Civil Party Participation in Trials of Mass Crimes

A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia

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Abstract

The Extraordinary Chambers in the Courts of Cambodia (ECCC) have taken the innovative approach of granting victims of international crimes the status of a legal party to the proceedings. The implementation of the new concept of civil party participation has caused controversial discussions about the advantages of including victims in international(ized) criminal trials. This article presents the results of the qualitative study, 'Victims in Trials of Mass Crimes: A Multi-Perspective Investigation of the Value of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia' which has explored the perspectives of legal professionals on victim participation in Cambodia. In light of the study's findings and an analysis of the court's jurisprudence, three main challenges of civil party participation have been identified: (i) the lack of coordination among civil party lawyers; (ii) deficiencies in representation; and (iii) uncertainties about the procedural rights of the civil parties. The findings give rise to the question whether the attribution of legal standing is required to guarantee meaningful victim participation. Based on an evaluation of the benefits and drawbacks of civil party participation, this article discusses what lessons can be learned from the experiences at the ECCC and the role that victims can play in trials of mass crimes.

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1. Victims in Trials of Mass Crimes

A. Victim Participation in Proceedings before International(ized) Criminal Courts

The rights of victims in international criminal proceedings have significantly evolved since the early establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda. Following the Anglo-American legal system, the role of victims was limited to serving as witnesses in the trial. Since the ad hoc tribunals were criticized for failing to adequately consider victims’ concerns, the state parties to the ICC decided to grant victims broader participation rights. Victims have the opportunity to present their views and concerns at all stages of the proceedings determined to be appropriate by the Court on the condition that their personal interests are affected and their participation does not prejudice a fair trial. In addition to their procedural rights, victims are entitled to claim compensation from the Court’s trust fund. The Special Tribunal for Lebanon (STL) follows the general approach of the ICC and provides victims with a general right to participate in the trials. However, in the STL’s Rules of Procedure and Evidence, judges have imposed significant restrictions on victims’ rights. Victims are not allowed to participate in the investigation and shall, in principle, be represented by lawyers during all phases of the trial. A further limitation compared to the ICC can be seen in the fact that victims are not allowed to request reparation.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) — a hybrid court set up in 2006 to prosecute the crimes of the Khmer Rouge regime committed between 1975 and 1979 — went one step further and granted victims the status of a full-fledged legal party to the proceedings. The concept was derived from the French criminal procedure code that allows the victim of a crime to participate as a party in criminal proceedings brought against the accused, and claim reparation for damage suffered as a result of the offence. Consequently,

1 J.I. Turner, ‘Decision on Civil Party Participation in Provisional Detention Appeals’, 103 American Journal of International Law (2009) 116–121, at 119.
2 C. Jorda and J. de Hemptinne, ‘The Status and Role of the Victim’, in Cassese et al. (eds), The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press, 2002) 1387–1419, at 1387.
3 C. Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’ 6 Northwestern Journal of International Human Rights (JIHR) (2008) 459–545, at 459.
4 Art. 68(3) ICCSt.
5 On the legal framework for victims’ participation at the ICC, see L. Catani, ‘Victims at the International Criminal Court’, 10 Journal of International Criminal Justice (JICJ) (2012) 905–922.
6 Art. 17 STL.
7 Rule 86(A) STL RPE and Rule 87(B) to (D) STL RPE.
8 De Hemptinne emphasizes that victims are not given the status of civil parties at the STL since they are not entitled to claim compensation before the STL, but rather before domestic courts on the basis of an STL judgment; J. de Hemptinne, ‘Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon’, 8 JICJ (2010) 165–179, at 165.
9 Art. 2. 3 French Code of Criminal Procedure.
Rule 23 of the ECCC Internal Rules permits victims to ‘participate in criminal proceedings’ as Civil Parties and to ‘seek collective and moral reparations’.

Although civil party participation is commonplace in some domestic legal systems, there was no prior experience of civil party participation at the international level. The innovative approach taken by the ECCC presented a challenge to the parties involved in the trial. Since judges and prosecutors could not rely on existing jurisprudence, they faced the challenge of adapting a domestic concept of victim participation to an international trial of mass atrocities. The practical difficulties of implementing a civil party system have given rise to debates on the advantages and disadvantages of victim participation and raised doubts about the future application of the concept in international criminal law. Although a more humanitarian approach has strengthened the role of victims in international criminal proceedings, victim participation in trials of mass crimes is still highly disputed among scholars and practitioners. Opinions about the legitimate role of victims in the proceedings and the scope of rights a court should attribute to the victims differ significantly.

This article first briefly recalls the academic discussion on the risks of and opportunities for victim participation. The theoretical assumptions thus raised are then contrasted with the accounts of the legal parties involved in the trial. To that end, the qualitative study, ‘Victims in Trials of Mass Crimes: A Multi-Perspective Investigation of the Value of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia’ (‘the Study’), explores the perspective of judges, prosecutors, defence counsel and civil party lawyers on victim participation at the ECCC. The article attempts to paint a picture of the participants’ perception of civil parties in the courtroom, their impact on the proceedings and the evolution of their procedural role during the trial. An insight into the legal professionals’ concerns and priorities facilitates an understanding of the opportunities and practical challenges of civil participation.

10 For example, the French and the German criminal procedure codes guarantee victims — under certain circumstances — the right to participate in the trial.

11 C. McCarthy, ‘Victim Redress and International Criminal Justice: Competing Paradigms or Compatible Forms of Justice’, 10 JICJ (2012) 351–372, at 353.

12 See e.g. M. Elander, ‘The Victim’s Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia’, 7 International Journal of Transitional Justice (IJTJ) (2013) 95–115; H. Friman, ‘The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?’ 22 Leiden Journal of International Law (2009) 485–500; K. Yesberg, ‘Accessing Justice Through Victims’ Participation at the Khmer Rouge Tribunal’, 40 Victoria University of Wellington Law Review (2009) 555–579, at 576; E. Haslam, ‘Victim Participation in the International Criminal Court: A Triumph of Hope over Experience?’ in D. McGoldrick et al. (eds), The Permanent International Criminal Court – Legal and Policy Issues (Hart Publishing, 2004), 334; M. Heikkila, International Criminal Tribunals and Victims of Crime (Institute for Human Rights, Åbo Akademi University, 2004), 152–154; R. Cryer et al., An Introduction to International Criminal Law and Procedure (Cambridge University Press, 2007), 361.

13 See E. Hoven, M. Feiler and S. Scheibel, ‘Victims in Trials of Mass Crimes – A Multi-Perspective Investigation of the Value of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia’, Cologne Occasional Papers on International Peace and Security Law 3, September 2013.
party participation in Cambodia. A lack of coordination among civil party lawyers, insufficiencies in representation and uncertainties about the procedural role of the civil parties will be identified as significant shortcomings of the ECCC participation model. In light of the Study’s findings, suggestions for improvements of procedural prerequisites will be developed in order to guarantee both a meaningful and effective participation of victims.

B. Victim Participation in Academic Debate

Victim participation has been receiving growing attention as a rationale for international(ized) criminal trials. McCarthy observes that ‘justice for victims’ is prevalent in academic discourse on international criminal proceedings and that ‘the language of justice for victims’ is commonly invoked to justify the mandate of hybrid and international courts. Many scholars consider the development of victim participation as an important achievement and ‘dominant commitment of international criminal justice.’ Hearing the voices of victims in trials of mass crimes has been described as significant progress from the exercise of purely retributive justice to a model of restorative or reparative justice. Scholars observe a ‘trend toward restorative justice at the international level’ that promotes national reconciliation and closure for victims. Findlay understands the integration of victims on the process as a necessary prerequisite for the legitimacy of international criminal courts. He writes: ‘International criminal justice has no choice but to move towards a victim constituency if its legitimacy and functional relevance are to be confirmed beyond the authority of legislative instruments and sponsor agencies.’

