Cambodian Code in relation to civil parties and broadly state that their purpose in the proceedings is in support of the prosecution. The rules were the product of a complex drafting process, which involved 11 months of discussion of judges from different countries and different legal systems. The discussions ended with the conclusion and adoption of the rules by the Plenary Session of national and international judicial officers unanimously.<sup>60</sup>

To qualify as a civil party, the person must have suffered an injury of either a physical, material or psychological nature which is a direct consequence of the offence, personal and has actually come into being.<sup>61</sup> Anytime during the investigation, a victim may write to the co-investigating judges asking to be a civil party. However, it is within the power of the judges to order the application inadmissible, which is then open to appeal.<sup>62</sup> If an application is found to be admissible, the victim will become a party to the proceedings which means they can no longer be questioned as a simple witness. They also have the right to be represented by a national lawyer, or an international lawyer with a national representative.<sup>63</sup> The original rules stated that a group of civil parties may also choose to be represented by a single lawyer, or alternatively the co-investigating judges may request that a group be represented by a single lawyer.<sup>64</sup> This experimental framework has led to difficulties in practice.

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<sup>59</sup> Ignaz Stegmiller “Legal Developments in Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia” (2014) 27 LJIL 465 at 466.

<sup>60</sup> “Joint Statement by Judicial Officers: ECCC Plenary Session Unanimously Adopts Internal Rules” (13 June 2007) The Extraordinary Chambers in the Court of Cambodia < <http://www.eccc.gov.kh/>>.

<sup>61</sup> Internal Rules, r 23 (2).

<sup>62</sup> Rule 23 (3).

<sup>63</sup> Rule 23 (6) a.

<sup>64</sup> Rule 23 (8).

#### *IV Limitation of Civil Party Rights at the ECCC*

##### *A Limitation during the Trial for Case 001*

Case 001 was the first international or hybrid criminal trial to allow victims to participate as civil parties and exposed the impracticalities which large scale victim involvement can cause.<sup>65</sup> Case 001, which admitted 98 civil parties to the proceedings, saw the trial chamber accept a system of grouping civil parties which was suggested by a coalition of NGOs. This resulted in the formation of four groups of civil parties, roughly divided based on the NGO which was acting as an intermediary between the group and the legal team representing them, which consisted of at least one national and one international lawyer.<sup>66</sup>

During the trial, the court began to limit the scope of civil party participation and this trend continued following the trial when alterations to the Internal Rules were made. This began when civil party lawyers for one of the groups appealed to the judges to allow them to make an opening statement, asserting that they possessed the same right to do so that was given to the co-prosecutors and the defendant's counsel.<sup>67</sup> This application was swiftly rejected by the judges, stating that there was nothing in the Internal Rules or otherwise which guaranteed this right to the victims.<sup>68</sup> The judges further stated that although civil parties are party to the proceedings, their role in the proceedings is limited to "supporting the prosecution" and "do not have an autonomous role to play" at this stage in the proceedings.<sup>69</sup> The judges gave no wider explanation as to their decision and this was the first blow to be dealt to the civil party framework, with many more to follow during the trial.

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<sup>65</sup> Stegmiller, above n 59, at 466.

<sup>66</sup> Phuong Pham and others "Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia" (2011) 3 Journal of Human Rights Practice 264 at 269.

<sup>67</sup> *Kaing (Decision on the Request of the Co-Lawyers for Civil Party Group 2 to Make an Opening Statement During the Substantive Hearing)* ECCC Trial Chamber 001/18-07-2007/ECCC/TC, 27 March 2009 at [6].

<sup>68</sup> *Kaing (Decision on Civil Party Opening Statements)*, above n 67, at [6].

<sup>69</sup> *Kaing, (Decision on Civil Party Opening Statements)*, above n 67, at [9].

The judges later decided that the Internal Rules must generally be interpreted restrictively when it came to civil parties and their role in the trial, demonstrating the flaws with the flexible framework which had been adopted in the rules.<sup>70</sup> Using this restrictive interpretation of the rules, it was decided during the trial that civil parties were unable to make submissions in relation to sentencing of the accused. This decision was made after civil parties requested the right to do so, stating that facts relating to the finding of guilt or innocence cannot be separated from those relevant to sentencing.<sup>71</sup> It was further argued by the civil parties that as many of the civil parties achieved their status as a result of losing a relative due to the alleged crimes, their submissions were relevant only at sentencing and therefore should be allowed.<sup>72</sup> The defence strongly opposed any such involvement, stating that civil parties had no role to play in sentencing.<sup>73</sup> The Court held that civil parties had no interest in making submissions at the sentencing stage of the trial, with their interests primarily in reparations and to a limited extent in determining guilt or innocence.<sup>74</sup> It was further decided that civil parties were not permitted to ask questions in relation to the accused' character. The judges reasoned that this questioning occurred for the purpose of determining aggravating and mitigating factors for the eventual sentence, therefore the same reasoning applied in relation to sentencing submissions, must be applied here.<sup>75</sup>

### ***B Limitation in the Internal Rules Following Case 001***

Modifications to the Rules were made in November 2009 by a plenary session of the Court, in light of the majority of the first trial being completed. Plenary sessions generally occur at the ECCC every six months and involve all of the judges of the Court coming together to discuss amendments to the Internal Rules and administrative guidelines of the Court.<sup>76</sup>

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<sup>70</sup> Phuong Pham and others “Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia” (2011) 3 J of HR Prac 264 at 269.

