

# *Mass Victims Litigation Practices*

*Suggestions For Victims' Participation at the ECCC  
From Japanese Experiences in Mass Plaintiff Cases*

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## **Introduction**

For the Extraordinary Chambers in the Courts of Cambodia (ECCC), *Human Rights Now (HRN)* already issued “*Justice for Victims – Fundamental issues for the Extraordinary Chambers in the Courts of Cambodia*” on September 13th, 2006<sup>1</sup> and called on the ECCC and those concerned to confirm the fundamental principles of victims’ rights, including the right of access to justice through participation in the legal process and a right to reparations.

Subsequently, the ECCC adopted its Internal Rules in June 2007,<sup>2</sup> incorporating processes for victims’ participation as Civil Parties and the system of reparations, as well as the provisions for the establishment of a Victims Unit, all of which were recommended in our paper above.

Now, we see that victims have actually begun to participate in the ECCC process and that the Victims Unit has initiated its operations. We emphasize again the importance of victims’ voices and the recognition of victims’ rights as fundamental for improved administration of the ECCC and ultimately for Cambodia as a whole in the process of national reconciliation.

At the same time, concerns have been expressed that the participation of too many victims might delay or disrupt the proceedings.

Certainly, the establishment of efficient systems for the participation of mass numbers of victims is among the crucial factors for the success of this tribunal. This report is prepared with the hope of contributing to addressing at least some of these concerns about the participation of large numbers of victims in the ECCC. Introduced here are practical experiences of mass-injury litigation in Japan, which were established in the 1970s and have evolved since.

## **I. Scope and Methods of this Report**

### **1. Civil Procedures of Japan: Similarity and Differences with the ECCC system**

The system of Japanese civil procedure is based on a civil law system<sup>3</sup>, not a

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<sup>1</sup> Revised slightly on October 13th, 2006. Available on the HRN website.

[http://www.ngo-hrn.org/project/JusticeforVictims\(HRN-Japan\)english.pdf](http://www.ngo-hrn.org/project/JusticeforVictims(HRN-Japan)english.pdf) (English)

[http://www.ngo-hrn.org/project/JusticeforVictims\(HRN-Japan\)japanese.pdf](http://www.ngo-hrn.org/project/JusticeforVictims(HRN-Japan)japanese.pdf) (Japanese)

<sup>2</sup> Then revised on February, 2008. [http://www.eccc.gov.kh/english/internal\\_rules.aspx](http://www.eccc.gov.kh/english/internal_rules.aspx)

<sup>3</sup> Partly because both Cambodia and Japan are civil law jurisdictions, Japanese legal experts on civil procedures, through the Japan International Cooperation Agency (JICA), assisted the Department of Justice of Cambodia to prepare the Civil Procedure Code of Cambodia, which entered into force in July of 2006.

common law system. Japan does not have a class action system like that in the U.S. Although Japanese criminal procedural rules were recently revised so that victims can participate in the criminal process, Japan has not yet had any experience of mass-victims' participation in criminal procedures. Therefore this report is based on Japanese experiences of civil lawsuits with mass victims.

In comparing Japanese procedures with the ECCC procedures, we begin by recognizing the inherent difficulty and inadvisability of directly applying legal mechanisms and practices from one jurisdiction to another. Building from this recognition of the limitations of applying Japanese practices to another context, this report discusses selected topics in which we still believe our experiences could be of use to the Cambodian people.

## 2. Selected Sources of Information, Knowledge, and Experiences

For this report, we draw from seven lawsuits filed with courts in Japan by many victim plaintiffs: (i) the SMON case (Tokyo)<sup>4</sup>; (ii) the HIV case (Tokyo)<sup>5</sup>; (iii) the Yokota Air Base case (Hachiohji)<sup>6</sup>; (iv) the Hansen's disease case (Kumamoto)<sup>7</sup>; (v) the Hepatitis case (Tokyo)<sup>8</sup>; (vi) the case of Japanese "War Orphans" left in China (Orphans case) (Tokyo)<sup>9</sup>; and (vii) the Atomic-Bomb Radiation Disease case (Tokyo)<sup>10, 11</sup>. All of these cases attracted public attention in Japan and significant achievements were made

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<sup>4</sup> Please see the Annex 1 to this report for general outlines of the case. For more detailed information (Japanese), see "*Yakugai SMON Zen-shi*" [*Complete History of Drug induced disease SMON*], National Liaison Conference of SMON Associations ed., 1981

<sup>5</sup> Please see the Annex 2 to this report for general outlines of the case. For more detailed information in Japanese, see "*Yakugai AIDS Saiban-shi*" [*Drug Induced AIDS Lawsuit History*] vol.1 "Soshō-hen" [*Litigation*], Tokyo HIV Litigation Representing Attorneys ed., 2002

<sup>6</sup> Please see the Annex 3 to this report for general outlines of the case.

<sup>7</sup> Please see the Annex 4 to this report for general outlines of the case. For more detailed information in English, see <http://www.mhlw.go.jp/english/policy/health/01/pdf/01.pdf>. For more detailed information in Japanese, see "*Hansen-byo Iken Kokka-baisho Saiban Zen-shi*" [*Complete History of Hansen's Disease Lawsuit on Government Liability of Unconstitutionality*], The Editorial Committee of the Complete History of Hansen's Disease Lawsuit ed., 2006

<sup>8</sup> Please see the Annex 5 to this report for general outlines of the case. See also "Zadankai; Seisaku Keisei Soshō no Arikata wo Kangaeru," [*Round-Table Discussion: Insight into Policy Formation Lawsuit*], (Discussions by five lawyers) "Hoh to Minshu-shugi" [*Law and Democracy*], No.425, Japan Democratic Lawyer's Association, 2008.

