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# REDUCED VICTIM PARTICIPATION: A MISSTEP BY THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

## I. INTRODUCTION

On August 27, 2009, the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) issued a verbal ruling altering the extent to which victims of the Cambodian conflict are allowed to participate in the prosecution of their tormentors and former members of the Khmer Rouge.<sup>1</sup> Prior to this decision, victims of the conflict were, after joining a Civil Party, allowed to question the Accused on all factual topics before the Trial Chamber.<sup>2</sup> However, following the decision, victims are no longer able to question the Accused on his character or on other matters pertinent to sentencing.<sup>3</sup> At the heart of the decision was a desire to balance the goals of the ECCC with the need to increase efficiency and the right of the Accused to have a fair and just trial as required under international law.<sup>4</sup>

Ultimately, the decision places too much emphasis on the perceived need to increase the efficiency of the trial proceedings, and neglects the ECCC’s goal of national reconciliation. Additionally, the decision undermines the healing power accompanying full victim participation

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1. As noted by KRT Trial Monitoring Group:

In its [written] decision issued on 9 October 2009, the majority of the Trial Chamber noted that Civil Parties’ role in trial proceedings did not confer on them “a general right of equal participation with the Co-Prosecutors.” As Civil Parties’ role within the trial must not “transfer them into additional prosecutors,” sentencing should remain the exclusive domain of the Prosecution. This included questioning character witnesses, given their evidence was led to support the Accused Person’s claim to mitigating circumstances.

Michelle Staggs Kelsall, Mary Kristerie A. Baleva, Aviva Nababan, Vineath Chou, Rachel Guo, Caroline Ehlert, Sovannith Nget & Savornt Pheak, Asian Int’l Justice Initiative, KRT Trial Monitoring Grp., *Lessons Learned from the ‘Duch’ Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia*, 32 (Dec. 2009), available at [http://socrates.berkeley.edu/~warcrime/documents/Lessons%20Learned%20from%20the%20Duch%20Trial\\_MRSK\\_FINAL.pdf](http://socrates.berkeley.edu/~warcrime/documents/Lessons%20Learned%20from%20the%20Duch%20Trial_MRSK_FINAL.pdf).

2. *Report Issue No. 19*, KRT TRIAL MONITOR (Asian Int’l Justice Initiative, Berkeley, Cal.), Aug. 30, 2009, at 5–6, available at [http://socrates.berkeley.edu/~warcrime/documents/KRT\\_Monitor\\_Report\\_19\\_week\\_18.pdf](http://socrates.berkeley.edu/~warcrime/documents/KRT_Monitor_Report_19_week_18.pdf).

3. *Id.*; Prosecutor v. Kaing Guek Eav “Duch”, 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, ¶ 40 (2009), available at [http://www.eccc.gov.kh/english/cabinet/courtDoc/452/E72\\_3\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/452/E72_3_EN.pdf) [hereinafter Standing Decision].

4. See generally International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

throughout criminal trial proceedings. Finally, the decision runs contrary to the rules and regulations on which the ECCC is based, as well as the Cambodian Constitution.

#### A. *History of the Khmer Rouge Conflict*

In order to fully understand the goals of the ECCC, it is useful to briefly examine the conflict which resulted in the need for an international tribunal to prosecute those responsible for the atrocities of the conflict.

From April 17, 1975, to January 6, 1979, the country's Communist Party, the Khmer Rouge regime, ruled Cambodia.<sup>5</sup> During this period, countless crimes against humanity and murders were committed,<sup>6</sup> and as many as three million people were killed.<sup>7</sup> On December 18, 2002, the General Assembly of the United Nations passed Resolution 57/228, calling for the creation of a joint U.N.-Cambodia hybrid tribunal in order to prosecute those responsible for the Khmer Rouge.<sup>8</sup> A formal agreement between the U.N. and the Royal Government of Cambodia was signed on

5. The Communist Party of Kampuchea (also known as the Khmer Rouge) came to power in 1975. The Khmer Rouge, in an attempt to turn the country into a classless society, forced individuals to leave major urban centers and relocate to rural agrarian regions of the country. It also eliminated all laws and currency. JOHN TULLY, *A SHORT HISTORY OF CAMBODIA: FROM EMPIRE TO SURVIVAL 177–79* (2005).

6. The Khmer Rouge viewed many classes of people as enemies and initiated large-scale attempts to eliminate these people. Professionals (e.g., doctors, lawyers, and other well-educated individuals) were particularly targeted. See SANDRA WHITWORTH, *MEN, MILITARISM, AND UN PEACEKEEPING: A GENDERED ANALYSIS* 56 (2004); Padraic J. Glaspy, *Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21 HARV. HUM. RTS. J. 143, 144–45 (2008) (“In addition to the deaths attributable to communist economic reorganization, members of the Khmer Rouge executed hundreds of thousands of civilians in bloody purges targeting the educated, racial minorities, religious figures, officials of the former regime, and Khmer Rouge members themselves, all as perceived enemies of the revolution. A network of prisons throughout the country helped ferret out these ‘spies’ and ‘conspirators’ through the detention and brutal torture of anyone with a middle-class background, a link to foreign countries, or a friend or family member who had confessed. Between 1975 and 1979, in the regime’s principal detention and interrogation center alone, known by the codename S-21, some 14,000 men, women, and children were interrogated, tortured, and, in all but a handful of cases, put to death.”) (footnotes omitted).

7. Introduction: Extraordinary Chambers in the Courts of Cambodia, [http://www.eccc.gov.kh/english/about\\_eccc.aspx](http://www.eccc.gov.kh/english/about_eccc.aspx) (last visited Apr. 16, 2011) [hereinafter Introduction: ECCC]. See generally Cambodia—Society under the Angkar, <http://countrystudies.us/cambodia/29.htm> (last visited Feb. 18, 2010) (Much of the killing and actions of the Khmer Rouge were said to be done by Angkar, which translates to “The Organization,” a fictional character created to lead the movement). It is estimated that the total population of Cambodia between 1975 and 1979 was 7.3 million and estimates vary with regard to how many people died during the conflict with some as low as one million people. JUSTIN CORFIELD, *THE HISTORY OF CAMBODIA* 93 (2009). Many of the people died in furtherance of the Khmer Rouge’s goal of constructing a utopia which required purging the populace of dissenters and symbols of the old regime. TULLY, *supra* note 5, at 181–83.

8. G.A. Res. 57/228, ¶ 2, U.N. Doc. A/RES/57/228 (Dec. 18, 2002).

June 6, 2003, in Phnom Penh, Cambodia,<sup>9</sup> creating the Extraordinary Chambers in the Courts of Cambodia, a Cambodian court supported by the United Nations which operates independently from other Cambodian courts.<sup>10</sup>

One of the major innovations and unique elements of the ECCC is the role that victims of the Khmer Rouge regime play in the Court. Victims can submit complaints to the Co-Prosecutor in hopes that they will be investigated and prosecuted.<sup>11</sup> Additionally, victims can petition to become part of the trial proceedings by seeking status as Civil Parties.<sup>12</sup> The Civil Parties are comprised of victims of the Khmer Rouge regime and are represented by counsel during the trial proceedings.<sup>13</sup> Specifically, under Rule 23(1) of the Internal Rules of the ECCC, the purpose of the Civil Party action before the ECCC is for the victims to “[p]articipate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution” and “to seek collective and moral reparations, as provided in this Rule.”<sup>14</sup> According to

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9. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter Agreement].

