

Since the subsidy payments made after September 2005 were provided under the same conditions and criteria as those that were challenged in the original proceeding, it was appropriate for the panel and the Appellate Body to find them to be properly within the scope of DSU Article 21.5.

*U.S.—Upland Cotton* was only the second WTO decision to find that a subsidy caused serious prejudice to the interests of another WTO member under the SCM Agreement, and it is the only finding of serious prejudice to be adjudicated under DSU Article 21.5. As such, the findings of the compliance panel and the Appellate Body on compliance with DSB rulings and recommendations concerning serious prejudice were ones of first impression. The findings of the compliance panel and the Appellate Body on the scope of compliance proceedings are also significant. Dozens of WTO disputes have already proceeded to compliance proceedings under DSU Article 21.5, and in view of the dwindling likelihood of an immediate conclusion to the Doha Round, one might well expect that resort to DSU Article 21.5 will only increase. Finally, the prospect for cross-retaliation by Brazil, together with the billions of dollars at stake, ensures that *U.S.—Upland Cotton* will continue to generate considerable interest.

KAREN HALVERSON CROSS  
*John Marshall Law School, Chicago*

*Extraordinary Chambers in the Courts of Cambodia—victims as civil parties—civil parties' participation in pretrial proceedings—provisional detention appeals*

DECISION ON CIVIL PARTY PARTICIPATION IN PROVISIONAL DETENTION APPEALS. Case No. 002/19-09-2007-ECCC/OCIJ (PTC01). At <[http://www.eccc.gov.kh/english/court\\_doc.list.aspx](http://www.eccc.gov.kh/english/court_doc.list.aspx)>. Extraordinary Chambers in the Courts of Cambodia, March 20, 2008.

A pretrial chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the court established to try the most serious crimes of the Khmer Rouge, recently issued a ruling that supports the rights of victims to participate in court proceedings. Specifically, it held that victims who have been admitted as “civil parties” in a case have the right to participate in appeals of provisional detention orders. The opinion in *Civil Party Participation in Provisional Detention Appeals*<sup>1</sup> provides the most expansive interpretation to date by an international criminal court of victim participation at the pretrial stage. In part, the ruling reflects the openness of Cambodian law to victims' involvement in criminal cases. But it is also part of a trend in international criminal law to interpret victims' rights generously. While the court's conclusion appears to be a fair interpretation of national and international law, policymakers and courts in future cases should be aware of the possible tensions between this approach and other important principles, such as the defendant's right to a fair trial and the public's interest in efficient proceedings.

The decision arose in the context of Nuon Chea's appeal of an order that he be detained pending his trial. Nuon was the second in command to Pol Pot during the Khmer Rouge's

<sup>1</sup> Case No. 002/19-09-2007-ECCC/OCIJ (PTC01) (Mar. 20, 2008). The court's legal materials, including the records of the instant case, are available at the Web site of the Extraordinary Chambers of the Courts of Cambodia (ECCC), at <<http://www.eccc.gov.kh/english/>>. The full list of documents for the case (with links to the documents themselves) is at <[http://www.eccc.gov.kh/english/court\\_doc.list.aspx?courtDocCat=case\\_docs](http://www.eccc.gov.kh/english/court_doc.list.aspx?courtDocCat=case_docs)> (select case/appeal no. 002/PTC01).

reign in the late 1970s.<sup>2</sup> He is charged with planning, instigating, directing, or otherwise aiding and abetting war crimes and crimes against humanity during that period.<sup>3</sup> He was arrested in his home near the Thai border on September 19, 2007, and was ordered provisionally detained on the same day. He appealed the order, arguing that the detention hearing was held in violation of his right to a lawyer and that the conditions for provisional detention were not satisfied.<sup>4</sup>

Soon after Nuon filed his appeal, the co-investigating judges admitted four victims as civil parties in the case. The pretrial chamber notified the civil parties of the appeal. At the appeals hearing, the pretrial chamber heard arguments from all the parties on the merits of the appeal and on the question of civil party participation. It later received written submissions from the parties and amici curiae on the question of civil party participation. On March 20, 2008, the chamber issued its decision, holding that victims admitted as civil parties could participate in provisional detention appeals.