<sup>9</sup> Please see the Annex 6 to this report for general outlines of the case. See also *supra* "Zadankai" at note 8.

<sup>10</sup> Please see the Annex 7 to this report for general outlines of the case. See also *supra* "Zadankai" at note 8.

<sup>11</sup> While several courts are often involved in cases which are seen as one social issue with a similar fact pattern by the public (as victims can choose the court in which they file their case, within the bounds of civil procedural law), we generally focus on one court for the purpose of this report among the cases with the same fact pattern. See the Annex to this report.

as a result of the pursuit of inventive legal procedures by multiple victims. In some cases, advances came not necessarily through court decisions, but in the form of settlements that contained various types of non-monetary reparations. Six of the cases were tort litigation and the remaining one (the Atomic-Bomb case) was administrative litigation.

Several staff lawyers working for HRN represented victims in these cases. This report reflects direct knowledge and information gained from their practical experiences. In preparing this report, we also interviewed leading attorneys in these cases and selected lawyers who played a key role in assisting the victims. We have also referred to treatises and literature dealing with mass litigation in Japan.<sup>12</sup> Though the bulk of the information in the report is based on the seven cases cited above, it is also informed by the practical experiences of HRN staff lawyers representing plaintiffs in other similar cases.

In examining these cases, we focus on (i) group representation and the role of victims' organizations, (ii) methods for effectively and efficiently introducing testimony regarding victims' injuries, and (iii) the protection of victims' confidentiality, as we believe this practical information could aid victims and those involved in the ECCC procedures,<sup>13</sup> even after considering the differences with Japanese civil procedures.<sup>14</sup>

## II. Practices in Japan

### 1. Group Representation/ Victims Organizations

Group representation<sup>15</sup> is an indispensable element of mass injury litigation in

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<sup>12</sup> Among others is "*Daikibo-Sosho no Shinri ni Kansuru Kenkyu*" [*Study on Trials of Large-Scale Litigation*], Legal Training and Research Institute of the Supreme Court of Japan ed., 2000 (written by five judges). See also *supra* "*Zadankai*" at note 8.

<sup>13</sup> See the Annex to this report which contains other information.

<sup>14</sup> From the filing of the cases to the achievement of settlements or the issuance of court decisions of first instance the seven cases described in this report took between 2 years and 10 months (the Hansen's disease case) and 7 years and 3 months (the SMON case, for the plaintiffs who chose to receive a court ruling rather than a settlement). These periods include time spent for pleadings, preparatory proceedings for clarification of points at issue and for organizing documentary evidence, and the stage of proving the alleged illegality/liability. However, in the ECCC (i) the judicial investigation precedes the trials and (ii) at the trial stage the primary responsibility for proving perpetrators' acts is assumed by Co-Prosecutors, the role of which were served by the plaintiffs' side attorneys in Japanese civil procedures, although Civil Parties of the ECCC may be involved in such process.

<sup>15</sup> Even when one lawyer represents many victims, the term "group representation" may be used. However, it is extremely difficult to imagine such a situation for mass litigation in Japan. Plaintiffs lawyers in Japan generally believe that plaintiffs who file collectively instead of individually are able to obtain better reparations. Also, Japanese plaintiffs' lawyers feel that multiple lawyers are better able to represent collective victims than one individual lawyer and indeed the practice of representation by a team of lawyers has been developed to handle these situations, as is mentioned

Japan. In some cases, victims' organizations or groups play significant roles, though these roles are *de facto* ones as Japanese civil procedural rules have not yet recognized the equivalent of the Victims' Association system under the Internal Rules of the ECCC.<sup>16</sup> While organizational characteristics among such victims groups or lawyers groups are common to some extent, none are identical. Such organizational characteristics depend on the unique circumstances of each case, including not only the specific nature of the litigation but also the historical situation, the local culture, and personal relationships among leaders involved in the litigation.<sup>17</sup>

### **(1) Victims Organizations and Groups**

In the SMON, Yokota Air Base, Orphans, and Atomic-Bomb cases, the organizations of victims or patients pre-existed the litigation. In the SMON, Orphans, and Atomic-Bomb cases, these organizations had missions independent from the purpose of the litigation, while in the Orphans case another association of victims was later formed with a view to bringing a lawsuit. Roughly speaking, in all these cases such victims' organizations first made the decision to bring a lawsuit (or, in the Atomic Bomb case, to file applications collectively for administrative determination), and then a team of lawyers to represent the group was organized.

On the other hand, in the HIV and Hansen's disease cases, even though patients' organizations existed, these organizations did not play an active role in the initial filing of the lawsuits.<sup>18</sup> In the Hepatitis case, there was virtually no organized group of patients. Therefore, lawyers' groups who were interested in the issues, together with a handful of active potential individual plaintiffs, took the initiative in organizing other plaintiffs.

The relationship of one victims' group with other groups varies. In the Hepatitis case, the plaintiffs group at the national level was created from the beginning

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later in the report.

<sup>16</sup> In Japan there is a system that qualified consumer organizations are allowed to file a case under the Consumer Contract Act.

<sup>17</sup> For this reason, and to avoid misunderstandings, we suggest that the following examples should be modified in their application to organizing Civil Parties at the ECCC.