10. Introduction: ECCC, *supra* note 7 (“This special new court was created by the government and the UN but it will be independent of them. It is a Cambodian court with international participation that will apply international standards. It will provide a new role model for court operations in Cambodia.”).

11. Victims Unit: Extraordinary Chambers in the Courts of Cambodia, [http://www.eccc.gov.kh/english/victims\\_unit.aspx](http://www.eccc.gov.kh/english/victims_unit.aspx) (last visited Feb. 18, 2010) (“Victims of crimes that fall under the jurisdiction of the Court are given a fundamental role in the ECCC. They can submit complaints to the Co-Prosecutors, who take the interests of Victims into account when considering whether to initiate an investigation or a prosecution.”); *see also* Victims Unit (Victims’ Rights), [http://www.eccc.gov.kh/english/victims\\_rights.aspx](http://www.eccc.gov.kh/english/victims_rights.aspx) (last visited Feb. 18, 2010) (“Anyone 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 is considered to be a Victim by the ECCC. For example: if you were detained or tortured; if you suffered from forced starvation; if you were forced to leave your home and to work hard labor against your will; if your parents, grandparents, or other family members were killed, abducted, detained, or tortured; if you lost your house, your rice fields, your animals, or other property, you may be considered a Victim.”).

12. *See* Internal R. 23 (Rev. 4) (ECCC), *available at* <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv4-EN.pdf>. The Internal Rules were revised to their fourth revision on September 11, 2009. Unless otherwise stated, all references to the Internal Rules in this Note are to the fourth revision.

13. *Id.* Prior to the start of trial, those wishing to be joined as Civil Parties must submit an application pursuant to Rule 23 of the Internal Rules. *See supra* note 11. Additionally, as discussed in the July 26, 2010, Judgment of Duch, Civil Parties must show the existence of wrongdoing attributable to the Accused which has a direct causal connection to an injury personally suffered by the civil party. Prosecutor v. Kaing Guek Eav “Duch”, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 640-42 (2010), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/court/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLIC.pdf](http://www.eccc.gov.kh/sites/default/files/documents/court/20100726_Judgement_Case_001_ENG_PUBLIC.pdf). Family members of victims may, in exceptional circumstances, meet the standard set forth in the Judgment. *Id.* ¶ 643.

14. Internal R. 23(1)(a)-(b).

the ECCC, the Civil Parties are accorded the same rights as other parties and are given a great deal of freedom and responsibility in the criminal proceedings.<sup>15</sup> As of May 31, 2010, over 8,200 victims had filed applications in order to join either the Victims Unit or a Civil Party.<sup>16</sup>

The prosecution of the first Khmer Rouge defendant, Kaing Guek Eav (alias Duch) began on March 30, 2009,<sup>17</sup> and closing statements concluded on November 27, 2009.<sup>18</sup> From the beginning of the trial, the precise role that Civil Parties should play in the trial and prosecution was somewhat contentious. The Defense objected from the beginning of the trial to the rights of the Civil Parties to question the Defendant's character as it pertained to sentencing guidelines.<sup>19</sup> On August 27, 2009, the ECCC issued two verbal decisions limiting the role Civil Parties can play in the prosecution of members of the Khmer Rouge.<sup>20</sup> The written reasoning behind the decisions defining Civil Party rights during trial proceedings was issued on October 9, 2009.<sup>21</sup>

The Chamber, after reviewing Civil Party Groups 1 and 2's joint request for a ruling in favor of standing to make submissions pertaining to sentencing, rejected the claims that the Civil Parties should have

15. See Victim's Rights, *supra* note 11 ("[The Civil Parties] enjoy the same rights as every other party to the proceedings, such as the prosecution and the charged/accused persons. Becoming a Civil Party not only gives Victims the right to actively participate in the proceedings, but it also allows Victims to ask the court for collective and moral reparations from the convicted persons."); see also Victims Unit (VU), *supra* note 11 ("[The Victims] are recognised as parties to the proceedings and are allowed to claim collective and moral reparations. This reflects the commitment of the ECCC to its mandate of helping the Cambodian people in the pursuit of justice and national reconciliation, as stated in the Preamble to the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea.").

16. Victims Unit (Statistics), <http://www.eccc.gov.kh/english/statistics.aspx> (last visited Feb. 18, 2010) (including applications from Cases 001 and 002). The number of victims participating in the trial of Duch stood at ninety on October 9, 2009. Standing Decision, *supra* note 3, ¶ 26.

17. Chhun Chhean, *Cambodia: Trial Begins for Khmer Rouge Leader*, GLOBAL VOICES ONLINE (Mar. 31, 2009), <http://globalvoicesonline.org/2009/03/31/cambodia-trial-begins-for-khmer-rouge-leader/>.

18. David Scheffer, *Duch Seeks an Acquittal and Immediate Release*, CAMBODIA TRIBUNAL MONITOR 1 (Nov. 27, 2009), [http://cambodiatribunal.org/images/CTM/ctm\\_blog\\_11-27-2009.pdf](http://cambodiatribunal.org/images/CTM/ctm_blog_11-27-2009.pdf).

19. *Report Issue No. 19*, *supra* note 2, at 5.

20. *Id.* ("[T]he Chamber rejected the Civil Party Lawyers' request, with Judge Lavergne partly dissenting. Written reasons for the decisions of the majority and minority are to be issued in due course. Civil Parties are now directed not to make submissions relevant to sentencing, including: 1) submissions on a sentence to be imposed; 2) legal submissions relevant to sentencing, and 3) submissions on or evaluation of factors underlying a decision on sentencing."). This was the first time during the proceedings that a judge dissented. Kate Gibson & Daniella Rudy, *A New Model of International Criminal Procedure? The Progress of the Duch Trial at the ECCC*, 7 J. INT'L CRIM. JUST. 1005, 1016 (2009).

21. See Standing Decision, *supra* note 3.

standing.<sup>22</sup> As a result, Civil Parties are now barred from making submissions regarding the sentencing of the Accused.<sup>23</sup> The Chamber further held that Civil Party attorneys may not ask questions pertaining to the character of the Accused or certain enumerated witnesses and experts.<sup>24</sup> The holding also narrowed to fifteen days the window for written applications seeking status as a Civil Party.<sup>25</sup> Previously, one could apply to be a member of the Civil Party “[a]t any time during the judicial investigation.”<sup>26</sup> In large part, the Chamber’s decision was based on a desire to increase the efficiencies of the Chambers.<sup>27</sup> Unfortunately, as this paper argues, the decision goes too far and sacrifices much in the interest of increased efficiency.

## B. Background on Civil Parties

### 1. The French *Partie Civile*

The role of the Civil Party in criminal proceedings began in the French legal system.<sup>28</sup> Under that system, a victim could apply to join the prosecution as a Civil Party with a *plainte avec constitution de partie civile*.<sup>29</sup> The standards for who was able to be joined as a Civil Party varied by jurisdiction, but historically, the individual must have suffered a personal and direct harm.<sup>30</sup> However, in instances where the literal victim is incapacitated or dead, the victim’s heirs are able to bring an *action civile*

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22. *Id.* ¶¶ 1, 40.

