Chapter 7. A Historic First: Recognizing Victims as Case Parties

Published by

Heindel, Anne and John D. Ciorciari.
Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia.

For additional information about this book
https://muse.jhu.edu/book/28895
Chapter 7

A HISTORIC FIRST
Recognizing Victims as Case Parties

One of the main arguments in favor of in-country hybrid tribunals is that they facilitate robust victim participation. Victims can more easily observe or participate in the proceedings, which offer them an opportunity to engage in truth-telling, contribute to the search for justice, and otherwise seek empowerment and a degree of personal and collective reconciliation. Addressing the rights and needs of victims—including the right to accountability for atrocities and the right to the truth—has been one of the core stated objectives of all mass crimes courts. Locating a hybrid tribunal beside the survivor population gives it a potentially formidable functional advantage in that regard.

The ECCC has developed an unprecedented scheme for victim participation. In addition to involving victims as witnesses and complainants, the ECCC is the first internationalized mass crimes court to follow the civil law practice of including victims as parties in the proceedings. For that reason, there is no direct precedent for it to follow, requiring it to forge its own path and establish new law that will in turn guide the decisions of future courts. Acting Director of Administration Tony Kranh has said that “[v]ictims’ participation is one of the areas in which the ECCC is breaking new ground and setting new standards for courts with international support and involvement.”

Notwithstanding frequent self-laudatory rhetoric, the ECCC has struggled to manage its expansive victim participation scheme. The Court’s under-resourced Victims Support Section (VSS) has been hard-pressed to respond to thousands of victim complaints and provide other services. The novel civil
party scheme has been even more difficult for the Court to administer. Unlike some aspects of the Court’s work, victim participation has not been hobbled by political feuds between its national and international sides. Rather, the ECCC’s challenges in this area reflect relative UN neglect, a tepid Cambodian commitment, and the inherent difficulty of involving myriad survivors in the process. The Court’s example suggests that an in-country mixed tribunal cannot fulfill its potential for victim participation without ample resources and advance planning. The ECCC also shows that however meaningful individual civil party participation may be, it is unlikely to be practicable in mass crimes proceedings.

GENESIS OF CIVIL PARTY PARTICIPATION AT THE ECCC

The ECCC’s civil party scheme is one of its most notable innovations. The mandates of previous mass crimes tribunals, including the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) and the hybrid Special Court for Sierra Leone (SCSL), provided a role for victims only as simple witnesses. Critics argued that these courts missed an opportunity to provide victims a more central role in the proceedings.\(^2\) ICTY Prosecutor Carla Del Ponte told the Security Council:

> The voices of survivors and relatives of those killed are not sufficiently heard. Victims have almost no rights to participate in the trial process, despite the widespread acceptance nowadays that victims should be allowed to do so. . . . It is regrettable that the Tribunal’s statute makes no provision for victim participation during the trial, and makes only a minimum of provision for compensation and restitution to people whose lives have been destroyed. . . . We should therefore give victims the right to express themselves, and allow their voice to be heard during the proceedings.\(^3\)

In response to such critiques, the Rome Statute was drafted to include a role for victims to participate directly at the International Criminal Court (ICC).\(^4\) In formulating these provisions, the drafters looked back to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985,\(^5\) a watershed document for the victims movement.\(^6\) Although the Decla-
ration is not legally binding, it is the first international instrument to establish minimum standards for crime victims. It affirms that victims should have both “access to the mechanisms of justice” and the ability to receive redress for their harms. At the ICC, victims do not have the full rights of a party but are considered “victim participants.” The Special Tribunal for Lebanon (STL) offers victims a similar participatory role, while the Extraordinary African Chambers, much like the ECCC, will include civil parties based on a domestic law model.

Neither the 2003 UN-Cambodian Framework Agreement nor the 2004 law establishing the ECCC set forth any participatory role for victims in the proceedings. There is only one offhand reference in the ECCC Law, which requires the Supreme Court Chamber to decide on appeals by victims from decisions of the Trial Chamber. However, as a former French colony, Cambodia’s modern legal system has its roots in the French civil law tradition. Unlike in common law countries, where civil actions are brought separately from criminal actions, civil law countries based on the French model often provide a role for victims as a party to the public proceeding. Because the ECCC was mandated to apply Cambodian procedures, NGOs and other observers expected that the Court would include civil party participation.

According to former U.S. Ambassador-at-Large for War Crimes Issues David Scheffer, who helped negotiate the Framework Agreement:

[The ECCC] was never conceived by those who negotiated its creation as an instrument of direct relief for the victims[.]. . . The victims’ numbers are simply too colossal and the mandate and resources of the ECCC far too limited to address the individual needs, including the award of reparations, for so many victims.

Reportedly, most of the ECCC’s international judges agreed that it would be unwise to follow the French model on this question. Their major concern was the Court’s ability to provide reparations. The accused likely would be found indigent, and the ECCC would have no power or funding to provide redress. Some found it problematic that due to the large number of victims in Cambodia, in theory almost everyone might qualify to be a civil party. Why privilege only victims with the knowledge or affluence to file a civil claim? Instead, most international judges favored recognizing the needs of victims by including them as “injured parties” or “subsidiary prosecutors,” a mode of participation in some civil law countries that is separate from any compensation claim.
Nevertheless, the first international Co-Investigating Judge, Marcel Le- 
monde, and one of his legal advisors pressed for the adoption of a civil party 
scheme modeling French law. Japan, the largest ECCC funder, was worried 
about the added financial burden a civil party scheme would impose, but 
France—also a major donor to the Court—supported the scheme. Cambodian 
judges, although initially hesitant about the extra work involved, became ame- 
nable because the scheme would apply Cambodian law.

The Internal Rules, adopted in 2007, provide victims the opportunity 
both to submit complaints to the Co-Prosecutors and to participate in the 
proceedings as civil parties with the right to “symbolic and moral” reparations. 
The ECCC thus became the first mass crimes process to include victims as full 
parties. Because the ECCC’s unprecedented victim participation scheme was 
not anticipated in the Court’s framework documents but instead designed from 
scratch by independently acting judges, this ambitious experiment was vulner- 
able from the outset to resource constraints. There was no money in the bud- 
get for civil parties, no vision of how the scheme would work in practice, and 
relatively few people at the Court—or in the United Nations or Cambodian 
Government—interested in prioritizing the effort to ensure its success.

VICTIM ADMINISTRATION

In public relations efforts, the ECCC Office of Administration (OA) has of- 
ten emphasized the historic importance of the Court’s victim participation 
scheme—in particular when countering bad publicity or seeking funds. For ex- 
ample, as corruption allegations mounted in 2008, OA Deputy Director Knut 
Rosandhaug asserted to donors in New York “that the Tribunal will be remem-
bered for its novel approach to victim participation[.]” In practice, however, 
the United Nations and international administrators at the ECCC offered lim- 
ited support for victim participation due to concern about the financial and ad- 
ministrative burden it entailed. Without strong UN interest and engagement, 
the Court’s support for victims became increasingly nationalized with little 
international involvement or oversight.