14 Elander, supra note 12, at 95.
15 McCarthy, supra note 11, at 353.
16 T. van Boven, ‘The Position of the Victim in the Statute of the International Criminal Court’, in H. von Hebel et al. (eds), Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos (T.M.C. Asser Press, 1999) 77–89, at 87; G. Bitti and H. Friman, ‘Participation of Victims in the Proceedings’, in R. Lee (ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers, 2001) 456–474, at 456; G. Bitti, ‘Les victimes devant la Cour pénale internationale. Les promesses faites à Rome ont-elles été tenues?’ 2 Revue de science criminelle et de droit pénal comparé (2011) 293–341; E. Baumgartner, Aspects of Victim Participation in the Proceedings of the International Criminal Court’, 90 International Review of the Red Cross (2008) 409–440; C. Van den Wyngaert, ‘Victims Before International Criminal Courts - Some Views and Concerns of an ICC Trial Judge’, 44 Case Western Reserve Journal of International Law (2011) 475–496.
17 M. Findlay, ‘Activating a Victim Constituency in International Criminal Justice’, 3 IJTI (2009) 183–206, at 203; Friman, supra note 12, at 485.
18 S.A. Fernandez de Gurmendi and H. Friman, ‘The Rules of Procedure and Evidence of the International Criminal Court’, 3 Yearbook of International Humanitarian Law (2001) 289–336, at 312.
19 See e.g. Turner, supra note 1.
20 Findlay, supra note 17, at 189.
Advocates of victim participation argue that their involvement in the trials help victims to achieve healing, rehabilitation and empowerment.\(^{21}\) Their participation would further contribute to national reconciliation since their impact on the proceedings increases the acceptance of judgments rendered by the courts.\(^{22}\)

De Hemptinne distinguishes three main effects of victim participation on international(ized) trials: a reparative, a symbolic and a judicial effect.\(^{23}\) Granting victims the right to convey their suffering and claim compensation can help victims recover from the harm experienced.\(^{24}\) Besides this reparative purpose, victim participation also serves a symbolic value. Giving victims a ‘say’ in the proceedings could render the tribunal’s work more transparent and accessible for the victims.\(^{25}\)

For the purpose of this article, the ‘judicial effect’ of victim participation is of particular interest. De Hemptinne argues that victims can make a valuable contribution to the establishment of the truth in international(ized) proceedings: ‘Indeed, victims may bring up relevant facts or evidences that are not provided by the prosecutor or the defence, thereby helping the judges to develop a more nuanced view of the case.\(^{26}\)’ The independent voice of victims could complement the prosecution’s work and provide the court with knowledge that ‘only those who experienced the events possess.’\(^{27}\) Catani observed with regard to the Lubanga trial before the ICC that victims significantly assisted the chambers in the ‘determination of the truth.’\(^{28}\) However, de Hemptinne acknowledges that victims might not primarily seek the truth, but would also be interested in securing a conviction and receiving compensation.\(^{29}\)

Despite the general enthusiasm in academic literature, critical voices have been raised about the cost of victim participation in international criminal trials. In light of the potentially large number of victims, scholars and practitioners have expressed concerns about the impact of victim participation on matters such as procedural fairness and efficiency.\(^{30}\) Involving victims in the

\(^{21}\) F. McKay, ‘Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture & Genocide’, REDRESS, 1999, available online at http://www.redress.org/documents/inpract.html (visited 19 April 2013), at 15; War Crimes Research Office, Victims’ Participation before the International Criminal Court, (2007), available online at http://www.wcl.american.edu/warcrimes/icc/iccreports.cfm (visited 19 April 2013), at 8; Y. Danieli, Victims: Essential Voices at the Court, VRWG Bulletin, Issue 1, September 2004, available at http://www.vrwg.org/Publications/04/ENG01.pdf (visited 19 April 2013), at 6.

\(^{22}\) C. Stahn, H. Olásolo and K. Gibson, ‘Participation of Victims in Pre-Trial Proceedings of the ICC’, 4 JICJ (2006) 219–238, at 221.

\(^{23}\) De Hemptinne, supra note 8, at 167.

\(^{24}\) Ibid.

\(^{25}\) J. Doak, ‘Victims’ Rights in Criminal Trials: Prospects for Participation’, 32 Journal of Law & Society (2005) 294–316, at 295.

\(^{26}\) De Hemptinne, supra note 8, at 167.

\(^{27}\) Jorda and de Hemptinne, supra note 2, at 1388.

\(^{28}\) Catani, supra note 5, at 919.

\(^{29}\) De Hemptinne, supra note 8, at 167.

\(^{30}\) War Crimes Research Office, supra note 21, at 9.
trials is seen as ‘time and resource consuming’, and a threat to the accused’s right to be tried without undue delay. Turner assumes that a broad interpretation of victims’ rights could ‘overwhelm’ a court and impair its ability to adequately fulfil its mandate.

A further argument levied against victim participation is that it could violate the principle of ‘equality of arms’ which requires ‘each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent’.

Granting victims substantial rights in the proceedings creates in practice a second opposing party to the accused in addition to the prosecution: the victims’ representatives. Victims’ active contribution in the presentation of evidence with the intention of securing a conviction could shift the procedural focus in a way that would be detrimental to the accused and thus affect their right to a fair trial. Equality of arms is particularly at risk if victims assume tasks and responsibilities of the prosecution. If victims act as an additional prosecutor in the trial, this would upset the fragile balance between the investigation and the rights of the defence.

Scholars have opined that not only the defence, but also ‘prosecutors and judges ... may be tepid about the prospect of victim participation’. Disagreements about the prosecution’s case theory and the appropriate trial strategy to adopt could undermine the prosecution’s ability to secure a conviction. Diverging approaches to the case might have adverse consequences on the presentation of evidence and the questioning of witnesses and the accused. Jouet describes a possible scenario:

[O]ne can easily imagine a ... prosecutor sighing in relief upon concluding the successful cross-examination of a defendant, only to be disconcerted a few moments later by the fact that the victims’ counsel may recklessly conduct another cross-examination that could allow the defendant to redeem himself.

Jouet concludes that prosecutors are likely to feel concerned that victim participation ‘will jeopardize their ability to convict defendants’. Potential reservations on the part of judges could result from the challenges victims pose to the conduct of the trial. As victim participation might cause

31 De Hemptinne, supra note 8, at 168; Friman, supra note 12, at 485.
32 War Crimes Research Office, supra note 21, at 9; Friman, supra note 12, at 486.
33 Turner, supra note 1, at 118.
34 Nideröst-Huber v. Switzerland, Judgment of 18 February 1997, Reports 1997-I, 23.
35 M. Damaška, ‘What is the Point of International Criminal Justice?’ 83 Chicago-Kent Law Review (2008) 329–365, at 333; De Hemptinne, supra note 8, at 168.
36 See Yesberg, supra note 12, at 576; Haslam supra note 12, at 334; Helkkila supra note 12; Cryer et al., supra note 12, at 361.
37 Yesberg, supra note 12, at 576.
38 M. Jouet, ‘Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court’, 26 Saint Louis Public University Law Review (2007) 249–307, at 275; de Hemptinne, supra note 8, at 168.
39 Jouet, ibid., at 276.
40 Ibid.
procedural delays and complicate the management of the trial, judges ‘may try to limit the extent of victim participation’.41

While scholars have developed compelling theories on victim participation, the validity of their predictions can only be assessed in practice. As de Hemptinne puts it, the success of victim participation in international(ized) trials depends ‘entirely on the roles played by the prosecutor, the judges and the victims themselves during trial.”42 An insight into the practitioners’ experiences of victim participation at the ECCC will test academic assumptions on the advantages and risks of involving victims in trials of mass crimes.

2. Evaluating Victims’ Participation

A. The Background of Civil Party Participation at the ECCC

During the Khmer Rouge regime between 17 April 1975 and 7 January 1979, an estimated 1.7 million people — almost one-quarter of the population — died in Cambodia.43 After years of negotiation, the United Nations and the Cambodian government agreed on the establishment of a court to try the crimes committed under Pol Pot. The ECCC were established by treaty between the Royal Government of Cambodia and the United Nations as a separate court within the Cambodian legal system. Based on an Agreement between the UN and Cambodia (‘the Agreement’),44 as well as the Cambodian Law on the ECCC (‘ECCC Law’),45 the ECCC is considered a hybrid court that applies both domestic and international law.