23. *Id.*

24. *Id.* ¶¶ 3, 48.

25. *Id.*

26. Internal R. 23(3) (Rev. 3) (ECCC), available at <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv3-EN.pdf>; cf. Internal R. 23(3) (Rev. 4) (limiting application period to fifteen days after notification of the conclusion of the judicial investigation).

27. See Standing Decision, *supra* note 3.

28. The ECCC borrows much of its procedure from the French legal system. See generally Guido Acquaviva, *New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers*, 6 J. INT’L CRIM. JUST. 129 (2008).

29. MARTIN WESTON, AN ENGLISH READER’S GUIDE TO THE FRENCH LEGAL SYSTEM 124 (2d ed. 1993); see also Elizabeth Bingold, Michael H. Huneke & Don Shaver, *International Criminal Law*, 43 INT’L LAW. 473, 474 (2009) (“The ICC and ECCC victim participation rights are similar to the French civil law system in this regard. In the French system, a victim of a serious crime may join and participate in an ongoing criminal prosecution as a *partie civile*, with a civil claim for damages. This right to bring a civil claim before a *juge d’instruction* was recognized by the *Cour de Cassation* as early as 1906.”) (footnotes omitted).

30. CATHERINE ELLIOTT & CATHERINE VERNON, FRENCH LEGAL SYSTEM 159 (2000) (“[T]he individual must have suffered a personal and direct harm—including psychological harm—as a result of the offence.”).

on behalf of the victim.<sup>31</sup> It is commonly recognized that the *action civile* provides several benefits.<sup>32</sup> By being a party to the action, Civil Parties are able to claim damages resulting from the actions of the offender. Additionally, the victim is able to achieve moral reparations by playing an active role in prosecuting the alleged offender.<sup>33</sup>

## 2. Civil Parties in Other Courts

Civil Parties also play a role in the International Criminal Court (ICC). Indeed, in an effort to increase the restorative and reparative abilities of the court, the ICC was the first international criminal tribunal to adopt victim participation.<sup>34</sup> The ICC is also the first international court to have a separate pre-trial chamber.<sup>35</sup> The ECCC shares this same judicial structure.<sup>36</sup>

The ICC further recognizes that “[i]t is through the process of victim participation . . . [that the Court] can recognize and value the plight of

31. *Id.*

32. Jonathan Doak, *Victims’ Rights in Criminal Trials: Prospects for Participation*, 32 J.L. Soc’y 294, 310–11 (2005) (“The procedure is relatively commonplace in France and Belgium, where the victim must formally demonstrate his or her intention of becoming a party to the proceedings by initiating an independent action before the *juge d’instruction (constitution de partie civile)* at any stage in the proceedings. The procedure confers three important rights upon victims of crime. First, they can use the procedure to initiate a prosecution; secondly, they have the right to participate and be heard as a party in any prosecution; and thirdly, they have a right to pursue a claim for civil damages in the criminal action.”) (footnotes omitted).

33. SIMON WHITTAKER, *LIABILITY FOR PRODUCTS* 382 (2005) (“French lawyers recognise that the *action civile* therefore has a double purpose: to permit the victim of a crime to gain damages from the offender but also to allow the victim to participate in the enforcement of the criminal law and so give vent to private vengeance.”); see also Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 486 (recognizing the benefit of victim participation, the author notes: “[a]t these three kinds of hearings—bail, plea, and sentencing—victims have compelling reasons to be heard and can be heard without adversely affecting the defendant’s rights.”).

34. Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT’L L. 93, 96 (2009); see also Amnesty Int’l, *The International Criminal Court: Ensuring an effective role for victims—Memorandum for the Paris Seminar, April 1999*, 19, AI Index IOR 40/06/99 (Mar. 31, 1999), <http://www.amnesty.org/en/library/info/IO40/006/1999> (download: “PDF”) (“The Rules of Procedure and Evidence should permit victims to participate in the trial, sentencing and hearing to determine the award [sic] of reparations, and provide notice to victims of their right to participate, but leave it to the Trial Chamber to determine the scope of such participation in the light of experience.”).

35. McGonigle, *supra* note 34, at 111.

36. See *Organizational Chart of the ECCC*, EXTRAORDINARY CHAMBER IN THE COURTS OF CAMBODIA, [http://www.eccc.gov.kh/english/popup.image.aspx?imgUrl=/image/org\\_chart\\_big.jpg](http://www.eccc.gov.kh/english/popup.image.aspx?imgUrl=/image/org_chart_big.jpg) (last visited Feb. 18, 2010) (displaying the organizational structure behind the ECCC including the Pre-Trial Chamber, the Trial Chamber, and the Supreme Court Chamber supported by the Office of Administration).

victims.”<sup>37</sup> Among other rights conferred to victims participating in criminal proceedings in the ICC, the Court grants the victims the right to participate in sentencing of the accused and questioning of witnesses.<sup>38</sup>

Although the definition of participation is not explicit in any ECCC sources, it is thought to mean “having a say, being listened to, or being treated with dignity and respect.”<sup>39</sup> Moreover, the process of victim participation is thought to allow for healing and rehabilitation of the victims.<sup>40</sup> Some scholars further acknowledge that “the participation of victims may assist courts ‘in making a contribution to the reconciliation of a community or nation more generally,’”<sup>41</sup> while at the same time increasing the probability that those most affected by the alleged acts are persuaded that justice is achieved.<sup>42</sup>

When the ICC was debating whether to include victim participation in its proceedings, it weighed the prospective benefits of such a move with the possible cost to efficiency.<sup>43</sup> The ICC nevertheless decided to allow Civil Party participation.<sup>44</sup> Undeniably, the ICC recognizes the valuable role that victims can play in sentencing.<sup>45</sup>

### 3. *Civil Parties in the ECCC*

The integration of Civil Parties into the ECCC might be one of the most progressive ideas of the Chambers.<sup>46</sup> Due to the mass casualties

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37. McGonigle, *supra* note 34, at 106.

38. *Id.* at 110.

39. Susana SáCouto & Katherine Cleary, *Victims' Participation in the Investigations of the International Criminal Court*, 17 *TRANSNAT'L L. & CONTEMP. PROBS.* 73, 76 (2008) (quoting Doak, *supra* note 32, at 295).

40. *Id.* at 76–77 (“[Victim] participation has a number of potential restorative benefits, including the promotion of victims’ healing and rehabilitation, through a sense of empowerment and closure that is said to accompany victims’ participation.”) (footnotes omitted) (internal quotation marks omitted).

41. *Id.* at 77 (quoting Carsten Stahn, Héctor Olásolo & Kate Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 *J. INT'L CRIM. JUST.* 219, 221 (2006)).

42. *Id.* at 77–78.

43. *Id.* at 83.

44. *Id.* at 85.

