

Cologne Occasional Papers on International Peace and Security Law

Number 3
September 2013

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Victims in Trials of Mass Crimes

A Multi-Perspective Study of Civil Party Participation
at the Extraordinary Chambers in the Courts of Cambodia

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AND SECURITY LAW



This research project was conducted at the International Research and Documentation Centre War Crimes Trials, Faculty of Law, University of Marburg.

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The authors would like to express their deepest gratitude to the German Academic Exchange Service (DAAD) and the Fritz Thyssen Foundation for providing the financial means to realize this study both in Cambodia, at the University of Marburg and at the Harvard University.

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Executive Summary

The rights of victims in international criminal proceedings have significantly evolved since the early establishment of the ad hoc tribunals in the 1990s. While the role of victims at the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) was limited to serving as witnesses in the trial, the State parties to the International Criminal Court (ICC) decided to provide victims with broader participation rights. The Extraordinary Chamber 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. Although Civil Party participation is commonplace in several 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 victims' 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 victims' participation and raised doubts about the future application of the concept in international criminal law.

The qualitative study *Victims in Trials of Mass Crimes - A Multi-Perspective Study of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia* explores the value of Civil Party participation in a multi-perspective approach. Qualitative in-depth interviews were used to

investigate attitudes, motivations and perceptions related to Civil Party participation at the ECCC in the most open way possible. Fieldwork was carried out between June and November 2012 with a total of 30 interviews conducted in Cambodia.¹ The sample represents the views of Civil Parties on the one hand as well as other legal parties to the proceedings and NGOs on the other hand. The study's aim was to identify potential issues, and make recommendations for improvements.

A. Findings

Justice emerged as the key expectation and motivation for the interviewed Civil Parties to participate in the trial. Fathoming the understanding of the term, the results reveal four different dimensions of justice: (1) 'Justice for (or against) the accused' - reflecting the Civil Parties' wish for punishment and a "bad treatment" of the accused; (2) 'Justice for the Civil Parties' - meaning recognition and compensation with a clear focus on monetary reparations; (3) 'Justice for the dead' - which stood for the acknowledgment and honoring of those killed during the Khmer Rouge regime and (4) 'Justice for the country' - which referred to their hope of understanding what happened during the regime in order to prevent such atrocities from happening again. Altogether, the various expectations of the victims towards the trial do not seem to have been completely fulfilled thus far.

Professionals took different approaches to the question, which forms of 'justice' a trial of mass crimes can and should achieve. Their view on victims' participation appeared to depend largely on their general understanding of a court's aims and the forms of 'justice' it should deliver. Those who took a broader view on international criminal justice were more open towards Civil Party participation and supported alternative and creative ways to provide justice

for victims. On the other hand, those who had a narrow understanding of justice were more likely to experience victims' participation as an obstacle to the aim of establishing accountability.

Civil Parties interviewed showed a limited understanding of the court's legal framework and their procedural rights as a party to the proceedings. Informing the victims about procedural details and developments proved to be challenging for the lawyers and NGOs. Reasons included a low level of education, the advanced age of the Civil Parties and logistical difficulties as many of victims live in remote areas. Even more pressingly, a lack of interest in the procedural rules and their standing as Civil Parties became apparent as a limitation that prevented victims from following and processing the information they were given. Victims seemed to be less interested in the legal procedure itself but focused more on the surrounding benefits of the trial. Interviewees commonly mentioned the main advantages of their Civil Party status as being the opportunity to come to Phnom Penh, to see the accused and visit the court, to sleep in a hotel and to receive a free lunch.

Professionals involved in the proceedings were very critical about Civil Party participation in Case 001. As main reasons could be identified: (1) The lack of coordination among Civil Party lawyers which slowed down the proceedings, (2) deficiencies in representation by Civil Party lawyers as well as (3) the legal and practical uncertainties about the role of Civil Parties in the trial. Most respondents did not mention a positive impact of Civil Party participation other than bringing a 'human side' to the proceedings.

The interviewed Civil Parties were primarily interested in individual financial reparations and expressed comparatively little interest in collective and moral reparations. Albeit collective and moral reparations did not seem to be their primary concern, not receiving anything

decent confused and frustrated them. Communication about the finally granted reparations might have been deficient as some of them appeared to be confused about the outcome.