<sup>18</sup> In an earlier stage of the HIV case, hemophilia patients infected with HIV by tainted blood products feared social discrimination against them, and a majority of them were reluctant to file a lawsuit because they thought such an action could make their primary doctors avoid "plaintiff" patients. In an earlier stage of the Hansen's disease case, ex-patients also feared social discrimination and many of them thought a lawsuit would attract "unnecessary" public attention to them and their families. In addition, ex-patients who lived in a national sanatorium for decades were afraid that such an action could make the government discriminate against them in their treatment. Therefore in both cases, just a small group of victims began lawsuits first and expansion of the victims group occurred only gradually. For these reasons, the protection of plaintiffs' anonymity and privacy were among the critical challenges for both cases, as is discussed below.

through the initiative of the lawyers. In the SMON case, there was a nation-wide patients' association which later split. In the Hansen's disease case, plaintiffs groups were gradually organized at local levels and later the national-level network association was established. In the HIV case, the relationship between the victims' groups in Tokyo and Osaka was not necessarily amicable at the beginning and a good relationship was not developed until much later.

These organizations play substantial roles in the litigation process in communicating among plaintiffs and victims, facilitating group decision-making so that plaintiffs' opinions can be delivered as a unified voice, building a sense of fellowship, supporting victims mentally and emotionally, and attracting public awareness.<sup>19</sup> Meetings were usually held just after court hearings or sessions by the victims' groups along with lawyers and support people to ensure victims understood the day's proceedings. The organizations or the attorneys also often published newsletters to enhance communication with the plaintiffs. Such an organization, especially a national-level organization or network, is particularly important when victims collectively request reparations other than monetary compensation. In Japan, mass victims are often successful in obtaining non-monetary reparations<sup>20</sup> from settlements if the requests are based on coordinated or unified requests among multiple groups of plaintiffs.

## **(2) Lawyers Groups**

In each of these mass injury cases in Japan, victims were represented not by one individual lawyer but by one or multiple teams of lawyers. Each attorney in the team is usually responsible for one or more victims for the purpose of ensuring consistent communication and preparing the victims' written statements.

The relationship of one group of attorneys with other groups does not follow the same path as that among plaintiffs groups.<sup>21</sup> Not only in the Orphans and Atomic-Bomb cases, but also in the SMON case (after the split of the nation-wide patients' organization), in the HIV case (even before the good relationship was developed between the two patients' groups), and in the Hansen's disease case (even

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<sup>19</sup> To acquire centripetal force, it is essential for such an organization to maintain its integrity.

<sup>20</sup> HRN is considering preparing another report on reparations including what type of non-monetary reparations have been realized in mass victims cases and what role was played by victims in this regard in Japan, with the hope that these experiences can serve as a reference for the ECCC.

<sup>21</sup> In the Hepatitis case, there was only one national-level lawyers group from the beginning (around November of 2000), even though cases were filed with five courts. The Yokota Air Base case was brought only in the Hachiohji Branch of the Tokyo District Court by a group of the plaintiffs and their lawyers.

before the plaintiffs were organized locally and nationally), each group of lawyers representing a group of plaintiffs kept in communication or established good relationships with other lawyers representing other plaintiffs groups, even when the relationships among these plaintiffs groups were not necessarily amicable. In the SMON and Hansen's disease cases national-level networks were later created among lawyers groups.

The lawyers' groups shared various practical experiences and information on the proceedings, such as what type of evidence had been produced or was being prepared. Sometimes, evidence produced for one court was copied for another court based on such communications.

### **(3) Suggestions for the ECCC from Japanese Experiences**

One of the key factors for the success of the ECCC will be determining how to best organize group representation, including determining which victim should be represented by which lawyer. Based on the Japanese experiences, we suggest the following, not as static guidelines, but as stepping stones to develop better practices for the tribunal.

First, the formation of a very large group of Civil Parties represented by a small group of lawyers would deserve serious consideration. Such a victims' group does not have to be a Victims' Association. Worrying too much about the large size of the group will distract from recognizing the real values of participation, as the inclusion of large numbers of victims can indeed work. As described in the Annex to this report, the Yokota Air Base case had more than 6,000 victims represented by 20 lawyers and the Tokyo Orphans case had around 1,100 victims represented by 40 lawyers. For the ECCC, except for such Civil Parties who already have specific reasons (such as conflicts of interest<sup>22</sup>) or intentions of choosing particular lawyers<sup>23</sup>, all the Civil Parties

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<sup>22</sup> It could be difficult for attorneys to deal with conflicts of interest among victims in the same group. However, each victim has a right to "opt-out" and can leave the group whenever she or he likes. Civil Party lawyers or the Victims Unit of the ECCC should be able to listen to Civil Parties and explain carefully, without putting any pressure on their choice, *both* the conflicts of interest (apparent or potential) and victims' right to leave the group, *and* the possible benefits of remaining in the group and waiving the conflicting interest. More precisely, those who want to remain in the group need not waive the conflicting interest forever, but only as long as they stay in the group and continue to be represented by the same lawyers. In Japan, while a victims' group sometimes splits or is amicably separated due to conflicts of interests or opinions, in other cases many victims voluntarily choose to remain in the large group despite conflicting interests as they appreciate the group's ability to gather and share information, strengthen their collected voices, provide fellowship and improve mental health. Discussions among victims in the same group can help them understand each other and find better solutions for both conflicting interests.

<sup>23</sup> The Civil Parties who have been supported by lawyers of the same NGO in filing a Civil Party application may be better off forming one group with common lawyers.

who have not joined any Victims' Association may be requested or ordered be represented by the same group of lawyers<sup>24</sup> under Rule 23, sections 8 (a) and (c) of the Internal Rules in accordance with "the interests of Justice." In short, the idea is to form just one (or as few as possible) group(s) to which all the Civil Parties belong. This may be done as a provisional solution until a more appropriate grouping, if any, is identified.<sup>25</sup>

Second, the Civil Parties' lawyers can and should communicate and cooperate with each other. Especially among the lawyers representing different groups of Civil Parties, frequent communication and exchange of information and best practices help generate efficient and effective advocacy and a better management of court procedures, as well as serving the interests of each client and of justice. The Victims Unit may host meetings to enhance cooperation among Civil Parties' lawyers from time to time.