45. See CHARLES JACKSON, DOCUMENTATION CTR. OF CAMBODIA, INTERNATIONAL SENTENCING GUIDELINES APPLICABLE TO THE TRIAL OF KAING GUEK EAV, AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 10 (2009), [http://www.cambodiatribunal.org/images/CTM/memo\\_sentencing\\_factors\\_charles%20jackson.pdf](http://www.cambodiatribunal.org/images/CTM/memo_sentencing_factors_charles%20jackson.pdf) (“When discussing aggravating and mitigating factors, the ICC rules include a list of potential factors the court may consider. Aggravating factors may include abuse of power or official capacity, crimes against particularly vulnerable victims, commission of a crime with particular cruelty or against multiple victims, and commission of a crime motivated by discrimination.”).

46. Kelsall et al., *supra* note 1, at 28 (“Perhaps one of the most innovative steps taken by the ECCC (and certainly one which has garnered some of the most significant international attention) has been its inclusion of a comprehensive civil party participation process in its proceedings.”).

under the Khmer Rouge regime, the vast majority of victims participating as Civil Parties are relatives of the actual victims of the Khmer Rouge. The ECCC, under Internal Rule 23, mandates that the individual must have suffered a physical, material, or psychological injury.<sup>47</sup> Individuals claiming such an injury may submit an application in writing to the Co-Investigating Judges who may reject or accept the application.<sup>48</sup> Under the traditional French system, if the Civil Party loses, the victim is liable for costs and might even be subject to criminal penalties for bringing a malicious claim.<sup>49</sup> However, the ECCC, by implementing a mandatory application process, seems to have preempted any liability on the part of a party erroneously claiming injury and the right to be part of a Civil Party. The application process provides a vetting system to ensure that only parties meeting the requirements under the Internal Rules are allowed to join a Civil Party.<sup>50</sup>

Historically, the public prosecutor plays an active role in the prosecution of the Accused, while Civil Parties tend to take a lesser role in the prosecution. The public prosecutor conducts most of the hearing and trial while Civil Parties serve as support.<sup>51</sup> The ECCC has adopted this historical function by explicitly granting the Civil Parties the role of “supporting the prosecution.”<sup>52</sup> This supporting role suggests that the

47. Internal R. 23(2)(a).

48. Internal R. 23(3).

49. WESTON, *supra* note 29, at 124 n.2.

50. *See* Internal R. 23(3)-(5). The Rules state:

3. A Victim who wishes to be joined as a Civil Party shall submit such application in writing no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation pursuant to Internal Rule 66(1). Subject to the provisions in these IRs relating to the protection of Victims, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person. The Co-Investigating Judges may reject Civil Party applications at any time until the date of the Closing Order. Such orders shall be open to expedited appeal by the Civil Party applicant as prescribed by Practice Direction.

4. When issuing the Closing Order, the Co-Investigating Judges shall decide on the admissibility of all remaining Civil Party applications by a separate order. This order shall be open to expedited appeal by the parties or the Civil Party applicants as prescribed by Practice Direction. Such appeal shall not stay the proceedings.

5. All Civil Party applications must contain sufficient information to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator. With a view to service and notifications, the domicile of the Victim, the registered office of the Victims' Association of which he or she is a member, or the address of the lawyer, as appropriate, must also be stated. Where this address is outside of Cambodia, an address in Cambodia shall be provided.

*Id.*

51. ELLIOTT & VERNON, *supra* note 30, at 159.

52. Internal R. 23(1)(a); *see* Amnesty Int'l, *supra* note 34, at 17 (noting that the *parties civiles*

authors of the Internal Rules did not wish for the Civil Parties to play a completely separate role, but instead, felt it necessary for the actions of the Civil Parties to be closely tied to those of the Prosecution.

The ECCC is a hybrid court,<sup>53</sup> meaning that its laws are based on both international and Cambodian law.<sup>54</sup> The Chambers has held that the Internal Rules of the Chambers will govern in instances of conflict.<sup>55</sup> As a former French colony, Cambodian law is premised on the French model of criminal procedure.<sup>56</sup> Therefore, while under Cambodian law the principle purpose of the Civil Parties is to collect damages, the internal rules explicitly provide that the Civil Parties play an additional role: to support the prosecution.<sup>57</sup>

Thus, in past decisions, the ECCC recognized that it interprets the rights of victims more broadly and liberally than “any of its predecessor international courts.”<sup>58</sup>

## II. DISCUSSION

The holding by the ECCC limiting the participatory role of members of the Civil Parties in the Chamber’s proceedings is not only contrary to the rules of the ECCC, it is also contrary to the stated purpose of the Chambers. Moreover, the decision will impede the Court’s ability to achieve its goals.

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were historically able to question the accused and otherwise participate in sentencing).

53. Alison Kamhi, *Private Funding for Public Justice: The Feasibility of Donations to the Cambodian Tribunal*, 48 HARV. INT’L L.J. 581, 581 (2007).

54. *Id.*

55. Jenia Iontcheva Turner, International Decisions, *Decision on Civil Party Participation in Provisional Detention Appeals. Case No. 002/19-09-2007-ECCC/OCIJ (PTC01)*, 103 AM. J. INT’L L. 116, 119 (2009).

56. *Id.* at 118.

57. *Id.* at 119; *see also* Internal R. 23(1)(a); Standing Decision, *supra* note 3, ¶ 16 (Lavergne, J., dissenting) (“Civil Parties are also entitled to the same rights as the other parties during the trial stage. They may submit a list of witnesses before the initial hearing . . . They may also examine the case file through their lawyers (Rule 86). More generally, they may request to put any evidence before the Chamber. *They have the right to be heard (Rule 91) and the right to question any person testifying before the Chamber, including the Accused, witnesses and experts* (Rules 90(2) and 91) . . . The Internal Rules *do not* contain any other restrictions whatsoever pertaining to these rights . . . In particular, they impose *no restrictions* based on the subject-matter of the evidence to be presented or examined.”) (emphases added) (footnotes omitted).

58. Turner, *supra* note 55, at 119.

A. *Legal Concerns with the Holding Limiting the Participation of Victims in ECCC Proceedings*

The Trial Chamber's decision raises several legal issues. Rule 90 of the Internal Rules of the ECCC explicitly allows that "[a]fter questioning by the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused."<sup>59</sup> According to the internal rules, the Civil Parties are an actual party to the proceeding<sup>60</sup> and thus should be permitted to question the Accused accordingly.<sup>61</sup> Rule 90 fails to quantify on what specifically the parties are able to question the Accused, and barring any restrictions, a limitation of the Civil Parties' ability to question the character of the Accused by the Trial Chamber would violate the Rules.<sup>62</sup>

Additionally, under article 36 of the ECCC law, victims are given the opportunity to participate in the right to appeal Trial Chamber decisions,<sup>63</sup> which necessarily implies participation in the trial procedures. It would be illogical to allow a party to appeal a decision in which they themselves were unable to participate. Civil Parties are also accorded rights to participate in all phases of the proceedings before the Chamber.<sup>64</sup>

1. *Cambodian Law Supports Greater Civil Party Participation*

Article 12 of the agreement between the United Nations and the Royal Government of Cambodia mandates that Cambodian law determines the Chamber's procedure.<sup>65</sup> Under the Cambodian Code of Civil Procedure,

59. Internal R. 90(2).

60. Internal R. 23(6)(a).

61. See Bingold et al., *supra* note 29, at 480 ("The purpose of the 'civil party action' is to 'participate in criminal proceedings . . . by supporting the prosecution, and allow victims to seek collective and moral reparations . . . .' A civil party is considered a party for all purposes and entitled to a separate judgment based on the judgment in the prosecution.") (footnotes omitted); Internal R. 90(2).