Legal professionals involved in the proceedings admitted to have difficulties understanding the term ‘collective and moral reparations’. Uncertainties about the scope and limits of the concept caused dissatisfaction on all sides. Many prosecutors and Civil Party lawyer expressed a critical view on the Trial Chamber’s decision on reparations in Case 001. Interviewees challenged the judges’ literal understanding of the rules and criticized their lack of “creativity” when it came to grant meaningful reparation measures. The judges, on the other hand, felt they had no choice but to act within their understanding of the reparation mandate and demanded adequate funding.

Civil Parties had little knowledge about the content and consequences of the procedural changes for Case 002. However, Civil Parties felt that their participation in Case 002 had become less intense and wished for closer contact with their lawyers and more frequent visits to the court.

Interviewees agreed that the introduction of the Lead Co-Lawyer system has led to improvements in questioning and trial efficiency. However, the amendment of rules in the middle of an ongoing trial made it more difficult for Civil Party lawyers involved in the proceedings prior to the appointment of the Lead Co-Lawyers to accept the limitation of their role. Many respondents criticized that the Internal Rules do not foresee mechanisms to settle disputes on diverging interests between different Civil Party groups or between Civil Party lawyers and Lead Co-Lawyers. Furthermore, the modified participation scheme substantially alters - and marginalizes - the role of victims in the trial.

B. Recommendations

Based on the finding, recommendations can be made to improve victims' participation and reparation in international(ized) trials.

1. Recommendations for Participation

1. Trials with Legal Victims' participation

Future courts should establish a permanent victims' office that assumes the tasks of coordinating outreach and victims' representation. All efforts to facilitate victims' participation should be consolidated under the umbrella of the victims' office. Informing victims about the trial, providing psychological support and organizing visits to the court form integral parts of a meaningful participation scheme. Since procedural participation and extrajudicial outreach activities both address the needs of victims in criminal proceedings, their coordination within the same section will avoid friction losses and improve the efficiency of communicating victims' interests.

In future trials, a system of victims' representatives following the example of the Lead Co-Lawyer model at the ECCC should be introduced from the beginning. The experiences in Case 001 proved the need for a joint representation of victims through one or two lawyers that work permanently at the court. Lead lawyers need to be supported by a number of staff members - instead of independent Civil Party lawyers - that communicate directly with the victims to inform them about the proceedings and seek their views on the case strategy. Operating within a joint victims' office will significantly reduce conflicts of interests between different victims' groups and allow victims to speak with a unified voice in the courtroom.

The lack of adequate funding for victims' participation at the ECCC has to be considered one of the court's major shortcomings. The budget allocated for victims'

participation must thus be sufficient to cover the costs of representation, adequate case preparation and a meaningful interaction between lawyers and clients. In particular, lawyers must be in regular contact with victims in order to fully understand and protect their clients' interests. Efforts must be increased to organize forums that inform victims about the ongoing trials and facilitate discussions on the victims' needs and concerns.

Findings have proven the importance of including national and international lawyers in victims' representation. 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. Future courts should provide more intensive trainings for domestic lawyers in both theory and practice. A transfer of knowledge in case management and effective questioning will help local lawyers improve their representation of clients.

Interviews with legal professionals revealed profound uncertainties about the victims' role in the proceedings. A meaningful and still effective victims' participation scheme requires a clear definition of procedural aims, rights and roles from the beginning. Rules on victims' participation will have to set out detailed provisions on participation and refrain from using ambiguous wording. If future courts decide to grant victims a legal standing, drafters should carefully distinguish their procedural role from the prosecutors' competences. In order to guarantee a meaningful contribution to the trial that goes beyond a claim for reparations, the victims' role must allow them to add a new perspective to the trial.

In future trials, those regulations should be accompanied by codes of conduct for the parties involved in the proceedings. Codes of conduct would help develop a common understanding of how to deal with victims' participation in trials of mass crimes. These provisions

should remind legal professionals not to apply their domestic law but to promote an international legal culture within the office. At hybrid tribunals, a code of conduct should also take into consideration the national culture and legal system of the country where the court is located.