Before examining the chamber's reasoning, it is helpful to lay out the context in which the court rendered its decision. In 2001, the Cambodian National Assembly passed a law establishing the ECCC. Given the weaknesses of the Cambodian legal system, the assembly recognized that international assistance would be helpful in operating the court. It signed an agreement to this effect with the United Nations, which resulted in the participation of international judges, prosecutors, and officials, as well as financial support from the international community.<sup>5</sup> The ECCC's statute and rules of procedure combine domestic and international law. Cambodian law is to govern procedure, but when that law is ambiguous or deficient, the court is to seek guidance from international law.<sup>6</sup> To reduce the uncertainties that might arise from the mix of legal sources, ECCC judges adopted "Internal Rules," which integrate Cambodian criminal procedure provisions and relevant international standards.

The pretrial chamber's decision on civil party participation rests largely on the court's interpretation of the text and purpose of Internal Rule 23(1), which provides that the "purpose of Civil Party action before the ECCC is to . . . participate in criminal proceedings . . . by supporting the prosecution."<sup>7</sup> The Internal Rules preclude civil parties from participating in the initial hearing on detention<sup>8</sup> but are silent on the ability of civil parties to take part in detention appeals. The key questions for the court were whether the term "criminal proceedings" includes appeals against provisional detention orders and whether such an interpretation is consistent with the defendant's right to a fair trial.

<sup>2</sup> He held titles such as deputy secretary of the Communist Party of Kampuchea, chairman of the People's Assembly, and acting prime minister. ECCC Office of the Co-investigating Judges, Case No. 002/14-08-2006/Investigation No. 002/19-09-2007, Provisional Detention Order 2 (Sept. 19, 2007).

<sup>3</sup> *Id.*

<sup>4</sup> Nuon Chea's Appeal Against Order of Provisional Detention, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01) (Nov. 8, 2007).

<sup>5</sup> ECCC, Introduction to the ECCC, at <<http://www.eccc.gov.kh>>.

<sup>6</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art. 33 new (2004); 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, Art. 12 (2003).

<sup>7</sup> ECCC, Internal Rules (Rev. 2, Sept. 5, 2008) [hereinafter ECCC Internal Rules].

<sup>8</sup> *Id.*, Rule 63(1).

On the first question, the defense argued that a broad reading of “criminal proceedings” would be inconsistent with other provisions in the Internal Rules. The defense pointed out that while the rules specifically allow civil parties to appeal other orders by the co-investigating judges, they do not mention the right to appeal detention orders. It argued further that civil party involvement at the pretrial stage could impair the accused’s right to a fair and speedy trial. In particular, extensive civil party involvement would unduly delay the prosecution and place an unjust burden on the defense to respond to a multiplicity of opponents. The defense also contended that unrestrained victim participation could inject irrelevant and potentially prejudicial material into the proceedings and interfere with the accused’s right to be presumed innocent.<sup>9</sup>

The prosecution submitted that “criminal proceedings” should be interpreted broadly to include appeals of detention orders. It contended that a narrower reading would severely limit civil parties’ ability to represent their interests at the pretrial stage and would relegate their status to something less than a “party,” contrary to the intention of the Internal Rules’ drafters and to Cambodian law. The prosecution added that reading the rules as a whole supports this argument. Rule 77(3), for example, provides that the greffier (registrar) of the pretrial chamber shall notify the “parties” of all appeals filed before the chamber, implying that all parties will be allowed to participate in these appeals. The term “parties” here includes the civil parties, as both the glossary to the Internal Rules and Rule 23(6)(a) specifically confirm. Other rules enable civil parties not only to consult the case file, but also to file pleadings, make brief observations, and request the holding of a public hearing before the pretrial chamber.<sup>10</sup>

The court agreed with the prosecution that the Internal Rules specifically classify civil parties as parties to the proceedings (para. 26).<sup>11</sup> The court concluded also that the rules’ provisions on civil party participation, when read together, “make it clear that Civil Parties have active rights to participate starting from the investigative phase of the procedure” (para. 36). This more inclusive reading of “criminal proceedings” to include appeals of detention orders was found to be consistent with national reconciliation, one of the main goals of the ECCC (para. 37).

The court next turned to Cambodian law, which had influenced the Internal Rules’ provisions on detention appeals. Under that law, which follows the French model of criminal procedure, victims can become parties to criminal cases and participate actively in both pretrial and trial proceedings by presenting evidence, requesting investigative action, and making written submissions. The chamber noted that the Cambodian Criminal Procedure Code also appears to provide for civil party participation in detention appeals. In particular, under Articles 259 and 260, the parties can consult the dossier and make written submissions on appeals before the pretrial chamber, and the pretrial chamber can order the parties to appear at appeals hearings.<sup>12</sup>

<sup>9</sup> Joint and Several Submissions on Civil-Party Participation in Appeals Related to Provisional Detention, Filed by Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01) (Feb. 22, 2008).

