Leiden Journal of International Law, 22 (2009), pp. 127–149
 Printed in the United Kingdom doi:10.1017/S0922156508005669

CURRENT LEGAL DEVELOPMENTS

Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles

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Abstract
This article illustrates how the ECCC is struggling to combine successfully two distinct institutional responses to crimes, by being both a criminal tribunal, with its formal rules of procedure and focus on retributive justice, and a quasi-truth and reconciliation commission, with its more flexible approach to participatory rights for victims and focus on reconciliation. The article highlights the advantages and challenges of adopting a 'two for the price of one' model within the Cambodian context and uses the experiences of the ECCC to underscore important lessons for future ad hoc and hybrid courts.

Key words
Cambodia; international criminal law; restorative justice; truth and reconciliation commissions; victims

1. INTRODUCTION

In 2007, following the adoption of its Internal Rules,[1] the Extraordinary Chambers in the Courts of Cambodia (ECCC or Court) began trying individuals accused of serious crimes committed during the Khmer Rouge regime spanning the years 1975–9.[2]

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1 Extraordinary Chambers in the Courts of Cambodia (ECCC), Internal Rules, as revised 1 February 2008, available at www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01–02-08_eng.pdf.

2 Specifically the Court has personal jurisdiction over senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia that were committed between 17 April 1975 and 6 January 1979. See 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 (hereinafter UN–Cambodia Agreement), 6 June 2003, available at www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf, Arts. 1–2. On the history of discussions between Cambodia and the United Nations see D. K. Donovan, 'Joint UN–Cambodia Efforts to Establish a Khmer Rouge Tribunal', (2003) 44 *Harvard International Law Journal* 551.

Currently, five former top Khmer Rouge officials are in the custody of the Court, including Nuon Chea (also known as Brother No. 2, to Pol Pot), Khieu Samphan (former head of state), Ieng Sary (former Minister of Foreign Affairs), his wife Ieng Thirith (former Minister of Social Affairs), and Kaing Guek Eav (also known as Duch, former commandant of the infamous Tuol Slen interrogation centre). Although the subject of an international agreement between the United Nations and Cambodia,[3] the ECCC was established by domestic law and is therefore essentially a domestic court,[4] albeit with crucial international involvement. Because the ECCC is a domestic court the nature of proceedings will, for the most part, mirror Cambodian criminal proceedings, which are modelled on the French civil-law, inquisitorial framework.[5] As a result of its French colonial past as well as the political compromises preceding the creation of the Court, ECCC procedure will differ in a number of respects from previous international and hybrid criminal courts. Two important differences concern the broad focus on national reconciliation and the role of victims in the proceedings, including their right to claim moral and collective reparations.[6]

Issues relating to the topics of national reconciliation and the role of victims are highly complex, particularly when it comes to transitional justice processes. Post-conflict societies must often ask what form of post-conflict justice they wish to pursue – a purely retributive one in the form of criminal trials, one based on restorative justice principles such as truth and reconciliation commissions (TRCs), or some mixture of the two processes. Cambodian and international officials grappled with this question, and it appears that the ECCC's commitment to prosecution combined with its endorsement and expansion of victims' rights illustrates a unique approach to post-conflict justice. The ECCC approach also highlights an important question arising more and more often in international criminal law, namely how to combine successfully traditional retributive procedures with restorative or victim-centred processes.

The ECCC has attempted to adapt its victim participation scheme to the unique context of domestic trials for mass crimes, which the creators of the court felt required a focus on the collectivity of victims and on the reconciliation process as a whole. To this end, the Chambers' rules and recent jurisprudence seem to reinforce the collective nature of Khmer Rouge victims in an attempt to bring about national reconciliation. Despite the fact that the Cambodian government opted in favour of criminal trials over a truth and reconciliation process, the ECCC incorporates a number of important elements commonly associated with TRCs. The focus of the Court on reconciliation and victims indicates that Cambodia is attempting to get

3 See UN–Cambodia Agreement, *supra* note 2.

4 See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereinafter ECCC Law), with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), available at www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

5 UN–Cambodia Agreement, *supra* note 2, Art. 12(1), which states that 'the procedure shall be in accordance with Cambodian law'.

6 Rather than being merely witnesses for the prosecution as is the case at the ad hoc tribunals or being participants in the proceedings as is the case at the International Criminal Court (ICC), victims at the ECCC may participate in the criminal proceedings as civil parties.

two for the price of one, even though the 'truth and reconciliation commission' is not recognized as such.

This article addresses the challenges posed by the tentative relationship between the need to hold individuals accountable for grave crimes and the desire to address the interests and concerns of victims and to focus on national reconciliation. It will illustrate how the ECCC is struggling successfully to combine two distinct institutional responses to human rights and humanitarian law violations, by being both a criminal tribunal, with its formal rules of procedure and focus on retributive justice, and a quasi-truth and reconciliation commission, with its more flexible approach to participatory rights for victims and focus on reconciliation. This article highlights the advantages and challenges of adopting a 'two for the price of one' model within the Cambodian context and uses the experiences of the ECCC to underscore important lessons for future ad hoc or hybrid court structures.

2. Responses to mass atrocities and victim participation

2.1. Criminal trials

International and hybrid prosecutions for war crimes and crimes against humanity have been created in response to a number of atrocities, including, *inter alia*, the conflicts in the former Yugoslavia, Rwanda, Sierra Leone, East Timor, the Democratic Republic of the Congo, Uganda, and the Central African Republic. Responding to mass atrocities with criminal prosecutions, either domestically or internationally, demonstrates a firm commitment to the rule of law and a recognition that specific individuals can (and should) be held accountable for the crimes they committed.[7] The rule of law requires dedication to fairness and a formal proceeding by which both the accused and the accuser have the opportunity to be heard by impartial decision-makers. In addition to demanding accountability and punishment, trials also seek through the truth-seeking functions of the court to acknowledge the harm done to victims.

Although trials are a popular choice for societies emerging from conflict situations as well as for those still immersed in conflict, they have a number of drawbacks. When conducted fairly, trials take a long time to complete and require a large amount of resources. There is no empirical evidence that they have a deterrent effect, despite rhetoric to the contrary, and, particularly when following mass atrocities, they can never establish an accurate or complete historical record. Most important for this article is the fact that trials are typically not an ideal place for victims to tell their stories. In most trial situations, victims are unable to convey their experiences in narrative form. Instead, they must often undergo direct and cross-examination as a witness for one of the parties or for the court, with little opportunity to have their concerns presented.

One reason for the difficulties surrounding victims and criminal prosecutions is that the spotlight of criminal prosecutions is naturally focused on the person charged

7 M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1998), 25.

or accused.[8] At the international level, this focus on the accused is understandable in the sense that the primary role and function of international and hybrid criminal tribunals, designed to adjudicate international (and sometimes domestic) criminal law, is to investigate and prosecute individuals for the most serious crimes of concern to the international community.[9] Another factor contributing to the focus on the accused includes the limited amount of funds set aside for international tribunals, which the court allocates to investigations, protection for witnesses, translation services, salaries, and defence budget. Often there simply are not enough resources to meet the needs of all those affected by a court's prosecutions. Moreover, the sheer number of victims affected by crimes prosecuted at the international level, as compared with the national level, makes it difficult to address the individual needs and concerns of victims. Therefore victims' interests have, until recently, usually been subverted by traditional criminal justice concerns. But this is beginning to change.