During the negotiation process between 1997 and 2003, the issue of victim participation had hardly been touched upon.46 As a result, the only reference to the idea of civil party participation can be found in Article 36 of the ECCC Law that grants victims the right to appeal. Since it was agreed that the trials would be conducted according to the existing Cambodian criminal procedure law, victim participation was introduced through the back door.47 By consenting to the application of Cambodian criminal procedure law — which foresees an active participation of victims — the drafters implicitly introduced the civil party model to the proceedings. The Cambodian criminal procedure law

41 Ibid., at 277.
42 De Hemptinne, supra note 8, at 179.
43 Historians are uncertain about the exact number of victims, T. Fawthrop and H. Jarvis, Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal (University of New South Wales Press, 2005).
44 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.
45 2001 Law on the Establishment of ECC for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as amended in 2004.
46 P. Kroker, ‘Transitional Justice Policy in Practice: Victim Participation in the Khmer Rouge Tribunal’, 53 German Yearbook of International Law (2010) 753–791, at 763.
47 Ibid., at 765.
is not codified in one document and its rules were not designed for a trial of mass crimes. In June 2007, the ECCC decided to issue Internal Rules to consolidate Cambodian procedural law applicable to the proceedings. With the adoption of the ECCC Internal Rules, victims were granted the role of civil parties to the trials. Since neither the ECCC Law nor the Agreement provides the ECCC with the power to establish procedural rules, practitioners and scholars were critical about the ECCC’s authority to design a system governing victim participation that differs substantially from Cambodian law.

The ECCC’s first case (‘Case 001’) against the Kaing Guek Eav alias Duch, who was in charge of the notorious torture prison Tuol Sleng (S-21), commenced in February 2009. Ninety victims — both survivors and relatives — participated in the proceedings; 78 were recognized at the end of the trial. Since the founders of the ECCC did not provide a budget for victim participation, the legal representation of victims was dependant on the support of intermediary organizations and pro bono lawyers. In the course of the Duch case, the Trial Chamber progressively developed a limited approach to civil party participation. An important turning point was the Trial Chamber’s decision of 9 October 2009. The Chamber prevented the civil parties from questioning the accused and witnesses on the defendant’s character and from making submissions on sentencing, emphasizing that civil parties do not generally enjoy the same rights as the prosecution. The court’s decision has been strongly criticized among scholars and practitioners and ultimately prompted the

48 G. Acquaviva, ‘New Paths in International Criminal Justice? The Internal Rules of the Extraordinary Cambodian Chambers’, 6 JICJ (2008) 129–151, at 129.
49 C. Ryngaert, ‘Victim Participation and Bias in the Cambodian Courts’, The Hague Justice Portal, 2008, available online at http://www.haguejusticeportal.net/index.php?id=9135 (visited 19 April 2013), at 15.
50 Acquaviva, supra note 48, at 132.
51 S. Studzinsky, ‘Nebenklage vor den Extraordinary Chambers of the Courts of Cambodia (ECCC)—Herausforderung und Chance oder mission impossible?’ Zeitschrift für Internationale Strafrechtsdogmatik (2009) 44–50, at 45; see also ECCC, Civil Party Co-Lawyers’ Joint Request for Reconsideration of the Pre-Trial Chamber’s assessment of the legal status of the Internal Rules in the Decision On Nuon Chea’s Appeal against order refusing request for annulment, Case 002 (002/19-09-2007-ECCC/OCIJ), Pre-Trial Chamber, 13 October 2008, § 27.
52 After an Initial Hearing on 17 and 18 February 2009, the substantive part of the trial commenced on 30 March 2009. The hearings before the Trial Chamber ended with the closing statements between 23 and 27 November 2009.
53 Twenty-eight applications were admitted at the pre-trial stage. The Trial Chamber decided on the application of another 62 victims in their final judgment and rejected 24 of them; the Supreme Court Chamber allowed the appeals of 10 civil parties.
54 Kroker, supra note 46, at 787.
55 A. Werner and D. Rudy, ‘Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?’ in 8 JIHR (2010) 301–309, at 302
56 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, Case 001: Kaing Guek Eav (001/18-07-2007/ECCC/TC), Trial Chamber, 9 October 2009, (hereinafter ‘ECCC, Submissions on Sentencing’), at § 28 et seq.
57 See e.g. P. Kroker, Zivilparteien in Völkerstrafverfahren (Duncker & Humblot, 2011), at 300.
civil parties to boycott the proceedings for several days. After 72 days of hearing evidence, the Trial Chamber convicted Duch on 26 July 2009 for crimes against humanity as well as grave breaches of the 1949 Geneva Convention and sentenced him to 35 years of imprisonment. In February 2012, the Supreme Court Chamber overruled the Trial Chambers judgment and sentenced Duch to life imprisonment.

In the tribunals’ second case (‘Case 002’) that commenced in June 2011 against the most senior leaders of the Khmer Rouge regime, almost 4,000 victims were admitted to participate as civil parties in the proceedings. The accused are charged with crimes against humanity, genocide, war crimes and other counts of crimes under Cambodian law. To streamline the trials, the ECCC substantially modified the procedural rules for Case 002. Victims no longer participated individually in the proceedings, but exercised their rights as a ‘consolidated’ group. Two Lead Co-Lawyers were appointed to assume the responsibility for an overall strategy and in-court presentation of Civil Parties’ interest at the trial and appeal stage.

B. Methodology of the Study ‘Victims in Trials of Mass Crimes: A Multi-Perspective Investigation of the Value of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia’

The Study has been conducted to explore the value of civil party participation at the ECCC from the perspective of all parties involved in the proceedings, to identify potential issues and make recommendations for improvements. Qualitative interviews were conducted to investigate attitudes, motivations and perceptions relating to civil party participation at the ECCC in the most open way possible. In contrast to quantitative studies, qualitative research does not intend to achieve statistical representativeness but aims at providing an in-depth understanding of complex social processes. The qualitative paradigm seeks to grasp a phenomenon from the viewpoint of interviewees, by reconstructing the meanings attributed to the experience of the situation being researched. The scientific value of studying smaller samples thus lies in the opportunity to explore meanings, coherences and values that cannot be explained with statistical numbers.

58 His sentence was reduced to 19 years, taking into account prior periods of detention at the ECCC and illegal detention by the Cambodian Military Court between May 1999 and July 2007; Trial Judgment, Case 001: Kaing Guek Eav (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010.
59 Appeal Judgment, Case 001: Kaing Guek Eav (001/18-07-2007/ECCC/SC), Supreme Court Chamber, 3 February 2012.
60 The accused were Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith. The proceedings against Ieng Sary have been terminated on 14 March 2013 following his death. Ieng Thirith was found unfit to stand trial due to dementia; the case has been severed.
61 A total of 3988 victims applied for Civil Party status; 3866 were admitted.
62 D. De Vaus, Surveys in Social Research (3rd edn., UCL Press, 1996); T. May, Social Research. Issues, Methods and Process (Buckingham Open University Press, 1997); C. Marsh, ‘The Critics of Surveys’, in C. Seale (ed.), Social Research Methods (Routledge, 2004).
Fieldwork was carried out between June and November 2012 with a total of 30 interviews conducted in Cambodia. The sample represents the views of civil parties on the one hand as well as other legal parties to the proceedings and non-governmental organizations (NGOs) on the other hand. The number of interviews conducted with each of the parties was determined by, first of all, the size of their ‘population’ and, second, by the principle of saturation, because depending on their role they contributed differently to the overall research question. In order to capture a broad range of opinions, 12 civil parties, eight civil party representatives (six civil party lawyers and two lawyers in the Lead Co-Lawyer section), four judges, three prosecutors and one defence lawyer were interviewed. The interviews were analysed following the inductive approach of ‘grounded theory’ whereby hypothesis and concepts emerge from the data during the process rather than being pre-defined.

The civil parties’ perception of the trials has already been examined through previous studies. Generally in line with earlier research, the present Study reveals that victims’ expectations were only partly fulfilled and many participants were not entirely satisfied with the outcome of the trial. While the perspective of victims is of utmost importance when assessing the success of their participation in a trial, it is not the only factor to be taken into account. In order to achieve a comprehensive evaluation of the ECCC’s civil party scheme that allows for recommendations for future trials, it is essential to also consider the experiences of legal professionals involved in the trial. This article thus focuses on the innovative, multi-perspective approach of the Study and the results obtained on the largely unexplored view of legal professionals.

3. The Findings of the Study — Challenges of Civil Party Participation at the ECCC

A. The Procedural of the Civil Parties — ‘Supporting’ the Prosecution?

Rule 23, paragraph 1 lit. a, of the Internal Rules describes the purpose of civil party action as participating ‘in criminal proceedings against those responsible

63 Three of the 30 interviews served as brief background interviews being shorter and more spontaneous than in-depth interviews: one with a civil party lawyer, one with a judge and one with a defence Lawyer.