<sup>71</sup> *Kaing (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)* ECCC Trial Chamber 001/18-07-2007/ECCC/TC, 9 October 2009 at [4].

<sup>72</sup> *Kaing (Decision on Civil Party Submissions on Sentencing)*, above n 71, at [4], [6].

<sup>73</sup> *Kaing (Decision on Civil Party Submissions on Sentencing)*, above n 71, at [1].

<sup>74</sup> *Kaing (Decision on Civil Party Submissions on Sentencing)*, above n 71, at [33].

<sup>75</sup> *Kaing (Decision on Civil Party Submissions on Sentencing)*, above n 71, at [46].

<sup>76</sup> “Plenary Sessions” The Extraordinary Chambers in the Courts of Cambodia < <http://www.eccc.gov.kh>>.



The judges concluded that the changes were necessary to meet the requirements of trials of mass crimes and to ensure that the “proceedings respond more fully to the needs of the victim”.<sup>77</sup> It was stated that the changes would promote greater efficiency and the ability of the ECCC to reach a verdict.<sup>78</sup> The amended version of the civil party rule in the Internal Rules of the Court stated that civil parties could only participate in a “consolidated group” once the trial stage was reached. The lead civil party co-lawyers would represent the interests of the consolidated group as a whole.<sup>79</sup> In addition to this, the rules also clarified and limited the position of civil parties in relation to reparations, again by consolidating the claims of civil parties into a single group.<sup>80</sup>

### ***C Limitation during Case 002/01***

The trial for Case 002 continued to limit the rights of civil parties, finding that there was no legal basis in the ECCC legal framework for granting the consolidated group of civil parties the right to make preliminary remarks during the opening statements of the court.<sup>81</sup> In addition to this, the second trial uncovered problems with the new civil party representation framework, seemingly compromising the quality of civil party representation. There is criticism regarding the conflicting rules, as one requires individual representation for each civil party, while the new rule requires that the lead co-lawyers are the only ones to participate in the trial.<sup>82</sup> This means individual civil party lawyers are dependent on the lead co-lawyers good will to allow them to act. In addition to this, the lead international co-lawyer is French, creating a need for translation of documents and, therefore, shortening deadlines for English speaking civil party lawyers.<sup>83</sup> Another problem

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<sup>77</sup> “Press Release: Sixth ECCC Plenary Session Concludes” (11 September 2009) The Extraordinary Chambers in the Courts of Cambodia <[www.eccc.gov.kh](http://www.eccc.gov.kh)>.

<sup>78</sup> “Press Release: Sixth ECCC Plenary Session Concludes,” above n 77.

<sup>79</sup> Stegmiller, above n 59, at 470.

<sup>80</sup> Johanna Herman “Realities of Victim Participation: The Civil Party System in Practice at the Extraordinary Chambers in the Courts of Cambodia” (2013) 16 Contemporary Justice Rev 461 at 465.

<sup>81</sup> Judge Nil Nonn “Trial Chamber Response to Lead Co-Lawyers and Civil Party Lawyers Request to make a brief Preliminary Remarks on behalf of Civil Parties” (15 November 2011) The Extraordinary Chambers in the Courts of Cambodia” <[www.eccc.gov.kh](http://www.eccc.gov.kh)>.

<sup>82</sup> The International Federation for Human Rights *Victims’ Rights Before the Extraordinary Chambers in the Courts of Cambodia* (FIDH, 2012) at 30.

<sup>83</sup> Herman, above n 80, at 465.

is that individual civil party interests can be wide ranging and may sometimes be in conflict with the consolidated group, requiring a mechanism to resolve conflicts of interest which has so far been unconsidered.<sup>84</sup>

### *V The Justifications behind Victim Participation Limitations*

The court has limited victim participation to the extent that it removes the right to participate in a significant proportion of the proceedings. It became obvious that changes were necessary during the trial due to concerns raised regarding the right of the defendant to the fair trial and the need for the trial to be completed in a timely fashion. However, little consideration appears to have been given to the victim and the importance of meeting their needs within the trial process. The dismissive way the judges have stated in their judgments, that victim's interests are largely limited to reparations, fails to see the bigger picture as to what this trial needs to achieve for the future of Cambodia and national reconciliation.

