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Alain Werner

Daniella Rudy

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Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?

Alain Werner* and Daniella Rudy**

I. INTRODUCTION

¶1

This past November 2009, the long anticipated trial against Khmer Rouge Prison Director Gaing Guek Eav, alias Duch, at the Extraordinary Chambers in the Courts of Cambodia (ECCC) finally came to a conclusion. Many eyes were upon this trial, not simply because Duch was the first of five defendants to go on trial for the atrocities committed by the Khmer Rouge under Pol Pot's reign more than 30 years after the events, but also for its highly anticipated victim participation scheme. Under the initial scheme, the victims of the Khmer Rouge were afforded the opportunity to join the criminal proceedings as Civil Parties, endowing them with near-equal participatory rights as the Prosecution and the Defense. By the conclusion of the trial, however, changes to the ECCC Internal Rules threatened to limit the broad scope of the victim participation scheme. Participation was cast into doubt by proposed changes to the ECCC Internal Rules that would severely restrict the Civil Parties' right to participate during the trial. In an attempt to address concerns regarding their participation, the Plenary revised the Internal Rules offering a different mechanism for the representation of the Civil Parties, with the intent to "streamline and consolidate Civil Party participation in advance of the commencement of trial."¹ The ECCC further noted that the revised

* LL.M (Columbia), Senior Counsel at the Aegis Trust, London; Co-Counsel for Civil Parties' Group 1, Gaing Guek Eav, alias Duch case, ECCC [alain.werner@aegistrust.org].

** LL.M (Cardozo), Associate, Proskauer Rose LLP, New York. Legal Advisor for Civil Parties' Group 1, Gaing Guek Eav, alias Duch case, ECCC [daniellarudy@gmail.com].

¹ Press Release, Extraordinary Chambers in the Courts of Cambodia, 7th Plenary Session of the ECCC Commences Monday 2 February 2010 (Jan. 28, 2010),

Internal Rules are “necessary to safeguard [the ECCC’s] ability to reach a verdict in its core case, as well as to enhance the quality of victim participation from the perspective of the victims.”² Whether the new Rules will in fact accomplish these goals remains to be seen.

II. CIVIL PARTY PARTICIPATION

¶2

While victim participation at criminal proceedings is not a novel concept, the Duch trial marked the first international or ad hoc tribunal where victims were afforded the opportunity to join the criminal proceedings as Civil Parties. The Cambodian Code of Criminal Procedure allows victims to join their civil claims to the criminal proceedings,³ where the victim can demonstrate that he or she was harmed as a direct consequence of the prosecuted crime.⁴ According to the ECCC Internal Rules, the purpose of the Civil Party participation is two-fold: first, to participate during the criminal proceedings by “supporting the prosecution” second, to seek collective and moral reparations.⁵ The exact scope of the civil party participation provoked lengthy debates during the Duch proceedings, with the Defense frequently alleging that the Civil Parties were stepping outside the boundaries by essentially acting as “second prosecutors.”⁶

¶3

As the proceedings against Duch progressed however, the rights of the victims changed markedly as the Trial Chamber increasingly sought to limit Civil Party participation. By the close of the trial, the Chamber shifted its previous general rulings,⁷ and rendered a decision preventing the Civil Parties from making submissions on the issue of sentencing. Additionally, the Chamber made a *proprio motu* ruling, holding that the Civil Parties are prohibited from posing questions to either the accused, expert witnesses or other defense witnesses regarding the character of the

available at <http://www.eccc.gov.kh/english/cabinet/press/144/ECCC-PR28Jan2010-Eng.pdf> (last visited on April 2, 2010).

² *Id.*

³ Cambodian Code of Criminal Procedure (CCCP), art. 20.

⁴ *Id.* art. 13.

⁵ ECCC Internal R. 23(1)(a) and (b).

⁶ Kaing Guek Eav Trial Transcript, June 22, 2009, at 92.

⁷ *Id.* at 98. The Chamber, in response to a Defense objection, ruled that the Civil Parties are entitled to pose questions to witnesses “*in support of the prosecution*,” provided they are not “*longwinded*” or irrelevant.

accused.⁸ In its decision, the Chamber found that the Internal Rules were to be interpreted “restrictively,” such that they do not “confer a general right of equal participation [of the Civil Parties] with the Co-Prosecutors.”⁹

¶4 Notably, the French Judge sitting on the bench, Judge Lavergne, issued the first dissent in the proceedings pursuant to this issue. In his strong and detailed dissent, Judge Laverge asked: “[h]ow far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of Civil Parties before the ECCC and the purpose of the trial as a whole, characterized by the coexistence of two interrelated actions, namely criminal and civil actions?”¹⁰

¶5 The revised Internal Rules adopted in February 2010 reflect this “restrictive” interpretation of the Rules. The revised Rules mark two important shifts. First, they consolidate all of the Civil Parties into one group at the Trial stage, thereby reducing the universe of available reparations, and ultimately failing to capture the divergent needs of each Civil party.¹¹ Second, the revised Rules institute a novel scheme of representation in anticipation of Trial 002, which is thought to commence sometime in 2011. However, the exact scope of Civil Party participation at the Trial stage, including the right to “support the prosecution” remains ambiguous.