64 Within the boundaries of possibility, they have been selected by gender as well as legal background in common law or civil law.

65 B.G. Glaser and A.L. Strauss, The Discovery of Grounded Theory. Strategies for Qualitative Research (Aldine Pub., 1967).

66 See P. Pham et al., After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia, (Human Rights Center, University of California, Berkeley, 2011); P. Pham et al., ‘Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia,’ 3 Journal of Human Rights Practice (2011) 265–287.

67 This study will be published in late summer 2013. See also Pham et al., ibid.
for crimes within the jurisdiction of the ECCC by supporting the Prosecution. The wording of Rule 23 ECCC-IR leaves room for interpretation. The aim of Rule 23 ECCC-IR could be seen as the prevention of conflicts of interest between prosecution and civil parties. Civil parties would thus be seen as a distinct party whose approach to the case must not interfere with the prosecution's procedural strategy. A broader understanding would define 'support' as an active form of cooperation between the parties and would allow the civil parties to play a more significant role during the assessment of evidence. As a consequence, a defence lawyer noted that there is 'a lot of confusion about the role of Civil Parties in the trial'.

The uncertainty about the understanding of the civil parties' role in the trial became clear in discussions on the scope of questioning. The defence objected to questions by civil party lawyers that focused on issues already addressed by the prosecution, stating that the civil parties should not 'act as additional prosecutors' but be limited to talking about their clients' specific interests. In the interview, the defence lawyer emphasized that civil parties 'had not fully understood their role in the proceedings' and had 'no right to do the work of the prosecutor'.

Referring to Rule 23 ECCC-IR, civil party lawyers found that their competences must be seen as equivalent to the responsibilities of the prosecution. In order to adequately support the prosecution, civil parties would need to be in a position to fully assist in the examination of witnesses. While ruling in favour of the civil parties, allowing them to ask questions outside the scope of victims' suffering, the Chamber did not take the opportunity to clarify the meaning of 'support' in the sense of Rule 23 ECCC-IR and to discuss the procedural role of civil parties in general.

Considering the permission of extensive questioning, trial observers concluded that the Chamber 'will continue to adopt a broad interpretation of the Civil Party right to participation'. That assumption was proven wrong in the Trial Chamber's later decision on submissions on sentencing. The majority made it clear that the Civil Parties do not have a 'general right of equal participation with the Co-Prosecutors' and that their role within the proceedings must not 'transfer them into additional prosecutors'. Thus, the understanding of Rule 23 ECCC-IR and the extent to which civil parties are entitled to support the prosecution remains rather unclear. Trial observers noticed that the 'real meaning of the phrase 'support the prosecution' under Rule 23 ECCC-IR still appears to be unresolved'.

68 Khmer Rouge Tribunal Trial Monitor, Asian International Justice Initiative, Report Issue No 10, week ending 28 June 2009, available online at http://krtmonitor.org/ (visited 19 April 2013), at 6.
69 Ibid.
70 ECCC, Submissions on Sentencing, supra note 56, at § 25.
71 Ibid., § 42.
72 Khmer Rouge Tribunal Trial Monitor, Asian International Justice Initiative, Lessons Learned – A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia, December 2009, available online at http://krtmonitor.org/2009/12/31/krt-trial-monitor-c001-lessons-learned-from-the-duch-trial/ (visited 19 April 2013; hereinafter: KRT, Lessons Learned), at 27.
Those prosecutors interviewed interpreted Rule 23 to mean that civil parties should not act ‘as a second prosecutor’ or contest the prosecution in the courtroom. They opposed the idea that the reference to ‘support’ in Rule 23 would imply an active form of collaboration or joint strategy and shared the Defence’s concern about civil parties doing the ‘prosecution’s job’. When asked how they would envisage valuable support being provided by the civil parties, interviewees did not mention any procedural contributions regarding evidence or case management. On the contrary, prosecutors emphasized that civil parties should refrain from interfering with their strategy. Thus, ‘support’ was not seen as a chance to benefit from the civil parties’ work. Instead, prosecutors seemed to prefer that the civil parties play a passive role, as the answer to the following question posed in the Study demonstrates:

Q: Civil Parties are supposed to support the Prosecution. How would you define that support?
A: Certainly not to approach the case in a way that would interfere with the Prosecution’s strategy or obstruct the Prosecution and theory or approach to the case.

The prosecutors interviewed found that civil parties do not dispose of the power to prove the charges, and should thus refrain from developing a ‘whole theory of the case’. Since the prosecution was ‘better equipped’ to establish the guilt of the accused, it should not be the civil party lawyers’ task to prove liability.

The Study revealed the prosecutors’ strong concern about civil party lawyers exceeding their procedural role instead of focusing on specific victims’ interests. This criticism is supported by the observations made by trial monitors who found that many civil party lawyers indeed acted as ‘second prosecutors’ during the trial.73 Ambiguities in the legal meaning and an obvious lack of substantial cooperation between the prosecution and the civil parties have caused profound uncertainties about the civil parties’ responsibilities in the trial.

B. Civil Parties in the Courtroom — Examination of Witnesses in Case 001

The questioning of witnesses at the ECCC was organized according to the subject-matter being covered. At the initial hearing in Case 001, civil parties were divided into four groups, each represented by both national and international lawyers. In consequence, up to eight different lawyers for civil parties were entitled to address the court during the hearing and ask questions to the witnesses.

Early in the trial, the Defence raised the issue whether questioning by lawyers for civil parties had to be limited to matters directly related to the suffering and damages of the civil parties they represented.74 Civil party lawyers objected to that restriction and referred to their competence under Rule 23(1)(a)

73 Ibid., at 33.
74 Khmer Rouge Tribunal Trial Monitor, supra note 68.
ECCC-IR to 'support the prosecution'. The ECCC ruled in favour of the civil parties and permitted their legal representatives to freely determine the content of their examination. This broad approach allowed the civil party lawyers to ask questions on all aspects of the trial regardless of their relevance to a specific interest of victims. In the following, witness examinations turned out to be problematic. Judges stated that irrelevant and repetitive questioning slowed down the proceedings and posed a risk to the expeditious completion of the trial. One judge summarized their impressions as follows:

It was valuable to have first-hand accounts of experiences. But apart from that, the questioning by the Civil Party Lawyers tended to slow the trial for no particularly useful purpose, because it didn't add much, frankly, to the material that we needed to decide on guilt or innocence, reparations, admission of Civil Parties, etc. So it was a bit chaotic.

This statement reflects concerns about the performance of civil party lawyers in the courtroom. Interviewees emphasized that coordination among different civil party groups was poor. It was felt that some of the lawyers were not used to working in teams and showed reluctance to submit individual aims to the interests of the civil party group. It was remarked in this respect that '[t]he problem was obviously that very few of these lawyers had ever had to work together with other lawyers. That became very obvious, there was certainly no culture of cooperation, but I’m not even sure there was willingness.'

The lack of agreement and joint strategy was deemed 'confusing' and a major factor contributing to the length of the proceedings. Since a timely trial was seen as crucial for the success of the ECCC and the rights of the accused, the delay caused by the civil parties gave rise to strong criticism. Given the absence of cooperation among many of the civil party lawyers, their questioning was characterized as 'repetitive' and as needlessly prolonging the proceedings. As was observed, '[t]he repetitious questions were absolutely dire.'

A closer look at the transcripts of the hearings reveals that the examination of witnesses by civil party lawyers was a constant problem at trial. Judges had to intervene on multiple occasions as a result of repetitive and unclear questioning. The challenges experienced during witness examination led the judges to increasingly take proactive measures to expedite the trial. Trial observers noticed a clear trend towards improving punctuality and interrupting irrelevant questioning. To ensure a more structured hearing, the Chamber decided by the ninth week of the trial to set time allocations for the parties. Trial observers found this measure to be enforced rather strictly with requests

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75 Ibid.
76 See e.g. Transcript of Trial Proceedings, Kaing Guek Eav, Day 26, Case File No. 001/18-07-2007-ECCC/TC, 10 June 2009, available online at http://www.eccc.gov.kh/en/indicted-person/all/transcript (visited 19 April 2013), at 70.
77 Khmer Rouge Tribunal Trial Monitor, supra note 68, at 39.
for additional time often rejected.\textsuperscript{78} It is worth noting that a rejection of time extension applied most often to civil parties.\textsuperscript{79}

Although time management was an important step to avoid further delays, the problem of repetitive questioning persisted. Prosecutors described the civil parties’ questioning of witnesses as ‘poorly prepared’ and often a ‘waste of time’. Since the prosecution had to share its allotted time with the civil parties, efficient witness examinations were of major importance to the prosecutors interviewed. In Case 001, prosecutors criticized that the lack of coordination and repetitive questioning by civil party lawyers for unnecessarily prolonging the trial. In this vein, one prosecutor stated that ‘[s]ort of a dozen people were asking questions and I think it’s a waste of time and I think it duplicates the examination and it makes an already very long trial even longer.’