## **2. Methods for Proving Victimization**

### **(1) Significance of the Process of Proving Victims' Injuries**

Trial Judges must be given a clear picture of the reality of the injuries and sufferings of victims. The court's determination of the nature of the crimes and the appropriateness of reparations depend on Judges' understanding of victims' experiences. If Judges' understanding of victims' reality is only superficial, their decisions could

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<sup>24</sup> For instance (i) just one lawyers group which consists of perhaps all or most of the lawyers on the list without any specific client may represent most of the Civil Parties, or (ii) lawyers may be divided into groups of a few or up to twenty to represent Civil Parties from each area or province respectively, paying special attention to ethnic minorities.

<sup>25</sup> In order to reach such a more appropriate grouping, if any, efforts by the Victims Unit to coordinate among Civil Parties, lawyers, NGOs, and the ECCC staff would be crucial, if potentially time-consuming. In grouping victims, it may be good to start based on the communities (i) where they now live and/or (ii) where they lived at the time of the crime(s) in question. Grouping based on place of current residence would be convenient for communication regarding the trial. Grouping based on place of residence at the time of the crime would help the representing lawyers have a better understanding of the situation the victims faced and survived. Each community-based group can also be a sub-group under a larger group based on each district, etc. Careful attention should be paid victims' expectations for the ECCC. Even if these expectations are not necessarily common, they can continue to form one group unless there is serious conflict of interests or emotions. The ECCC, Civil Party lawyers and the Victims Unit must be sensitive to and able to handle a difficult situation such as one where a killer and a family of the victim killed are in the same community based group. While Japanese plaintiffs lawyers may not have faced a analogous case, our experiences suggest that lawyers or staff of the Victim Unit must listen carefully to both of the stories (by different interviewers, as appropriate), consult with those concerned, judge as to which would be better to leave the group, and try to explain each of them the reason for asking one to leave, with the last resort being requesting an court order. All the rights of the one (under the IRs) who left one group must be guaranteed even thereafter, of course. The Victims Unit is best placed to establish a guideline on common representation of a group of Civil Parties, including measures to settle such disputes.

easily undermine the credibility of the tribunal.<sup>26</sup>

The presentation of evidence is also a crucial process through which victims can feel a sense of participation. Merely watching a final court decision, even one favorable to victims, is fundamentally different from victims actually participating in establishing the evidence before the court. Experiences from Japanese mass-victims cases have shown that participation in this process can even have a healing effect on victims that contributes to their recovery from the trauma they have experienced.

On the other hand, there are unavoidable limitations of time and resources that constrain the ECCC. The challenge, then, is how the relevant actors can organize this process in an effective and efficient manner. Careful, coordinated efforts of lawyers representing victims are crucial and the sections below describe some of the methods that have been successfully used in Japanese mass-victims cases.

## **(2) Written Statements**

Written statements are usually prepared based on interviews with each victim by their attorneys in order to document their personal histories, the contexts in which the injuries were sustained, the impact of the injuries on their lives and their current perspectives. Frequently, the attorney prepares a draft and the victim reads it by him or herself or the attorney reads it to him or her for confirmation, and then he or she signs it.<sup>27</sup> In mass-victims litigation in Japan, the plaintiffs' attorneys usually prepare written statements for as many victims as possible.<sup>28</sup>

Because many victims cannot physically appear in court to present their testimony, written statements can serve to some extent as a substitute. Written statements also can provide necessary information for the representing attorneys or the judges who are selecting those plaintiffs whose appearance and testimony in court would be most important.

## **(3) Briefs on Injuries and Sufferings/ Findings of Researchers or Medical Doctors**

Briefs are prepared by representing attorneys, based on analysis of the interviews and the written statements of victims, as well as other sources.

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<sup>26</sup> For instance a court decision for some mass litigation in Japan was called "colder than snow," even though the decision was for the plaintiffs.

<sup>27</sup> Needless to say, building a trust relationship is crucial between an interviewer and an interviewee, as interviews can reach suppressed hidden traumas. As some victims may not have talked about their experiences with anyone, not even their spouses, care in choosing the place of the interview is important to ensure confidentiality.

<sup>28</sup> Where causal connection with injury is contested by the opposite party, then as a matter of course a written statement of the victim is required. However, even in other instances, all or most of the plaintiffs usually submit their written statements. In the Yokota Air Base case, a written statement was prepared for each family, not for each individual plaintiff.

Additionally, representing attorneys may submit the results of studies by researchers or medical doctors in the relevant field. Sometimes such experts may also appear in court to explain and elaborate on the findings.

Such briefs and expert findings help judges to understand both the overall picture of the injuries and the distinctive fact patterns of each case that characterize the nature of victims' suffering.<sup>29</sup> To ensure equal participation by victims, it is important for lawyers to explain these briefs, studies and expert testimonies to the plaintiffs.

#### **(4) Examination of Victims before Trial Judges**

In order for the ECCC judges to understand the reality of the victimization that has taken place, testimony by the victims themselves is indispensable. Though the practice in the ECCC may differ because of its unique context, we still believe some of the information below can be useful in order to develop the tribunal's own practice in this regard.