III. CIVIL PARTY REPRESENTATION

¶6 The ECCC Internal Rules provide that the Civil Parties are entitled to representation by counsel during the criminal proceedings before the Chamber. During the Duch proceedings, Civil Parties were represented by four different groups, each with at least one national and one international attorney, both of whom had standing to appear before the Chamber. According to the revised Rules, however, the Civil Parties are to be consolidated into one larger group, represented by lead counsels during the Trial phase.¹² The

⁸ *Case of Kain Guek Eav*, Case No. 001/18-07-2007/ECCC/TC, Decision on Civil Parties’ Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Parties Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, ¶ 46 (Oct. 12, 2009) [hereinafter *Sentencing Decision*].

⁹ *Id.* ¶ 25.

¹⁰ *Id.* ¶ 4, Dissenting Opinion of Judge Lavergne, Judge of the Trial Chamber.

¹¹ *See, e.g.*, ECCC Internal R. 23(3)(a) and (5).

¹² *Supra* note 5, R. 12ter(6).

individual lawyers who represented the Civil Parties during the Pre-Trial phase are expected to continue to provide assistance to the Lead Co-Counselors during the proceedings.¹³ A similar structure of victim representation is being considered at the International Criminal Court (ICC).¹⁴

¶17 This new structure, comprising one consolidated Civil Party, which will first make its entry into the proceedings at the start of Case 002, is expected to address a variety of issues raised in the Duch trial. A few weeks into the Duch trial it became apparent that the process of allowing each party to the proceedings, including every Civil Party group, to pose unlimited questions to witnesses, including experts and the Accused, considerably lengthened the duration of the proceedings. In an effort to curtail the often endless and repetitious questioning by the parties, the Trial Chamber allocated specific time slots for each party, limiting the amount of time available to pose questions.¹⁵ While this often truncated important lines of questioning, the Civil Parties demonstrated their ability to collaborate more effectively so as to avoid duplicative questioning.

¶18 A continuation of this system, however, will prove untenable in Case 002, where an estimated 3,000 victims are seeking to apply for Civil Party status in a trial against four Defendants. In contrast, Duch's case involved 93 Civil Parties and one Accused. Authorizing groups of 30 or more Civil Parties to participate during the criminal proceedings would be entirely impossible. Instead, the revised Rules seek to maintain the group-system by allowing for the various Civil Party attorneys to provide specific advice to the Civil Party lead Counselors and even allow for them to participate in Court on an ad hoc basis in agreement with the Lead Counselors.¹⁶

¶19 Although it is difficult to conceive of a different manner in which to represent over 3,000 victims in a criminal trial while balancing the right of the Accused to an expeditious trial, consolidation poses potentially crucial issues not currently addressed by the Internal Rules. The revised Rules acknowledge the

¹³ *Id.* R. 12ter(4).

¹⁴ Report, United Nations, *Interim report of the Court on legal aid: Legal and financial aspects for funding victims' legal representation before the Court*, ICC-ASP/8/3, (May 6, 2009). The Office of Public Counsel for Victims may start appointing one common attorney for all the victims of a particular case.

¹⁵ See, e.g., Kaing Guek Eav Trial Transcript, *supra* note 6.

¹⁶ *Supra* note 5, R. 12ter(6).

importance of the civil party lawyers, who are to be consulted by the Lead Counsels for the Civil Parties, but the Rules leave it up to the individual lawyers to decide how to balance the right of the individual victim to adequate representation and the interest of the consolidated group as a whole.¹⁷ As the ICC explained in *Katanga*, “[t]he common legal representative shall be responsible for both representing the common interests of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake.”¹⁸ The Trial Chamber in *Katanga* consolidated the victims represented by eight different lawyers into two groups, on the basis that the group of victims had special characteristics that would allow for them to be represented by one common legal representative.¹⁹ The victims in these groups had all been affected by the same particular attack, leading the Trial Chamber to assume there were no immediate conflicts on the basis of race, ethnicity, age, gender or other difference in characteristic.²⁰ Notably, the second, smaller group of victims was formed because the Trial Chamber was concerned about the potential conflicts of interest of this group with the main group.²¹