Prosecutors interviewed also expressed the opinion that questioning by lawyers for the civil parties was not adequately managed by the Court. It was felt that judges were somewhat overwhelmed with the procedural challenges and missed opportunities to appropriately curb the civil parties’ rights in order to guarantee an efficient trial. It was remarked in this regard that, ‘[i]n a way, you can’t blame the Civil Party Lawyers for that, because they were given that opportunity and that role and that ability to question in relation to the liability of the accused... So there needs to be more direction... and that’s sort of bad management in a way.’

In terms of the production of evidence, prosecutors did not think that the civil parties contributed substantially to the case. Prosecutors felt that questioning by lawyers for the civil parties did not follow a clear ‘purpose’ nor provided additional information, compared to their own questioning. To the contrary, respondents believed that the civil parties’ questioning was sometimes harmful to the prosecution’s strategy.\textsuperscript{80} They noted in this respect that: ‘...maybe the client’s interests or the Prosecution’s interests do not align at that particular moment and so you end up on the record with evidence that goes directly against the Prosecution case or the Prosecution’s theory of the case.’

Respondents explained that the prosecution develops a case theory to establish the guilt of the accused. If civil parties take a different approach to legal questions on matters such as individual criminal responsibility, their arguments could undermine the strategy employed by the prosecution to prove the charges: ‘When you’re proving a case, you usually have one theory for the case. And when you have a lot of people arguing the case in terms of liability, people may have different theories of that case, and so it can be quite undermining.’

\textsuperscript{78} Ibid., at 40.
\textsuperscript{79} Ibid., referring to Ms Silke Studzinsky and Ms Matine Jacquin’s request for an extension of time on 29 June and 1 July, respectively. See Khmer Rouge Tribunal Trial Monitor, Asian International Justice Initiative, Report Issue No. 11, week ending 5 July 2009, available online at http://krtmonitor.org/ (visited 19 April 2013).
\textsuperscript{80} This concern is shared by Damaška, supra note 35, at 342.
Many prosecutors were critical about the fact that civil parties were allocated the same amount of time and rights as the other parties to the proceedings, which they considered was unnecessary to depict the victims' perspective. It was thought that the time allocated to the civil parties was time needed for the prosecution to prove its case.

Civil party lawyers recognized that the examination of witnesses proved difficult in Case 001. Judges were overwhelmed by the large number of civil party representatives who all asked to be heard in the courtroom without following a joint strategy in pursuing their clients’ interests. Given the absence of internal coordination, civil party lawyers admitted that questioning was often repetitive and time-consuming:

I think that it was not serving the civil party, obviously it was doing the exact opposite effect because it was annoying the judge...There were eight lawyer[s] at the same time, some lawyers asking the same questions as the others; some lawyers having very different views [compared with others]. It's a shame.

Coordination among the civil party Lawyers in Case 001 proved to be challenging. Civil party interviewees described their collaboration as 'sometimes very difficult' and even discussed personal 'fights' that led to a rift between individual members of civil party teams. The difficulties were described by one civil party interviewee in the following terms: 'The problem [was] actually not accepting [one] other because they were so many different views, so many different egos.'

Although respondents admitted shortcomings in their examination of witnesses, they also emphasized the benefits of their questioning for the trial. Some of the civil party lawyers found they had been able to contradict false claims and statements by referring to victims' statements. It was also felt that certain witnesses would be more willing to respond to questions asked by civil party lawyers rather than to those of the prosecution:

Sometimes the witnesses speak differently to us than to the Prosecutions. Now I am talking about Khmer Rouge Cadres who come to testify, but we've had many, many times where the questions were put by the Prosecution and they were not answered and when we put them they answered to us [sic].

Overall, the examination of witnesses was regarded as a major shortcoming of civil party participation in Case 001. Unnecessarily lengthy questioning risks violating the accused's rights to a speedy trial and jeopardizes fair trial standards. In light of the advanced age of the accused, efficient time management was particularly important.

C. Performance and Responsibilities of Civil Party Lawyers

Judges interviewed cited the 'inexperienced' of some of the civil party lawyers with international trials and their insufficient legal training as one of the main reasons for their weak questioning technique. Although the judges
noted that some teams were better prepared than others, they expressed an overall dissatisfaction with the work of lawyers for the civil parties. As one judge put it: ‘...I think they’re a little bit amateurish. But certainly in terms of analyzing and applying the law, I was not particularly impressed.’

The prosecutors interviewed shared the judges’ critical view of the effectiveness of the civil party lawyers’ performance in the courtroom. They attributed poor questioning technique largely to the lack of individual competence among the civil party lawyers. This criticism was directed primarily at the Cambodian civil party lawyers who were perceived as not being ‘adequately prepared’ for the trial. Some of the interviewees felt that the Cambodian lawyers did not have the necessary legal knowledge and experience to represent victims in the proceedings. Since the academic system and legal education in Cambodia are underdeveloped, many prosecutors demanded better training in witness examination and closer ‘supervision’ of the Cambodian civil party lawyers by their international counterparts.

On the other hand, international civil party lawyers emphasized the importance of involving Cambodian lawyers in victims’ representation. Cambodian lawyers were perceived to be in a better position to fully understand and respond to the victims’ personal needs. Given their shared historical and personal backgrounds, Cambodian lawyers could develop a closer relationship with the civil parties. One interviewee commented in this regard that, ‘[o]ur Cambodian lawyer, part of his family too was killed. So basically you have a very strong link with your client which obviously is a difference compared to the relationship that the international lawyers have with the civil parties.’

Judges, prosecutors and defence lawyers emphasized the complexity of the cases which requires a deep understanding of international law as well as a continuous involvement in the proceedings. Thus, interviewees were critical about the participation of pro bono lawyers who came to Cambodia only on an occasional basis. As one prosecutor put it: ‘...many ...different lawyers came in only occasionally. They flew in and out. The French lawyers fly in and out knowing nothing about the case or the evidence.’

Since pro bono lawyers were not constantly present at court, other legal professionals felt they were not sufficiently familiar with the case and that it was thus ‘difficult to deal with this group. Interviewees questioned whether these lawyers could establish a meaningful relationship with their clients or, as one judge put it, ‘even know who they represent’. It was assumed that the limited contact with the civil parties would impede communication and restrict the lawyers’ opportunity to understand and represent their clients’ interests.

The pro bono lawyers interviewed acknowledged that they were not in close contact with their Cambodian civil party clients as they could not directly correspond with them on the phone and had little contact with them in person during their occasional visits. As a consequence, they depended largely on their Cambodian colleagues to ‘make the bridge’ with their civil party clients.

Another concern raised by the judges interviewed related to the way in which civil party lawyers’ perceived the work they were carrying out. Some of the interviewees from the judiciary were critical of the fact that many
representatives for civil parties acted more as human rights advocates than as actual lawyers. Judges felt that some of the lawyers attempted to ‘fight the Court system’ instead of trying to do the best for their clients within the existing legal framework. It was observed that especially lawyers who were brought in by NGOs followed their own political agenda without considering the limits of a criminal trial. The same was observed for French lawyers who expected their domestic system to be applied. Some of the interviewees considered that these lawyers blamed the shortcomings of the trial entirely on the procedural decisions made by the Chamber and they did not accept the procedural restrictions imposed as being necessary for a trial conducted at the international level. One judge advised civil party lawyers to consider that ‘they are civil parties in an internationalized trial, not in their domestic legal system and not to expect or demand identical treatment without an understanding of the overall system’.

Reviewing the work of civil party lawyers in the first ECCC trial, interviewees from the judiciary were highly critical of their overall lack of coordination, their insufficient preparation of questioning and their unwillingness to accept procedural limitations. One judge concluded that: ‘I didn’t really think that they [civil party lawyers] played a useful role.’