##### **(a) Selection of Victims/Time Spent for Victims Testimony**

In Japanese mass litigation cases, a court often determines that it will first issue a ruling for the first group of plaintiffs and then expedites the proceedings for that group. After such a determination to expedite proceedings for the first group, in some of the cases most or all of the plaintiffs in that group actually testified before the judges: the SMON case (154 plaintiffs, taking less than 6 months); the HIV case (49 plaintiffs, taking 15 months); the Hepatitis case (around 12 plaintiffs, taking 7 months); and the Atomic-Bomb case (around 30 plaintiffs, taking one year).<sup>30</sup> Although this broad participation helped judges better understand victims' experiences, such an approach to encouraging most or all of the plaintiffs to testify would not be appropriate for the ECCC considering the constraints on its time and resources.

In several of the other mass plaintiff cases, only a limited number of selected victims testified: in the Yokota Air Base case (the plaintiffs side selected only 14 victims out of 6,000 plaintiffs, taking 10 months), the Orphans case (40 out of 630 first group plaintiffs, taking 14 months), and the Hansen's Disease case (24 out of 127 first group plaintiffs, taking 7 months). The factors considered, mainly by the plaintiffs, but also by the judges, for the selection of victims to testify were (i) a balance of places of residence,

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<sup>29</sup> For example, the experiences of victims in the A-Bomb case were truly unusual and unprecedented, and often their injuries affected their memories resulting in partial amnesia or in seemingly unreasonable narratives. For this reason, in the A-Bomb Radiation Disease case, the books and testimony of a psychiatrist who had seen many A-Bomb survivors were useful for the judges to understand such phenomena.

<sup>30</sup> For the HIV case, the Hepatitis case, and the A-Bomb case, it was necessary for most of the plaintiffs to testify as the causal connection with the injury of each plaintiff was a seriously contested issue.

occupations, ages, and genders, (ii) severity of injuries, or a balance of types of injuries, and (iii) roles among the plaintiffs such as group leadership and desire to testify.

**(b) Testimony before Commissioned Judge or Visiting Judge/ On Site Testimony**

A judicial body for each case usually consists of three judges in mass litigation in Japan. However, for a limited purpose such as hearing victim testimony, a court sometimes allows one judge to conduct these sessions alone. This method makes possible three simultaneous hearings conducted by the three judges in different locations. A commissioned judge may also go outside of the court to conduct such sessions in more convenient locations. In the SMON case, six or seven plaintiffs were heard each day under the commissioned judge system. Also, in the SMON case the judges made a one week stay at Tokushima (500 kilometers away from Tokyo) to hear the testimony of 17 plaintiffs there. In the Hansen's disease case, the judges went to several sanatoriums and each time they heard four to six plaintiffs' testimony for two days.

Depending on the health conditions of the victim testifying, judges may hear the victims' testimony in a hospital or another appropriate place. In the HIV case, twelve victims testified before visiting judges at hospitals in order to present the evidence in the voices of these terminally ill victims. One plaintiff with terminal cancer also was heard in a hospital in the Hepatitis case as well.

**(5) Importance of Planning and Cooperation by All the Parties Concerned**

In order to ensure effective and efficient proceedings under the constraints of time and other resources, Japanese judges and lawyers with experience of mass litigation emphasize the importance of scheduling and planning proceedings with cooperation by all the parties. All the lawyers involved are responsible for improving practice in this regard. Japanese rules of civil procedure provide for preparatory proceedings in order to ensure cooperation and planning among all the parties. Additionally, consultation sessions with all the parties are usually held from time to time for scheduling and for more frank discussions<sup>31</sup>.

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<sup>31</sup> For the ECCC, if appropriate, (informal) consultation sessions prior to some hearings may be ordered in advance by presiding judges with the condition of "without prejudice" to each formal position, or such a consultation session may be explicitly established by a Practice Direction, etc. (Please note, for the avoidance of doubt, these sessions are neither for fact-finding nor for arguments on substantive issues. The principle of presumption of innocence must base such sessions. ) Also such a consultation session can be useful in relation to reparation-related matters, which would be discussed in our next report under contemplation.

## **(6) Suggestions for the ECCC from Japanese Experiences**

We believe that at least the Trial Judges<sup>32</sup> of the ECCC should hear, for the purpose of fact-finding, selected Civil Parties among those who wish to be heard.<sup>33</sup> In discussion with each other and with the coordination of the Victims Unit or the Trial Chamber, if appropriate, Civil Parties' lawyers should consider the factors listed above and communicate the reasons for the selection of Civil Parties to the Trial Judges for their consideration.

To hear the testimony of such selected Civil Parties, sessions by commissioned judges and/or on-site sessions by visiting judges may be held, as appropriate.<sup>34</sup>

In order to create effective and efficient hearings, written statements by Civil Parties, briefs by Civil Parties' lawyers, and findings by experts, as appropriate, should be prepared and submitted in advance.

Such sessions for preparation or consultation as discussed in (5) above may be hosted by the Trial Chamber between the Initial Hearing and the subsequent sessions. Trial Judges may declare at the Initial Hearing (or any time they deem appropriate) that some matters should be put off for later decision and refer the scheduling of these matters to subsequent consultation sessions to be attended by all the representatives of the parties, without prejudice to the position of each party and the final authority of the judges to decide on the matters.

## **3. Protection of Confidentiality and Privacy of Victims**

### **(1) Anonymous Party Practice**

In the HIV case and the Hansen's disease case, anonymity of the plaintiffs was maintained in order to protect the confidentiality and privacy of victim plaintiffs.<sup>35</sup> Each plaintiff was given a number and called by that number instead of his or her name at every stage of the proceedings, unless a plaintiff waived the protection.

Case files were also kept strictly confidential. Only very limited staff of the court were allowed access to the list containing both the name and the corresponding number of a plaintiff. The representing attorneys also designated a limited number of lawyers who had full access to the information regarding victims' identities. Even postal

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<sup>32</sup> We suppose that the Investigating Judges has heard more of their voices. Other Judges also should hear Civil Parties as appropriate in accordance with the nature of each stage of the procedures, of course.