In the 1980s the international community began to focus its attention on improving the situation for victims within national jurisdictions. In 1985 the UN General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration).[10] Being a non-binding document, the Declaration merely proposes guidelines for how victims' needs should be addressed at the national level, with the aim of ensuring respect for victims and safeguarding their interests through justice processes. The Declaration defines victims as 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights . . .'.[11] The Declaration also recognizes immediate family members of the direct victim and persons who have suffered harm as a result of intervening on behalf of victims in distress or when preventing victimization. Moreover, victims may be identified regardless of whether a perpetrator is identified, apprehended, prosecuted, or convicted.[12] The Victims Declaration, therefore, urges states to consider that (i) victims can be both direct (victims proper) and indirect victims (family members); and (ii) victims are victims regardless of whether the perpetrator is found. Much of the Victims Declaration resonates with the approach taken by truth and reconciliation commissions. But criminal courts, especially at the international level, have also paid a great deal of attention to its recommendations.[13]

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8 See E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (2005).

9 M. Dembour and E. Haslam, 'Silencing Hearing? Victim-Witnesses at War Crimes Trials', (2004) 15 EJIL 151, at 152.

10 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter Victims Declaration), UN Doc. GA Res. 40/34 (1985).

11 Ibid., at para. 1.

12 Ibid., at para. 2.

13 See *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, Pre-T.Ch. I, 17 January 2006, paras. 115, 131, 145, 161, 172, 182; see also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial State of the Case, ICC-01/04-01/07, Pre-T.Ch. I, 13 May 2008 (hereinafter *Katanga*, Decision), nn. 80–1 and *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06–1432, App. Ch., 11 July 2008 (hereinafter *Dyilo*, Judgment), paras. 26–27.

Recently, the International Criminal Court (ICC) became the first international criminal tribunal to endorse active victim participation in an unprecedented expansion of victims' rights at the international level.[14] Article 68(3) of its Statute, mirrored in Article 6(b) of the Victims Declaration, provides that

> Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The jurisprudence from the ICC has found that victims who can show in proceedings how their 'personal interests' are affected shall have the opportunity to present their views and concerns, so long as their participation does not infringe the rights of the accused. In her decision of 13 May 2008 the single judge of Pre-Trial Chamber I granted to non-anonymous victims in the pre-trial stage the following participatory rights: (i) access to public and confidential record of the case, including evidence filed by the parties; (ii) notification rights; (iii) access to transcripts of both public and closed sessions; (iv) the right to examine and make submissions on evidence; (v) the right to examine witnesses at the confirmation of charges hearing; (vi) the right to attend all public and closed session hearings; (vii) the right to make oral motions or submissions and file written motions or submissions; (viii) the right to make opening and closing statements at the confirmation of charges hearing; and (ix) the right to raise objections.[15] Similarly for the trial stage, in its 18 January 2008 decision the trial chamber in the Lubanga case outlined the participatory rights of victims. These rights include (i) the right to introduce and challenge evidence;[16] (ii) the right to examine witnesses;[17] (iii) the right to make submissions; (iv) the right to make opening and closing statements;[18] and (v) the right to access material in the possession of the prosecution provided that the victims request such material and show how the material is relevant to their personal interests.[19]

Following an appeal of the 18 January 2008 decision, the Appeals Chamber reversed a finding of the trial chamber by holding that, '[f]or the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused',[20] and clarified that victims do not have an unfettered

14 The Special Tribunal for Lebanon also allows victim participation. Art. 17 of its Statute, based on Art. 68(3) of the ICC Statute, provides that 'where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. Additionally, Art. 25 of the Statute allows victims to bring a civil action in a national court to obtain compensation similar to provisions found in the ICTY and ICTR Statutes.

15 *Katanga*, Decision, *supra* note 13, at paras. 45–50. The ICC makes a distinction between the procedural rights of anonymous and non-anonymous victims.

16 *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, No. ICC-01/04-01/06-1119, Tr. Ch. I, 18 January 2008, para. 108.

17 Ibid.

18 Ibid. at para. 117.

19 Ibid. at para. 111.

20 See *Dyilo*, Judgment, *supra* note 13, at para. 2.

right to lead and challenge evidence, but instead are required to demonstrate why their personal interests are affected by the evidence, upon which the Chamber will decide on a case-by-case basis whether or not to allow such participation.[21] These decisions emphasize the fact that although the judges may limit the timing and the modality of participation, they may not restrict participation per se unless it is found that the personal interests of the victim are not affected or that the participation would be prejudicial to or inconsistent with the defendant's rights. Additionally, the ICC allows a broad category of victims to participate, including any individual who has suffered harm, even indirect victims suffering emotional harm, as well as organizations or institutions that have sustained direct harm to their property.

Nonetheless, the promotion of victim participation at the International Criminal Court is still problematic as it continues to struggle to find the right balance of rights between the victims and the parties in its proceedings. Furthermore, victim participation at the ICC must be viewed from the context of the proceedings of other international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). At these tribunals victims were only permitted to participate as witnesses for either the prosecution or the defence. Prohibited from having legal counsel to represent their interests, victims were not given the opportunity to file reparation claims attached to the criminal proceedings.

2.2. Truth and reconciliation commissions

In addition to criminal trials, beginning in the mid-1970s and through to the present, truth and reconciliation commissions have emerged as viable, strategic tools for governments to adopt in order to address human rights and humanitarian law violations and promote reconciliation.[22] However, TRCs have usually been created as justice-supportive processes, 'designed to complement rather than replace national or international prosecution'.[23] Typically they are established to research and report on human rights abuses that occurred over a specific period of time, under a specific regime, or in relation to a specific conflict.[24] Often the commissions are created or funded by governments, international organizations such as the United Nations, or non-governmental organizations. They have the capability of collecting a broader range of 'truth' than do trials because, rather than focusing on the individual guilt of an accused, TRCs look at wider patterns of crimes.

Three distinguishing characteristics of TRCs are their focus on the reconciliation of society, their focus on victims, and their focus on reparations. Indeed, most

21 Ibid., at paras. 3–4.

22 El Salvador, Guatemala, Somalia, the former Yugoslavia, Rwanda, South Africa, and Sierra Leone have all created some form of truth and reconciliation commission; see M.P. Scharf, 'The Case for a Permanent International Truth Commission', (1997) 7 *Duke Journal of Comparative & International Law* 375, at 377–9.

23 C. Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor', (2001) 95 AJIL 952, at 954.

24 G. J. Knoops, 'Truth and Reconciliation Commission Models and International Tribunals: A Comparison', speech delivered at the symposium on 'The Right to Self-Determination in International Law' organized by Unrepresented Nations and Peoples Organization (UNPO), Khmers Kampuchea-Krom Federation (KKF), Hawaii Institute for Human Rights (HIHR), The Hague, 22 September–1 October 2006.

commissions seek to facilitate national reconciliation and address impunity (collectively rather than individually).[25] Martha Minow argues that if the 'goal of healing individuals and society after the trauma of mass atrocity is elevated, truth commissions could well be a better option than trials'.[26] Although prosecutions can also be a form of healing for a society, in that once perpetrators are punished the society can move forward, truth commissions are increasingly viewed as a better alternative when it comes to reconciliation. Furthermore, Hayner credits truth commissions with the ability to advance 'national' reconciliation rather than 'individual' reconciliation.[27] Critical to this collective reconciliation process is the hearing of both victim and perpetrator testimony. Victims especially are encouraged to tell their stories in narrative form. In addition to the taking of testimony, TRCs can often aid in the reparation process. Through their reports and recommendations they can directly or indirectly contribute to the redress of victims. Such reparations can be financial, but usually take the form of social or moral reparations. Although, for the most part, truth commissions have acted as alternatives to traditional criminal justice structures, the simultaneous existence of a trial and a TRC is not uncommon. There are situations in which, in their parallel operation, they complement one another's functions.