### *A The Importance of the Defendant's Right to a Fair Trial*

The Internal Rules state that civil parties will act in a capacity which supports the prosecution, creating confusion regarding what exactly their role entails.<sup>85</sup> This supporting role was modelled on the French civil law system, which allows civil parties to play a role in supporting the prosecution, while the prosecution conducts most of the hearing and trial.<sup>86</sup> The Internal Rules seem to envisage a mirroring of this procedure, where civil parties would not have a separate role in the proceedings and their actions would remain closely linked to those of the prosecution.<sup>87</sup>

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<sup>84</sup> The International Federation for Human Rights, above n 82, at 35.

<sup>85</sup> Internal Rules, r 23 (1) (a).

<sup>86</sup> David Sokol "Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Court of Cambodia" (2011) 10 Wash U Global Stud L Rev 167 at 175.

<sup>87</sup> Sokol, above n 86, at 175.

A defendant's right to a fair trial is one of the most well recognised principles in criminal proceedings.<sup>88</sup> The lack of clarity in the civil party role at the Court creates the risk of "double prosecuting" the accused. In the early stages of the first trial the defence raised concerns about the rights of the accused being jeopardized by the co-prosecution and civil party counsels having more time for questioning than the defence.<sup>89</sup> Further criticism was made by the defence regarding the nature of the questioning posed by the civil party counsel to the accused, which appeared "repetitive and fairly unrelated to the civil parties harm."<sup>90</sup>

The concern was addressed by a decision of the Trial Chamber in 2009, stating that it is the accused's right to face only one prosecuting authority and accordingly, "while the civil parties have the right to support or assist the prosecution, their role within the trial must not, in effect, transform them into additional prosecutors."<sup>91</sup>

It is not surprising that following the atrocities which resulted in the trial, for most people sympathies lie with victim's rights rather than the defendants. However, the Internal Rules provides that a fundamental principle of proceedings shall be a fair trial and preservation of balance between the parties.<sup>92</sup> Decisions and statements made by the Court and the judges thus far suggest that precedence is being placed on the defendant's rights, causing the civil parties rights to be significantly limited. It is clear from the decisions made by the judges that victims now lack the opportunity to be active in the proceedings to the extent to which they were originally entitled. This is necessary to ensure a fair trial, although it is

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<sup>88</sup> Jacob Katz Cogan "International Criminal Courts and Fair Trials: Difficulties and Prospects" (2002) 27 Yale J Int'l L 112 at 113.

<sup>89</sup> Caroline Ehlert and Christine Kaufmann "The Duch Trial at the Extraordinary Chambers in the Court of Cambodia- Involving the Cambodians in the Process" (2010) 28 Chinese Taiwan YB Int'l L & Aff 22 at 32.

<sup>90</sup> Caroline Ehlert and Christine Kaufmann, above n 89, at 32.

<sup>91</sup> *Kaing (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)* ECCC Trial Chamber 001/18-07-2007/ECCC/TC, 9 October 2009 at [26].

<sup>92</sup> Internal Rules, r 21 (1) (a).

not desirable for the victims or for the innovative civil party system which was originally envisaged.<sup>93</sup>

### ***B The Public Interest in Efficient Justice***

The public interest in efficient justice weighs against the importance of victim participation, as the extent to which victims participate will inevitably force the extension of the proceedings. Time is of the essence; with the atrocities themselves occurred close to 40 years ago. As the two trials have already illustrated, the accused criminals are aging with one accused found unfit to stand trial while the other died during the proceedings.<sup>94</sup> To date, the trials have been slow in comparison to other international criminal tribunals. In seven years, the Court has seen only two successful prosecutions and there may only be one other. In comparison to this, the SCSL was able to convict 11 perpetrators of crimes between its establishment in 2000 and its conclusion in 2012.<sup>95</sup>

Civil parties, by logic, increase the time taken to complete a trial. One of the lawyers for the civil parties in Case 001 stated that it became apparent a few weeks into the trial that to allow every civil party group to pose unlimited questions to witnesses, would considerably lengthen the duration of the proceedings.<sup>96</sup> The large number of civil parties in Case 002 creates difficulties.<sup>97</sup> These people are victims who seek justice and the truth. However, it would cause conflict with both the rights of the defendant and the principle of efficient justice to allow each of those victims to tell their story and have an individual role in the trial, which is often what they desire.<sup>98</sup> The amount of civil parties which the Court has

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<sup>93</sup> Karim Khan and Daniella Rudy *The Right of the Civil Parties to Participate vs. the Right of the Accused to a fair and Expeditious Trial: Challenges at the ECCC?* (University of Oxford Transitional Justice Research, Oxford, 2010) at 2.

<sup>94</sup> For the number of civil parties for each case, see Appendix II.

<sup>95</sup> Lansana Gberie “The Special Court for Sierra Leone Rests for Good” (April 2014) United Nations <[www.un.org](http://www.un.org)>.