<sup>33</sup> Protection of confidentiality and privacy of victims will also be discussed later in the report.

<sup>34</sup> Rule 91 (1) would be applicable if the examination is conducted within the frame of "hearing." Rule 93 could be also utilized for this purpose. Otherwise, a Practice Direction or the revision of the IRs may be required.

<sup>35</sup> As for the fears victims felt in the HIV case and the Hansen's disease case, *see supra* note 18.

delivery of sensitive court documents with identifying information was sometimes avoided. While trial documents are generally available for anyone to read under civil procedural rules in Japan, some documents in the HIV and Hansen's disease cases, such as written statements of the victims, were protected by a restrictive order of the court and physically separated from other parts of the case file.

Thanks to the efforts of all those concerned, there have been no reported unintended disclosures or leakages of the identities of the victims who wanted anonymity in these cases. The media also cooperated in maintaining anonymity.

### **(2) Closed Court Sessions /Shielding at Open Sessions**

For the testimony of plaintiffs who wanted to remain anonymous, closed hearings (i.e., hearings *in camera*) were conducted (by a commissioned judge in some instances) in the HIV and Hansen's disease cases. In the Hansen's disease and HIV cases some plaintiffs also testified at open hearings while maintaining their anonymity, in the latter case through the protection of partitions shielding their identity while testifying in the open court room.

### **(3) Suggestions for the ECCC from Japanese Experiences**

Though we have emphasized that the Trial Judges of the ECCC should hear selected Civil Parties among those who wish to be heard, we must also emphasize that Civil Parties' safety must be guaranteed by the court at all costs. Civil Parties who wish to testify before Trial Judges (or any other Judges) should not be forced to give up their desire to testify only because of security concerns. Ensuring both Civil Parties' participation and their safety should be considered to be among the core missions of the ECCC in the historical context of Cambodia. For this purpose, the tribunal needs to take all possible measures to ensure Civil Parties safety and anonymity, including those utilized in Japan as described above.

## **III. Conclusion**

We would like to emphasize that an efficient and effective method of Civil Party participation can and should be established at the ECCC. In this report, we have not only described Japanese practices for mass-victim proceedings, but also ventured to make some suggestions for the ECCC derived from these experiences. This is done only because we would hope our report will be of use for those concerned with the ECCC and for the Cambodian people as a whole. Aware that the practices of another jurisdiction cannot be directly applied to the ECCC in its effort to develop mass Civil Party practice, we present this report and its suggestions as starting point from which to

move forward, not as a static ending point or goal. Japanese practices tell us that while there are similarities in the methods and procedures among various types of mass injury litigation, no two cases are the same. Parties and lawyers must explore past experience and possible solutions in order to develop a better practice on a case-by-case basis.

As we stated in our previous paper<sup>36</sup>, victims' presence and participation in the ECCC is essential to achieve real justice and the ultimate purpose for which the ECCC was established. With this in mind, we believe that coordinated efforts among the Victims Unit and all concerned parties will develop a better practice for mass Civil Party proceedings.<sup>37</sup>

## Suggestions

### For Lawyers Representing Civil Parties:

- Communicate and cooperate with lawyers representing other victims' groups, as well as with the Victims Unit and the Trial Chamber as appropriate, in order to create efficient and effective trial advocacy and a better management of court procedures, and in order to achieve the best interests of each client and of justice.
- Support the organizing of a large group of Civil Parties in cooperation with other lawyers.
- Select appropriate Civil Parties to testify before the judges, considering the appropriate balance among types and severity of injuries, ages, genders, occupations and places of residence, among other factors. Lawyers representing different groups of Civil Parties should communicate with each other in the selection process.
- Prepare and submit written statements of victims, briefs, and expert findings, as appropriate.
- Make all possible efforts to maintain the confidentiality of the Civil Parties, including developing a procedure to ensure anonymity and limiting the number of lawyers who have full access to identifying information, except for the Civil Parties who waive such protection. Request, as appropriate, hearings *in camera* or protective screens to shield the identities of Civil Parties in open hearings.

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<sup>36</sup> See *supra* note 1.

<sup>37</sup> We are available for inquiries and requests for more information regarding Japanese practices and experiences.

- Establish strong relationships with civil society organizations supporting victims in order to ensure their appropriate and effective participation in the ECCC.

**For the Victims Unit:**

- Coordinate Civil Parties, lawyers and the judges in order to organize as large a group of Civil Parties as possible. The Unit may host meetings to facilitate the process of organizing Civil Parties to ensure the broadest possible participation by victims. The division of the entirety of the Civil Parties into appropriate smaller groups may be considered later based on experiences of the functioning of the large group.
- Assist and coordinate Civil Parties and their lawyers in the process of selecting Civil Parties to testify before the judges.
- Make every effort to maintain the confidentiality of the Civil Parties, including cooperating with anonymity procedures and limiting the staff who have access to identity information as far as possible, except for the Civil Parties who waive such protection.
- Facilitate strong relationships with civil society organizations and build their capacity by holding regular meetings to share information.
- Establish comprehensive guidelines for the common representation of groups of Civil Parties in order to ensure victims' effective participation and avoid conflicts of interests.

**For the Judges:**

- Consider the formation of a large group of Civil Parties, in consultation with the Victims Unit, represented by a small team of common lawyers based on Rule 23, section 8 (a) or (c) of the Internal Rules in accordance with the interests of Justice. This consolidation may be undertaken as a provisional solution until more appropriate groupings are identified.
- Hear directly, especially at the trial stage, selected Civil Parties among those who wish to be heard, in order to grasp the reality of victims' experiences. The examination of such selected Civil Parties may be held by commissioned judges and/or as on-site sessions by visiting judges.