The Special Court for Sierra Leone and that country's Truth and Reconciliation Commission illustrate a successful combination of two independent institutions performing complementary roles. Despite some of their goals overlapping, such as examining the responsibility of groups, their primary goals were distinct. The criminal court was designed to prosecute individuals alleged to have committed serious crimes. In contrast, the Sierra Leone Truth and Reconciliation Commission (SLTRC) was established to

> Create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.[28]

Operating parallel to one another, the two institutions primarily functioned at the same time with a slight overlap in jurisdiction. Nevertheless, the SLTRC was able to investigate a number of things that the SCSL could not, such as events that occurred prior to the conflict as well as the role of external actors. And although the two institutions showed the feasibility of simultaneous operations of a court and a TRC, tensions did exist. The major concerns centred on whether the two institutions should have an agreement detailing their relationship and whether they would share information. Essentially, the two institutions agreed not to share information or

25 For example, the South African Truth and Reconciliation Commission's mandate was to facilitate national reconciliation (1995–8). See South African Promotion of National Unity and Reconciliation Act (1995), available at www.doj.gov.za/trc/legal/act9534.htm.

26 Minow, *supra* note 7, at 57.

27 P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001), 155.

28 Sierra Leone Truth and Reconciliation Commission Act 2000, available at www.usip.org/library/tc/doc/charters/tc_sierra_leone_02102000.html, section 6(1).

sign agreements with each other, creating a cordial, albeit ill-defined, relationship.[29] Moreover, the two institutions suffered from competition for resources, in terms of both monetary contributions and trained personnel.[30]

Another example of an international(ized) court and a TRC acting complementarily to one another is that of East Timor. On 13 July 2001 the UN Transitional Administration in East Timor (UNTAET) created the Commission for Reception, Truth and Reconciliation (CRTR).[31] Designed to complement the criminal trials of the Special Panel for Serious Crimes within the District Court of Dili (SPSC), which had exclusive jurisdiction over serious criminal offences, the purpose of the CRTR was to promote national reconciliation.[32] More specifically, the CRTR sought to establish the truth about human rights violations that had been committed in East Timor under Indonesian rule as well as to facilitate the reintegration of those accused of committing lower-level offences in the context of the political conflicts which took place anywhere from 25 April 1974 to 25 October 1999. The mandate of the Commission was wide-ranging. In addition to establishing the truth about past human rights violations by reporting on their nature, causes, and extent, it could make recommendations regarding reforms and initiatives to help to prevent such violations in the future.[33] Indeed, the CRTR recommended that the government implement a programme of reparations for the most vulnerable victims, including those living in extreme poverty, who were disabled, or who were shunned by their communities for any number of reasons.[34] It also had the ability to recommend prosecution to the Office of the General Prosecutor.[35] Like the SLTRC, the CRTR had a relatively good relationship with the UN-administered courts; however, the CRTC also struggled to find adequate funding and often clashed with the court over its jurisdiction.[36]

The creation of the SLTRC and the CRTR is in accordance with the general trend of establishing post-conflict processes designed to focus on national reconciliation that complement those processes dealing with traditional forms of criminal justice. Carsten Stahn has noted that 'the increasing reliance on truth and reconciliation commissions [in addition to trials] is based on the perception that they serve various

29 W. A. Schabas, 'Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court', (2004) 2 *Journal of International Criminal Justice* 1082, at 1084.

30 Ibid., at 1088.

31 UNTAET Regulation 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (July 13, 2001). UNTAET Regulations are online at www.un.org/peace/etimor/untaetR/UntaetR.htm. Although the UN actively supported the establishment of truth and reconciliation processes in a number of situations, including in El Salvador, Haiti, Guatemala, and Sierra Leone, the CRTR marked the first time it acted as the formal founding authority. See Stahn, *supra* note 23, at 956.

32 UNTAET Resolution 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000).

33 UNTAET Regulation 2001/10, *supra* note 31, at sections 2(2), 3(1)(c), and 13(1).

34 Commission for Reception, Truth and Reconciliation in East Timor, Final Report, 30 January 2006, available at www.ictj.org/en/news/features/846.html.

35 UNTAET Regulation 2001/10, *supra* note 31, Sections 3(1)(e) and 38.

36 See P. Pigou, 'Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste', Report for the International Center for Transitional Justice, August 2005, available at www.ictj.org/images/content/0/9/096.pdf; see also C. Reiger and M. Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect', Report for the International Center for Transitional Justice, March 2006, available at www.ictj.org/static/ Prosecutions/Timor.study.pdf, 34–5.

purposes that are usually beyond the reach of national and international courts'.[37] Commissions have evolved to the point where, to a large extent, they mirror many of the procedural aspects of traditional justice proceedings, such as the ability to subpoena witnesses.[38] Additionally, TRCs are adopting due-process guarantees whereby those accused of crimes in commission proceedings are given the opportunity to respond to such allegations. Many of these developments have transformed commissions into quasi-judicial institutions. And the reverse is also true. The ECCC has incorporated important elements commonly associated with TRCs, such as a focus on greater participation by victims and on national reconciliation, to the extent that the Court's focus has expanded beyond that of a traditional criminal tribunal.

3. ECCC STRUCTURE AND ORGANIZATION

Attempts to create a truth and reconciliation commission for Cambodia developed in the late 1990s, when Cambodian Prime Minister Hun Sen and high-ranking UN officials announced that Cambodia would seek a means of bringing Khmer Rouge leaders to justice without compromising peace.[39] Shortly thereafter a group of experts, appointed by the UN Secretary-General to explore options for bringing former Khmer Rouge leaders to justice, issued a report which discussed the possibility of creating a truth and reconciliation commission.[40] However, according to the report few Cambodians attending their meetings supported the creation of such a commission. Ultimately the group concluded that it was too premature to make a recommendation in favour of or against the creation of a commission.[41] Instead, the report recommended that the Cambodians reflect on a process that would be most desirable to the Cambodian people. And although the Cambodians ultimately worked out an agreement with the United Nations on establishing a criminal court, it appears from the rules governing the ECCC and its jurisprudence that the Cambodians have created a unique criminal court with strong restorative justice aspects similar to those usually associated with reconciliation commissions.