Weak Institutional Support

Reportedly, the original budget for the ECCC had an attached note explaining 
that UN planners, fearing that victim participation would cost too much, ex-
Hybrid Justice

plicitly rejected funding a victims unit. Nevertheless, the 2007 Internal Rules instructed the OA to establish an autonomous Victims Unit (VU) and provide it administrative support. The mandate of the VU—later renamed the Victim Support Section (VSS)—encompasses maintaining a list of eligible lawyers who wish to represent victims, facilitating victims’ representation, conducting outreach to victims, and helping victims submit complaints and civil party applications.

In October 2007, the ECCC issued a Practice Direction on Victim Participation outlining relevant procedures and establishing an application form. As a consequence of its late creation, the VU had neither a budget nor a chief until 2008. By the time it started functioning, it faced a large backlog of complainant and civil party applications but lacked the personnel and procedures to respond in a timely fashion. With little funding or staff, the mundane task of processing thousands of application forms overwhelmed the VU and limited its capacity to provide victims a broader range of services. The VU had few resources to conduct outreach to potential victim participants or to support their legal representation in proceedings. From the beginning, the VU was perceived by many—in particular the OA—as little more than an administrative processing unit, and it was actively discouraged from conducting outreach.

In the absence of a well-resourced Victims Unit, a few Cambodian NGOs conducted victim participation tasks, and were also discouraged from reaching out to large numbers of victims. OA international Deputy Director Knut Rosandhaug expressed concern about the capacity of the VU to process large numbers of applications and suggested that NGOs seek quality and not quantity. This approach both recognized serious practical limitations on involving large numbers of victims and demonstrated a clear policy preference for supporting perceived “core” legal functions of the court. One report on the early phases of the Court’s work confirms:

A number of interviewees felt that the unit was never properly supported by the ECCC’s administration, one of whom suggested that this may have been because of a fear of escalating costs and difficulties in securing sufficient funding for the structure of the court as it then stood without the added complication of a fully-staffed and fully-operational Victims’ Unit.

As a consequence of resource constraints, of the millions of victims who might have chosen to participate in ECCC proceedings, only a small fraction were in-
formed of their right to take part. A large majority of those learned their rights through NGOs, which served as their primary connections to the Court.27

Of the ECCC’s 479 staff members in 2011, only 28 (including a single international staffer) served in the Victims Support Section, and 3 served in the newly created Civil Party Lead Co-Lawyer Section.28 Aside from associated staff salaries and overhead, the Court had only spent $300,000 on victims support since its inception and only about $1.5 million on total travel—an essential cost for conducting nationwide outreach to victims.29 The Court’s 2010 funding shortfall had led to cuts to the Victims Unit and no backfilling of some vacant jobs.30

After November 2008, the VSS was primarily supported by earmarked contributions to the Cambodian side from the German Ministry of Foreign Affairs through the German Society for Technical Cooperation (GTZ), now reconstituted as the German Agency for International Cooperation (GIZ). As of February 2012, Germany had contributed 1.9 million Euros to the VSS, but in 2010, OSJI noted the OA’s failure to dispense German funds:

The Office of Administration has been reluctant to authorize planned expenditures by the VSS because of the court’s overall budget concerns. The need for improved VSS leadership is dramatically illustrated by the fact that the court was required to return over $340,000 in December 2009 to the German Technical Cooperation (GTZ), because it had not been programmed or spent in accordance with the grant under which it was given.31

That impasse supports a conclusion that the OA has had other spending priorities and has been loath to spend resources on victim participation. Dedicating less than 10% of its overall personnel and expenditures to those functions has compromised one of the chief potential advantages of Cambodia’s in-country hybrid court.

Nationalization of Victim Participation

Although unstated in the Internal Rules, it was agreed that the Head of the VU would be a Cambodian and the Deputy a UN appointee. However, over time the unit has been increasingly nationalized. As of August 2013, despite being almost entirely funded by German earmarked contributions, the VSS had one international consultant funded by GIZ pursuant to an agreement with the national side, but no UN expert on victim participation and reparations.32

The first national and UN staff to head the unit were criticized for neglect-
The timely processing of victim participation applications. Nevertheless, they were widely considered to be knowledgeable about victims’ issues and dedicated to supporting a strong role for victims. Both left after little more than a year. Former civil party Theary Seng alleges that Rosandhaug “drove away” unit head Keat Bophal. According to a leaked U.S. diplomatic cable and anecdotal accounts, Keat also faced resistance from the Cambodian judges, who “[did] not favor victims coming forward as civil parties.”

When the UN deputy left, the OA was slow to post the opening and recruit her replacement, and the position was vacant for nearly a year. Her successor lasted less than a year and was never replaced. This position was eliminated entirely in the 2010–11 budget, which found that a UN deputy was “no longer warranted,” because “the Victims Unit is staffed predominantly under the National Component, and has adequate human resources to support its programme of work.” Since that time, with the exception of a few international consultants, the office has been fully staffed by Cambodians.

The second person to head the office was Helen Jarvis, the former OA Chief of Public Affairs. She is a key advisor to Deputy Prime Minister Sok An, which raised concerns about her independence. Her lack of experience working with victims, avowed Marxist-Leninist views, and Australian origins prompted complaints from survivors. One civil society leader said, “I myself—and I am a victim—I would want a Cambodian person to represent me.” Indeed, it was awkward for a hybrid tribunal not to entrust the leadership of a victims unit to a Cambodian survivor. Nevertheless, Jarvis worked hard to prove herself, and due to her government connections she was more successful in fighting for resources.

Jarvis’s replacement, Rong Chhorng, also lacked experience working with victims. He was transferred while remaining head of the Personnel Unit. He has since occupied other ECCC jobs concurrently, as well as holding down his position as secretary-general of the Cambodian Council of Ministers’ National Committee for Population and Development. Rong’s multiple roles again raised concerns about the political independence of the VSS. Nevertheless, when the Office of Lead Co-Lawyers was created in 2010 to represent civil party interests, Rosandhaug immediately delegated all UN administrative power over that office to Rong for two years. This made the Office dependent on the VSS, contrary to its establishment as a functionally independent unit in the amended Internal Rules.
Lack of institutional support for robust victim participation can be explained largely by the additional time, money, and effort required, but the Government also has incentives to control victims’ input into the ECCC. Some prominent victims affiliated with the political opposition have vilified the Government and its role in the ECCC process.46 Such victims could undermine the Cambodian People’s Party’s self-portrayal as the party responsible for ridding Cambodia of the Khmers Rouges, either by painting the Government as an obstacle to UN-led justice or by naming perpetrators who are now members of the Government. One observer recorded speculation that the Cambodian judges’ initial opposition to including a role for civil parties was a reflection of the Government’s “fear of encouraging people to submit new evidence.”47

This fear can be noted in the reaction to Prince Sisowath Thomico’s declaration of intention to file a complaint against a government official for the death of his parents. A news account speculated:

Following the prince’s example, countless relatives of Khmer Rouge victims could follow suit and launch their own individual complaints, disrupting the UN and government’s carefully-scripted plans to try only a handful of top ex-leaders[.].48

That possibility reportedly made those with past Khmer Rouge associations “uneasy.”49 Although the ECCC Law and Internal Rules do not allow complaints to trigger ECCC investigations automatically, it was anticipated “that much finger-pointing could be expected from other victims’ families.”50 The realization that victims’ voices could propel the process forward in unforeseen and politically unfavorable directions may be one reason why the national side has eagerly filled the void left by the UN’s abdication of responsibility.

