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Have a Trial by Relevance, not Severance - The ECCC's Case 002

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An Internationalised Cambodian Court

The Extraordinary Chambers in the Courts of Cambodia

Between 1975 and 1979, the ultra-Maoist Khmer Rouge forcibly evacuated Cambodia's urban centres and enslaved the population in rural cooperatives that were designed to transform the nation into an agrarian society. To this end, the regime separated families, prohibited religion, shut down educational institutions, abolished all human rights, and adopted policies to eliminate intellectuals and ethnic and religious groups, such as the Vietnamese, Khmer Krom, and Cham minorities. These policies resulted in the execution and death of almost a quarter of the population.

By an Agreement between the Royal Government of Cambodia and the United Nations, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2003 as an internationalised tribunal to hold perpetrators of the Khmer Rouge regime accountable. The ECCC has jurisdiction over certain crimes set out in its National Penal Code such as murder, religious persecution and torture, as well international crimes of genocide, war crimes and crimes against humanity.

These crimes are included in the Closing Order and Indictment against the defendants in 'Case 002', which charge former senior leaders of the regime for their involvement in the atrocities. However, the trial proceedings for this case – commonly referred to as first mini trial '002/01' – and related judicial decisions have fallen short of victims' expectations in several respects.

Impossible to Make Case 002 'Representative'?

22 September 2011 Severance Order

Since the beginning of the current trial proceedings, which many feel may be the first and last mini trial for Case 002, its scope has been arbitrarily limited by a decision issued by the Trial

Chamber ("Severance Order") on 22 September 2011. This Severance Order has profoundly limited the evidence put forward by witnesses and civil parties at trial.

In our experience, civil parties have been prevented from submitting evidence highlighting the persecution and genocide they had suffered at critical junctures during the regime's reign. They have been able to speak only to crimes and crime sites in connection with forced evacuations from specific regions in Cambodia and time periods or phases when the Khmer Rouge regime first came to power; the regime's structure; and the defendants' roles during the period just prior to and during its reign. Even though its Severance Order contemplates that the Khmer Rouge's policies raised in the "entire Indictment" are within the scope of this mini-trial, the Trial Chamber has not given much latitude to witness/civil party evidence or testimony that relates to policies beyond the narrow confines of the early phases of the abovementioned forced evacuations. Put simply, if a witness/civil party testifies about being evacuated from Phnom Penh in 1975, and in the course of her testimony refers to policies that came into effect later in 1977 or 1978 which he witnessed or has knowledge about that do not relate to these evacuations, the Trial Chamber has deemed this irrelevant on its own instance or upheld the defence's objections in this regard. In effect, this has meant that witnesses/civil parties have often not been permitted to explain the full particulars of their evidence in relation to the entire Indictment and Closing Order.

Cognizant of these limits, the Co-Prosecutors sought the inclusion of a more representative selection of charges due to their concern that the advanced age and poor health of the accused would preclude the possibility of additional trials. The Trial Chamber rejected this but left the scope of the first trial open for more than a year on the broad basis that it would consider adding additional charges "at any time … subject to the right of the Defence to be provided with opportunity to prepare an effective defence and all parties to be provided with timely notice."

8 February 2013 Supreme Court Chamber Decision

The Severance Order has since been overturned by the Supreme Court Chamber on an appeal from the Co-Prosecutors. In its decision issued on 8 February 2013, the Supreme Court Chamber agreed with the Co-Prosecutors and emphasised the importance of ensuring that this mini trial is representative of the entire Closing Order and noting that, the Case 002 trial proceedings have lacked the 'representativeness' that is required of proceedings of this gravity. In reaching this decision, the Supreme Court Chamber found that by only envisioning the scope of Case 002/1 and not any future Case 002 trials, the Trial Chamber had "buried" the rest of the charges listed in the Closing Order.