Originally the UN–Cambodian Agreement, Cambodian legislation on the ECCC, and existing domestic procedural codes provided the legal foundations of the Court. However, it soon became apparent that a number of important procedural questions still remained, including the role of victims in proceedings dealing with mass crimes. Adding to the general uncertainty was the fact that there was confusion over successive domestic codes of criminal procedure and the well-known fact that Cambodian judicial institutions have an appalling reputation for unfairness and

37 Stahn, *supra* note 23, at 954.
38 Ibid., at 955.
39 See L. Dobbs, 'UN Official Calls for Cambodian Truth Commission', Reuters News, 6 February 1997; on the history of discussions between Cambodia and the United Nations see also Donovan, *supra* note 2.
40 Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850 of 16 March 1999.
41 M. Zwanenburg, 'Much Truth about Truth Commissions', review of P. B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2002), (2003) 3 *Human Rights and Human Welfare* 125, at 130.

widespread corruption.[42] As a result of the concerns over clarity, fairness, corruption, and usurpation of the judicial process, the Court went about drafting a new set of Internal Rules. These rules, together with the ECCC law and the domestic criminal procedural code (CPC) form the procedural structure for the court, marking a unique departure from previous international and hybrid criminal court organization. It is important, therefore, to understand the procedural framework in which the Court functions, because it is this framework that recognizes the distinctive role of victims and emphasizes the reconciliation process.

Exceptionally as regards both international and domestic court organization, the ECCC has two Co-Prosecutors, one Cambodian and one foreign, who jointly have exclusive competence to initiate the prosecution of crimes within ECCC jurisdiction on the basis of a complaint or *proprio motu*.[43] Together they conduct preliminary investigations to determine whether crimes were committed falling under the Court's jurisdiction and identify potential suspects and witnesses.[44] Once the Co-Prosecutors have completed their preliminary investigation they send their information to the Co-Investigating Judges by way of an introductory submission together with the case file.[45] The Co-Prosecutors are continuously under the obligation to turn over exculpatory evidence to the Co-Investigative Judges and may add to their introductory submission with supplementary submissions.[46]

Also unique to the Cambodian model is the establishment of Co-Investigating Judges, one Cambodian and one foreign. Their role illustrates the strong reliance on the French, non-adversarial, model.[47] Ultimately, although the Co-Prosecutors start the initial investigations, the bulk of investigations are to be judicial in nature rather than prosecutorial. After receiving an introductory submission from the Co-Prosecutors the Co-Investigating Judges investigate the facts laid out therein.[48] The Co-Investigating Judges have the power to charge individuals regardless of whether they are identified in the introductory submission or supplementary submissions provided by the Co-Prosecutors.[49] In addition to being able to interview persons they deem useful in ascertaining the truth, they also have the power to grant protective measures for victims and witnesses. Throughout the investigation stage the Co-Prosecutors, the person charged, and civil parties all have the opportunity to request the Co-Investigating Judges to undertake investigations on their behalf. Any denial of an investigation would need to be explained.[50] Importantly, when the Co-Investigating Judges conclude an investigation, all parties, including civil parties, must be notified.[51]

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42 G. Acquaviva, 'New Paths in International Criminal Justice?' (2008) 6 *Journal of International Criminal Justice* 129, at 132.
43 ECCC Internal Rules, *supra* note 1, Rule 49.
44 Ibid., Rule 50.
45 Ibid., Rule 53(1) and (2).
46 Ibid., Rule 53(2) and (4).
47 Acquaviva, *supra* note 42, at 135.
48 ECCC Internal Rules, *supra* note 1, Rule 55(2) and (3).
49 Ibid., Rule 55(4).
50 Ibid., Rule 55(10).
51 Ibid., Rule 66(1), providing that all parties may request an additional 15 days of investigation; Rule 66(2) and (3), providing that a denial of further investigations may be appealed to the Pre-Trial Chamber.

A five-judge Pre-Trial Chamber, a five-judge Trial Chamber and a seven-judge Supreme Court Chamber constitute the chambers of the ECCC.[52] The majority of judges in all of the chambers are Cambodian, including the presiding judge of each chamber.[53] However, decisions are based on a super-majority formula, meaning that at least one of the international judges must agree in every decision.[54] It is noteworthy that according to ECCC law the judges must always strive for unanimity.[55] This clause was included to reinforce the need for compromise and co-operation between the Cambodian and foreign officials. At this early stage in the process the Pre-Trial Chamber plays an important role due to the fact that it will handle disputes that arise between the Co-Prosecutors as well as the Co-Investigating Judges before a closing order is issued.[56] In addition, the Pre-Trial Chamber is responsible for appeals against orders and decisions handed down by the Co-Investigating Judges,[57] including orders concerning the provisional detention of charged persons.[58] It was in the appeal against one of these orders that the issue of victim participation first arose.

3.1. Models of participation in national jurisdictions

There are a number of ways in which victims participate in criminal proceedings in national jurisdictions. The three most common forms of victim participation are (i) submitting and/or reading victim impact statements; (ii) participating as a civil party; and (iii) participating as a private, subsidiary, or auxiliary prosecutor. All three forms of participation have advantages and disadvantages within national systems and have influenced the implementation of participatory rights at the international level.

First, in most common law jurisdictions victims cannot participate in the criminal trial except as a witness for one of the parties. However, once the accused pleads or is found guilty, victims do generally have the limited right to submit and/or read victim impact statements to the court. These statements reflect the physical and emotional harm they and their families have suffered as a result of the crime committed and are a way for victims to express their views as well as to influence the sentence handed out, questions of parole, and sometimes plea-bargaining agreements. Second, in almost every civil law jurisdiction victims have the opportunity of joining their civil claims to the criminal prosecution, making them civil parties in the case.[59] As the civil party (*partie civile* in France), victims generally have the right to lead and challenge evidence but only insofar as it pertains to their claim for damages against

52 ECCC Law, *supra* note 4, Art. 9.
53 Ibid.
54 See S. de Bertodano, 'Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers', (2006) 4 *Journal of International and Comparative Law* 285.
55 ECCC Law, Art. 14.
56 ECCC Internal Rules, *supra* note 1, Rule 71.
57 See Statement of the Co-Prosecutors, deciding to appeal against the Closing Order of 8 August 2008 indicting Kaing Guek Eav for crimes, available at www.eccc.gov.kh/english/cabinet/courtDoc/121/2008-08-21_OCP_Statement.pdf.
58 ECCC Internal Rules, *supra* note 1, Rule 63, which provides that Co-Investigative Judges may, after an 'adversarial hearing' between the charged person and the Co-Prosecutors (but not civil parties), issue orders concerning the provisional detention of charged persons.
59 See M. E. I. Brienen and E. H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (2000), 1069.

the accused.[60] Finally, in some civil and common law jurisdictions victims can participate by contributing to the prosecution as well as attaching their civil claim for damages.[61] In this form of participation the victim is usually referred to as the private prosecutor, secondary prosecutor, or auxiliary prosecutor. Private prosecutors have the right to bring charges and conduct the prosecution, but they are usually obliged to cover the costs of trial if the case is dismissed or an acquittal ensues.[62] Subsidiary prosecutors (usually also acting as civil parties) take over a prosecution once the public prosecutor decides not to prosecute.[63] As with private prosecutors, subsidiary prosecutors must pay costs should the trial end in an acquittal, but, unlike those victims who are only civil parties, they have the right to investigate the scene of the crime.[64] Auxiliary prosecutors (*Nebenkläger* in Germany and Austria), provided for in only a limited type of crime such as offences against honour or threatening with assault, have the advantage that the public prosecutor conducts the greater part of the prosecution; however, they can still lead and challenge evidence, attend hearings, and act as a witness.[65] This model allows victims to express their views and concerns but at the same time places the burden of prosecution on the public prosecutor. Moreover, the auxiliary prosecutor is not under an obligation to pay costs should the accused be acquitted.