¶10

Unlike the ICC, the Internal Rules do not explicitly address victims’ fear that their individual interests will be subjugated in the interest of the common consolidated group during trial. The scope of the Civil Party lawyer participation remains relatively ambiguous within the Rules, which will form a great obstacle for the lawyer in his or her ability to carry out an effective representation on behalf of their individual client or clients. Indeed, currently, the Internal Rules reference only the interests of the consolidated group, stating that the Civil Party lawyers shall “endeavour to support the Civil Party Lead Co-Lawyers in the representation of the interests of the consolidated group.”²²

¹⁷ *Id.* R. 12ter(3). The Rule provides that the Lead Counsel shall “first and foremost seek the views of the Civil Party lawyers and shall endeavor to reach consensus in order to coordinate representation of Civil Parties at trial. Internal Procedures shall be developed by the Civil Party Lead Co-Counsels, in consultation with the Civil Party lawyers, for this purpose.”

¹⁸ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, [hereinafter *Katanga*] Order on the Organisation of Common Legal Representation of Victims, ICC-01/04-01/07, (Trial Chamber II), July 22, 2009, ¶ 13.

¹⁹ *Id.* ¶ 12.

²⁰ *Id.*

²¹ *Id.* ¶ 12-13.

²² *Supra* note 5, R. 12ter(6).

¶11 Further limiting Civil Parties' role, the revised Internal Rules provide that during the Trial phase, individual Civil Parties are consolidated into one group that is represented by the Civil Party Co-Lawyers,²³ even though each Civil Party may form separate groups with their chosen Civil Party Lawyers during the Pre-Trial phase²⁴ and are accorded Civil Party status during this phase.²⁵ The Civil Parties are entitled to file only one claim for collective and moral reparations.²⁶ The strenuous balance between the collective interests of the consolidated group versus the individual victim is not addressed by the revised Rules. While the Civil Party has the right to choose his or her own attorneys,²⁷ the new scheme is necessarily limited in scope due to the subjugation thereof to the collective interest.

¶12 For example, there is no clear mechanism provided by the revised Rules for the settlement of disputes that will inevitably arise regarding divergent interests and goals between a Civil Party Lawyer, who represents a number of civil parties and the Lead Co-Lawyers. Instead, the ECCC should have seized this opportunity to adopt an approach similar to that of the ICC, which provides that if the common counsel cannot "fairly and equally" represent the interest of one or more groups of victims, the common counsel must notify the Trial Chamber, "who will take appropriate measures and may, for example, appoint the Office of the Public Counsel for the Victims to represent one group of victims with regard to the specific issue which gives rise to the conflict of interest."²⁸ This is not an unlikely situation. The victims in Case 002 represent a wide range of ethnic, religious and national backgrounds, which may result in conflicting interests and strategies within the consolidated group. If the Civil Party Lawyers are to exercise their profession properly, as advocates for their individual clients, they should be given the opportunity to voice these divergent interests and goals. Otherwise, the Civil Party attorney's role, and the Civil Party itself will become illusionary.²⁹

²³ *Id.* R. 23(5).

²⁴ *Id.* R. 23(4).

²⁵ *Id.* R. 23(3)(a).

²⁶ *Id.* R. 23(5).

²⁷ *Id.* R. 23ter(2)(a).

²⁸ Katanga, *supra* note 18, ¶ 16.

²⁹ Andrew F. Diamond, *Public Comment on Proposed Changes to Civil Party Participation before the ECCC*, Document Center of Cambodia, Dec. 2, 2009, available [at](#)

IV. NATIONAL VERSUS INTERNATIONAL COUNSEL

¶13 Representation by both a national and an international lawyer at the ECCC is not unique to the Civil Parties. Indeed, the Prosecution and the Defense are similarly headed by two lawyers, and the bench is comprised of a mixture of national and international judges, with the national judges forming the majority. This structure was established to reflect the hybrid nature of the ECCC, which is based on both Cambodian law and international law. Moreover, this requirement is thought to bring the proceedings and the ECCC as a whole closer to the Cambodian people, since their own nationals will be involved in prosecuting the atrocities.³⁰ The ECCC is the only international or hybrid tribunal which explicitly requires the parties to the proceedings to be represented by both a national and an international attorney.³¹

¶14 Notwithstanding these advantages, the co-lawyer requirement has proven to be challenging. The lawyers have different legal backgrounds, with potentially different strategies and interests. The most notable example of this constitutes the closing arguments during the Duch trial by the attorneys for the Accused. Duch's international defense counsel François Roux carefully planned a strategy premised on Duch's recognition and acknowledgement of the crimes committed, with the intent to obtain a reduced sentence. As the national Co-Lawyer, Kar Savuth, got up to speak during the final submissions, the entire strategy shifted when Mr. Savuth suddenly claimed that the Accused did not recognize the legitimacy of this Court and instead wished to be acquitted.³² As Mr. Roux explained during the Atrocity Crimes

http://www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/Public_Comment_on_Proposed_Changes_to_Civil_Party_Participation_before_the_ECCC.htm (last visited on April 15, 2010).