The Supreme Court Chamber added that by the time the Trial Chamber had agreed to hear arguments for expanding the case, "nearly a year of hearings on the substance under the terms of the Severance Order had already passed, effectively rendering the scope of Case 002/01 as shaped there by a *fait accompli.*" It ruled that the Trial Chamber must reassess its approach to severance after hearing party submissions and balancing all parties' interests against all relevant factors, as well as explain its plan for adjudicating any charges excluded from the first trial.

26 April 2013 Trial Chamber Decision

Yet, even after being directed by the Supreme Court Chamber to consider the concept of 'representativeness', the Trial Chamber reviewed its Severance Order only to observe that none of the parties had agreed on what should be added to Case 002/01. In its decision issued on 26 April 2013, the Trial Chamber has concluded that none of the proposals made by the parties enable it to improve the representativeness of Case 002/01 as it understands that notion. A press release summarizing this decision states that "(u)nlike other International Tribunals, neither the Co-Prosecutors nor the Trial Chamber have the *power* to decide what parts of the charges in the Closing Order might be considered and which abandoned".

With respect, the Trial Chamber's latest decision on this point is not helpful as, for all intents and purposes, this is precisely the power that the Trial Chamber had assumed for itself and had applied through its Severance Order. Whatever limits may have been imposed by a Closing Order handed down by the pre-trial Investigating Judges, the Trial Chamber has an inherent judicial discretion, and perhaps even a duty, to carefully consider, weigh and determine the 'representativeness', of the evidence and testimony that it should hear when considering the charges in the Indictment that lies before it.

Nor is it altogether helpful for the Trial Chamber to acknowledge that there are "circumstances beyond the control of the Chamber, namely the limited availability of financial resources to fund reparations …and the likelihood that future trials may be prevented by the death or unfitness of the remaining Case 002 Accused, may regrettably deprive many Civil Parties of their right to an effective remedy for the harm they have suffered".

'Representative' Evidence on Khmer Krom Persecution in Case 002

As solemn as this acknowledgement may be, these possibilities were not unexpected. Rather than to curse the darkness or to contemplate what it cannot be expected to do or take responsibility for, it may be prudent for the court to shed light on examples of representative testimony in Case 002/01 that may be revelatory of how the trials should now proceed. As an example, we refer to the testimony of Mr. Chau Ny who is the sole civil party representative of the Khmer Krom population to have given evidence at the ECCC thus far.

The ECCC did not include the crimes against the Khmer Krom as part of its three-year pre-trial judicial investigation for Case 002. However, Khmer Krom survivors have continued to press their case with the court, submitting extensive evidence of the atrocities they had suffered. These efforts paid off and finally, on 23 November 2012, Mr. Chau Ny testified in court about his community's suffering under the Pol Pot regime. Although his testimony was confined to the prescribed subject matter and geographical scope of Case 002/01, it has made a significant and lasting positive contribution to his community, other victims of the Khmer Rouge, and the court's jurisprudence.

Establishing a Policy of Discrimination against the Khmer Krom

The S-21 Security Centre was used by the Khmer Rouge regime from its rise to power in 1975 to its fall in 1979.

A Khmer minority group with geographic and cultural ties to Vietnam, the Khmer Krom were targeted for elimination after 1975 by the Khmer Rouge and slaughtered due to their perceived connections with Vietnam, when relations between the two countries became strained and Pol Pot turned against Vietnam. The Khmer Krom were labeled as having "Khmer bodies but Vietnamese minds", an accusation that led to their torture and eventual execution. The regime's racist policies against the Khmer Krom and the Vietnamese are reflected in the rules displayed at the entrance of the Regime's most notorious security centre, S-21.