3.1.1. Domestic Cambodian law

As noted above, a number of national jurisdictions have allowed victims broad rights to participate in and attach their civil claims to a criminal prosecution. Although national jurisdictions vary widely in their practice concerning the scope and manner of victim involvement in the criminal process,[66] it is fair to say that the French system and those judicial systems based on the French model, such as that of Cambodia, offer a fairly broad example of successful victim participation.[67] Under Cambodian domestic law, victims may file charges against an individual, participate as witnesses for the Court and participate as civil parties in criminal proceedings.[68] In this capacity, victims are granted full party rights, comparable to those of the accused. They may appeal against orders of the Trial Chamber, submit evidence, call witnesses and generally contribute to the prosecution.[69]

Notably, under Cambodian law the rights of victims are almost always exercised individually. This has to do with the fact that the vast majority of crimes involve

60 J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', (2005) 32 *Journal of Law and Society* 294, at 311.
61 See Brienen and Hoegen, *supra* note 59. Civil law jurisdictions include France, Spain, and Germany; common law jurisdictions include England and Wales.
62 Ibid., at 78 and 137.
63 Ibid., at 79.
64 Ibid.
65 Ibid., at 80 and 364.
66 See generally ibid.
67 Ibid., at 297–347, critically examining the *partie civile* and *citation directe* system.
68 D. Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation', (2006) 4 *Journal of International Criminal Justice* 307, at 310.
69 Ibid.

only one or two direct victims.[70] However, the representation of groups of victims through victim associations is nothing new. In a limited number of circumstances Cambodian courts have allowed certain national human rights organizations to take action in offences ranging from discrimination to torture.[71] Moreover, in previous prosecutions of Khmer Rouge leadership for mass crimes, authorities recognized the right of groups of victims to participate as civil parties.[72] Nonetheless, the vast majority of victims participating before Cambodian courts exercise their right individually and seek monetary compensation. This participatory model is not feasible, however, at the ECCC.

3.1.2. Civil party participation at the ECCC

Although the victim participation scheme is one of the most important features of the ECCC, the issue of victim involvement was one of the last issues taken up by judicial officers when drafting the Internal Rules.[73] This oversight most likely had to do with the fact that Cambodian law provides for victim participation, either as an initiator of a complaint, as a witness for the court, or as a civil party. However, it soon became apparent that the domestic victim participation scheme would not work at the ECCC due to the large number of victims and the complexity of the crimes charged.

The drafters of the Internal Rules sought instead to create a workable approach to victim participation for mass crimes. The Rules allow victims the right to file complaints with the Co-Prosecutors, but they do not allow victims to initiate prosecutions as they can in ordinary Cambodian courts. In regard to the Cambodian *partie civile* system, in order to qualify as a civil party before the ECCC individuals must have been victims of crimes within the ECCC's jurisdiction.[74] In contrast to the ICC, the ECCC defines victims as those having suffered actual personal injury. Injury is defined as physical, material, or psychological, as well as being a direct consequence of the offence.[75] Victims applying to become civil parties may do so at any time during the judicial investigation stage before the actual trial commences. The Co-Investigating Judges will either grant or deny civil party status and denials may be appealed to the Pre-Trial Chamber.[76] However, an amendment to Rule 23(4) suggests that victims will not be able to appeal against a decision of the Trial Chamber rejecting a civil party application. This change in the rules disadvantages

70 Ibid. One limitation found in Cambodian law, as compared with the ICC, is that only direct victims may participate.

71 Ibid., citing Projet de code de procédure pénale (Phnom Penh: Mission d'assistance technique française, 25 February 2005), Draft Art. L.131–5–7 (CCP).

72 Ibid., at 309. However, these trials are widely acknowledged to be highly public political show trials in which both Pol Pot and Ieng Sary were convicted *in absentia* and sentenced to death.

73 Acquaviva, *supra* note 42, at 140.

74 The ECCC has jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations. See ECCC Law, *supra* note 4, Arts. 2, 4, 5, 6, 7, and 8.

75 ECCC Internal Rules, *supra* note 1, Rule 23(2).

76 Ibid., Rule 23(3) and (4); see also Rule 82(2). Victims applying to participate during the trial stage will have their applications reviewed by the trial chamber.

applicants who apply once the case file has been transferred to the Trial Chamber, but was likely approved as a means of dealing with an increasing number of victim applicants. Once their participation is accepted, civil parties have the right to counsel, either individually or collectively, and are full parties to proceedings. This means that they may not be questioned as witnesses, but instead have the same rights as are afforded to a charged person or accused.[77] In this sense they may request that specific investigations be carried out on their behalf and their legal counsel may submit applications to the court. Under domestic law, the court may only deny victims' rights, including participatory rights, if there is some 'uncertainty' regarding their application. This will be the same before the ECCC; however, in addition, under ECCC jurisdiction victim applications may be denied if their participation would be 'inconsistent with international standards'.[78]

Importantly, Rule 23 of the Internal Rules, concerning the purpose of civil party action before the Court, provides that the purpose of civil party action is to participate in the proceedings against those responsible 'by supporting the prosecution'.[79] This wording could suggest the possibility that civil parties at the ECCC can support the prosecution in a way similar to the way in which an auxiliary prosecutor supports the public prosecutor in national systems. The Internal Rules also recognize the fact that civil party participation must adapt to the special circumstances of the ECCC. This may be noted, for example, by the Internal Rules' strong discouragement of individual representation in order to prevent a backlog of complainants.[80] Instead, the Internal Rules provide that groups of civil parties may choose from a list of common lawyers, organized through the victims' unit, to represent them. If the victims are unable to agree on a common lawyer, either the Co-Investigating Judges or the Chambers may group the civil parties together, including members of victims' associations, under common representation.[81] Clearly this system was designed to make victim participation more manageable for the Court.

Upon handing down a judgment, the judges of the ECCC may award reparations to civil parties, but only in the form of 'collective and moral reparations'.[82] Rather than setting up a trust fund or encouraging individual rewards, the Internal Rules provide for a system of collective and moral reparations to be borne by the convicted person.[83] According to the Internal Rules, reparations may take one of several forms. The ECCC may order that the judgment be published in any appropriate news or other media at the expense of the convicted person. It may order the convicted person to finance a non-profit activity or service designed to benefit the victims. Finally it may order any other appropriate or comparable form of reparation.[84] The key word is comparable. The ECCC is likely to find that 'other appropriate and comparable

77 Ibid., Rules 23(6), (7), (8) and (9).
78 Boyle, *supra* note 68, at 308
79 ECCC Internal Rules, *supra* note 1, Rule 23(1)(a).
80 Ibid., Rule 23(8).
81 Ibid.
82 Ibid., Rule 23(11).
83 Ibid.
84 Ibid., Rules 23(11) and (12).

forms of reparations' may include the erection of monuments or the establishment of educational programmes.