- Consider hosting, after the Initial Hearing, sessions for preparation or consultation to be attended by representatives of all the parties, for the purpose of scheduling and organizing the proceedings, without prejudice to the position of each party or the final authority of the judges to decide on such matters. Such sessions may also be held to facilitate the selection of testifying Civil Parties.
- Make all possible efforts to maintain the confidentiality of the Civil Parties, including developing and adopting procedures to maintain anonymity, separating sensitive parts of the case files for strict confidentiality and limiting the staff who have full access to identifying documents, except for the Civil Parties who waive such protection. Conduct hearings *in camera* or use protective screens to shield the identities of Civil Parties in open hearings upon request.

**For International Donors and the International Community:**

- Support and fund the systems and practices necessary for the participation of victims, especially as Civil Parties, in the ECCC process.

**Annex 1****Case Outlines (SMON case)**

Case Name	Lawsuit on Drag Induced Disease SMON
Estimated Number of Victims	More than 11,000
Courts (venue and number)	Tokyo, Osaka, Fukuoka, Kanazawa, Hiroshima, Sapporo, Kyoto, etc (32)
Venue Focused on in the Report	Tokyo
Number of Plaintiffs	5,953 (national level) / 1,750 (Tokyo) *1
Number of Attorneys Representing Plaintiffs	24 (Tokyo) *2
Defendant(s)	Pharmaceutical companies and the Japanese government
Date of Filing	May of 1971
Period Required for Plaintiffs' Testimony before Trial Judges	less than 6 months
Closing of the First Instance	Settlement in October 1977 (Tokyo), the court decision in August 1978 (Tokyo) *3, national level memorandum for settlement by the plaintiffs, pharmaceutical companies and the government in September of 1979
Plaintiffs Organization or Network at National Level	Nation-wide network of associations was formed March of 1974 *4
Attorneys Organization or Network at National Level	National level exchange conferences were held beginning in June of 1973
Privacy Protection	N/A
Case Abstract	Compensation claims based on tort for negligent production/distribution of quinoform by pharmaceutical companies and negligent supervision by the Japanese government. Quinoform is an anti-flatulent and caused SMON (subacute myelo-optico-neuropathy).

\*1 The numbers (both national level and Tokyo) are as of 1981

\*2 The number is for a group of 634 plaintiffs of 1,750 at Tokyo.

\*3 899 HANREI JIHO 48

\*4 The nation-wide patients association (National SMON Association) was established in November of 1969

**Annex 2****Case Outlines (HIV case)**

Case Name	HIV Litigation
Estimated Number of Victims	1,500 - 1,800
Courts (venue and number)	Tokyo, Osaka (2)
Venue Focused on in the Report	Tokyo
Number of Plaintiffs	118 (Tokyo) / 99 (Osaka) *1
Number of Attorneys Representing Plaintiffs	30 to 50 (Tokyo)
Defendant(s)	Five (5) pharmaceutical companies and the Japanese government
Date of Filing	May of 1989 (Osaka), October of 1989 (Tokyo)
Period Required for Plaintiffs' Testimony before Trial Judges	15 months (Tokyo), 8 months (Osaka)
Closing of the First Instance	Settlement in March of 1996 (for both Tokyo and Osaka)
Plaintiffs Organization or Network at National Level	N/A (cooperation between the two groups from March of 1996)
Attorneys Organization or Network at National Level	N/A (communication between the two groups)
Privacy Protection	Anonymity procedures/ Shielding during the testimony of selected plaintiffs in open court room/ Closed examination
Case Abstract	Compensation claims based on tort for negligent production/distribution of blood products for hemophilia patients by pharmaceutical companies and negligent supervision by the Japanese government. These blood products were unheated and caused HIV infection

\*1 The numbers (both Tokyo and Osaka) are as of March 1996

**Annex 3****Case Outlines (Yokota Air Base case)**

Case Name	New Litigation of Jet Noise of Yokota Air Base
Estimated Number of Victims	300,000
Courts (venue and number)	Hachiohji Branch of the Tokyo District Court (1)
Venue Focused on in the Report	Hachiohji Branch of the Tokyo District Court
Number of Plaintiffs	5,957
Number of Attorneys Representing Plaintiffs	About 20
Defendant(s)	Japanese government
Date of Filing	April of 1996
Period Required for Plaintiffs' Testimony before Trial Judges	10 months
Closing of the First Instance	Court decision in May of 2002 *1
Plaintiffs Organization or Network at National Level	N/A
Attorneys Organization or Network at National Level	N/A
Privacy Protection	N/A
Case Abstract	Claims for compensation and injunction based on tort for jet noise from Yokota Air Base, which is the base for U.S. Air Force in Japan

\*1 1790 HANREI JIHO 47

**Annex 4****Case Outlines (Hansen's disease case)**

Case Name	Hansen's Disease Lawsuit on Government Liability of Unconstitutionality
Estimated Number of Victims	More than 5,000
Courts (venue and number)	Tokyo, Okayama, Kumamoto (3)
Venue Focused on in the Report	Kumamoto
Number of Plaintiffs	779 (national level) / 592 (Kumamoto) *1 1,702 (national level)/ 995(Kumamoto) *2
Number of Attorneys Representing Plaintiffs	About 20 (Kumamoto)
Defendant(s)	Japanese government
Date of Filing	July of 1998 (Kumamoto)
Period Required for Plaintiffs' Testimony before Trial Judges	7 months (Kumamoto)
Closing of the First Instance	Court decision in May of 2001 (Kumamoto) *3 & Basic Settlement Agreement with the Government in July of 2001(national level)
Plaintiffs Organization or Network at National Level	Nation-wide network association was formed in April of 2001
Attorneys Organization or Network at National Level	National level network conference was held in October of 1999 and thereafter
Privacy Protection	Anonymity procedures/ Closed hearings for selected testimony
Case Abstract	Compensation claims based on tort for the Japanese government policy of segregating Hansen's disease patients into sanatoria, discriminatory and inhumane treatments including forced labor, and eugenic measures (forced sterilizations and abortions). Most of the plaintiffs have been placed in national sanatoria since 1940's, 1950's, or 1960's.