<sup>10</sup> Co-prosecutors’ Submission on Civil Party Participation in Provisional Detention Appeals, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 01) (Feb. 22, 2008).

<sup>11</sup> ECCC Internal Rules, *supra* note 7, Rule 23(6)(a).

<sup>12</sup> CAMBODIAN CRIM. PROC. CODE, Arts. 259, 260, at <[http://cambodia.ohchr.org/KLC\\_pages/KLC\\_files/section\\_011/section11\\_013\\_2007\\_fr.pdf](http://cambodia.ohchr.org/KLC_pages/KLC_files/section_011/section11_013_2007_fr.pdf)> (in French).

The chamber further held that, to the extent that Cambodian law differs from the Internal Rules, the Internal Rules should control. Under Cambodian law civil parties can recover damages in criminal proceedings—which is the main reason for their participation. But the ECCC Internal Rules provide that civil party participation has an additional purpose—to support the prosecution. The chamber appears to conclude that the purpose of supporting the prosecution justifies civil party participation in detention appeals (para. 35).

The court also held that a liberal interpretation of Internal Rule 23 is consistent with international standards on victim participation (para. 40). The court reviewed the text of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, as well as the rules of the International Criminal Court (ICC) and the UN-sponsored mixed courts for Kosovo and East Timor. It found that all these courts allowed some participation by victims at the pretrial stage and in hearings on detention orders. The UN declaration also encouraged states to “allow[] the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”<sup>13</sup>

The ECCC acknowledged that it interpreted victims’ rights more broadly than any of its predecessor international courts had done. At the ICC—the Court that had until recently granted the broadest rights of victim participation—victims have to show that they are personally affected by the proceeding in which they seek to participate. This showing has to be made again for each subsequent proceeding. Similarly, for each proceeding, ICC judges have to weigh the victims’ interests against the defendant’s right to a fair and expeditious trial.<sup>14</sup> By contrast, the ECCC accepted that civil parties generally have an interest in the outcome of detention order appeals and did not require that they make a special showing of a personal interest before taking part in an appeal. The ECCC also concluded that its procedures for civil party participation adequately balanced defendants’ rights and victims’ interests (paras. 44, 49).

The ECCC noted defense concerns that allowing civil party participation at such an early stage “could slow down the proceedings, place an unjust burden on the defense to respond to a multiplicity of opponents, and risk injecting irrelevant and potentially prejudicial material into the proceedings” (para. 11(vii)). It also recognized that, since civil parties do not participate in the initial hearing on detention, the defense would hear their arguments for the first time on appeal—which “could cause an imbalance in the procedures” (para. 42). But the court concluded that pretrial chambers could redress the imbalance by requiring the civil parties to submit their observations in writing before the hearing, allowing the defense sufficient opportunity to respond to the civil parties’ submissions, and limiting the civil parties’ submissions to relevant issues (paras. 43, 46). It also suggested that if civil parties became too numerous and their submissions unduly delayed the trial, the court could encourage or require them “to join their submissions where they share the same views” (para. 46).

<sup>13</sup> UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, annex (Nov. 29, 1985).

<sup>14</sup> Prosecutor v. Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-trial Chamber I Entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*,” Case No. ICC-01/04-01/06-284, paras. 40, 45, 55 (Int’l Crim. Ct. App. Chamber, Feb. 13, 2007); Prosecutor v. Lubanga Dyilo, Decision on Victims’ Participation, Case No. 01/04-01/06-1119, para. 101 (Int’l Crim. Ct. Trial Chamber I, Jan. 18, 2008).

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The ECCC pretrial chamber's decision is a fair interpretation of the arguably ambiguous law on civil participation. The chamber reached a reasonable conclusion as to both what law to apply and how to interpret that law.

With respect to choice of law, the chamber properly relied primarily upon the ECCC Internal Rules and Cambodian law. When confronted with textual ambiguity in the rules, it turned first to a structural and purposive analysis of the rules, and then to Cambodian procedure, rather than looking immediately to international law. The ECCC was deliberately designed as a Cambodian court, which was to make decisions consistent with Cambodian legal tradition and values. The court therefore does not need to look to international law on every issue. Indeed, on the subject of victim participation in criminal proceedings, the ECCC may well serve as an example for other national and international courts to follow.