D. Ensuring Equality of Arms —Victim Participation v. the Rights of the Accused

In the first ECCC trial, the defence raised the issue of equality of arms in several submissions. The principle of equality of arms is an essential element of a fair trial, having its roots mainly in the adversarial system. In international criminal law, equality of arms has been described as ‘obligating a judicial body to ensure that neither party is put at a disadvantage when presenting its case’ and — as a minimum — ‘entitle the accused to adequate time and facilities for his defence under conditions which do not place him at a substantial disadvantage as regards his opponent.’

Civil party participation was considered a risk to procedural fairness since the system introduces a third party who has an interest in securing the conviction of the accused. Balancing the rights of civil parties and the guarantee of procedural fairness for the accused proved to be one of the ECCC’s most significant challenges. Most interviewees felt that the dominance of civil parties in the courtroom created an imbalance to the disadvantage of the accused. The presence of numerous civil parties and their lawyers alongside the prosecution was seen as problematic for the accused. One judge described the atmosphere at trial as follows: ‘I had the feeling sometimes that the accused must have felt he had a pack of wolves looking at him ... all these lawyers and the prosecutors glaring at him ... It just didn’t feel fair.’

81 Judgment, Kordic and Cerkez (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 175.
Others emphasized the factual performance of civil party lawyers acting as ‘second prosecutors’ in the trial. Since it was felt that civil party lawyers worked more on general legal questions instead of concentrating on the victims’ specific impact, the equality of arms could change to the detriment of the accused.

The Chamber’s concerns about procedural fairness found expression in its tendency to strengthen the role of the Defence in order to ensure an equality of arms. The Defence had objected the Court’s decision on the allocation of time and argued that they should receive equal time to the total of the Co-Prosecutors’ and civil parties’ (who were allowed to ask questions for 30 and 40 minutes, respectively, while the Defence was given 40 minutes). While the Trial Chamber rejected the motion in principle, they acknowledged a potential unfairness and announced their intention to allocate additional time on a case-by-case basis.82

Interestingly, it could be observed that principally those with a common law background explicitly invoked the argument of equality of arms. Judges from civil legal systems mainly disagreed with the legal classification but still noted a ‘feeling of unfairness’ created by the number of civil party lawyers. Although the professionals did not agree on the legal argument, most of the interviewees found that the presence of civil parties in the courtroom had shifted the focus from the accused to the victims.

E. A Clear Need for Procedural Changes in Case 002

In light of the difficulties experienced in Case 001, judges felt that procedural changes were ‘absolutely mandatory’. One judge noted in this respect that ‘I think it became quite obvious, actually to everybody involved including the lawyers that they needed somebody to coordinate. It hadn’t worked with four groups in Case 001.’

Given the even higher number of Civil Parties in Case 002, judges were convinced that the individual participation system applied in Case 001 could not be maintained for the following trial. Procedural changes were deemed necessary to ensure a fair and efficient trial that safeguards the rights of the accused. As was noted: ‘It turns out that there might be something in excess of 4,000 [civil parties in Case 002], and so there’s just no way physically — let alone in terms of fairness — we can accommodate them each as individuals in the courtroom. It just couldn’t be done. It would simply be a reprise of what happened in Case 001 with hundreds more glaring at the accused.’

Judges placed emphasis on the assertion that they were not opposed to victims’ participation in general but found it impossible to realize a civil party participation model at the ECCC. One judge thus noted as follows: ‘I’ve never

82 Khmer Rouge Tribunal Trial Monitor, Asian International Justice Initiative, Report No. 15, week ending 2 August 2009, available online at http://krtmonitor.org/ (visited 19 April 2013).
acted against victim’s participation after we’ve had it, but I have opposed the civil party participation because I don’t think that’s the way to do it.’

Whereas the general decision to streamline the process for Case 002 was not in contention among the judges, the design of a new participation model had to be drawn up in detail. The ECCC Plenary Session of September 2009 agreed on key features of a new participation system which included the formation of a ‘consolidated group’ of Civil Parties pursuing one single claim of reparations. Further, the Plenary Session abolished individual representation in the courtroom and opted for the appointment of Lead Co-Lawyers who bear responsibility for the overall strategy and in-court presentation of Civil Parties’ interest at the trial and appeal stage. In February 2010, the 7th Plenary adopted the amendments to the Internal Rules, introducing the new civil party participation scheme. The Plenary found that the existing rules were ‘not designed to deal with individualized participation by victims on this scale. The number of civil party applicants, combined with the complexity, size and other unique features of ECCC proceedings, made it necessary to adopt a new system of victim representation.’

Judges acknowledged that the new system departed substantially from the participation model initially envisaged by the Court. Interviewees would no longer qualify the ECCC victim participation scheme as ‘civil party participation’ in a strict sense. Since the representation of a consolidated group through Lead Co-Lawyers was considerably different from the Cambodian or French concept of civil party participation, the use of the term seemed inaccurate to the judges. As one judge put it:

We are already extremely far away from the civil party concept. So when I am here and I have to speak about civil party participation, it’s difficult for me because there is this vocabulary issue and I am not sure that I am really speaking about civil parties participation and I think it would have been maybe a bit [fairer] to limit this to victim participation.

Another problem was seen in the timing of procedural changes. Judges admitted that altering the rules in the middle of the trial caused difficulties. Since civil party lawyers had already worked with their clients during the investigating phase and represented many of them in Case 001, judges recognized that the amendments must have ‘felt like a limitation’ of their role. Respondents assumed that civil party lawyers would have been more likely to accept the Lead Co-Lawyer model if it had been applied from the start. As was noted in this respect:

The way we did it was less than ideal because it obviously happened in the middle of the case, at a time when the Civil Party Lawyers who had accepted mandates had done it under a different framework, individual representation and participation. That was driven by the necessity not because I think it’s a very clean way to change rules.

83 Rule 12 ter ECCC-IR.
84 Press Release, 7th Plenary, 9 February 2010, available online at http://www.cambodiatribunal.org/sites/default/files/reports/7th.plenary.session.eng.pdf (visited 19 April 2013), at 1.
Overall, judges, prosecutors and the defence lawyer expressed a positive view on the new system. The defence lawyer considered the Lead Co-Lawyer model to be a ‘great improvement in the procedure’. Prosecutors interviewed described the procedural changes as a ‘wonderful idea’. Prosecutors felt that the trial management was ‘more efficient’ and the judges ‘much happier’ with the representation of a consolidated group. All respondents agreed that the experiences in Case 001 had demonstrated that victim participation through individual lawyers was not feasible in trials of mass crimes. The main advantage was seen in the Lead Co-Lawyers’ consistent presence in the courtroom which facilitates communication between the court and the Civil Parties. Since communication among civil party Lawyers was deemed poor, the new Lead Co-Lawyer system appeared necessary to guarantee one single voice of victims in the courtroom. It was noted in this regard that ‘I think that it [the new system] only really has advantages because it ensures coordination and cooperation between a group of people who really didn't cooperate over anything previously from what I can see.’

Judges continued to express regret that the Court did not make the most of the unique opportunity to develop a model for victim participation from the outset. Since the ECCC’s civil party participation was not designed carefully in advance, the Agreement failed to provide a well-grounded concept considering the challenges that would arise in a trial of mass crimes. One judge felt that they ‘lost a year or two years pretending that we could apply a system which as it turned out later could not be applied’. Although the amendments of the rules have led to improvements, the Lead Co-Lawyer system must be seen as a compromise solution. Change was limited to modifications within the existing legal framework. Creating a new and holistic victim participation model did not seem possible at that advanced phase of the trial, given the opposing interests of civil party lawyers and NGOs:

Because again we were in the middle of case two and there was already a system and so we had to find a way somehow to reconcile what we were doing with this old system and I think that was an opportunity lost. I think we have lost here a unique opportunity to develop something new from scratch.

Civil party lawyers’ attitudes towards the procedural changes were mixed. All lawyers interviewed acknowledged that the modifications led to an overall improvement in coordination and efficiency. In light of the high number of civil party applications in Case 002, respondents found it necessary to better streamline their efforts and pursue a common strategy. Still, a few civil party lawyers expressed strong criticism about the general concept of Lead Co-Lawyers. Since the Lead Co-Lawyers did not have a direct mandate from the victims, some interviewees doubted their legitimacy to speak for the civil parties. On the other hand, civil party lawyers were able to build a relationship with their clients during the investigation and pre-trial phase, and thus felt in a better position to communicate with the civil parties. A few lawyers argued that their superior understanding of the civil parties’ interest should entitle them to file individual submissions and ask questions in the courtroom.
Those lawyers also complained that the civil party lawyers were not given the possibility to challenge the decisions taken by the Lead Co-Lawyers in order to safeguard particular interests of specific victims, for example those of sexual violence. In consequence, they believed the Lead Co-Lawyer model was ‘not satisfactory for the victims’ and diminished their role in the proceedings. One interviewee stated that the amendments intended to ‘control the Civil Parties’ and limit the individual victim’s impact on the trial.