<sup>96</sup> Alain Werner and Danielle Rudy “Civil Party Representation at the ECCC: Sounding the retreat in international criminal law?” (2010) 8 North Western J of Int’l HR 301 at 304.

<sup>97</sup> Scully, above n 26, at 32.

<sup>98</sup> Mychelle Balthazard and others *Baseline Study of Cambodian Human Rights and Development Association’s Civil Party Scheme for Case 002* (Cambodian Human Rights and Development Association, Phnom Penh, 2013) at 19.

seen was clearly not comprehended in the original Internal Rules and could only be addressed by created a collective group, as has been done.

### *C Victim's Needs*

Studies have found that giving victims a role in the prosecution “assists victims to take back control of their lives and ensure that their voices are heard, respected and understood” even if that role is limited.<sup>99</sup> It seems questionable whether victims would feel that their voices are heard in the case of the ECCC, particularly in Case 002. However, victims do have the opportunity to participate, albeit in a very limited way. A study completed in Cambodia found that justice was the most frequent answer when a civil party was asked why they were participating.<sup>100</sup> It can be argued that whether or not the civil party has a personal role in the proceedings, justice will be done through the fair trial of the accused and perhaps that is sufficient for victims.

Despite this, studies have found value in including victims in proceedings where it is possible to do so. At the ECCC, near the conclusion of the Trial in Case 001, two weeks were allocated to allow the opportunity for civil parties to recount stories. Sixteen of the 65 Civil Parties in that case chose to, and the opportunity was “much appreciated” and highly emotional for the victims involved.<sup>101</sup> One study found that participants in the trial of Case 002 had been unable to contribute to the truth telling in a form that would be empowering to them.<sup>102</sup> Victims have often felt left without genuine apologies and explanations from the perpetrators and “unable to trust or forgive Khmer Rouge cadres living in their midst”, making reconciliation impossible.<sup>103</sup> A study conducted in Cambodia found that half of the respondents would be willing to talk openly in a public setting such

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<sup>99</sup> Yael Danieli "Victims: Essential Voices at the Court" Victim's Rights Working Group Bulletin (September 2004) <[www.vrwg.org](http://www.vrwg.org)>.

<sup>100</sup> Estelle Bockers and others “The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation” (December 2010) Psychology beyond Borders <<http://psychologybeyondborders.com>>.

<sup>101</sup> Ehlert and Kaufmann, above n 89, at 35.

<sup>102</sup> John Ciorciari and Jaya Ramji-Nogales “Lessons from the Cambodian Experience with Truth and Reconciliation” (2012) 19 Buff Hum Rts L Rev 193 at 212.

<sup>103</sup> Ciorciari and Ramji-Nogales, above n , at 212.

as a public hearing about what they or their family experienced during the Khmer Rouge regime.<sup>104</sup> This may have been what they expected to achieve through the Court process, though the limiting decisions of the Court have prevented this from becoming a reality. Therefore, an alternative forum should be provided, with these statistics indicating that many would potentially say yes to an opportunity to do so.

## *VI Solutions for the ECCC and Future Contexts*

### *A The Irreversible Civil Party Framework in Cambodia*

This paper will not address the possibility of the role of victims reverting to simply as witnesses, as in other international criminal tribunals. This is because it seems likely that victims will have a role in proceedings in the future, with the ICC's victim participation framework and civil law jurisdictions such as the Central African Republic, Burundi and Mali, which may require a criminal tribunal of some kind in the future.

Including victims as civil parties allows them to have active involvement in the trial process through representation. It also gives them access to confidential, internal documents that they may otherwise never see, which may benefit in the individual's healing process.<sup>105</sup> Allowing their participation is proved to make them feel that they themselves have had a role in bringing about justice, the most important role of the Court for them.<sup>106</sup> Additionally, hybrid tribunals are viewed as a way in which the international community can aid the "capacity building" of a judicial system and to remove civil parties would be to create a Court which would not be representative of the Cambodian legal system.<sup>107</sup> This would be a significant hindrance to efforts to stabilise and educate on the Cambodian legal system.

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<sup>104</sup> Mychelle Balthazard and others *So We Will Never Forget: A Population-Based Survey on Attitudes towards Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (University of California, Berkeley, 2009) at 27.

<sup>105</sup> Farrah Tek "Justice at the Extraordinary Chambers in the Court of Cambodia" (2011) 23 *Peace Review* 431 at 433.

<sup>106</sup> Tek, above n 105, at 434.

<sup>107</sup> Laura Dickinson "The Promise of Hybrid Courts" (2003) 97 *Am J Int'l L* 295 at 307.