Whatever the cause, the consequence is a lack of international input, including the expertise the hybrid model was intended to offer. Panhavuth Long of the Cambodia Justice Initiative believes it is positive that the VSS has become nationalized because it empowers national staff to be the ones taking care of victims. He says, “They understand the issues of victims, they know their audience.” At the same time, he notes that the nationals have no independent capacity—planning, skills, or will—to deal with the enormous number of victims.51 There is no UN presence contributing capacity, ensuring the work meets international standards, or providing checks and balances on decision making, and the office...
is widely viewed as nontransparent and nonconsultative. One court monitor found a few years ago that “the section as a whole has suffered from inadequate strategic planning and leadership and has not been fully effective in carrying out the expanded mandate given to it with the revised internal rules in February 2010.” As discussed below, this assessment remains valid.

An Office for Civil Party Support

As originally conceived, the VU “facilitated” victim representation but had no resources to develop a legal aid scheme comparable to the one established for the accused. As a consequence, victims participating as civil parties were immediately at a disadvantage in finding qualified lawyers to protect their interests in the proceedings. In the Court’s first case, legal representation was arranged through partnerships between those NGOs who had assisted victims in filing civil party applications and attorneys who either acted pro bono or received funding from sources outside of the Court. National civil party lawyers in Case 001 highlighted “serious problems of funding, lack of office space and resources, and limited opportunities to see all their clients who may live in far-flung provinces all around Cambodia.” Everyone on civil party co-lawyer Karim Khan’s team worked pro bono except for his Cambodian counterpart, who received a small grant from the British Embassy. He says, “A Court can’t operate on charity; it must operate on the basis of professionalism.”

Due to perceived problems in the civil party scheme in Case 001, in particular the large number of legal teams and the repetitive nature of argumentation, in February 2010 the Internal Rules were amended to make the trial process more efficient for Case 002. Among the changes was the establishment of a court-funded Civil Party Lead Co-Lawyers Section, headed by one national and one international. The Co-Lawyers have “[u]ltimate responsibility to the court for the overall advocacy, strategy[,] and in-court presentation of the interests of the consolidated group of Civil Parties during the trial stage and beyond.” In doing so, they are required to ensure effective organization of the civil parties “whilst balancing the rights of all civil parties and the need for an expeditious trial within the unique ECCC context.” Whereas the original Internal Rules gave civil parties the right to legal representation but did not mandate it, since this rule change civil parties may only participate as individuals at the pretrial stage and at trial must be represented by the Lead Co-Lawyers as part of a single, consolidated group. This change was made due to concerns
about the efficiency of the process and the fairness to the accused in Case 002, to which thousands of applicants sought to be joined.64

WHO SHOULD QUALIFY AS A CIVIL PARTY?

The question of which civil parties to admit to the ECCC’s cases points to a crucial dilemma for any hybrid court—how to promote robust victim participation without compromising undue efficiency or prejudicing the proceedings against the accused. The ECCC’s proximity to the crimes facilitates the involvement of survivors. However, in a country with millions of victims, the breadth of the criteria adopted for civil party participation impacts not only which of many victims may participate but also the Court’s practical capacity to administer justice—a major concern for a hybrid tribunal funded through voluntary contributions and expected to deliver a swifter, less costly form of justice than its purely international peers.

ECCC jurisprudence on admissibility has suffered from the lack of initial vision of the appropriate role civil parties should play in the proceedings. To a certain extent this is understandable due to the novelty of the endeavor. As at all new courts, innovations must be perfected in practice, not only on paper. Nevertheless, the ICC experience should have provided an early indication of some of the inherent challenges of mass victim participation. Documentation Center of Cambodia (DC-Cam) Director and survivor Youk Chhang has called the lack of planning “a legal experiment at victims’ expense.”65

Although apparently not clear to all parties in advance, the admissibility standards applied in Case 001 are sound and in conformity with the Internal Rules and Cambodian procedures. In Case 002, the Court applied these standards arguably too inclusively together with a broad definition of victimization that allowed most applicants to participate. Paradoxically, this development occurred contemporaneously with decisions in Case 003 that disregard the Internal Rules and the Court’s own jurisprudence in an apparent effort to prevent victims from meaningfully contributing to a politically controversial investigation.

Determining Who Is a Victim of the Crime

At the time the Internal Rules were adopted, the only explicit requirements for civil party status were a “physical, material or psychological” injury received
as a “direct consequence of the offence” that was “personal and [had] actually come into being.”

Language in the Practice Direction on Victim Participation soon clarified that “[a]ny victim of a crime coming within the jurisdiction of the ECCC may join the proceedings as a civil party in a case concerning that crime[,]” suggesting that a causal link must be shown between a crime charged and the harm suffered. Some argued this was an additional requirement unduly restricting the definition, but a subsequent revision of the Internal Rules clarified:

Civil Parties must demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material, or psychological injury upon which a claim of collective and moral reparation might be based.

The Supreme Court Chamber has since found that “[t]his clarification does not entail a change in the substance of the definition of civil party” and is consistent with both Cambodian law and international standards.

When the Duch verdict was announced, the Trial Chamber also ruled on whether the admitted civil parties had proved that they were victims of harm as a consequence of Duch’s actions at specific crime sites. Of the 92 civil parties who participated throughout the Duch proceedings, 24 had this status revoked when the Trial Chamber found that they had not sufficiently proved that they or their family members were victims of security centers under Duch’s control, or that they had “any special bonds of affection or dependency” with direct S-21 victims.

According to research conducted by the Transcultural Psychosocial Organization, the day after the verdict reading, those rejected “reacted with intense emotional distress” and viewed it as shameful and a personal failure “as they could not fulfill the felt obligation to seek justice for the spirits of their relatives.” The Supreme Court Chamber upheld this criterion but disagreed with its application in specific cases by the Trial Chamber and admitted 10 more persons as civil parties.