2. Alternative Models of Victims' participation

The experiences at the ECCC have raised doubts whether a Civil Party participation model is the best way to make the voice of victims heard. Given the costs and additional time legal participation requires, alternative measures of victims' participation should be considered for future trials. Knowing the victims' needs allows the international community to take measures that are of practical benefit to the victims and serve their interests instead of being merely symbolic. Prior to setting up a victims' participation scheme in transitional justice processes, victims' expectations and demands should be thoroughly inquired into.

Future courts could establish a Victims Section that serves as an umbrella to facilitate victims' support and institutionalizes the efforts that have been undertaken by intermediary organizations. Without providing a formalized legal status, a Victims Section would be able to organize victims meetings and coordinate NGO efforts to inform victims about the trials. In that way, international(ized) tribunals could guarantee a unified approach to communicating the work of the court and managing victims' expectations about the outcome of the trial.

To meet the victims' need to share their stories, accompanying measures such as storytelling projects, video interviews or a written collection of individual reports could be implemented. Giving a voice to the victims does not seem to be limited to the courtroom but might also happen in public forums outside the trial.

Truth commissions fail to address the victims' prevailing need for punishment of the perpetrators. However, they could be set up to support the court's efforts to promote national reconciliation. Their success will depend largely on the particular circumstances in the post-conflict country.

Regardless of the approach the international communities will follow, it seems advisable to establish general guidelines on victims' participation for future trials. On the basis of an international debate on the aims, opportunities and limits of victims' participation in trials of mass crimes, a basic legal framework of the rights and roles of victims should be agreed on. A universal model of victims' participation must leave enough room to adjust the scheme to the specific national context and domestic legal systems when establishing a hybrid tribunal.

II. Recommendations for Reparations

The duty to sufficiently inform Civil Parties and a close management of expectations should be a major concern in future trials. Prerequisite for this is an honest assessment of victims' needs and hopes. This evaluation should take into account local cultural views and customs. Chambers need to closely cooperate with outreach units and Civil Party lawyers. In doing so, Chambers must provide external communicators of the court with timely, coherent and unambiguous information to guide the foundation for the work with victims.

The incorporation of a system of victim redress must be planned well in advance of future tribunals. Funding reparations and enforcing the measures granted should be given close consideration from the start. An establishing agreement with the respective government should address the following aspects regarding reparations: (1) the inclusion of matters of state responsibility in the mandate

should be thoroughly negotiated, (2) if reparations are to be borne by the convicted person, regulations to seize and freeze assets of the individuals indicted are essential. If however it is decided that reparations measures are not or not only be borne by the convicted persons, (3) alternative sources for funding should be agreed on. Moreover, the agreement should (4) ensure the enforcement of titles against individuals or the state. Procedural possibilities are needed to utilize the national courts for this purpose, and in cases of temporary courts, the establishment of an administrative institution tasked with implementation of reparation measures after outliving the court is crucial.

The absence of a secured budget proved to be a major shortcoming of the ECCC's reparations mandate. No possibility to claim reparations should be incorporated in the regulatory body of future trials without funding. Moreover, the establishment of a Trust Fund comparable to the Trust Fund for Victims at the ICC may serve as a model. To better meet the victims' needs, the mandate of the Trust Fund should not be too narrow. As judicial reparations might not meet the victim's expectations, a broader mandate enabling the court to provide non-judicial measures may be needed.

The rules governing the procedure and the requirements to claim reparations should be detailed, unambiguous and leave no room for mistakes regarding their cogent character. Rules should clearly outline the conditions for the applicants, the level of proof needed to show the link between the individual and the crimes tried, as well as reparation measures possible to obtain. Moreover, the required level of specificity of a claim and a procedure to implement reparations awarded to the victims should be clearly stated. The creation of a reparations stage subsequent to the finding of guilt would be advantageous. In doing so, the trial against the accused is not unnecessarily prolonged by discussion of reparation

measures against an accused that has not yet been convicted.