While Cambodian law has its share of ambiguities, the ECCC judges adopted the Internal Rules to address this problem by consolidating applicable Cambodian and international law into one set of rules tailored to the ECCC proceedings. In addition to promoting predictability, the incorporation of international law into the rules helps ensure that the Internal Rules are consistent with international fair trial standards. The Internal Rules were drafted through a deliberative process that benefited from comments by the prosecution, defense, legal experts, nongovernmental organizations, and the general public.<sup>15</sup> Given the participation of national and international experts and stakeholders, the rules arguably present a legitimate compromise between local values and international standards. They also have the advantage of being drafted with the unique composition and purpose of the ECCC in mind. For all these reasons, the pretrial chamber was correct to focus on the structure and purpose of the rules, even when the text of the rules seemed less than perfectly clear.

The chamber's decision on the merits also appears reasonable. Criminal justice systems around the world approach the question of victim participation differently. Systems of common law tend to involve victims primarily at sentencing, after a defendant has been found guilty. Civil-law systems generally permit more active victim participation throughout the proceedings. Many allow victims to receive information about the case, to examine the evidence, and to submit arguments to the court.<sup>16</sup> The Cambodian system, like its French archetype, provides some of the broadest rights of participation. The ECCC decision reflects that approach.

The ECCC decision also accords with the increasingly influential "restorative justice" movement in international criminal law. Advocates of "restorative justice" have called for greater involvement of victims in international criminal proceedings as a way of promoting national reconciliation and providing closure for victims.<sup>17</sup> They have argued for procedures that give victims a "say" and a "sense of control" over their cases.<sup>18</sup> More concretely, some commentators have called for treating victims as full participants in the proceedings, following the civil-law

<sup>15</sup> Press Release, ECCC Rules Committee Releases Draft Internal Rules (Nov. 3, 2006), at <<http://www.eccc.gov.kh>>.

<sup>16</sup> Civil-law countries vary in the rights of participation given to victims. Amicus Brief by Christoph Safferling, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01) (Feb. 22, 2008) [hereinafter Safferling Amicus Brief].

<sup>17</sup> WAR CRIMES RESEARCH OFFICE, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT 8–11 (2007), at <[http://www.wcl.american.edu/warcrimes/icc/icc\\_reports.cfm](http://www.wcl.american.edu/warcrimes/icc/icc_reports.cfm)>.

<sup>18</sup> *Id.* at 8–9.

model. Such involvement is important because it allows victims to tell their stories and represent their interests in ways that may not be available to them if they were to participate merely as witnesses for the prosecution.<sup>19</sup>

The views of restorative justice advocates did not prevail during the creation of the first two modern international criminal courts—the International Criminal Tribunals for the Former Yugoslavia and for Rwanda—both of which engaged victims primarily as witnesses. But those Tribunals encountered serious criticism for failing to consider victims' concerns and to promote national reconciliation.<sup>20</sup> Drafters of the ICC Statute decided to avoid these possible deficiencies by granting victims greater participation rights in the Court's proceedings. Article 68(3) of the ICC Statute provides for victim participation at any proceeding determined to be appropriate by the Court, under conditions ensuring that such participation would be consistent with the rights of the accused. ICC pretrial chambers have relied on this provision to allow broad victim participation at the pretrial stage.<sup>21</sup>

In short, the merit of the ECCC decision was that it was broadly consistent with both Cambodian law and the trend toward restorative justice at the international level. At the same time, the court could have addressed more thoroughly the implications of its decision on the rights of the accused and on the public's interest in efficient administration of justice.

The chamber confronted a potential conflict between the right of victims to participate in the proceedings and the defendant's right to be presumed innocent. The victims of the brutal crimes of the Khmer Rouge generally want to participate in the proceedings to tell their stories and feel a sense of closure by helping bring to justice those who harmed them.<sup>22</sup> Scholars have emphasized the importance of active victim participation at trial if these restorative effects are to be realized.<sup>23</sup> At the same time, it is debatable whether such participation offers the same benefits during pretrial detention appeals. While victims can provide valuable information to the court about the likelihood that the accused might intimidate witnesses or destroy evidence,<sup>24</sup> they can do so as prosecution witnesses as well. The actual trial seems to offer a better opportunity for victims to tell their stories in a way that would encourage closure and reconciliation.