An Over-Broad Approach to Case 002

In Case 002, nearly 4,000 victims applied to be civil parties, and nearly half were rejected. On appeal, a supermajority of the Pre-Trial Chamber took a broadly inclusive approach, joining an additional 1,728 applicants to the case.
First, they noted that the Internal Rules do not require a link between the injury and the facts investigated, but instead between the injury and “one of the crimes alleged.”

While the facts investigated are limited to certain areas or crime sites, the legal characterizations of such facts . . . include crimes which represent mass atrocities allegedly committed by the Charged Persons by acting in a joint criminal enterprise together and with others against the population and throughout the country.

As a consequence, it was not necessary for applicants to link their injuries to crime sites in the Closing Order, which “serve only as examples in order to demonstrate how all these centres and sites functioned throughout Cambodia.” The Pre-Trial Chamber accepted the applications of victims who suffered from the implementation of the criminal policies charged in the Closing Order, including in areas of the country where specific crime sites were not investigated. The effect of its decision was to allow nearly 4,000 civil parties to join Case 002.

Judge Marchi-Uhel dissented in part from this decision, arguing that the Chamber’s acceptance of victims who were not alleging harms related to the specific crime sites named in the indictment was legally inappropriate and would undermine the role of the consolidated group, delay the process, frustrate civil parties who met the specific admissibility requirements, and disappoint wrongly admitted civil parties who would not have the harms they suffered discussed at trial. She found that the broader interests of victims could instead be addressed through the new scheme for nonjudicial measures, discussed later in this chapter.

The full Pre-Trial Chamber also adopted a broad perspective of the nature of victimization from international crimes and the resulting psychological impact on victims. The PTC held that victims who witnessed mass atrocities 30 years ago could still experience a high level of fear and that “psychological injury should be considered within the specific context of the Cambodian society in general and especially of its nature and organization during the period of the [Communist Party of Kampuchea] regime.” The Chamber found that because fear was instilled collectively, indirect injury could occur even if the direct victim was not a family member but was a member of the same persecuted group or community. Further, the Chamber adopted a presumption that members of
the same targeted group or community will have suffered psychological harm as a result of the injury to the direct victim. A supermajority found that under the new scheme for civil party representation (discussed below), admitting a large number of victims participating as a consolidated group would not affect the rights of the accused.

French Co-Lead Lawyer Elisabeth Simonneau Fort agrees with Judge Marchi-Uhel that the PTC took an overly permissive approach to Case 002 civil parties, who must be subjected to reasonable admissions criteria to distinguish them from the general victim population. Jeanne Sulzer, a former Legal Officer in the Lead Co-Lawyers Section, asserts that the Court’s inconsistent approaches to admission created inefficiency: had her office known the PTC would apply admissions criteria so loosely, it could have spent its resources gathering testimony rather than parsing thousands of applications.

After the PTC’s admissibility decision, the Trial Chamber severed the Case 002 indictment in anticipation of holding more than one trial on the crimes charged. As discussed in chapter 5, the case is limited to “population movement phases 1 and 2,” including the forced evacuation of Phnom Penh and the Tuol Po Chrey execution site. As a consequence, alleged criminal policies related to genocide, forced marriage, cooperatives, worksites, security centers, and forced movement from the Eastern Zone have been excluded from the first Case 002 trial. In making the decision to sever, the Trial Chamber stated that because (as discussed in the next section) civil parties no longer participate as individuals at trial but instead as a consolidated group with collective interests, “limiting the scope of the facts to be tried during the first trial . . . has no impact on the nature of civil party participation at trial[.]”

Civil party lawyers disagreed. Because Case 002/01 would only address a limited range of offenses—rather than the policies “throughout Cambodia” referenced by the Pre-Trial Chamber—numerous civil parties could have been excluded from the consolidated group. Out of the 3,864 civil parties, only about 750 were admitted due to harm related to the forced movement at issue in Case 002/01. However, the new Internal Rules make the PTC’s admissibility decisions final, and the Trial Chamber has let all victims participate by default. If they have not suffered harm from one of the crimes charged in the case, however, their inclusion as civil parties devalues the significance of that standing. Judge Marchi-Uhel’s admonition that overadmission would undermine the role of the consolidated group therefore appears prescient. Nevertheless, Simon-
neau Fort believes that civil party participation in Case 002/01 could still be meaningful if civil parties were clearly informed that they may not hear their specific harms discussed, may not be able to speak in Court, and may not have their names listed in the judgment. For some civil parties, being in Court and experiencing participation is more important than legal nuances.93

Restricting Civil Party Access to Case 003

While the Chambers were loosening the criteria for participation in Case 002, the CIJs constricted it in Case 003 to such an extent that all but direct victims would be rejected. With regard to an applicant whom the OCIJ had already accepted in both Cases 001 and 002, and whose harm was unquestionably factually linked to the crimes alleged in Case 003, CIJs You Bunleng and Siegfried Blunk found against all precedent and logic that the murder of his brother at Tuol Sleng was not the direct cause of his psychological injury. Instead there was an intermediate causal link: “the death of his brother.”94 Acknowledging the fact that they had already accepted him as a civil party in previous cases, the CIJs said that the prior decision had been made under great time pressure, and that at the time the judges had failed to consider causation in depth.95

Soon afterward, Judges You and Blunk rejected a woman who had been forced to marry during the Democratic Kampuchea period, and whose husband had then been forced to labor at Kampong Chhnang Airport (a crime site in Case 003) before being tortured and executed at S-21 prison. Although she likewise had been previously admitted in Cases 001 and 002, they reasoned again that she was not harmed by the crime committed against her husband, but instead by an intervening cause: his forced labor.96 Adding insult to injury, they found it “highly unlikely” that she experienced psychological harm from her husband’s forced labor 34 years ago and surmised that she had claimed this “based on unsound advice by a third person.”97 Finally, they said that she should not be admitted because she was already a civil party in Cases 001 and 002.98

These findings directly contradict the Court’s own jurisprudence and all international and national standards relating to victim participation.99 In Case 002 dicta, the full Pre-Trial Chamber has rejected the standard applied,100 and on appeal, the international PTC judges eviscerated the OCIJ’s reasoning.101 Although these decisions are discredited, they have nevertheless contributed to the lack of consistency between Chambers, and a concern that civil parties are not taken seriously. Yet the CIJs’ approach to victim participation in Case 003
was consistent with other evidence of their efforts to quickly bury the investigation and eliminate costs arising from Cases 003 and 004.

The ECCC’s struggles to apply admissibility criteria doubtlessly derive in part from the judges’ recognition that most Cambodians are victims, and a legal decision to charge one crime site over another is an unsatisfactory basis for excluding those who wish to participate in seeking justice after more than 30 years. The judges are also aware that the time required for making individual determinations and hearing appeals for thousands of victims can easily overwhelm the resources of a court. One judge estimated that defense challenges to even 1,000 civil party claims would last at least eight months. Donor demands and the age of the Case 002 defendants—and many victims—both militated strongly toward reducing the amount of judicial time devoted to the civil party scheme. In the face of these pressures, rather than regulate the number of admitted civil parties, the judges redrafted the rules to limit the scope of their participation.