It is worth noticing that the civil parties interviewed in this Study noticed a factual change in their procedural role. Many interviewees complained that they were less involved in Case 002 and desired greater participation.

Overall, procedural changes in Case 002 were deemed necessary to coordinate civil party participation at the ECCC. Still, the late introduction of the new system and the lack of adequate rules to settle disputes on diverging interests between civil party lawyers and Lead Co-Lawyers must be regarded as shortcomings of the proceedings.

F. The Value of Civil Party Participation for the Trial

Most of the respondents expressed an overall positive view on the general idea of victims’ participation in international(ized) trials. In light of the shortcomings of victims’ participation at the ICTY and ICTR, legal professionals found that their involvement at the ICC, STL and ECCC was an ‘indispensable improvement’ and ‘important development’ in international criminal law which should be retained in future trials. According to the defence lawyer, trials would be ‘incomplete if the voices of victims are not heard’. However, almost all of the respondents were critical about the practical implementation and success of civil party participation at the ECCC. The same defence lawyer noted that it was ‘extremely difficult to integrate victims in a trial that deals with mass crimes’ and that, until now, ‘we have not found good solutions to realize victims’ participation’ at the international level.

Implementing a meaningful and effective victims’ participation scheme in practice was seen as a major challenge for trials of mass atrocities. Judges emphasized that they were open towards the concept of civil party participation, but became increasingly sceptical during Case 001.

I welcomed the notion of...the concept of victims having formal status in the trial. I welcomed that in theory, but in practice – in my view – it was not particularly successful as a way of providing justice for victims. I don't think you will find now anybody at the court any longer who says 'yes it has to get louder voices for victims who are willing to extend proceedings until I don't know when.' I think some of them say well 'why did we do it?'

When asked about the impact that civil parties had on the trial, civil party interviewees mentioned that their participation provided a valuable insight into the victims’ experiences under the Khmer Rouge. Prosecutors and judges agreed that the civil parties ‘brought a sort of humanity to the proceedings.
that otherwise they won't have' and reminded the other parties of the true importance of their work. Since criminal trials of mass atrocities tend to focus on complex questions of individual responsibility, proceedings would risk becoming technical and losing touch with the interests and needs of victims. The expression of the civil parties' suffering showed how the crimes affected the Cambodian population and was a 'powerful' argument for the legitimacy of the ECCC. One prosecutor stated: 'It keeps the crimes, or the seriousness of the crimes, alive. The civil party presence is a constant reminder that these crimes occurred against human beings.'

Although prosecutors and judges appreciated that the civil parties brought 'a human side' to the proceedings, they questioned their actual impact on the trial. Apart from testimonies provided by some of the civil parties, victim participation was not seen to 'have much effect in the course of proceedings' and was also not considered beneficial to the legal discussion or the assessment of evidence. One interviewee stated in this respect: 'I think for me they [victims] are most interesting when it comes to presenting the suffering, but that's not necessarily something you need as a criminal court in the narrow sense.'

While all prosecutors interviewed emphasized the importance of expressing the victims' suffering, they were highly critical about victims having legal standing in international(ized) proceedings. To safeguard the fairness and efficiency of the trial, most prosecutors interviewed would restrict the procedural role of victims in trials of mass crimes. Even those who expressed a generally positive view on victim participation and attached great value thereto demanded a limitation of their procedural rights. One prosecutor suggested that victim participation be limited as follows: 'I would actually have quite a narrow basis of participation for the actual trial itself. I would limit the questioning of witnesses to witnesses that directly affect the interest of the civil parties in terms of pain and suffering.'

The prosecutors' sceptical attitude towards the legal standing of victims as civil parties might partly be attributed to the shortcomings of representation and trial management in Case 001. Another reason could be the absence of a clear definition of the parties' different roles and responsibilities. Prosecutors were concerned that civil parties would interfere with their case strategy, especially during the examination of witnesses. This concern, combined with a negative perception of civil party lawyers' performance in the courtroom, may have significantly influenced their overall view on victim participation.

4. Discussion — Lessons Learned from the ECCC

Although high hopes were attached to the idea of victim participation in the doctrine, the participation of victims as civil parties proved to be one of the most challenging procedural issues at the ECCC. A significant 'judicial effect' that victim participation was envisaged as having could not be ascertained

85 De Hemptinne, supra note 8, at 167.
in the Study. Most of the interviewees did not state that victims made a substantial contribution to the establishment of truth and justice.

On the contrary, Jouet’s assumption that judges and prosecutors could be ‘tepid’ about victim participation was corroborated in the Study’s findings. The interviewees expressed an overall critical attitude about how victim participation in the form of civil parties was realized and managed in the Duch trial. Their main criticism related to procedural delays caused by the civil party lawyers’ questioning of witnesses, which was described as ‘irrelevant’, ‘repetitive’ and ‘time consuming’ without ‘adding much to the proceedings’.

Problems anticipated by scholars were thus largely confirmed by practice. Interviewees considered victim participation to jeopardize the principle of equality of arms and the rights of the accused to a fair and speedy trial. Above all, the predicted tension between the prosecution and the victims proved to be a major problem in the reality of international(ized) trials. Conflicts about the role and responsibilities of victims have not been solved in practice and constitute a significant risk to the success of victim participation at the ECCC.

The experiences in Case 001 made it clear that a domestic concept of victim participation cannot be applied at the international level without substantial modifications. A trial of mass atrocities that involves a large number of civil parties provides different challenges for victims’ representation and the organization of hearings. Since the initial participation model was not adapted to the prerequisites of a trial with large numbers of victims, the Trial Chamber had to take restrictive measures to ensure effective proceedings. Despite the practical need for modifications, the continuous limitation of civil party rights during Case 001 could have been easily perceived as a rejection of victims’ participation as a whole.

The critical view of civil party participation raised the question about the underlying reasons for the participants’ dissatisfaction with its procedural implementation. Understanding the key problems of the trial is a prerequisite for improving future trials. During the interviews, three main explanations could be identified: the lack of coordination among civil party lawyers, deficiencies in representation and uncertainties about the role of civil parties in the trial.

A. Improving Coordination — Participating as a ‘Consolidated Group’

The absence of coordination between the civil party groups, which resulted in substantial procedural delays, was perceived as a major weakness of victim participation at the ECCC. The introduction of the Lead Co-Lawyer system has led to significant improvements in questioning and trial efficiency. Judges and prosecutors were positive about the implementation of the new participation model and emphasized its advantages for an expedited procedure. While the rule amendments have succeeded in streamlining the proceedings, they also posed new challenges to the trial. The Lead Co-Lawyer model might lead to a
marginalization of victims and cause internal conflicts among civil party representatives. Critics argue that the Plenary has changed the concept of victims’ participation fundamentally.86 Contrary to what was envisaged at the establishment of the ECCC, civil parties could no longer be regarded as actual ‘parties’ to the proceedings.

It cannot be denied that the rule amendments ‘moved the victims a step further away from the legal process.’87 However, given the challenges that confront victim participation in a trial of mass atrocities, individual representation like in the French civil party system was untenable at the ECCC. To safeguard fair trial standards and ensure a speedy trial, a form of collective representation had to be found. Still, the appointment of Lead Co-Lawyers raises the question of how to balance particular interests of individual victims against the interests of the consolidated group. Some victims might have specific requests that do not necessarily align with the majority’s interest. With little room left for individual concerns, those views would not be adequately represented by the Lead Co-Lawyers. If a collective representation model is applied, the issue of conflicting interest among the victims cannot be left unresolved.88 In Katanga, the ICC demonstrated a creative way of dealing with disagreements within the victims’ group.89 For future trials, it is advisable to establish clear rules on protecting the interests of individual victims whilst still ensuring the effective representation of the consolidated group.90 The ICC’s approach to appoint a second victims’ representative in case of diverging interests is an option worth considering.