62. See generally Internal Rules (Rev. 4) (ECCC).

63. See Standing Decision, *supra* note 3, ¶ 2 (Lavergne, J., dissenting) ("[T]his possibility of appeal can only exist if they are parties to the proceedings.")

64. *Report Issue No. 19*, *supra* note 2, at 5 ("[A]s a matter of principle, Civil Parties are regarded in the Internal Rules as full parties to the proceedings, with rights to participate at all stages of the proceedings.")

65. Agreement, *supra* note 9, art. 12(1) ("The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level."); see also Acquaviva, *supra* note 28, at 132.

victim participation in proceedings is allowed without limit.<sup>66</sup> Thus, Cambodian law does not support the Trial Chamber's decision to restrict the role of Civil Parties.<sup>67</sup>

## 2. *The Interplay Between French and Cambodian Law in the ECCC*

Given that Cambodia's judicial system is largely influenced by the French judicial system,<sup>68</sup> it is necessary to also examine the role of Civil Parties in French Law. It is disconcerting that the majority would assert that "French precedent concerning Civil Party participation in sentencing has limited value where the ECCC is required to base its law and procedure on Cambodian law."<sup>69</sup> Instead, the appropriate course of action would be to use French precedent as a model for examining the role that Civil Parties might play in a Chamber such as the ECCC. Consequently, because the Cambodian judicial system allows for a high level of victim participation,<sup>70</sup> the ECCC ought to follow similar procedure in allowing victim participation through the liberal use of Civil Parties. This notion is further supported by the fact that the Chamber intentionally included elements of the French system in the ECCC's internal rules to enhance the rights of victims.<sup>71</sup> As mentioned above, members of the French *partie civile* are generally entitled to full party rights.<sup>72</sup>

66. Gibson & Rudy, *supra* note 20, at 1016.

67. *Id.* However, it is also recognized that there is no acknowledgment that Civil Party attorneys may advance the prosecution's case. *Id.*

68. *Cambodia*, CIA—THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html> (last visited Apr. 16, 2011).

69. Standing Decision, *supra* note 3, ¶ 38. The ECCC utilizes many principles from the French legal system that further dilute the Court's opinion that the French precedent does not matter. See Acquaviva, *supra* note 28, at 147 ("This follows the principle of the French system . . . that an accused should not be put before the dilemma of, on the one side, be obliged to tell the truth under solemn declaration or, on the other, choose not to speak at all during his own trial."); see also Bingold et al., *supra* note 29, at 480 ("Cambodian domestic law is based on the French civil law system, so the ECCC procedure adopts the term *partie civile*, or 'civil party,' rather than 'victim.'").

70. See David Boyle, *The Rights of Victims: Participation, Representation, Protection, Reparation*, 4 J. INT'L CRIM. JUST. 307, 308 (2006) (In accordance with Cambodian criminal procedure, victims "have the right to file charges and intervene as 'civil parties' in ongoing criminal proceedings."); see also Standing Decision, *supra* note 3, ¶ 17 (Lavergne, J., dissenting) ("The decision denying Civil Parties the right to question certain witnesses and experts is therefore manifestly inconsistent with the adversarial principle according to which all evidence must be subjected to examination by *all parties*, as set forth in the Internal Rules.") (emphasis added). See generally Internal R. glossary (defining "Party" as "the Co-Prosecutors, the Charged Person/Accused and Civil Parties").

71. Kelsall, *supra* note 1, at 28 ("[T]he ECCC's Judges determined during a 2007 plenary session to import the French civil law notion of civil parties into the Court's Internal Rules, in order to further accommodate victims' right to truth and justice.")

72. See discussion *supra* Part I.B.1 and accompanying notes.

### B. *The Benefits of Victim Participation in the ECCC*

The majority holding also premises its argument on the notion that the “Civil Parties cannot contribute to the establishment of the truth by providing direct information concerning the crime alleged.”<sup>73</sup> On its face, this assumption by the Chamber appears illogical. Victims, more than any other party, by virtue of their unique position during the conflict, would be in the best position to help establish the truth of alleged crimes.<sup>74</sup> Indeed, the ICC recognizes the value that victims can add in establishing the truth.<sup>75</sup>

Moreover, it is well recognized that the character of the Accused is an important factor in deciding sentencing,<sup>76</sup> and the victim would be the appropriate party to delve into the character of the Accused.<sup>77</sup> While there is a possible concern that the victims’ questioning on the character of the Accused will overly emotionalize the trial, this type of participation could assist the Chamber in its other goal of national reconciliation.<sup>78</sup> Further, it is well documented that victim participation increases the satisfaction of and conveys a sense of power to those harmed by the alleged criminals.<sup>79</sup>

73. Standing Decision, *supra* note 3, ¶ 34.

74. Doak, *supra* note 32, at 312 (“As the alleged victim of the offence, it would seem logical that the complainant is best placed to give an account of the circumstances of the offence in his or her own words, notwithstanding more general problems of witness testimony such as vagaries of memory and the fact that not all complainants may tell the truth. The injection of the victim’s perspective could lend additional transparency to the outcome of the case, and . . . the broad notion of participation as a basic value of the criminal justice system could serve to enhance its overall legitimacy.”) (footnote omitted).

75. Miriam Cohen, *Victims’ Participation Rights Within the International Criminal Court: A Critical Overview*, 37 DENV. J. INT’L L. & POL’Y 351, 373 (2009) (“[V]ictims’ participation can be beneficial to the establishment of the truth since they have ‘first-hand knowledge of the crimes.’ Furthermore, their participation as victims and not merely their testimony as witnesses can assist the Court with clarification of the facts of the case. As noted by Claude Jorda and Jérôme de Hemptinne, this role can be a ‘decisive contribution to the prevention of future crimes.’”) (footnote omitted) (citing Claude Jorda & Jerome de Hemptinne, *The Status and Role of the Victim*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1397 (Antonio Cassese et al. eds., 2002)).

76. See Standing Decision, *supra* note 3, ¶ 16 (Lavergne, J., dissenting) (“[T]he assessment of the Charged Person’s character is part and parcel of the work of the Co-Investigating Judges in that it is part of the inculpatory and exculpatory material that may be gathered in relation to the Charged Person. The Rules do not draw any distinction between Civil Parties’ requests relating only to evidence of the facts set forth in the Introductory Submission and requests relating to the Charged Person’s character.”) (footnotes omitted).

77. *Id.* (“[D]ue to their personal knowledge of the accused, [the victims] may offer crucial information and are often best placed to describe his personality, his character and even his conduct before and after the crimes charged.”).

78. James P. Bair, *From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia*, 31 U. HAW. L. REV. 507, 546 (2009).

79. Doak, *supra* note 32, at 312 (“[O]ffering victims some form of acknowledged and formal

Both of these effects would likely facilitate and further the goals of the ECCC.