LIMITING CIVIL PARTY ROLES AND REPRESENTATION

In the midst of the Court’s first case, efficiency concerns and worries about equality of arms led the ECCC to reduce the scope of individual civil party participation, for example, eliminating their right to speak and removing their freedom to select legal representation for trial proceedings. Changes were necessary to allow even a fraction of the 4,000 civil party applicants to participate in Case 002, but the changes reduced the robustness of the mechanism, making the victims’ role look less like that of a full party and more like a participant. In that sense, the ECCC has been forced to adapt its ambitious initial model in a direction that converges toward the practice of the ICC. Although this outcome was a necessary move toward efficiency, there is a general consensus that too much was promised too early and then taken away. Former OCP investigator Craig Etcheson argues that for a mass crimes court, “one of the greatest challenges is the problem of managing expectations,” and the ECCC has been “more or less a complete failure” on that score—mainly due to its management of civil party participation.
Reducing the Scope of Civil Party Participation

Victims may participate as civil parties in ECCC proceedings by “supporting the prosecution” for the purpose of seeking “collective and moral reparations.” Under the Internal Rules, civil parties have many enumerated participation rights, including to request investigative actions, to lodge appeals and participate as a party therein, to call witnesses, to have access to the case file, to respond to preliminary objections, to question accused, to exercise the right of audience, to make written submissions, and to make closing arguments. Their participation has made important contributions to the proceedings, most notably the addition of forced marriage charges to the Case 002 indictment, and the decision of the international prosecutor to request the investigation of crimes against the Kampuchea Krom minority in Case 004.

Nevertheless, the right of victims to participate must be balanced against the right of the accused to a fair trial, including the right to be presumed innocent and the right to be tried without undue delay. As noted by one commentator:

If the victims were able to exercise [participation] rights freely without any control by a judge, the proceedings could last indefinitely, infringing the rights of the accused. The number of victims in cases of war crimes and crimes against humanity often runs into the thousands or even tens of thousands. Furthermore, the nature of the damage they have suffered adds to the emotive power of their intervention in the proceedings. If not controlled, their participation could therefore interfere with the smooth conduct of trials and the rights of the accused, as well as the search for truth.

The European Court of Human Rights has recognized that the scope of civil parties’ right of access to court proceedings may be limited “having regard to the role accorded to civil actions within criminal trials and to the complementary interests of civil parties and the prosecution . . . , their roles and objectives being clearly different.” However, “these limitations must not restrict or reduce a person’s access in such a way or to such an extent that the very essence of the right is impaired.” Moreover, any limitations must pursue a legitimate aim and have “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

The first request to limit civil party participation at the ECCC arose when
the defense objected to four civil parties participating in a hearing on Nuon Chea’s appeal against the CIJ’s provisional detention order. The Nuon Chea team, citing ICC jurisprudence, argued that civil parties should only be allowed to participate in the trial, and not during pretrial proceedings, because they did not have a personal interest in the outcome.¹¹⁴

At the ICC, victims are not considered “true” parties but are limited to presenting their “views and concerns . . . at stages of the proceedings determined to be appropriate by the Court” where their “personal interests are affected.”¹¹⁵ Therefore, “participation is not a once-and-for-all event but rather [is] decided on the basis of the evidence or issue under consideration at any particular point in time.”¹¹⁶ In contrast, at the ECCC, once a victim is found to meet the Internal Rules’ criteria to join a case as a civil party, he or she is a full party to the proceedings with rights similar to those of the accused, including extensive rights to participate during the investigative process.¹¹⁷ As emphasized by an ICC Appeals Judge:

The right of victims to participate enunciated by article 68(3) [of the Rome Statute] has no immediate parallel or association with the participation of victims in criminal proceedings in . . . the Romano-Germanic system of justice, where victims in the role of civil parties or auxiliary prosecutors have a wide-ranging right to participate in criminal proceedings.¹¹⁸

In ruling on the Nuon Chea challenge, the ECCC Pre-Trial Chamber found that the text of the Internal Rules, read in light of the Cambodian Code of Criminal Procedure, was clear that, unlike victim participants at the ICC, “Civil Parties can participate in all criminal proceedings, which includes the procedure related to appeals against provisional detention before the Pre-Trial Chamber.”¹¹⁹ Nevertheless, the scope of civil parties’ right to participate equally in proceedings has been reduced over time to limit the right of individual victims to speak in court, make opening statements, or make submissions on sentencing and character.

**Right to Speak in Person**

Under the original version of the Internal Rules, there were no specific limitations on civil parties speaking for themselves at any time during proceedings, except for closing statements.¹²⁰ However, early in the proceedings, the Pre-Trial Chamber restricted civil parties’ right to speak in person.¹²¹ During a
Nuon Chea detention appeal hearing, a civil party made remarks that “largely amounted to a victim statement” and were consequently disregarded by the Pre-Trial Chamber in making its ruling. At the subsequent Ieng Sary detention hearing, when the PTC prohibited her from speaking personally, she summarily dismissed her lawyer but was still not allowed to speak. Judge Downing dissented, noting a conflict between Internal Rule 23, granting a general right of appearance, and Rule 77(10), providing that only lawyers for the parties may make observations. Because the civil party was now unrepresented, he found it unfair not to permit her to address the Court.

A group of unrepresented civil parties submitted that they must be able to exercise all of their rights under the Internal Rules, even if unrepresented. Recognizing that unrepresented civil parties “may be unrepresented not through choice, but for financial reasons,” the Chamber said “legitimately” unrepresented civil parties could personally address the Court when their interests and those of the prosecution were different and advance notice was provided.

No situations arose again where unrepresented civil parties sought to speak before either the Pre-Trial or Trial Chambers. With the changes to the legal representation regime discussed below, representation by the Lead Co-Lawyers at trial is now mandatory. Although the Cambodian Code of Criminal Procedure allows oral submission by civil parties during trial, whether represented or not, a blanket prohibition was codified in the Internal Rules: “When the Civil Party is represented by a lawyer, his or her rights are exercised through the lawyer.” This limitation is necessary in light of the large number of victims who participate in proceedings. Nevertheless, it prevents the active participation of victims unless they are called to provide evidence.