3.1.3. Decisions on civil party participation at the ECCC

In a decision of the Pre-Trial Chamber pending the appeal against the provisional detention order in the case of 82-year-old Nuon Chea (Brother No. 2) the Court reinforced the collective notion of victimhood and found that victim participation facilitates one of the purported goals of the Court, namely the goal of reconciliation.[85] In its 20 March 2007 Decision, the Pre-Trial Chamber decided on whether civil parties could participate in an appeal against the provisional detention order in the case of a charged person despite the fact that they are barred from the adversarial hearing preceding the appeal and have no opportunity to appeal themselves. After hearing arguments from the lawyers for the charged person, the Co-Prosecutors, the lawyers for the civil parties, and six *amici curiae* from, amongst others, prominent victims' rights non-governmental organizations (NGOs), the Court found that, in fact, 'Civil Parties may participate in all criminal proceedings, which includes the procedure related to appeals against provisional detention before the Pre-Trial Chamber'.[86]

In addressing the arguments in a terminological, contextual, and teleological approach, Pre-Trial Chamber I provided a number of different reasons to support its decision. First, the judges looked at Rule 23 and concluded that the wording 'participate in criminal proceedings' means that victims may participate in *all* proceedings except for those proceedings in which the rules explicitly limit participation. The Court also concluded that since the domestic Cambodian Criminal Procedure Code (CPC) allows civil parties, outside the context of mass crimes, to file pleadings with the 'investigative chamber' hearing appeals against provisional detention orders, so too could victims before the ECCC, since proceedings should be in accordance with Cambodian law.[87]

In addition to examining the ECCC law, the CPC, and the Internal Rules, the Pre-Trial Chamber, in accordance with Article 33(new),[88] looked at international sources to see whether the CPC is consistent with international standards on the issue, despite the fact that it is highly contested whether such standards even exist. First, the Court considered the non-binding General Assembly Victims Declaration. They found it to support the idea of broad victim participation, even though, contrary to the ECCC law, the Declaration requires that personal interests of the victims be shown.[89] Although a non-binding document, the Victims Declaration is one of the few international documents addressing directly the issue of victim participation in criminal proceedings. Nonetheless, broad reliance on the document, which was

85 See *Nuon Chea* case, Pre-T.Ch., Decision on Civil Party Participation in Provisional Detention Appeals, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01) (hereinafter Civil Party Participation Decision), 20 March 2008.
86 Ibid., at para. 36.
87 Ibid., at paras. 29 and 38, citing the Cambodian Criminal Procedural Code, Arts. 259–60.
88 ECCC Law, *supra* note 4, Art. 33(new), providing that if the existing procedural rules do not deal with a particular matter or if there is uncertainty regarding interpretation or application, then guidance may be sought in procedural rules established at the international level.
89 Civil Party Participation Decision, *supra* note 85 (nowhere in the decision does the Court mention the need to show how the victims' personal interests are affected).

drafted with domestic criminal procedures in mind and not those dealing with mass crimes, may prove inappropriate. The Court then briefly looked to the ICC and its Article 68(3), which, as noted above, largely mirrors Article 6(b) of the Victims Declaration. Importantly, the Court failed to take note of any of the disagreements surrounding victim participation at the ICC. Instead, the Court looked to other jurisdictions that employ forms of participation.

The Court looked at the courts in territories transitionally administered by the United Nations, including UNTAET in East Timor and the provisional Criminal Procedure Code of Kosovo (administered by UNMIK). The Court found that UNTAET allows access to justice for victims of gross human rights violations and that the courts in Kosovo provide for victims' rights in the domestic criminal process, albeit with international supervision.[90] However, victim participation before the special panels in East Timor was limited, in that there were only a certain number of proceedings where victims had an absolute right of participation whereas in other proceedings the judges had discretion as to whether or not to allow participation.[91] Although the Court looked at a variety of sources, both national and international, the decision still suggests that the Court only conducted a fairly cursory examination of these sources, eventually drawing the conclusion that broad victim participation is consistent with international standards and practice. It is noteworthy that the Court did not look at ICTY, ICTR, or SCSL practice – none of which provides for victim participation – nor did it distinguish the practices of these courts from the ECCC. As for concerns about the increasing number of civil parties that may participate in proceedings, the Pre-Trial Chamber found that it is not in a position to speculate about facts that may or may not occur in the future. Again, this position of the Court is problematic for a number reasons, not the least of which is the glaring fact that the Court presently faces an increasing number of civil party applications and will need to address the issue at some point – preferably sooner rather than later.

Ultimately, the Court granted victims before the ECCC more participatory rights than those found in any other international criminal proceeding, including the ICC.[92] In fact, unlike the ICC, neither the Cambodian legal system nor the ECCC Law and Internal Rules require that victims demonstrate that their personal interests are affected in order to participate in proceedings.[93] At the ECCC victims are full parties to the proceedings, meaning that, in contrast to ICC procedures, victims will not need to seek prior permission before exercising most of their participatory rights. At the ICC the Appeals Chamber has found that victims do not have an unregulated right to lead and challenge evidence. Rather, they are required to demonstrate why their personal interests are affected by the evidence and the Court, on a case-by-case basis, must decide whether or not to allow such participation. Furthermore, civil

90 For a critical look at the Court's reasoning see C. Ryngaert, 'The Cambodian Pre-Trial Chamber's Decisions in the Case against Nuon Chea on Victims' Participation and Bias: A Commentary', (2008), The Hague Justice Portal, n. 31, available at www.haguejusticeportal.net/Docs/Commentaries%20PDF/Ryngaert_NuonChea_EN.pdf.

91 UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure, as amended by UNTAET Regulation 2001/25 of 14 September, section 12(3) and (5).

92 Acquaviva, *supra* note 42, at 140, except that victims cannot request individual reparations.

93 Civil Party Participation Decision, *supra* note 85, at para. 49.

parties at the ECCC have the right to request investigations on the part of the Co-Investigating Judges, who in turn must carry out those investigations or explain to the Court why they have not done so.

Despite the broad rights granted to victims in the Rules of the Court and in the 20 March 2008 decision, on 1 July 2008 the judges of the Pre-Trial Chamber curtailed victims' rights in proceedings, highlighting the challenges of successfully incorporating broad victims' rights in criminal proceedings dealing with international crimes. In an appeal by Ieng Sary against the order of provisional detention the judges denied the civil party Theary Seng the chance to address the Court directly, on the basis that she was represented by legal counsel. The following day, after dismissing her legal counsel in response to the judges' ruling, she was again denied the right to speak. The two decisions mean that civil parties represented by counsel may not speak in person during pre-trial appeals but instead must speak through their legal representatives, and that civil parties not represented by legal counsel may not make oral submissions during pre-trial appeals. Both of these decisions limit the participatory rights of victims in proceedings and contradict the Internal Rules and a decision of the Court in Nuon Chea's appeal against provisional detention, where a civil party represented by counsel was permitted to speak freely during proceedings.[94]

According to one commentator, the sudden change in the Court's stance towards victim participation is attributable, in part, to two factors.[95] First, Theary Seng, the civil party in the above-mentioned case, repeatedly disrupted proceedings in an attempt to invoke her broad participatory rights. Second, the chamber was ill-equipped for dealing with such a situation. The judges grew so frustrated with the civil party's apparent disregard for the court's procedures that when she tried continuously to address the court directly they held that unrepresented victims could not speak directly to the court, setting a negative precedent for future proceedings and victims' access to address the court. The judges' reaction to an overly assertive civil party was unfortunate. Had their management of the proceedings been better perhaps the entire situation could have been avoided.