The estimated capacities of a future court should be thoroughly assessed before deciding to entrust it with the question of reparations. To overburden an international(ized) criminal court is detrimental to all aims it is set up to serve. In cases of doubt about the court's possibilities, the founders could take the reparation mechanism of the Special Tribunal for Lebanon as an example. That is, the court will not grant reparations, but its findings as to the criminal responsibility of the convicted person will be binding for a national criminal court. Consequently the way is paved for victims to sue for reparations in a national civil court.

¹ 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 defense lawyer.

Section One

Background

A. Purpose and Aim of the Study

“[It] is the victims and affected communities who are the ones to determine whether or not justice has been done. Victims are the Court’s *raison d’être*.”¹

(Silvana Arbia, Registrar of the International Criminal Court)

In the past decade, international and hybrid criminal tribunals have increasingly referred to “justice for victims” as their main goal and achievement for post-conflict societies. 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 victims’ role was initially limited to serving as witnesses in the trial. Since the ad hoc tribunals were criticized for failing to adequately consider victims’ concerns,² the State parties to the ICC decided to grant victims broader participation rights.³ With the adoption of the Rome Statute of the International Criminal Court, victims were given the right to participate in the proceedings by expressing ‘views and concerns’ through their own legal representatives.⁴ The Extraordinary Chamber in the Courts of Cambodia (ECCC) went one step further and granted victims the status of legal parties to the proceedings. The implementation of the new concept of Civil Parties at the

ECCC has caused controversial discussions about the opportunities and challenges of victims' participation.

Although a more humanitarian approach has strengthened the role of victims in international criminal proceedings, victims' participation in trials of mass crimes is still highly disputed among scholars and practitioners. Referring to "victims" as the *raison d'être* for international courts seems to be more symbolism than reality. Opinions about the victims' legitimate role in the proceedings and the scope of rights a court should attribute to the victims still differ significantly.

Several quantitative studies were conducted after the first trial at the Khmer Rouge Tribunal to assess its success rate and the overall satisfaction of the Civil Parties. With the results of those studies in mind, the University of Marburg conducted a qualitative study in Cambodia in summer 2012. The qualitative study *Victims in Trials of Mass Crimes - A Multi-Perspective Investigation Study of the Value of Civil Party Participation at the ECCC* explores the perspectives of victims and legal professionals on Civil Party participation. 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 consideration. A well-rounded picture of Civil Party participation at the ECCC requires the consideration of the judges' and prosecutors' experiences and opinions next to the victims' and their lawyers. In order to achieve a comprehensive evaluation of the court's Civil Party scheme that allows for recommendations for future trials, it is essential to include the views of all parties involved in the proceedings.

The study aims to understand the meaning of Civil Party participation for both victims and legal professionals. It intends to shed light on victims' needs and concerns in trials of mass crimes. The study also evaluates the legal professional's perception of Civil Parties in the courtroom, their impact on the proceedings and the evolution of their

procedural role during the trials. In order to draw a comprehensive picture of victims' participation at the ECCC, this report will focus on the following four key aspects:

The parties' expectations and understanding of justice ([Section Three, A](#)), the perception of the victims' legal standing ([Section Three, B](#)), reparations granted at the ECCC ([Section Three, C](#)) and the perception of procedural changes ([Section Three, D](#)).

The study reveals the benefits and difficulties of victims' participation in trials of mass crimes. By taking a look "behind the label" of Civil Party participation at the ECCC, this study intends to clarify the value and challenges of integrating victims in international(ized) criminal proceedings. Based on the shortcomings identified at the ECCC, lessons learned for future trials can be developed. The study thus attempts to contribute to the discussion on objectives, risks and advantages of victims' participation in international(ized) proceedings. An insight into the parties' perception of victims' participation will help answer the fundamental question: How can a victims' participation model be designed for trials of mass crimes that meets the interests of victims and still guarantees the rights of the accused and procedural efficiency?

B. Historical Background

On April 17, 1975, Pol Pot led the Communist forces of the Khmer Rouge into the Cambodian capital city of Phnom Penh. A few days after they took power, the Khmer Rouge began to establish a radical form of agrarian communism, forcing millions of people from the cities to work in the countryside. Living conditions in these cooperatives were dramatic, hundreds of thousands people died of overwork, malnutrition and starvation. To transform Cambodia into a rural and classless society, the Khmer Rouge under Pol Pot abolished money, education, religious practices and culture.