In the Duch trial, 22 of the initial 93 civil parties were called by the Court to share their experiences. A common refrain was the momentousness of victims’ opportunity to express themselves directly to Duch—often to reject his pleas for forgiveness. For example, Ou Kamela, the daughter of an S-21 victim, said in a letter read in Court, “On behalf of my father, I refuse to express the slightest amount of pity. On behalf of my father, I request that justice be handed down.” When asked how his clients had felt after providing testimony to the Court, civil party lawyer Alain Werner said, “About 20 Civil Parties recounted their experiences in Court, and it is difficult after just these hearings to make a global assessment of their experiences. I know that some of my own clients were very relieved immediately after their testimony and some even felt empowered.”
Indeed, the testimonies of civil parties—including accounts of Tuol Sleng by well-known survivors such as Bou Meng and Chum Mey—provided some of the most powerful moments in the Duch trial. Their ability to confront the accused in court helped forge a connection between the hybrid court and the community of survivors in which it operates. In the Case 002 trial, only 32 of 3,864 civil parties had the opportunity to share their experiences in their own words.

**Right to Make Opening Statements**

In both Case 001 and Case 002, civil party representatives sought the opportunity to make opening statements and had their requests denied. The ECCC Internal Rules limit this right to the Co-Prosecutors and the accused. The Chamber has highlighted that Cambodian law also does not provide this right to civil parties. However, civil law practice, including Cambodian procedure, does not provide *any* party an opportunity to make opening statements, as the proceedings are not adversarial. The civil parties thus argued that a fair application of the Cambodian Criminal Procedure Code would exclude *all* parties from making opening statements, and that it was discriminatory to limit the right to two of three parties. To respect the parties’ equality of arms and the symbolic significance for the nearly 4,000 civil parties, they asked the Trial Chamber to exercise its discretion to give them 30 minutes to make preliminary remarks. However, this was summarily rejected by the Trial Chamber, which ruled with evident irritation: “The Chamber reiterates that there is no legal basis in the ECCC legal framework for granting the Co-Lawyers’ request.” Even the defense teams have expressed dismay at this unequal treatment.

At the ICC, representatives of victim participants have the potential right to make opening statements, and have in practice. It is unclear why the ECCC does not also grant that right, as time limitations could be imposed to encourage expediency. The judges drafted the rules, so their finding that they have no choice because “that’s what the rules say” is not compelling. Because civil parties are entitled to equal rights as parties, the failure to issue a reasoned decision explaining why they are not entitled to participate equally on this symbolically important occasion makes the ruling appear arbitrary and perhaps discriminatory.

**Right to Make Submissions on Sentencing and Question Witnesses about Character**

In the Duch case, the Trial Chamber emphasized the defense’s right to equality of arms when it departed from civil law practice and precluded the civil parties...
from making submissions on sentencing or questioning witnesses and experts about Duch's character. Judge Lavergne dissented on both rulings, finding them to be “inconsistent with the law currently applied before the Chambers” and to “misrepresent, for no valid reason, both the role and the meaning of Civil Party participation.” Although recognizing the need to adapt Cambodian procedures to the challenges of prosecuting mass crimes, he asked:

> How far can one go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of the Civil Parties before the ECCC and the purpose of the trial as a whole[.]"  

In his view, civil parties, as equal parties to the proceedings, are entitled to participate at all stages, except where expressly limited. Due to their “personal knowledge” of the accused, they may be in the best position to provide the Court relevant character information, and in fact during the Case 001 trial they had on a number of occasions asked witnesses and the accused questions related to character. Judge Lavergne also looked to ICC jurisprudence to assess international practice. Although he found it to be generally supportive of his views, at the time the ICC had not completed any cases and the evidence was fragmentary. Subsequently the ICC Trial Chamber issued its first verdict of conviction and invited the prosecution and the legal representatives of victims “to file written submissions on the procedure to be adopted for sentencing . . . and the principles to be applied by the Chamber when it is considering the appropriate sentence to be imposed[.]” Likewise, at the Special Tribunal for Lebanon, victims may, with the authorization of the Trial Chamber, make impact statements at the sentencing stage of proceedings.

The Role of Civil Party Lawyers

As noted earlier in this chapter, the ECCC amended its rules governing civil party representation, requiring that they be part of a single consolidated group represented by the Lead Co-Lawyers at trial. International Civil Party Lead Co-Lawyer Elisabeth Simonneau Fort has said the change “can permit a kind of coherent and strategical defence, avoiding opposite positions or repetitive pleadings.” Overloaded by the number of victims seeking to participate in its cases, the ICC appears to be moving toward a similar model due to its perceived potential for improving efficiency, reducing costs, and improving the quality of representation.
Nevertheless, obligatory representation eliminates the right of a party to select his or her own lawyer. Moreover, it no longer takes the individual needs of the civil parties into consideration. Under the prior Internal Rules, “the distinct interests” of each victim as well as the potential for conflicts of interests had to be considered before the Court could decide to designate a common lawyer.\footnote{147} Now, though civil parties still retain individual counsel, their primary in-court representation is predetermined with no such assessment.

Under the revised rules, civil party lawyers’ control over the representation of their clients is substantially diminished once trial proceedings begin. Although the Lead Co-Lawyers are expected to “seek the views of the civil party lawyers and endeavor to reach consensus in order to coordinate representation[,]”\footnote{148} there are no mechanisms in the Rules governing disputes or procedures by which a dissenting civil party lawyer can make his or her views known to the Court or secure a remedy for a conflict of interest between civil party groups.\footnote{149} Instead of directing the representation of their clients, they are expected to provide support to the consolidated group that is “mutually agreed” and “coordinated by” the Lead Co-Lawyers, including “oral and written submissions, examination of their clients and witnesses and other procedural actions.”\footnote{150}

The system was first tested when a civil party lawyer sought to submit a proposed witness and civil party list directly to the Trial Chamber. She argued that the document was “not the common interest” of the consolidated group, and therefore fell outside of the Lead Co-Lawyer’s mandate; however, the Trial Chamber rejected it because it was not signed and sent by the Lead Co-Lawyers.\footnote{151} In requesting the Chamber to accept the documents as a belated filing, the Lead Co-Lawyers noted, “[S]ome of [the Civil Party lawyers] still believed that with the power of attorney they have the rights to submit motions as individuals.”\footnote{152}

The rule change also severs the civil party attorney-client relationship. The civil party Lead Co-Lawyers derive their powers only from the Internal Rules,\footnote{153} and civil party lawyers are now unable to represent their clients’ interests in court, such as by making oral or written submissions, without agreement from the civil party Lead Co-Lawyers. Concomitantly, civil parties are unable to hire or fire the Lead Co-Lawyers, to determine the overall objectives of their legal representation, or to participate in deciding the means of carrying out those objectives. Instead: “Ultimate responsibility to the court for the overall advocacy, strategy and in-court presentation” falls to the Lead Co-Lawyers,\footnote{154} who
represent the interests of the consolidated group, not individual civil parties.\textsuperscript{155} As noted by an ICC Judge with regard to victim participation at that court:

Even if these common legal representatives organize themselves to take instructions from a great number of victims, it will be very difficult if not impossible to relay these instructions to the court. In those circumstances, can legal representation be anything more than symbolic? And if it is only symbolic, how meaningful can it be?\textsuperscript{156}