It is unlikely that the Court will make decisions to reverse the limitations which have been placed on civil parties. Therefore, these limitations must not be extended any further, as civil party participation would become meaningless. Research suggests, as did the UN Working Group's report, that Cambodian's priority and key interest is in seeing justice done at the trials. Without these limiting decisions, the trials would not have been just in terms of defendant rights and the two trials would arguably not be finished today, given the large number of civil parties. The Court should, therefore, leave in place the civil party rules which exist today, while an alternative forum should be created where healing, truth and reconciliation can take place.

### ***B A Truth and Reconciliation Commission***

The concept of a Truth and Reconciliation Commission (TRC) was discussed as a potential implementation in Cambodia, in the UN Working Group report. The Report suggested that at that stage, Cambodians would not understand the purpose of the commission or its relationship to the trial and felt that the priority should be on trials of the Khmer Rouge.<sup>108</sup> Despite this, the report does not dismiss the potential benefits of a TRC for educational, psychological and political purposes and providing spiritual reparation for the victims.<sup>109</sup> The report is 15 years old, and a 2013 study found that 40 per cent of civil party respondents had become civil parties to tell their story and receive acknowledgment of their suffering, and a TRC could provide a suitable forum for that.<sup>110</sup> One study found that there is no evidence of the ECCC promoting healing for individuals; while a TRC could also fulfil the role of healing.<sup>111</sup>

TRCs have been used in response to conflicts around the world, most notably in South Africa post-apartheid.<sup>112</sup> The structure and procedure of each TRC which has been used

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<sup>108</sup> *Report of the Group of Experts*, above n 17, at [202].

<sup>109</sup> *Report of the Group of Experts*, above n 17, at [200].

<sup>110</sup> Balthazard and others, above n 98, at 19.

<sup>111</sup> Tek, above n 105, at 436.

<sup>112</sup> Alison Bisset "Truth Commissions: A Barrier to the Provision of Judicial Assistance" (2010) 10 Int C L R 143 at 145.

varies greatly depending on the situation to which it responds.<sup>113</sup> TRCs can be established either nationally by the state or by an international panel, such as the Commission on the Truth in El Salvador in 1992.<sup>114</sup> It is accepted that truth commissions have three main purposes; to uncover the truth, provide a written account of the historical events and to acknowledge the past.<sup>115</sup> In the context of South Africa, an important though controversial element of the TRC was the amnesty for human rights violations which is seen to have significantly contributed to the willingness of many of the security forces to speak voluntarily at the Commission.<sup>116</sup> It is important to note that empirical studies have found that the majority of victims of serious human rights violations seek criminal justice, a role which TRCs will never fulfil.<sup>117</sup> For that reason, it is submitted that a TRC will not be suitable in Cambodia as a “stand-alone” mechanism as it was in South Africa, due to the severity and brutality of the crimes which occurred in Cambodia. Alternatively, it could work as a complementary mechanism to proceed alongside the ECCC.

A TRC could also provide a mechanism which can incorporate principles of Cambodia’s main religion in finding justice. An estimated 93 per cent of Cambodian people are Theravada Buddhists, who believe that truth is an essential component of reconciliation.<sup>118</sup> Buddhist principles state that although the truth cannot change the past, it can provide important lessons for the future.<sup>119</sup> A TRC could provide a forum for the truth and reconciliation to be facilitated in line with this. It would also provide a forum in which the many Khmer Rouge soldiers who live today to speak the truth, without facing the consequences of a criminal trial.

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<sup>113</sup> Angelika Schlunck “Truth and Reconciliation Commissions” (1997) 4 ILSA J Int’l & Comp L 415 at 417.

<sup>114</sup> Thomas Buergenthal “The United Nations Truth Commission for El Salvador” (1994) 27 V and J Transnat’l L 497 at 499.

<sup>115</sup> Schlunck, above n 113, at 418.

<sup>116</sup> Phillip Tahmindjis “The Truth and Value of Truth and Reconciliation Commissions” (2002) 27 Int’l Legal Prac 133 at 134; Promotion of National Unity and Reconciliation Act 34 2005 (South Africa), s 20.

<sup>117</sup> Bisset, above n 112, at 36.

<sup>118</sup> “Cambodia: International Religious Freedom Report” (2007) US Department of State <[www.state.gov/](http://www.state.gov/)>.

<sup>119</sup> Capeloto, above n 37, at 112.



## ***C Other Complementary Truth Telling Mechanisms***

### ***1 Sierra Leone***

Sierra Leone's Special Court was given a similar mandate to that of the ECCC, with jurisdiction over only those "who bear the greatest responsibility" for the violations of international humanitarian law during the conflict.<sup>120</sup> This meant that there were a significant number of perpetrators of crime who were left without repercussions for their actions.<sup>121</sup> A TRC was established in conjunction with the Court, providing a forum where those less responsible could speak freely and hear from the victims. In Sierra Leone, the two entities worked together although questions were raised regarding coordination between the TRC and the Special Court.<sup>122</sup> There was no information sharing relationship between the two, though studies have shown that perpetrators were often unlikely to offer testimony at the TRC for fear of being prosecuted or having to testify against commanders at the Special Court.<sup>123</sup> This is seen as the most problematic aspect of the TRC in Sierra Leone and should be avoided in the future with a formal agreement regarding the relationship between the mechanisms, as was put in place in East Timor. This situation is where a TRC can provide an alternative forum, where those who are less guilty can speak the truth, as can victims and aid reconciliation.