*C. The Role of Victim Participation in Achieving the Goals of the ECCC*

The holding of the Chamber as it pertains to the role of the Civil Parties frustrates the purposes of the Chamber.<sup>80</sup> As the majority notes, “[t]he interests of society as a whole and of justice necessarily include the general interests of victims of the alleged crimes.”<sup>81</sup> It is thus curious why the Chamber would seek to limit the role of the victims in the ECCC. Moreover, it is observed that allowing victims to play a role in sentencing the Accused can have little impact on the actual sentencing but tremendous positive effects on the victims.<sup>82</sup>

Further, the goals of restorative and reparative justice shift the attention away from solely punishing the accused, and instead aim to repair the ill-feelings of victims through their involvement.<sup>83</sup> Thus, one explanation for the majority’s holding may be that it focused too much on the goal of establishing criminal responsibility, and it did not give enough attention to furthering the Chamber’s goal of reconciliation.

The plight of victims of the Khmer Rouge is further frustrated by the lack of an alternative means of addressing the wrongs suffered. While the statute of limitations for criminal proceedings relating to the Khmer Rouge regime was extended an additional twenty years beyond the original thirty years, the same extension has not been granted for civil suits.<sup>84</sup> The statute of limitations for civil claims is between five and thirty years.<sup>85</sup> Since the conflict ended in 1979, the window has closed for such claims.<sup>86</sup> Therefore, the decision by the majority not only undermines the

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role at the trial should enhance their sense of satisfaction with the criminal justice system, and serve to combat the sense of powerlessness that many have reported during criminal proceedings.”)

80. Agreement, *supra* note 9, pmbl. (“Whereas in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security.”).

81. Standing Decision, *supra* note 3, ¶ 20.

82. Erin Ann O’Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL’Y 229, 241 (2005) (“[S]tudies of victim impact statements indicate that the statements have little or no effect on sentencing, although they seem to contribute significantly to victim satisfaction in the resolution of the cases.”).

83. See Elmar Weitekamp, *Reparative Justice: Towards a Victim Oriented System*, 1 EUR. J. ON CRIM. POL’Y & RES. 70 (1993).

84. Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers into Context*, 11 SING. Y.B. INT’L L. 195, 251 (2007).

85. *Id.*

86. CORFIELD, *supra* note 7, at 93.

proceedings of the ECCC but also reduces the ability of victims of the conflict to seek any recourse.

#### *D. Ability of the Victims to Support the Prosecution*

The Civil Parties are also tasked with “supporting the prosecution,”<sup>87</sup> and the ability of the Civil Parties to support the prosecution will necessarily be hindered if they are unable to submit questions pertaining to the sentencing of the accused.<sup>88</sup> The goal of the Civil Parties to support the prosecution is further frustrated by the fact that the ECCC’s procedure does not separate the trial from the sentencing phase.<sup>89</sup> Further, the majority proceeds to acknowledge the difficulty in separating facts relating exclusively to sentencing from those relating to the trial,<sup>90</sup> while at the same time concluding that the Civil Parties may not evaluate the facts that relate solely to sentencing.<sup>91</sup> If the Civil Parties cannot appropriately conclude which factual questions they are able to ask the Accused, then the Chamber’s ruling will be difficult to follow. The majority’s analysis appears illogical in that it admits a blurry line but then proceeds to claim a bright line exists on acceptable factual questions. As a result, the decision sets a difficult task for the Civil Parties to identify on what material they can and cannot question the Accused.

#### *E. Frustration of the ECCC’s Purpose*

As noted in the preamble of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, part of the purpose of the ECCC is to facilitate national reconciliation.<sup>92</sup> The experience of speaking openly and

87. Internal R. 23(1)(a).

88. See Prosecutor v. Kaing Guek Eav “Duch”, Case No. 001/18-07-2007-ECCC/TC, Appeal of Co-Lawyers for Civil Parties (Group 2) Against Trial Chamber’s Decisions to Exclude Civil Party Lawyers from Questioning the Accused, Witnesses and Experts on the Accused’s Character and to Exclude Civil Parties from Submissions on Sentencing, ¶¶ 26–29 (Sept. 16, 2009), available at [http://www.eccc.gov.kh/english/cabinet/courtDoc/443/E169\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/courtDoc/443/E169_EN.pdf).

89. Standing Decision, *supra* note 3, ¶ 36 (“the criminal process before the ECCC . . . is not separated into two distinct trial and sentencing phases”).

90. *Id.*

91. *Id.* (“Where facts relate exclusively to sentencing, Civil Parties may not evaluate such facts or make submissions in relation to them.”).

92. See Agreement, *supra* note 9, pmbl.; see also Standing Decision, *supra* note 3, ¶ 31 (Lavergne, J., dissenting) (“[P]unishment is, above all, a tool designed to put an end to and facilitate the repair of a disruption of the social order, and it is often the requisite pre-condition for

questioning the accused on any topic can greatly facilitate the healing process for victims<sup>93</sup> and help ensure that the community at large is fully aware of the atrocities committed.<sup>94</sup> Further, the ECCC, unlike other courts, sponsored exclusively by the United Nations, is a hybrid tribunal whose applicable law is that of Cambodia. In fact, the ECCC is typically regarded by “Cambodian participants as ‘their’ court.”<sup>95</sup> Thus, by limiting the role of the Civil Parties to question the character of the accused at the final stage of the trial,<sup>96</sup> the Chamber is diluting the ability for Cambodians to claim the trial as their own. In turn, this inhibits the goal of

reconciliation. One of the fundamental goals of this court is reconciliation. And one of the purposes of punishment is to help victims reach this goal, particularly where their bereavement may be difficult to bear.”). For additional insight and commentary, see Virginia Hancock, “No-Self” at Trial: How to Reconcile Punishing the Khmer Rouge for Crimes Against Humanity with Cambodian Buddhist Principles, 26 WIS. INT’L L.J. 87 (2008).

93. See *Civil Party Forum in Kampot*, ECCC (Sept. 28, 2009), <http://www.eccc.gov.kh/en/articles/civil-party-forum-kampot> (“Mrs [sic] Chum Neou, a Civil party for case 001 told participants how she used to cry every time she talked about her experiences during the Khmer Rouge period. However, after participating in the trial and with help from the psychological support organization, TPO, she is now able to speak in public without crying. Mrs [sic] Chum Neou told participants it had been very important for her to sit in one of the 10 seats reserved for Civil Parties in the courtroom. She described how difficult it had been to give testimony in the court and said she cried a lot at that time.”).

94. Stahn et al., *supra* note 41, at 221 (“[T]he participation of victims will ensure that the Court, and the international community at large, are made fully aware of the suffering endured by victims. Finally, the participation of victims may assist the Court in making a contribution to the reconciliation of a community or nation more generally.”); see also Graeme Simpson, A Brief Evaluation of South Africa’s Truth and Reconciliation Commission: Some Lessons for Societies in Transition (1998) (paper written prior to publication of Truth and Reconciliation Commission’s Final Report), [http://www.csvr.org.za/index.php?option=com\\_content&task=view&id=750&Itemid=195](http://www.csvr.org.za/index.php?option=com_content&task=view&id=750&Itemid=195).