By contrast, at the time that a detention order is appealed, the court has not yet even confirmed the charges against the accused. It is only the co-investigating judges that have pronounced on detention after a brief adversarial hearing on the day of arrest and on a standard of proof no higher than "a well founded reason to believe that the person may have committed the crime."<sup>25</sup> The presumption of innocence is arguably stronger at this stage, and allowing the

<sup>19</sup> For example, victims may be able to bring information relevant to charges that were ignored by the prosecution until that point. Amicus Brief by Redress, International Federation of Human Rights, and Avocats Sans Frontières, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), para. 14 (Feb. 21, 2008).

<sup>20</sup> WAR CRIMES RESEARCH OFFICE, *supra* note 17, at 11–14.

<sup>21</sup> *See supra* note 14.

<sup>22</sup> Georgia Wilkins, *Victims in Emotional, Legal Limbo over Participation at the KR Trial*, PHNOM PENH POST, Sept. 10, 2008, available at <<http://www.phnompenhpost.com>>.

<sup>23</sup> *E.g.*, Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L. 151 (2004).

<sup>24</sup> These factors are considered in deciding whether to detain charged persons. ECCC Internal Rules, *supra* note 7, Rule 63(3)(b).

<sup>25</sup> *Id.*, Rule 63(3)(a).

victims to present their unfiltered stories may interfere with this presumption.<sup>26</sup> The ECCC was correct to require written, rather than oral, submissions from victims in future pretrial detention appeals, but it may need to develop more specific guidelines to avoid prejudicial victim statements at this early phase of the proceedings.

The participation of civil parties in appeals of detention orders may also generally slow down the proceedings. In the case at hand, only four persons were admitted as civil parties at the time of the detention appeal. But the living victims of crimes within the ECCC's jurisdiction number potentially more than a million<sup>27</sup> and include both those who were themselves tortured, beaten, and otherwise mistreated, and relatives of those who were tortured, mistreated, or killed.<sup>28</sup> Given the vast scope of the crimes before the ECCC, the number of civil parties could rise to hundreds or thousands in any single case. A broad interpretation of victim participation, if not properly structured, could overwhelm the court and the parties, and it could result in significant delays in the processing of victims' applications, leaving many victims frustrated with the process. Such delays would likely impair the ability of the ECCC to fulfill its mandate. Acknowledging the potential for delays, the pretrial chamber noted the possibility of joint submissions by victims in future cases. Yet the pretrial chamber could have said more on this point. The future work of the ECCC and other international criminal courts would have benefited from a more thorough consideration of ways to balance victim participation with the public interest in efficient administration of justice.

In the end, the pretrial chamber's approach to the question of civil participation was reasonable and consistent with Cambodian legal tradition and international law. It was also a small legal victory for victims of the Khmer Rouge and will likely serve as an example to other national and international courts that wish to involve victims of international crimes more fully in their proceedings. At the same time, the decision did not fully elaborate on the conflict between victim participation and other goals of the criminal trials, such as efficiency and fairness to the accused. Its full effect on defendants and victims is yet to be seen and will depend on future rulings by the court about the selection of victims, joint representation, and other aspects of victims' participation.

JENIA IONTCHEVA TURNER

*Southern Methodist University Dedman School of Law*

*Deportation—forced labor—international crimes—jus cogens—state immunity in civil proceedings—tort exception—commercial exception*

FEDERAL REPUBLIC OF GERMANY V. GIOVANNI MANTELLI AND OTHERS. Order No. 14201. At <<http://www.cortedicassazione.it/Documenti/14201.pdf>>.

Italian Court of Cassation, May 29, 2008 (plenary session).

On May 29, 2008, the Italian Court of Cassation sitting in plenary session delivered fourteen rulings (Judgment No. 14199 and Order Nos. 14200 to 14212) holding that states

<sup>26</sup> Safferling Amicus Brief, *supra* note 16, at 3.

<sup>27</sup> Farina So & Sarah Thomas, *Article on the Victim Participation Project*, at <[http://www.dccam.org/Projects/Tribunal\\_Response\\_Team/Victim\\_Participation/Article\\_Victim\\_Participation\\_Project.htm](http://www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/Article_Victim_Participation_Project.htm)>.

<sup>28</sup> ECCC, Practice Direction 02/2007, Art. 3(2)(c).