### ***2 East Timor***

In July 2001, the United Nations Transitional Administration in East Timor established the Commission for Reception, Truth and Reconciliation (CRTR) to promote national reconciliation and healing, following years of political conflict in the country between independence movement FRETILIN and Indonesia.<sup>124</sup> The Commission was designed to

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<sup>120</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone 2178 UNTS 137 (signed 16 January 2002, entered into force 12 April 2002), preamble.

<sup>121</sup> Elizabeth Evenson "Truth and Justice in Sierra Leone: Coordination between Commission and Court" (2004) 104 Colum L Rev 730 at 733.

<sup>122</sup> William Schabas "Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone" (2004) 11 UC Davis J Int'l L & Pol'y 145 at 152.

<sup>123</sup> Bisset, above n 112, at 92.

<sup>124</sup> Carsten Stahn "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission" (2001) 95 Am J Int'l L 952 at 953.

act in conjunction with criminal proceedings, conducted by the Special Panels for Serious Crimes (SPSC), within the domestic court structure.<sup>125</sup> The SPSC faced significant challenges during its existence, largely due to lack of funding from the UN and the Timorese government, with the UN unexpectedly announced the ending of their support in 2004, with 514 investigated cases outstanding.<sup>126</sup> These challenges appear unrelated to the CRTR and it seems that this was, in itself, relatively successful. The CRTR, like the South African TRC, stressed Christian values such as repentance, penitence and forgiveness, while other TRC's have been secular in nature.<sup>127</sup> The ability to incorporate values to suit the situation are of great benefit, as for example in Cambodia, Buddhist principles and values could be incorporated into the TRC.

One element of the CRTR which attracted criticism was the creation of the Commission by the UN. It is generally accepted that due to the long term importance and largely irreversible nature of a TRC, it should ideally be created by the legislature or executive of a democratically-elected government in that country.<sup>128</sup> A success of the CRTR was the clarification that individual immunity or amnesty was limited to low level crimes that were the subject of the reconciliation procedure.<sup>129</sup> This was important, as the South African TRC received criticism for giving amnesty for serious human rights violations. In contrast to the Sierra Leone TRC, the CRTR set out the relationship it had with the SPSC in the commission's enacting legislation. The SPSC had exclusive jurisdiction over serious human rights violations and allowed perpetrators of lesser crimes to obtain amnesty by completing an act of reconciliation, for example community service.<sup>130</sup> By creating an agreement between the two mechanisms, it ensures consistency and clarity in the two mechanisms' individual roles and prevented issues relating to information sharing.

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<sup>125</sup> Herbert Bowman "Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor" (2004) 18 Emory Int'l L Rev 371 at 385.

<sup>126</sup> Cherif Bassiouni *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, Cambridge, 2011) at 249.

<sup>127</sup> Cheah Ling "Forgiveness and Punishment in Post-Conflict Timor" 10 UCLA J Int'l L & Foreign Aff 297 at 312.

<sup>128</sup> Carsten Stahn, above n 124, at 957.

<sup>129</sup> Carsten Stahn, above n 124, at 958.

<sup>130</sup> Bisset, above n 112, at 87.

### ***D A More Informal Solution for Cambodia***

The Cambodian Government is unlikely to agree to a formal TRC. As well as the financial burden it would place on the already burdened ECCC, the government does not possess the political will to implement such an initiative which would likely damage its reputation.<sup>131</sup> This, along with likely procedural difficulties with establishing a TRC at this stage in the trials, makes an informal truth telling mechanisms more feasible.

Town meetings could provide an alternative to a formal TRC and would be economically feasible. As discussed above, these are helpful in community outreach and are already implemented by NGO's, but could also provide an opportunity for victims to speak about experiences, educate the younger generations and work towards reconciliation. This would need to be tested in the Cambodian context to ascertain whether it would be beneficial. It seems likely, based on research conducted and would be in line with Buddhist principles. The level of informality could also allow people to express themselves in a way that the formality of the ECCC prevents. Additionally, this would be suitable in the Cambodian context given the evidence that attending the trial process proves costly and complicated for many victims.<sup>132</sup> A large proportion of the population lives rurally and in many areas there is no working public transport system, making it difficult for victims to attend the trial and actively participate as a civil party. Town hall meetings would provide an invaluable opportunity for those who wish to talk freely about what they or their family members experienced under the Khmer Rouge regime, at a low cost and in an accessible way. However, it is again unlikely that the government would allow this, given the risk of political unrest and lack of freedom of expression granted in Cambodia.<sup>133</sup>

### ***E Finding the Right Solution in Future Contexts***

It is important to address the ways in which the ECCC victim participation framework can be improved. However, it is equally important to analyse what can be learnt from the Court

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<sup>131</sup> Capeloto, above n 37, at 126.