95. David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 28 (2007) (“The ECCC, as its name indicates, is located within the domestic legal system of Cambodia, albeit as an ad hoc institution created for a special purpose. Its applicable law is that of Cambodia and it is regarded by the Cambodian participants as ‘their’ court. This idea of Cambodian ‘ownership’ is widely accepted by the U.N. side of the court administration, which views its role as, in essence, one of support for the process, in accordance with international standards.”).

96. A monitor for the Court also noted that

throughout the entire proceedings witnesses had been questioned about the character of the accused and it would untenable [sic] were the trial chamber to restrict this practice at such a late stage. [The civil parties] also stressed that Cambodian criminal procedure, much like its counter-part in all other national civil law jurisdictions, permitted civil parties to question all witnesses, including those who testify to the character of the accused.

Michael Saliba, *Trial Chamber Restricts Substantive Participation of Civil Parties*, CAMBODIA TRIBUNAL MONITOR (Aug. 27, 2009), [http://cambodiatribunal.org/images/CTM/ctm\\_blog\\_8-27-09\\_rev.pdf](http://cambodiatribunal.org/images/CTM/ctm_blog_8-27-09_rev.pdf); see also Standing Decision, *supra* note 3, ¶ 35 (Lavergne, J., dissenting) (“The prohibition at this stage is thus wholly inconsistent with the manner in which the proceedings have been hitherto conducted, in particular during the examination of events or the conduct of the Accused that have no direct bearing on the discussion pertaining to his innocence or his guilt as they predated the events covered by the charges.”).

the ECCC to promote national reconciliation for the people of Cambodia.<sup>97</sup>

#### *F. Violation of Cambodia's Constitution*

Not only does the Chamber's decision frustrate the purpose of the Court, but it also violates part of the Cambodian Constitution. Specifically, article 52 of the Kingdom of Cambodia's Constitution calls for Cambodia to "adopt the policy of national reconciliation to ensure national unity."<sup>98</sup> While the meaning of article 52 is admittedly vague, scholars have noted that "truth and national healing are necessary principles implicit in the policy of national reconciliation."<sup>99</sup>

The changes in victim participation further restricts their ability to uncover the truth of the Khmer Rouge regime and is likely to negatively impact the national healing process.<sup>100</sup> Victim participation is also noted to directly further reconciliation processes.<sup>101</sup>

97. See Boyle *supra* note 71, at 307 ("Such personal involvement could make a decisive contribution by helping guarantee fair and impartial proceedings and a broader contribution to national reconciliation.").

98. CONSTITUTION OF THE KINGDOM OF CAMBODIA art. 52 (1993) ("The Royal Government of Cambodia shall . . . adopt the policy of national reconciliation to insure national unity.").

99. Tessa V. Capeloto, *Reconciliation in the Wake of Tragedy: Cambodia's Extraordinary Chambers Undermines the Cambodian Constitution*, 17 PAC. RIM L. & POL'Y J. 103, 111 (2008) ("Cultural conceptions of national reconciliation strongly suggest that truth and national healing are necessary principles implicit in the policy of national reconciliation. More generally, Article 52's legislative history and intent support the proposition that truth and national healing are important principles underlying the constitution. When viewed in light of the constitution and related international agreements, 'the policy of national reconciliation' requires truth and national healing. As a result, Cambodian laws and policies that undermine truth and national healing are in tension with this constitutional provision."); see also *id.* at 111 n.68 ("Analysis of Article 52 is virtually non-existent. Legal scholars have yet to interpret the meaning of Article 52's requirement that the Cambodian government 'adopt the policy of national reconciliation to ensure national unity . . . .' Further, the Constitutional Council, the body entrusted with interpreting the Cambodian Constitution, has yet to rule on this issue. Nonetheless, until Cambodian legal scholars or the Cambodian Constitutional Council dictate otherwise, cultural and religious conceptions of national reconciliation coupled with the constitution's legislative history provide important insight and guidance.").

100. See *id.* at 123 ("Providing victims a role in the process gives them a 'sense of empowerment' and 'may bring them a step closer to healing and rehabilitation.' Victim participation is essential for combating 'the sense of powerlessness' that victims inevitably feel during proceedings. In addition, the CEC Law's failure to provide victims a more formal role in the trials will undoubtedly fail to enhance their satisfaction with the process.") (footnotes omitted).

101. SáCouto & Cleary, *supra* note 39, at 77-78 ("Additionally, some supporters of victims' participation claim that the participation of victims may assist courts 'in making a contribution to the reconciliation of a community or nation more generally.' Finally, groups that supported a right of victims' participation before the ICC argued that victims' involvement will bring the Court's proceedings 'closer to the persons who have suffered atrocities' and increase the likelihood that those most affected by criminal acts will be satisfied that justice has been done.") (quoting Stahn et al., *supra* note 41, at 221; quoting Gilbert Bitti & Håkan Friman, *Participation of Victims in the*

Thirty-five years ago the United Nations urged states to allow “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected.”<sup>102</sup> The vetting process<sup>103</sup> required before victims are allowed to join a Civil Party precludes individuals whose personal interests are not affected from participating in the proceedings. Increasingly, criminal justice systems are turning towards restorative justice as a tool to move societies beyond instances where international human rights were violated.<sup>104</sup> The ECCC and Cambodia should not shun the recent progress, but instead embrace it in furtherance of the goals of the ECCC and the Kingdom of Cambodia’s Constitution.

### *G. Rebutting the Majority’s Position*

#### *1. The Concerns of Active Participation by Civil Parties Jeopardizing the Efficiency of the Court are Unfounded*

In limiting the role of victim participation through the Civil Parties, the Trial Chamber seems to be taking action based on a concern that the Court is not efficient enough.<sup>105</sup> It will likely face a shortage of funding before the trials are completed,<sup>106</sup> and it is no secret that the limited funding of the ECCC and the age and health of the Accused require that the trials proceed expeditiously.<sup>107</sup>

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*Proceedings, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF EVIDENCE* 456, 457 (Roy S. Lee ed., 2001)).

102. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex ¶ 6(b), U.N. Doc. A/RES/40/34 (Nov. 29, 1985).

103. Internal R. 23.

104. SáCouto, *supra* note 39, at 76 (“The unprecedented provisions of the Rome Statute governing victims’ participation before the International Criminal Court are largely a product of a much broader movement in recent decades towards the achievement of restorative justice.”). SáCouto also notes that the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) do not allow full victim participation, they are only allowed to be called as witnesses. *Id.* at 80. She further acknowledges that “[o]ne of the specific criticisms of the ad hoc tribunals is that the failure to focus on victims’ interests has led to a disconnect between the tribunals’ work and the victims of the atrocities those institutions were designed to address.” *Id.* at 81; *see also* Press Release, Int’l Criminal Tribunal for the Former Yugo., The Judges of the ICTY Acknowledge the Right of Victims of Crimes Committed in the Former Yugoslavia to Seek Compensation, JL/P.I.S./528-e (Sept. 14, 2000), <http://www.icty.org/sid/7822>.

105. There has been much commentary regarding the length of the proceedings. *See, e.g.*, Gibson & Rudy, *supra* note 20, at 1006.