3.1.4. The unique ECCC approach

Although the Cambodian authorities opted to forgo a TRC and instead chose to create a hybrid criminal tribunal, the set-up and procedures suggest that the ECCC combines a traditional criminal process with important aspects usually associated with a TRC. First, ECCC law and jurisprudence specifically note that national reconciliation is an important goal of the Court, thereby expanding its mandate from mere criminal prosecution and traditional justice concerns. The preambles to the UN–Cambodia Agreement and the Internal Rules recognize that both justice and national reconciliation are of concern to the Cambodian government and

94 S. Thomas, 'Civil Party's Repeated Attempts to Address Bench and Poor Management of Proceedings Force Worrying Precedent for Victim Participation before the ECCC', 4 July 2008, available at http://ecccreparations.blogspot.com/2008/07/civil-partys-repeated-attempts-to.html.

95 Ibid.

Cambodian people. Likewise, as mentioned above, the Pre-Trial Chamber found that victim participation facilitates reconciliation, which is one of the purported goals of the Court.[96]

Second, the Court has found that victims have a broad right to participate in order that their voices be heard. Victims may participate in many ways including by filing complaints with the Co-Prosecutors, by applying to be a witness in a case, and by applying to be a civil party in a case, which last includes the right to lead and challenge evidence. Unlike the ICC, once the Court admits a civil party applicant they may participate in all proceedings without having to demonstrate any special personal interests.[97] In other words, their role in the proceedings is not limited to their specific interest, such as a claim for damages. The Internal Rules state that they may participate by supporting the prosecution generally. Moreover, the civil parties have argued that their right to participation encompasses the right to represent not only their individual interests in the case but also the wider community's interests. To this end, the lawyers for the civil parties in Nuon Chen's provisional detention appeal argued that the victims should be able to address the Court on how the charged person could affect *society* if he were released rather than how he could affect them personally or victims specifically.[98]

Finally, another example of how the victim participation scheme at the ECCC resembles a process more usually associated with a truth and reconciliation commission has to do with the issue of redress. One of the main purposes of victim participation is to receive reparation for the harm suffered to the individual victim.[99] Unlike at the ICC, where both individual and collective awards are possible, either through payment by a convicted defendant or through the Trust Fund for Victims, at the ECCC only moral and collective awards are possible and only through the defendant once he has been convicted by the Court. It is more than likely that the reparation scheme at the ECCC will prove largely symbolic. In addition to the high number of potential complainants and the immeasurable harm suffered, the indigent situation of those accused by the Court make it highly unlikely that victims will ever receive any compensation for harm suffered. At present there is no trust fund established that could provide possible monetary compensation to victims or victim communities, and the government has given no indication that it will fill the void left by indigent defendants. Nonetheless, the moral awards that the Court may hand down mirror those found in other TRC processes such as that in Sierra Leone.[100]

4. Advantages, challenges, and lessons for the future

One of the reasons why the ECCC, with its unique combination of retributive and restorative elements, works so well in the Cambodian context is because, unlike

96 See Civil Party Participation Decision, *supra* note 85.
97 Ibid., at para. 49.
98 Ibid., at para. 7.
99 ECCC Internal Rules, *supra* note 1, Rule 23(1)(b).
100 However, Sierra Leone also had a voluntary trust fund established to aid victims and victims' groups.

in other post-conflict societies, there was already a vast amount of documentation about Khmer Rouge activities in the Khmer Rouge archives, leaving little doubt that these crimes took place.[101] Because NGOs and other organizations have already carried out a number of duties usually associated with those of a TRC, such as the gathering of victim testimony and reporting on the conflict, Cambodia could argue that a TRC was not necessary and in fact would duplicate the work already carried out by other institutions. For example, the Documentation Center of Cambodia (DC-Cam), an NGO assisting in the documentation of Khmer Rouge atrocities and the facilitation of victim participation at the Court, carries out a number of TRC activities such as interviewing victims and reporting. Of course, these activities are not state-supported, which on the one hand means the state may not acknowledge and validate the experience of survivors and the findings of the organization, but on the other hand allows the organization more independence from corrupt government practices. Indeed, DC-Cam aims to assist at least 10,000 victims of Democratic Kampuchea in filing victim participation requests (either criminal complaints or civil party applications) with the Court during 2008. The organization views this work as assisting ordinary Cambodians 'to participate in the process of bringing the leaders of Democratic Kampuchea to a formal legal accounting, and equally important, as reactivating the informal "*truth commission*" that was begun during the early 1980s with the signing of the Renakse petitions'.[102] The Renakse petitions are a collection of stories signed by over a million victims of the Khmer Rouge and collected by officials from the Vietnamese-supported People's Republic of Kampuchea government. DC-Cam's Victim Participation Project often refers to the petitions as the 'closest thing to a truth commission on the Khmer Rouge that Cambodia has had' and it plans to submit the petitions to the Court.[103]

Opting for trials against particular individuals, specifically senior Khmer Rouge leaders, rather than a TRC, which could pronounce on the collective impunity generally or could name specific perpetrators, is an additional benefit for the Cambodian government. Very few members of Cambodia's current government have not been associated with the Khmer Rouge regime at some time.[104] This was one reason given why the Cambodian government was originally reluctant to create criminal trials. However, now that the Court only has personal jurisdiction over senior leaders of the Khmer Rouge in 1975–9, most, if not all, of the fears of either prosecution or association with the brutal regime are gone. And because no formal truth commission exists independent of the Court, there will be no institutional body making final determinations of culpability which could negatively affect the government.

A final benefit for Cambodia of having a criminal trial which incorporates a number of important elements traditionally associated with TRCs has to do with

101 T. Klosterman, 'The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?', (1998) 15 *Arizona Journal of International and Comparative Law* 833, at 857.

102 See website for the Documentation Center of Cambodia, available at www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/Victim_Participation.htm.

103 A. Nette, '*Locus Standi* for Victims at Khmer Rouge Trials?', Inter Press Service, 25 March 2008, available at http://ipsnews.net/news.asp?idnews=41717.

104 Klosterman, *supra* note 101, at 860, noting that virtually all senior leaders of Hun Sen's government had been Khmer Rouge officials during the Democratic Kampuchea regime.

funding issues. In late March 2008 officials from the ECCC travelled to the United Nations in New York to request US$114 million in additional funds because resources originally allocated for the Court were expected to run out later in 2008.[105] The new funds are necessary to ensure that the Court can expand its services and nearly double its staff. The focus on victims and reconciliation in addition to traditional criminal justice concerns has clearly added to the budget problems. Nonetheless, as was evident from the Sierra Leone and East Timor experiences, conventional TRCs often have a more difficult time securing funding than do criminal trials, and a combination approach like the ECCC, which offers 'two for the price of one', may appeal to Cambodia as well as to donor states. However, officials at the United Nations are in the process of reviewing new allegations of corruption.[106] The nature of the allegations is not yet public, but their timing will not help the Court to secure additional funds. Nonetheless, despite the current corruption allegations, US Deputy Secretary of State John Negroponte announced recently that the United States will donate approximately US$2 million to the Court (subject to approval by Congress).[107] The money, however, will go to the UN-administered side of the Court and not the Cambodian side, which is largely seen as the side struggling with corruption.

Despite the above-mentioned advantages for the Cambodian context, the ECCC scheme is uniquely adapted for Cambodia and may not necessarily be the best model for future ad hoc or hybrid court structures. The ECCC has attempted to broaden the Court's mandate precisely because it desired to accomplish a number of goals. And although in theory it may be possible successfully to combine the two distinct institutions of criminal trials and truth and reconciliation commissions, in practice it is most certainly a challenge. The case of the ECCC highlights a number of these challenges.