<sup>132</sup> Ehlert and Kaufmann, above n 89, at 30.

<sup>133</sup> "Press Freedom Index 2013" (2013) Reporters Without Borders: For Freedom of Information <<http://en.rsf.org/>>.

and the ways in which this can inform future tribunals, and the ICC. The ICC and the recent Special Tribunal for Lebanon are examples of courts where greater emphasis is being placed upon the role of the victim within the process.

It is clear from these examples and the situation in Cambodia that when deciding what the appropriate victim participation model is, the context is the most important consideration. In Cambodia, it was particularly relevant that the judicial system is based on a civil law model, which led to civil parties being allowed. The weak state of the Cambodian judicial system and the insistence of the Cambodian Government that the tribunal not be purely international were also important factors.

If an International or Hybrid Criminal Tribunal was to be established again with victims taking the role of civil parties, a greater effort would need to be made, to regulate from the beginning, the role that civil parties would take. Where the ECCC failed was in its decision to give no structure to the civil party framework, other than to define their role as “supporting the prosecution”. It should have been foreseen that this would cause problems, both with defendant’s rights and with the time taken to conduct the trials. Despite the advantages of a flexible framework, in practice this is difficult where victim numbers are large. It is important from the start to clearly define the victim role, if it will be more than as a simple witness. Whether their role may be merely in gaining reparations, or as part of a consolidated group of victims, this must be clear from the beginning to avoid misconceptions and therefore causing distrust or frustration towards the judicial system.

The role of outreach in the success of Sierra Leone’s SCSL and TRC must not be understated, as it enabled the people of Sierra Leone to understand the process, and therefore, justice was seen to be done. This should be a further lesson learned for future tribunals that significant resources should be given to an outreach department to ensure an understanding and education on the court process.

If a similar framework to the ECCC is to be adopted today, where victim participation is now largely limited to claiming reparations, and to a small extent, aiding the finding of

guilt or innocence, then an alternative forum for expressing grievances must be assessed. The models of Sierra Leone and East Timor provide examples of where a TRC has successfully proceeded alongside a court, though the Court itself was less successful in East Timor. Having a dual process creates an environment where victim interests are served in two senses, both in their ability to aid the process of finding justice at the court and in their ability to be involved in national reconciliation and healing at the TRC. The TRC also creates a fair historical account of the atrocities which have occurred and therefore helps the country to learn from its past. It is preferable that this TRC be set up by the democratically elected government in the state, though UN financial support will often be necessary, with countries likely to be in financial difficulty after a conflict.

It is proposed that a “dual” model, as was put in place in East Timor should be considered as the best option when looking at models for international or hybrid criminal tribunals. An important element of that will be ensuring an agreement is put in place to clarify and assert the relationship between the court proceedings and the TRC. The contrasting situations in Sierra Leone and East Timor show the value in creating such an agreement, with issues of information sharing avoided due to specific agreement about the extent to which this may or may not occur. If this model is used, it should only excuse those who have committed less serious crimes, as in East Timor.

Proceedings at the ICC should also take into account the possibility of a TRC as a form of “outreach” which could occur in the state where the crimes are alleged to have taken place. When the ICC established, there were fears that it would prevent countries from finding their own ways to protect victims, rebuild societies and stabilise democracy, such as using a TRC, due to Article 17 of the Rome Statute.<sup>134</sup> Article 17 addresses the complementarity principle, which is the doctrine that a country with control of a person accused of violating international criminal law has jurisdiction to charge and try that person.<sup>135</sup> Article 17 states

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<sup>134</sup> Yav Katshung Joseph *The Relationship between International Criminal Courts and Truth and Reconciliation Commissions: Some Thoughts on How to Build a Bridge Across Retributive and Restorative Justices* (Coalition for the International Criminal Court, Lubumbashi, 2005) at 12.

<sup>135</sup> Bryan Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, Minnesota, 2009) at 324.

that the ICC will only assert jurisdiction where that country is unwilling or unable to investigate and prosecute that individual.<sup>136</sup> Schabas has questioned the ability of a sincere truth commission established by the state in question, to prevent the ability of the ICC to operate due to Article 17, although stating this was an unlikely interpretation.<sup>137</sup>

In the ICC context also, a TRC should not be considered as an alternative to prosecution and should not meet the Article 17 requirements, as from the victims perspective, the gravity of crimes will often require retributive justice against those most responsible. In situations with large numbers of perpetrators or crimes, a TRC may be able to work alongside ICC proceedings. The ICC is able to try only those responsible for the most serious crime of concern to the international community as a whole.<sup>138</sup> Therefore a TRC could provide a forum to examine the actions of those who have committed less serious crimes within the conflict. It will always depend on the circumstances, but a TRC can provide an accessible forum for the truth, which proceedings at the ICC are unable to do.