³⁰ See Michael Marien, *The Khmer-Rogue Tribunal in International Perspective*, available at

http://kambodscha.ded.de/cipp/ded/custom/pub/content,lang,2/oid,13838/ticket,g_u_e_s_t/~The_Khmer_Rouge-Tribunal_in_international_perspective.html (last visited on April 3, 2010).

³¹ See, e.g., *supra* note 5, R.11(1), 12*ter*(4), 13(1) (which provides the rules as they related to the "Co-Prosecutors").

³² Kaing Guek Eav Trial Transcript, November 25, 2009, 106, 109, 113-114. Mr. Savuth: "I therefore submit that Duch is not guilty and he shall be free from being prosecuted." See also David Scheffer, *Duch Seeks an Acquittal and Immediate Release*, CAMBODIA TRIBUNAL MONITOR, November 27, 2009, available at

Litigation Year-in-Review (2009) Conference held at Northwestern University School of Law on February 4, 2010, the Internal Rules provide no mechanism for managing the roles of the national and international lawyers, and in particular, for deciding which of the two co-captains should steer the plane when they disagree.³³

¶15 Instead of seizing the opportunity to institute an effective system to resolve potential conflicts among the Co-Lawyers within the Internal Rules, the ECCC Plenary perpetuated the risk of conflicts by adopting a similar scheme applicable to the Civil Parties. The Plenary agreed to mandate a national and international Lead Co-Lawyer who, as a single unit, are to represent the interest of the collective group of civil parties, without providing for effective conflict resolution mechanisms. While this system addresses the efficiency considerations involved in representing 3,000 plus Civil Parties in Case 002, it does not address the inevitable conflicts between the Co-Lead Lawyers and the other Civil Party Lawyers.

¶16 Instead, the Plenary could have looked more closely to the system already in place for the Defence Support Section, which is in charge of providing support to the various existing defense teams at the ECCC. The system provides for one Head of Office, who is elected based on merit and not based on nationality, with two deputies assisting him, comprising of one national lawyer and one international lawyer to remain true to the hybrid nature of the ECCC.³⁴ This system has proven effective for the operations of the Defence Office at the ECCC and could form a good basis for the Victims Unit and the Civil Parties.

V. CONCLUSION

¶17 Anyone who heard the Civil Parties recount the enormous cruelty suffered during the Khmer Rouge era will be left with no doubt as to the importance, and indeed necessity, of their participation at the criminal proceedings before the ECCC. The decision to limit the Civil Parties' participatory rights seems

<http://www.cambodiatribunal.org/blog/2009/11/duch-seeks-aquittal-and-immediate.html> (last visited on April 3, 2010).

³³ See also Ka-set Information Website on Cambodia, *available at* <http://ka-set.info/actualites/khmers-rouges/cambodge-proces-khmers-rouges-duch-douch-roux-avocat-savuth-091202.html> (last visited on April 3, 2010).

³⁴ See *supra* note 5, R. 11(1).

founded principally on efficiency considerations and ignores the balance to be made between the right of the Accused with the rights of the victims. As Judge Lavergne pointedly noted in his dissent: “civil party participation in the review of all evidence, including evidence pertaining to character, as it exists in many Romano-Germanic countries, has, to date, never been considered a violation of the equality of arms or as likely to affect, as a matter of principle, the fairness of the trial: quite the contrary.”³⁵

¶18

There is no doubt, even amongst the Civil Parties, that the participatory scheme should be regulated, particularly in the light of Case 002. Yet this adjustment can and should not be at the expense of the Civil Parties, such that their presence is rendered void of all purpose. The exact scope of their role during the coming proceedings remains ever ambiguous within the Internal Rules, though few doubt the “restrictive” approach that will be taken going forward. The new system has the potential to create two distinct conflicts, first, between the Co-Lead Lawyers, and second, between the Co-Lead Lawyers and the individual Civil Party Lawyers, but it does not provide a clear recourse should these conflicts arise. The ECCC has the extraordinary opportunity of developing its groundbreaking Civil Party participation policy. Unfortunately, however, it is currently heading in the opposite direction.

³⁵ Sentencing Decision, *supra* note 8, at 33, Dissenting Opinion of Judge Lavergne, Judge of the Trial Chamber.