With such a broad scope of authority, the Lead Co-Lawyers have the authority to shut some or all civil party lawyers out of the trial process. One civil party lawyer expressed frustration at the Lead Co-Lawyers’ “seemly arbitrary” rejections of submissions she sought to file on behalf of her clients: \textsuperscript{157} “We have NO body to complain to about whatever decision they take. We are fully in their hands. They do not have only a coordinating role, they decide which content is submitted and which is excluded. They have uncontrolled power.”\textsuperscript{158} Despite such complaints, which are likely inevitable given the balance of authority in the new scheme and the strong views of legal representatives advocating on behalf of their clients, it appears that the Lead Co-Lawyers selected have made every effort to follow the intent of the rules and work collaboratively in recognition of the enormous workload involved.\textsuperscript{159}

The Trial Chamber has occasionally appeared dissatisfied with this inclusive approach and has made decisions limiting the participation of civil party lawyers. For example, the Chamber classified medical reports regarding accused Ieng Thirith and Nuon Chea as strictly confidential and limited distribution specifically to the Lead Co-Lawyers, with authorization for them to share the documents only with civil party lawyers specifically tasked with providing support to the consolidated group.\textsuperscript{160} The Lead Co-Lawyers argued that all civil party lawyers should be granted access, as under the new regime decisions regarding strategy and drafting of submissions is a collective and joint decision of the group.\textsuperscript{161} The Lead Co-Lawyers “can not discharge their primary duty of consultation and seeking a consensus in order to consolidate representation . . . if the civil party lawyers do not have access to procedural materials.”\textsuperscript{162} Moreover, without access, civil party lawyers cannot defend the interest of their clients.\textsuperscript{163}

A supermajority of the Trial Chamber rejected the request, finding that the Lead Co-Lawyers were not required to obtain the consensus of civil party
Hybrid Justice

lawyers in all circumstances. Judge Laverne dissented, saying that restricting access from some party counsel is at odds with Cambodian law. Moreover, he argued that merely because at the trial stage the civil parties act as a consolidated group, this does not alter the civil party lawyers' responsibilities to their clients. He rejected the view that representation at the trial stage was not a shared responsibility, and called the measure “discriminatory” and “undeniably prejudicial to the adequate representation of the Civil Parties’ interests.”

The Trial Chamber also pressed the Lead Co-Lawyers to be the only civil party voices in Court. One way it made this apparent is by seeking to limit the number of lawyers who could speak for each team on particular issues, which though intended to improve efficiency, also directly impacts the opportunity of individual civil party lawyers—and their clients—to participate. The Trial Chamber has also expressed displeasure when lawyers other than the Lead Co-Lawyers speak in Court.

Moreover, the Trial Chamber has at times appeared irritated that the civil parties intervene separately from the prosecution. Although the civil party teams “assist the prosecution,” they do not collaborate, and their interests are different. In one instance, the international Lead Co-Lawyer made a brief interjection, and when the prosecution also sought to make a small point, the President took more time than their statements to admonish him:

What is on your mind, Mr. Co-Prosecutor? Do you have anything else to add? Can you organize yourself amongst the parties to express your objections or comments in order? And, as you know, the Lead Co-Lawyer is on the support side of the Prosecution, and on the other side is the Defence, and if you keep taking turn, this morning session would not be efficient. I believe you need to organize yourself so that your objection shall be done once and together to make it more efficient, as we shall adhere to the principle of proceedings—a fair trial proceeding.

International Lead Co-Lawyer Elisabeth Simonneau Fort has said, “Sometimes it is clear that the [Trial] Chamber considers that civil parties have not such an important role as a party.”

Changes to the civil party scheme were necessary for efficiency and arguably to avoid breaching the equality of arms. Etcheson argues that the civil party scheme in Case 001 was “absolutely untenable and did a lot to discredit
the whole idea of civil party participation.” Case 002 was “much closer to the mark” in striking the right balance between active victim participation and the need for fair and efficient proceedings, and the idea of lead colawyers “makes perfect sense,” but the Court may have overcompensated for the flaws of Case 001 and cut back too dramatically on civil parties’ time in court. The result is that civil parties no longer participate as individual parties in the trial proceedings. They instead form part of a collective group of victim participants with no direct connection to the lead lawyers who represent them.

REPARATIONS AND NONJUDICIAL MEASURES

Reparations

The effort to provide reparative justice has presented the ECCC with further challenges. Like other international and hybrid courts, the ECCC is designed with a primary institutional focus on criminal trials rather than reparative measures. The limits of hybrid courts are compounded by expectations of cost efficiency. Pursuant to the Internal Rules, the ECCC, in contrast to the ICC, has no authority to grant individual reparations, only “collective and moral.” The Trial Chamber has noted:

[T]he ECCC lacks the competence to award individual monetary compensation to Civil Parties. . . . Such departures from national law were considered necessary in view of the large number of Civil Parties expected before the ECCC and the inevitable difficulties of quantifying the full extent of the losses suffered by an indeterminate class of victims. Reparations before the ECCC were therefore intended to be essentially symbolic . . . rather than compensatory.

As discussed in chapter 4, at the time the Case 001 verdict was issued, the ECCC Internal Rules only authorized reparations “awarded against, and . . . borne by convicted persons.” The Trial Chamber found that it had no jurisdiction to order Cambodian authorities to provide reparations to civil parties, and that at most it could “encourage” the Government and other entities to offer financial and other forms of support. The Chamber also said that no legal mechanism existed “allowing the ECCC to substitute or supplement awards made against [accused] with funds provided by national authorities or other third parties.”
The accused was found indigent, and the Trial Chamber awarded civil parties only the inclusion of their names and those of the immediate victims in the final judgment, and the compilation and publication of statements of apology made by the accused during the trial.\textsuperscript{180}

In anticipation of the ECCC’s second trial, the judges expanded the Court’s authority to provide reparations, giving the Trial Chamber the authority to recognize a specific project designed in cooperation with the VSS that has secured sufficient external funding.\textsuperscript{181} When the Trial Chamber provided initial observations about the types of requests that may be entertained, it notably excluded the possibility of a trust fund being established to financially compensate civil parties.\textsuperscript{182}

At the behest of the Trial Chamber, the Lead Co-Lawyers have identified a prioritized list of reparations projects, which have been accepted by the Chamber “in principle” if sufficient funding is secured in advance: (1) Government recognition of a new remembrance day for Khmer Rouge victims; (2) the creation of three to six public memorials acknowledging the harms of Case 002 civil parties; the funding of mental health services for Case 002 civil parties including (3) testimonial therapy and (4) self-help groups; (5) a mobile exhibition with short films and live testimonials by civil parties; (6) a permanent exhibition space with documents, multimedia testimonials and artistic displays to preserve civil party accounts of the harms they suffered; and (7) a booklet explaining the ECCC judicial process, civil party participation, and the crimes encompassed in Case 002.\textsuperscript{183}

In addition to proof of sufficient outside funding, before final endorsement the Trial Chamber requires, when relevant, proof of the Government’s willingness to support the projects, and additional specificity (such as who will be responsible for project implementation, the projects’ duration, and whether the participation of non-governmental organizations listed as partners is dependent on available funding).\textsuperscript{184}

According to Simonneau Fort, shortly before closing arguments there were only “a very small number of [financial] sponsors” for the requested projects. An unnamed advisor to a mental health NGO collaborating with the VSS on a reparations project says the problem lies “in part” with VSS: “There are no staff [there] who are actually experienced enough to deal with project management . . . proposal writing, dealing with donors and all that. . . . Also, [there is] probably a lack of motivation to really go forward and systematically and ef-
fectively address it with potential donors.”