## *VII Conclusion*

The scope and severity of the Khmer Rouge's actions in Cambodia between 1975 and 1979 created the necessity for a large scale international criminal tribunal, which would never have come without significant challenges. Those challenges continue as the Cambodian Government hinders the Court's progress. Despite this, the Court persists and it is of utmost importance to those inside and outside of Cambodia that the court continues and concludes its work, to find justice for those victims, both dead and still living. The civil party framework allows, in theory, victims to play an active role in the trial. However, in practice, the implementation of the civil party participation has created many challenges.

The key challenge within the Court is the unclear provisions relating to civil party participation, which have caused conflict with the right of the defendant to a fair trial and

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<sup>136</sup> The Rome Statute, Article 17.

<sup>137</sup> William Schabas *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2010) at 347.

<sup>138</sup> The Rome Statute, Article 5.

the public interest in efficient justice, leading to the reduction of civil party rights. The lessening of civil party participation in the proceedings is a significant blow to victims, though if it ensures justice is done, it may meet the victim's needs. However, if this approach is to be taken then it must be ensured that another forum is provided to the victims, to tell their stories and play a part in the reconciliation process.

It is clear that in the context of the ECCC, the decisions which have been made are largely irreversible and due to the political environment, it is unlikely that any greater role will be given to the victims in Cambodia. However, there are important lessons to be learned from the ECCC. It is clear that from the outset, legislation or internal rules must play a greater role in regulating the role of victims within the process to avoid confusion. In addition, outreach should be given effect to from the beginning of the process. Where there are large numbers of victims, a TRC can be an effective mechanism to consider, which will ensure victim participation within the reconciliation process. Victim participation frameworks in an international or hybrid court process, must be based on considerations of the particular context which the court responds to. As well as context, lessons learned from courts such as the ECCC should be considered, to determine which framework will deliver the best results for victims while maintaining a fair and efficient tribunal process.

## *VIII Appendices*

### *A Appendix I*

#### *Status of Cases at the Extraordinary Chambers in the Courts of Cambodia*

##### *Case 001*

**Accused** Kaing Guek Eav, alias Duch

**Status:**

Case 001 Trial Chamber found him guilty of crimes against humanity and grave breaches of the Geneva Convention.<sup>139</sup>

**Case 002**

**Accused** Khieu Samphan

**Status**

Case 002/01 Trial chamber found him guilty of crimes against humanity.<sup>140</sup>

Case 002/02 Case in the process of meeting procedural requirements before the trial can begin.<sup>141</sup>

**Accused** Nuon Chea

**Status**

Case 002/01 Trial Chamber found guilty of crimes against humanity.<sup>142</sup>

Case 002/02 Case in the process of meeting procedural requirements before the trial can begin.<sup>143</sup>

**Accused** Ieng Sary

**Status** Deceased (2013).<sup>144</sup>

**Accused** Ieng Thirth

**Status** Found unfit to stand trial (2012).<sup>145</sup>

**Case 003**

**Accused** Unknown identities (two accused)

**Status** Under investigation by the co-investigating judges after introductory submissions filed in 2009.<sup>146</sup>

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<sup>139</sup> *Kaing (Judgment)* ECCC Trial Chamber 001/18-07-2007/ECCC/TC, 26 July, 2010 at [568].

<sup>140</sup> *Case 002/01 (Judgment)* ECCC Trial Chamber 002/19-09-2007/ECCC/TC, 7 August, 2014 at 622.

<sup>141</sup> “Case 002/02” Extraordinary Chambers in the Courts of Cambodia (2013) <www.eccc.gov.kh>.

<sup>142</sup> *Case 002/01*, above n 140, at 622.

<sup>143</sup> “Case 002/02” Extraordinary Chambers in the Courts of Cambodia (2013) <www.eccc.gov.kh>.

<sup>144</sup> “Case 002/02”, above n 143.

<sup>145</sup> “Case 002/02”, above n 143.

<sup>146</sup> Kheang Un “The Khmer Rouge Tribunal: A Politically Compromised Search for Justice” (2013) 72 *J of Asian Studies* 783 at 785.



**Case 004****Accused**

Unknown identities (three accused)

**Status**Under investigation by the co-investigating judges after introductory submissions filed in 2009.<sup>147</sup>***B Appendix II*****Number of Individual Civil Parties Admitted to Proceeding in Each Case**Case 001      93 parties.<sup>148</sup>Case 002      3866 parties.<sup>149</sup>


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<sup>147</sup> Un, above n 146, at 785.

<sup>148</sup> The International Federation for Human Rights, above n 82, at 34.

<sup>149</sup> The International Federation for Human Rights, above n 82, at 34.

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