\*1 The numbers (both national level and Kumamoto) are at the time of the court decision by the Kumamoto District Court (11 May 2001)

\*2 The numbers (both national level and Kumamoto) are as of 21 May 2001

\*3 1748 HANREI JIHO 30

**Annex 5****Case Outlines (Hepatitis case)**

Case Name	Drug Induced Hepatitis C Litigation
Estimated Number of Victims	10,000
Courts (venue and number)	Tokyo, Sendai, Nagoya, Osaka, Fukuoka (5)
Venue Focused on in the Report	Tokyo
Number of Plaintiffs	50 (Tokyo), 7 (Sendai), 16 (Nagoya), 69 (Osaka), 58 (Fukuoka) *1
Number of Attorneys Representing Plaintiffs	about 30 (Tokyo), about 100 (nationally)*2
Defendant(s)	Three (3) pharmaceutical companies and the Japanese Government
Date of Filing	October of 2002 (Tokyo and Osaka)
Period Required for Plaintiffs' Testimony before Trial Judges	7 months (Tokyo)
Closing of the First Instance	Court decision in March 2007 (Tokyo) *3 and settlement based on the Redress Act enacted on 11 January 2008
Plaintiffs Organization or Network at National Level	National organization existed at the beginning and the five cases were filed based on the decision of the national organization
Attorneys Organization or Network at National Level	National organization existed from January of 2001 prior to the establishment of the plaintiffs group
Privacy Protection	Anonymity procedures/ Shielding during selected open plaintiffs' examination
Case Abstract	Compensation claims based on tort for negligent production/distribution of blood products by pharmaceutical companies and negligent supervision by the Japanese government. These blood products caused Hepatitis C infection

\*1 As of the time of the enactment of the Remedial Act on 1/11/2008

\*2 As of January of 2008 (see above \*1)

\*3 1975 HANREI JIHO 2

**Annex 6****Case Outlines (Orphans case)**

Case Name	Government Liability Lawsuit by "Japanese War Orphans Left" in China
Estimated Number of Victims	Around 2,500
Courts (venue and number)	Tokyo, Sapporo, Sendai, Nagoya, Kyoto, Osaka, Fukuoka, etc.(15 )
Venue Focused on in the Report	Tokyo
Number of Plaintiffs	2,211 (national level) / 1,100 (Tokyo court) *1
Number of Attorneys Representing Plaintiffs	About 150 (national) / 40 (Tokyo)
Defendant(s)	Japanese government
Date of Filing	December of 2002
Period Required for Plaintiffs' Testimony before Trial Judges	One (1) year and two (2) months
Closing of the First Instance	Court decision in January of 2007 (Tokyo) & withdrawal of complaints in December of 2007 and thereafter in response to the enactment of a revised Support Act (national level)
Plaintiffs Organization or Network at National Level	Nation-wide network of plaintiff organizations was formed in July of 2004.
Attorneys Organization or Network at National Level	National organization existed from July of 2002 prior to the establishment of the plaintiffs' group
Privacy Protection	N/A
Case Abstract	Compensation claims based on torts for the Japanese government policy and measures which failed to support Japanese who were left (in childhood at the time) in China in turmoil due to the defeat of Japan in World War II. The Japanese government officially promoted immigration of Japanese to northeastern China until 1945. Alleged necessary assistance was to support further the orphans returning to Japan and to support their self-reliant living in Japan after returning.

\*1 The numbers are as of January of 2007

**Annex 7****Case Outlines (A-Bomb Radiation Disease case)**

Case Name	Lawsuit for Administrative Determination of Atomic-Bomb Radiation Diseases
Estimated Number of Victims	Up to 250,000
Courts (venue and number)	Tokyo, Sapporo, Nagoya, Nagasaki, Osaka, Hiroshima, Sendai, etc. (17)
Venue Focused on in the Report	Tokyo
Number of Plaintiffs	304 (national level) / 80 (Tokyo) *1
Number of Attorneys Representing Plaintiffs	40 (Tokyo)
Defendant(s)	Japanese government
Date of Filing	May of 2003
Period Required for Plaintiffs' Testimony before Trial Judges	1 year
Closing of the First Instance	Court decision in March of 2007 (Tokyo) (appeal pending)
Plaintiffs Organization or Network at National Level	National group of Atomic-Bomb survivors existed from 1946. The nation-wide plaintiffs group for this litigation was organized in 2007.
Attorneys Organization or Network at National Level	The first national level network conference was held in October of 2002, prior to filing the lawsuits.
Privacy Protection	N/A
Case Abstract	Administrative lawsuit to request reversal of administrative decisions by the Japanese government which failed to determine patients' symptoms as Atomic-bomb radiation diseases caused by the Atomic-bomb dropped by the U.S. in 1945. Under the existing law, an administrative decision of Atomic-bomb radiation disease entitles the said patient to receive JPY 140,000 per month as a special medical allowance.

\*1 The numbers (both national level and Tokyo) are as of December of 2007



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***Mass Victims Litigation Practices***

Suggestions For Victims' Participation at the ECCC

From Japanese Experiences in Mass Plaintiff Cases

(July 9, 2008)

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**Human Rights Now**

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