106. Aileen Thomson, Update from International and Internationalized Criminal Courts & Tribunals, *International Co-Investigating Judge of the ECCC Accused of Bias*, HUM. RTS. BRIEF, Fall 2009, at 55.

107. Youk Chhang, *Sad Situation for Civil Parties*, PHNOM PENH POST, Oct. 1, 2009 (“the

The victims have just as much of an interest in expedited trial proceedings.<sup>108</sup> The events at issue transpired decades ago, and it appears illogical that the victims would desire a drawn-out criminal proceeding. Therefore, the Chamber may have been looking to devise a strategy limiting the role of a party, in this case the Civil Party, to promote greater efficiency.<sup>109</sup> However, there are other ways to increase the efficiency of the Court, such as implementing the screening mechanisms provided for in the Internal Rules,<sup>110</sup> which do not limit the role of victims already admitted to Civil Parties. Nonetheless, the Trial Chamber decided not to take these actions. Simply eliminating the rights of the victims is akin to using a machete in a situation where a scalpel may be more appropriate.<sup>111</sup>

The ECCC might be riddled with inefficiencies, but reducing the rights of Civil Party victims is an inappropriate means of increasing the Court's efficiency.

## 2. *Concern Over the Rights of the Accused*

An additional concern of the Chamber was likely defending the rights of the Accused.<sup>112</sup> Balancing the interest in handing out guilty sentences and holding people responsible for the crimes committed by the Khmer Rouge with the rights of the Accused is a difficult task. Nevertheless, it is essential that the Accused be provided with a fair trial as required under international law.<sup>113</sup> The right of the Accused to a fair trial becomes

suspects in detention are old and frail, and the ECCC has limited time and money and is therefore under pressure to reach judgment as quickly as possible") (on file with author).

108. Amnesty Int'l, *The International Criminal Court: Fact Sheet 6—Ensuring Justice for Victims*, AI Index IOR 40/07/00 § 1 (Mar. 3, 2004), available at <http://www.amnesty.org/en/library/asset/IO40/007/2000/en/5f77209e-df60-11dd-aaaa-7d9091d4638f/ior400072000en.pdf> ("overriding interest of victims is likely to be the interest in seeing that crimes are effectively investigated and that justice is done.").

109. Chhang, *supra* note 107 ("[T]he ECCC judges now stand ready to substantially reduce or eliminate the role of civil parties in advance of the second trial due to concerns about the time involved in adjudicating the large number of expected defence challenges. The unfortunate result of this is the impression that the ECCC has conducted a legal experiment at victims' expense.").

110. *Id.* (noting "no attempt was ever made by the co-investigating or trial judges . . . to limit the number of civil parties by applying the qualifying criteria or otherwise vetting the applications").

111. Boyle, *supra* note 97, at 309 ("It would appear illogical, to say the least, to exclude the victims of the most serious mass crimes simply because there are too many of them. The real question is whether it is possible to find some way of organizing the effective participation of a potentially large number of victims, given that the trials are supposed to be completed within an extremely short . . . period.") (emphasis omitted).

112. The Trial Chamber's decision makes no mention that the rights of Duch were considered. However, it is unlikely that this was a factor *not* considered given the importance of such rights.

113. The right to a fair trial is customary international law and is codified in numerous pieces of international law. See Organization of American States, American Convention on Human Rights art. 8,

increasingly important as victims become more involved.<sup>114</sup> Given the potential for the ECCC to serve as a model court,<sup>115</sup> it is arguably of great importance that the Chamber does not rubber-stamp guilty verdicts. Indeed, a defense lawyer for one of the Khmer Rouge leaders noted, “The question is whether or not everything in this tribunal is institutionalized in such a way that only guilty verdicts can come.”<sup>116</sup>

While there is a danger that the Chamber will render guilty verdicts without cause or as demanded by popular interest in punishing individuals responsible for the crimes during the Khmer Rouge conflict, an expanded role of victim participation does not enhance this danger.<sup>117</sup> The role of victim participation is already sanctioned by international law and will be regulated by the judge in surveying both the defense and the prosecution’s evidence.<sup>118</sup> Further, the vetting process<sup>119</sup> limits the number of victims allowed to participate, which helps control the proceedings and ensures the rights of the Accused are not violated.<sup>120</sup> Therefore, limiting the rights of the victims does not resolve the Chamber’s concern for the rights of the Accused.

### III. CONCLUSION

The Chamber of the ECCC erred in its decision regarding the role that the Civil Parties are allowed to play in sentencing and questioning the

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Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of African Unity, African Charter on Human and Peoples’ Rights art. 7(1)(d), June 27, 1981, 21 I.L.M. 58; ICCPR, *supra* note 4, art. 14(1).

114. Kate Yesberg, *Accessing Justice Through Victim Participation at the Khmer Rouge Tribunal*, 40 VICT. U. WELLINGTON L. REV. 555, 576 (2009) (“[C]ommentators at the ECCC have begun to stress the importance of fundamental due process rights, such as the presumption of innocence, in the face of increasing victim involvement.”).

115. *Id.*

116. Seth Mydans, *In Khmer Rouge Trial, Victims Will Not Stand Idly By*, N.Y. TIMES, June 17, 2008, at A6, available at <http://www.nytimes.com/2008/06/17/world/asia/17cambodia.html>.

117. Doak, *supra* note 32, at 295 (“[I]t is largely agreed that [victim participation] threaten[s] neither the public character of the criminal justice system nor the due process rights of the accused.”).

118. Boyle, *supra* note 97, at 309 (“The active participation of victims in the prosecution of international crimes is also consistent with the current state of international law. In particular, the Rome Statute of the International Criminal Court (ICC) allows victims to present their views and concerns when their personal interests are affected, ‘. . . in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’ This suggests that victim participation will not breach international rules on defence rights so long as it respects equality of arms. In Cambodia, the obligation of the investigating judge to take account of both the prosecution and the defence evidence ensures this balance.”) (citing Rome Statute of the International Criminal Court art. 68(3), July 17, 1998, 2187 U.N.T.S. 3).

119. Internal R. 23.

120. See Cohen, *supra* note 75, at 374 (stating in context of victim participation in the ICC, “[i]t is thus crucial to define who is eligible to participate and when it is appropriate to participate”).

character of the Accused. The decision is not only contrary to the Internal Rules and the Agreement of the Chambers, but is also contrary to the express purpose of the Chambers to promote national reconciliation. Further, it reverses an international trend towards increased victim participation,<sup>121</sup> which is commonly considered beneficial.<sup>122</sup>

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121. Bingold et al., *supra* note 29, at 473–74 (“Victims have long been allowed to participate in sentencing proceedings in domestic courts and in reparation hearings in international criminal tribunals, but the International Criminal Court (ICC) broke new ground in 2006 when it allowed direct participation of victims in all court proceedings. In 2008, the Extraordinary Chambers in the Courts in Cambodia (ECCC) became the second international criminal tribunal to do so when it authorized the participation of victims in the appeal of the pretrial detention hearing of Nuon, Chea over the defense’s objection.”) (footnotes omitted).

122. Stahn et al., *supra* note 41, at 219 (“The participation of victims in the proceedings of the International Criminal Court (ICC) is generally presented as a major structural achievement of the ICC system, by both academics and legal practitioners.”).

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