Any failure to sufficiently develop and fund reparations programs in accordance with the Internal Rules thus also stems from the UN side’s unwillingness to dedicate international expertise to the running of this office.

Civil party lawyer Nushin Sarkarati notes that, under the revised rules, everything proposed for reparations must be essentially completed before judgment and the ECCC will merely rubber-stamp the completed project. She argues that this sets a horrible legal precedent, as reparations should be paid for either by the convicted person or by the state, not by NGOs through third-party funding. Most concerning, the Court is putting the burden on victims to design and fund reparations themselves. She says, “The Court is essentially allowing concerns over the implementation of an award to belie an appropriate judgment on reparations. I hope no [other] court adopts this system.”

The splitting of the indictment in Case 002 has also changed the import of reparations, which are intended to “acknowledge the harm suffered by civil parties as a result of the commission of the crimes for which an Accused is convicted” and “provide benefits to the Civil Parties which address this harm.” However, if only civil parties with harms related to crimes in the severed indictment are entitled to reparations, many in the consolidated group would be excluded. At the urging of the civil party lawyers, the Trial Chamber has therefore decided that reparations requests that do not result in enforceable claims against a convicted person, but are instead funded externally under the new rule, may benefit all civil parties in the consolidated group. As a result, the implementation of this aspect of the civil party scheme has also moved the ECCC toward a collective victim participation model, and away from the recognition of individual victims as “parties” to the proceedings.

Nonjudicial Measures

In discussions with NGOs before the civil party role was revised, the Senior Judicial Coordinator and the reserve international Trial Chamber judge emphasized that restrictions on the role of civil parties would be balanced by expanding the mandate of the VSS to reach out more broadly to the general victim population. A new Internal Rule was therefore adopted, which provides:

The Victim Support Section shall be entrusted with the development and implementation of non-judicial programs and measures addressing the broader
interests of victims. Such progress may, where appropriate, be developed and implemented in collaboration with governmental and non-governmental organisations external to the ECCC.\textsuperscript{190}

Judge Silvia Cartwright said the judges believed that nonjudicial measures “will be a major legacy of this Tribunal.”\textsuperscript{191} The Open Society Justice Initiative, a key Court monitor, explained:

This development is important because, as stated previously, large numbers of Cambodians who do not become formal civil parties are victims of the Khmer Rouge and have an interest in the same kinds of information and services offered by the court to civil parties. . . . Examples of additional activities planned by the Victims Support Unit pursuant to its expanded mandate include presenting public forums with court officials, providing the opportunity to view proceedings, and disseminating information about the nature of the cases before the court.\textsuperscript{192}

However, these ambitions have not been realized. Over two years later, the VSS “ha[d] not yet even identified what non-judicial projects it will pursue or clearly differentiated these measures from court-ordered reparations.”\textsuperscript{193} The nonjudicial program manager told a local paper, “We have a mandate on this, but we are not really implementing, so we need to facilitate and then work with NGO partners to implement these non-judicial measures[,]”\textsuperscript{194} The VSS Chief responded to criticisms by noting that the unit had since late 2011 been implementing a two-year joint project with local NGOs on “Promoting Gender Equality and Improving Access to Justice for Female Survivors and Victims of Gender Based Violence under the Khmer Rouge Regime.”\textsuperscript{195} Moreover, “[s]imilar projects” had already been implemented by a number of NGOs, “which could be seen as [Non-Judicial Measures] projects.”\textsuperscript{196} It thus appears that in most cases, the VSS will merely put its stamp of approval on projects planned and executed by NGOs.\textsuperscript{197}

Although the Trial Chamber has noted that VSS projects developed during the life of the Court may eventually turn into a form of Court-sanctioned reparations upon conviction,\textsuperscript{198} they are two separate, if potentially overlapping, Court mandates. Nevertheless, with the creation of a “Reparation and
Non-Judicial Measures” team, and efforts to create a foundation to fund the implementation of both, they have been welded together, and are stagnating as a result. The Open Society Justice Initiative has said that to effectively implement this broader mandate, international input and expertise is required, but as discussed above, there is currently no UN reparations expert within the VSS. Initial hopes that with its expanded mandate the VSS would undertake basic outreach to the general victim population during the trial proceedings appear guaranteed to remain unrealized.\(^{199}\)

CONCLUSION

Victim participation was bound to be difficult for the ECCC, especially after the judicial creation of an unprecedented civil party scheme that neither the national nor international side of the Court fully embraced. Some questioned the feasibility of transposing this domestic civil law practice to a mass crimes court. Others questioned the additional effort and funding required for what they viewed as a peripheral endeavor. The scheme was disadvantaged from the start due to general neglect, and the haphazard manner in which it was implemented in the Court’s first case caused delays, confusion, and sometimes dashed victim expectations.\(^{200}\) In Case 001, many of the relatively small number of civil parties involved were able to participate directly in the proceedings, which appears to have been meaningful and even cathartic for most of the civil parties involved.\(^{201}\)

Since that time, the participation rights of civil parties—and their lawyers—have been reduced in anticipation of the practical realities of accommodating thousands of victims into the Case 002 proceedings. Now participating indirectly and represented as a group, the system is functioning more efficiently, but it is questionable if civil parties in Case 002 are still accorded the rights of “parties” or will have the same quality of experience as those who joined Case 001.\(^{202}\) Indeed, the primary ECCC lesson for future internationalized courts may be the impracticability of individual civil party participation in mass crimes proceedings.\(^{203}\)

Sulzer suggests that instead of individuals, perhaps organizations and associations with common interests should be accorded party status in future proceedings—a model building off mass claims processes in both the common
and civil law and the expanding role of victims’ organizations in postconflict societies. Ieng Sary’s former international lawyer, Michael Karnavas, suggests a two-phase trial: upon conviction, a restitution hearing could be held during which victims are given a genuine opportunity to be heard. Both proposals take into account the need to design future hybrid tribunals with realistic expectations of the forms of victim participation that a tribunal can manage effectively and that donors are willing to fund.