Another matter that could cause problems is the timing of the amendments. Interviewees identified the modification of rules during the ongoing trial and the limitation of civil party lawyers’ rights after the investigation phase as problematic. An important lesson to be learned from the ECCC is thus the need for a well-conceived participation scheme from the outset of the proceedings. If an international or hybrid court provides for victim participation, detailed rules on modalities of representation and procedural rights must be adopted in advance.

B. Equipping Civil Party Lawyers

Judges and prosecutors interviewed during the course of the Study raised their concerns about the effectiveness of civil party lawyers’ performance in the courtroom. Their criticism focused mainly on deficiencies in skills and legal

86 A.F. Diamond, ‘Victims Once Again? Civil Party Participation before the ECCC’, 38 Rutgers Law Record (2010–2011) 34–48, at 37.
87 Kroker, supra note 46, at 777.
88 Werner and Rudy, supra note 55, at 306.
89 In case of conflict, the Trial Chamber ‘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’; Order on the Organisation of Common Legal Representation of Victims, Katanga and Ngudjolo Chui (ICC-01/04-01/07), Trial Chamber, 22 July 2009, §13.
90 KRT, Lessons Learned, see supra note 72, at 7.
experience and the participation of pro bono lawyers in the trial. Respondents found that Cambodian civil party lawyers in particular lacked the sufficient legal knowledge and practice to represent victims in a trial of mass crimes. In post-conflict countries, educational and judicial systems have often been destroyed and need to be rebuilt after the hostilities have ended. This was particularly true for Cambodia where schools and universities were closed during the Pol Pot era. Since it is estimated that only 11 trained lawyers survived the Khmer Rouge regime, the legal education system had to be built from scratch. Cambodian lawyers thus did not have an extensive background in law or case management. However, involving Cambodian lawyers was essential in order to communicate directly with the victims and overcome linguistic and cultural differences. A hybrid court system which includes both domestic and international lawyers appears to be the best approach to combine local expertise with an understanding of international law and procedural standards.

Still, further measures are required to enhance civil party lawyers’ work in the courtroom. Future courts should provide more intensive training for domestic lawyers in both theory and practice. A transfer of knowledge in case management and effective questioning will help local lawyers improve representation of their clients. In addition to this basic training, international lawyers will have to work closely with their Cambodian counterparts. Witness examinations should be prepared carefully in a joint effort by both lawyers. An interesting approach taken by the Office of the Prosecution at the ECCC could serve as a model for civil parties. The prosecution has frequently organized internal mock trials to train Cambodian prosecutors in questioning witnesses and the accused. Close cooperation between local and international lawyers not only ensures a better quality of examination but also contributes to capacity building in the country. Lawyers who return to their national legal systems after the trials will apply their acquired skills in domestic proceedings. A transfer of skills and knowledge can thus make a valuable contribution to victim participation and the legacy of the ECCC.

Judges and prosecutors were particularly critical about the participation of pro bono lawyers in the trial. Experiences in Case 001 have shown the importance of having civil party lawyers based in the country for the duration of the trial. Experience demonstrates the need for courts to require the continuous presence of civil party lawyers throughout the trial. If lawyers are obligated to work full time on the case, the ECCC needs to provide adequate funding. The lack of sufficient resources for victim participation must be regarded as a crucial shortcoming of the ECCC. If a court allows for victim participation, its practical implementation must not depend on the involvement of external sources and donors. This seems particularly true since some lawyers’ ties with NGOs were negatively perceived by some interviewees. As civil party lawyers should refrain from acting as advocates for political agendas, their appointment and payment

91 Trainings for civil party lawyers were provided by NGOs such as DC-Cam. These efforts need to be intensified and focus should be more on the practical and procedural challenges of the trial. 92 Khmer Rouge Tribunal Trial Monitor, supra note 68, at 33.
should be secured by the ECCC. The budget allocated to the civil parties must be sufficient to cover the costs of representation, adequate case preparation and a meaningful interaction between lawyers and clients.

C. Clarifying the Role of Civil Parties

Interviews with judges, prosecutors and civil party lawyers carried out in the course of the Study revealed profound uncertainties about the role of civil parties in the proceedings. The unclear wording of Rule 23 ECCC-IR and the Chamber’s reluctance to provide further guidance led to misunderstandings about the scope of victim participation and left many frustrated as a result of the restrictive approach adopted by the ECCC. Instead of merely imposing time limits on the civil party lawyers, the Chamber should have clarified the role of civil parties and defined the notion of ‘supporting the prosecution’ in Rule 23 ECCC-IR. 93

Victim participation is challenging in trials of mass crimes. Courts have the difficult task of guaranteeing victims’ rights and — at the same time — ensuring fair and expedited proceedings. A meaningful and still effective victim participation scheme requires a clear definition of procedural aims, rights and roles. Rules on victim participation will have to set out detailed provisions on participation and refrain from using ambiguous wording when delimiting the competences of civil parties and the prosecution.

In future trials, those regulations should be accompanied by codes of conduct for the parties involved in the trial. Since victim participation is a relatively novel concept in international criminal law, many lawyers are not familiar with its requirements and the practical challenges it poses. The Study also revealed that the participants’ attitude towards the civil party scheme was related to their own legal background. Both common law and civil law lawyers referred to their domestic system when discussing the advantages and disadvantages of victim participation. Whilst lawyers from common law systems were overall more critical about the integration of victims in the proceedings, French lawyers familiar with a civil party system opposed many of the procedural restrictions imposed by the Chamber. Codes of conduct for legal professionals would help develop a common understanding of dealing with victim participation in trials of mass crimes. These provisions should entail a positive obligation for lawyers to promote an international legal culture and not work on the basis of their own domestic system.

The overall question remains: What role can and should victims play in trials of mass crimes? The results of the Study indicate that prosecutors and judges saw the impact of civil parties in ‘bringing a human side’ to the proceedings. None of the interviewees mentioned that the civil parties made a valuable contribution to the legal aspects of the proceedings – by filing submissions on legal questions, presenting evidence or examining witnesses and the accused. These

93 Ibid., at 28.
findings beg the question whether victims should have legal standing in order to guarantee their meaningful participation. From the perspective of the other parties, the question appears to be answered in the negative. Reminding the ECCC of the gravity of crimes and providing a voice for victims in the courtroom are important benefits of victim participation but do not necessarily warrant a civil party status. Since civil party participation at the ECCC was perceived as having a primarily symbolic value for the trial, the question must be asked whether there are less complicated and costly ways to achieve this.

If future courts decide to grant victims legal standing, drafters should carefully distinguish their procedural role from the prosecutors’ competences. Practice before the ECCC demonstrates that the civil parties’ function of ‘supporting’ the prosecution has been downgraded to a mere policy of non-interference with the prosecution’s strategy. In order to guarantee a meaningful contribution to the trial that goes beyond a claim for reparation, the role of victims must extend to them contributing a new perspective to the trial. This could be achieved by providing victims’ lawyers with the competence to control and challenge decisions taken by the prosecution on the conduct of the investigation and the scope of the case. Another approach would be to strengthen cooperation between the civil parties and the prosecution. ‘Supporting’ the prosecution should not be understood as an obligation to prove the entire case. Instead, questioning by representatives for civil parties would be more efficient and beneficial if civil party lawyers were to concentrate on their clients’ particular views and concerns. To ensure a valuable role of victims in the proceedings, more attempts should be made to coordinate the examination of witnesses between the prosecution and representatives for civil parties.

Victim participation in trials of mass crimes is an important yet challenging development in international criminal law. While victim participation is widely regarded as a positive development, the modalities for integrating victim participation in the proceedings remain open to debate. The experiences at the ECCC have raised doubts about whether a civil party model is the best way to make the voice of victims heard. In light of the controversies that arose at the ECCC, an international discussion about the aims and contributions of victim participation seems necessary.

94 At the ECCC, participation is required to claim reparations. The example of the ICC shows that participation is not necessarily a requirement for the reparation claim. A different reparations stage might be advisable for trials of mass atrocities.

95 Jouet, supra note 38, at 306 and 307.

96 De Hemptinne, supra note 8, at 179: ‘Finally, victims’ representatives should understand that their function is not to distort the facts of the case in order to secure a conviction but to meaningfully contribute to the discovery of the truth.’

97 Still, Elander rightly questions whether a ‘massive, multiple and at times contradictory victimization [can] be held on to through joint representation’, Elander, supra note 12, at 109.