The issue regarding the number of victim participants has a direct impact on the Court's ability to keep proceedings efficient, as is required by international standards.[108] By allowing a large number of victims to participate in proceedings, efficiency may be compromised to the detriment of the Court, the charged person, or the accused, as well as the victims themselves. Despite the fact that many of the victims have died in the thirty years since the atrocities took place,

105 In November 2008 Germany donated €1.5 million (US$1.9 million) to the Victims Unit of the Court in an effort to help the Court process the growing number of victim applications.

106 'Court Rocked by New Corruption Allegations', *Phnom Penh Post*, 5 August 2008, available at www.phnompenhpost.com/index.php/component/option,com_myblog/Itemid,149/show,Court-rocked-by-new-corruption-allegations.html/.

107 Phnom Penh Post, 'U.S. Promises $1.8 million to KRT', blog, 16 September 2008, available at www.phnompenhpost.com/index.php/component/option,com_myblog/Itemid,149/show,U.S.-promises-1.8-million-to-KRT.html/.

108 Art. 64 of the Rome Statute of the International Criminal Court requires the Court to ensure that proceedings be conducted in 'a manner that is fair and expeditious'. See Rome Statute of the International Criminal Court, Arts. 64(2), 64(3)(a), 67 (right to be tried without undue delay), adopted 17 July 1998 by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, entered into force 1 July 2002, UN Doc. A/CONF.183/9; see also International Criminal Court, Rules of Procedure and Evidence, Rule 101, ICC-ASP/1/3 (2002); see also International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976, Art. 14(3)(c) (right to be tried without undue delay).

there is potentially still a large number of victims who can apply to participate. Since the setting up of the Victims Unit in January 2008, a year after the first trial began, victims have submitted over 1,800 applications to the Co-Prosecutors – the majority of which have expressed the applicant's interest in becoming a civil party.[109]

Efficient court operation will hinge on the ability of the judges to control the proceedings effectively and on the important role played by the Victims Unit in helping to organize victim participation at the Court. When a victim or victims' group lodges a complaint with the Co-Prosecutors Office, the Co-Prosecutors are required to inform the complainant of their decision as soon as possible and in any case not more than sixty days after registration of the complaint.[110] Not surprisingly, this time frame has proved difficult for the Court to meet, leaving many victims frustrated with the process and believing that the Court does not value the contribution of their stories.[111] Nonetheless, improvements are forthcoming and the Victims Unit is now processing the complaints. Moreover, it is drafting documents that will both 'clarify and tighten the definition of civil party'.[112] With sufficient personnel and adequate resources the Victims Unit and other offices of the Court should be able to respond better to the needs of victims. However, this all depends on the budget of the Court, which, as mentioned above, is about to run out.

Related to the issue of efficiency is another challenge facing the Court, namely the lack of funding and resources. Trials were meant to be completed within three years, but that period has now been extended to five years. Representatives of the Court have already had to request additional funding from the United Nations in order to keep the Court functioning – and this with limited victim participation. The Rules provide that the Co-Investigating Judges are to carry out independent investigations, taking care to investigate both incriminating and exonerating evidence. The fact that victims or victims' associations, like the Co-Prosecutors or the charged person, are able to request the Co-Investigating Judges to investigate their specific situation may negatively affect investigations in two ways. First, the pressure of victims and victims' groups on the investigating judges may unduly influence investigations to the point where other factors, such as gravity and workload, may be overlooked. Second, the gross lack of funding is going to affect negatively the interests of one of the parties, be it the charged person or the victims. Moreover, the victims themselves might become frustrated by a process that does not have the funds to sustain itself, as seems to be the case for victims who have not yet heard from the Court after filing individual complaints.

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109 G. Wilkins, 'Victims in Emotional Legal Limbo over Participation at the KR Trial', *Phnom Penh Post*, 10 September 2008, available at www.phnompenhpost.com/index.php/20080910215 97/National-news/Victims-in-emotional-legal-limbo-over-participation-at-the-KR-Trial.html. See also Nette, *supra* note 103.

110 ECCC Internal Rules, *supra* note 1, Rule 49(4).

111 Documentation Center of Cambodia, follow-up to article on the victim participation project: 'Victims Still Waiting to Hear from Tribunal – Response Will Come', available at www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/PDF/Victims_Still_Waiting_to_Hear_from_Tribunal%20-%20Response_Will_Come_Eng.pdf.

112 See Nette, *supra* note 103.

The advantages and challenges of incorporating restorative or victim-centred justice elements into trials for mass crimes at the ECCC highlight a number of considerations for future ad hoc courts. Before adopting a broad victim participation scheme, the ECCC experience suggests that courts should look at both the desirability and the feasibility of direct victim involvement in criminal proceedings for mass crimes and a focus on national reconciliation by bringing victims and convicted perpetrators together. Creators of future ad hoc courts should examine whether victims can participate as civil parties at the domestic level. If this is the case then adopting some type of civil party participation seems reasonable. Nonetheless, due to the large number of potential victim participants the courts would need to modify domestic procedures. Such modifications may include the grouping together of victims with a common legal counsel or the removal of individual reparation awards and determinations. Furthermore, it would be wise for these courts to establish a special victims' unit to handle victims' concerns. Unfortunately for the ECCC its unit was set up as an afterthought, and it is now struggling to keep up with the pace of complaint filings.

Another consideration that should be taken into account by future courts is whether large amounts of documentation already exist, as was the case in Cambodia. If NGOs, universities, or museums have already carried out much of the work a TRC would typically undertake, it is perhaps best to forgo the creation of such an institution. The drawback would be the fact that the reports issued by these institutions or organizations would not have government backing; however, such government recognition could always be arranged. Due to the costs of these institutions it would be wise not to duplicate work that has already been carried out. Instead, after verifying the information, the authorities could use it in new ways such as the creation of museums or of textbooks.

Perhaps the most important lesson for future courts to bear in mind has to do with funding. If the funding and resources are not available to deal with a large number of victim applicants in a formal court procedure then post-conflict societies need to make difficult decisions. Either they can create a combined structure like the ECCC which uses its court budget to pursue a broader range of goals, or they can create two separate institutions, with separate funds, to pursue similar yet distinct goals, as was the case in Sierra Leone and East Timor. Both models have their advantages and disadvantages.

5. Conclusion

Throughout the past few decades both criminal trials and TRCs have developed a great deal, taking on a variety of forms. Domestic and international criminal trials have sought ways to incorporate more restorative justice measures while TRCs have adopted a number of legalistic procedural norms. Therefore it was a matter of time before a country adopted a process by which it could achieve a broad range of goals ranging from individual criminal prosecution to national reconciliation in one institution. Rather than create two independent institutions as was the case in Sierra Leone and East Timor, the Cambodian government has opted for a unique approach

to criminal trials, one that focuses not only on criminal prosecutions but also on victims' broad participation and national reconciliation. This 'two for the price of one' model illustrates the fact that the notion of justice can be served by a number of different approaches and that, although traditionally reconciliation was 'not the goal of criminal trials except in the most abstract sense', this idea is transforming.[113] However, the ECCC faces many challenges in successfully incorporating its victim participation scheme into the Court's procedural framework. Many of the challenges faced by the ECCC suggest that although the Court's victim participation scheme may potentially work in the Cambodian context, it may not necessarily be the best model for future ad hoc or hybrid courts.

113 Minow, *supra* note 7, at 26.