Mr. Chau Ny's evidence brought to the fore multiple key issues relating to the hitherto neglected Khmer Krom minority. In the course of the trial proceedings, he told the court about the following:

- a deliberate policy of discrimination introduced by the Khmer Rouge regime against the ethnic Khmer Krom population. *"I had to hide my identity as a Khmer Krom because I felt I could have been killed if I had revealed it";*
- how he had changed and hidden his traditional Khmer Krom surname and barely spoke as he had feared that his accent might give away his identity as a Khmer Krom;
- how other Khmer Krom who had attempted to cross the Cambodian-Vietnamese border had not made it across alive;
- forced transfers from Phnom Penh to cooperatives and detention centres in various provinces;
- the conditions of forced labour in these cooperatives and detention centres; and
- the fatal impact of starvation and inadequate medicine on his late brother and young nephews.

Exercising Judicial Discretion

The proceedings at the Tribunal were unprecedented and representative of the suffering the Khmer Krom community experienced during the Khmer Rouge regime. The Trial Chamber's Judge Jean-Marc Lavergne showed a keen interest in the ordeals of the Khmer Krom community. Picking up on Mr. Chau Ny's examination by his Civil Party lawyers and the Co-Prosecutors, Judge Jean-Marc Lavergne asked Mr. Chau Ny clarificatory questions to better understand what had prompted his fear that he would be killed for being a Khmer Krom, whether this fear had existed prior to, during and after the Khmer Rouge came to power and Mr. Chau Ny's evacuation, and if his fears had been founded.

On the application of Mr. Chau Ny's Civil Party Lawyers and the Co-Prosecutors, the Trial Chamber's President, Judge Nil Nonn, also delivered a landmark procedural ruling regarding the scope of what a civil party is prohibited from saying or asking when requested to make a general statement about his or her suffering during the entire period of the Khmer Rouge regime. Unlike other civil parties who have by and large recounted their stories of pain and requested for reparations, Mr. Chau Ny chose to direct his question bluntly at former Khmer Rouge senior leader and Khmer Rouge Head of State, Mr. Khieu Samphan, one of the defendants seated in court. Judge Nil authorized Mr. Chau Ny to put his questions to the Accused through him, as the Trial Chamber President, and he asked Mr. Khieu Samphan directly if he would like to answer the questions posed by Mr. Chau Ny. Though Mr. Samphan indicated an interest in doing so at one point, he was advised by his counsel not to.

Speaking About Suffering & Asking for the Truth

Mr. Chau Ny's question was a powerful one. He asked the defendant to reveal where the remains of his late uncle, Mr. Chao Sao, a prominent Khmer Krom banker and community leader, could be found as Khieu Samphan allegedly knew and was close to him. Mr. Chau Ny stated that this request was not motivated by a sense of revenge, but by a desire to know where his uncle's remains were so that he could carry out long overdue final rites, according to Buddhist tradition to allow his uncle's soul to rest in peace. This question prompted a response from the defendant. It is rare for defendants to speak at this stage of the proceedings, especially when they often choose to waive their right to be present and reserve their right to remain silent. Breaking with this tradition, however, Mr. Khieu Samphan rose to his feet to attempt to make a statement to the court and was restrained by his defence lawyers who insisted that he should not respond to Mr. Chau Ny's questions.

Disappointed with the defendant's non-response, Mr. Chau Ny ended his closing statement by stating: *"Of course, Mr. Khieu Samphan knew my uncle very well! They had meals together, and of course he should know where his skeletal remains are, and he should not refuse to respond to this question…. for that reason, even though I am here, my suffering still remains because I don't have the answer."*

Following Mr. Chau Ny's testimony, the Khieu Samphan defence team has sought to recall Mr. Chau Ny to further examine the statements and questions he put to Khieu Samphan, claiming that it would be in the interests of justice. Mr. Chau Ny's lawyers, Mr. Kong Phallack and Mr. Mahdev Mohan, did not object to the recall of Mr. Chau Ny but asked that the scope of questioning by the Defence should be limited to matters raised in Mr. Chau Ny's statement of suffering concerning his late uncle. The Co-Prosecutors supported the request to recall the Civil Party on grounds that information contained in his statement of suffering merited further questioning by the parties and was in the interests of justice.

In its decision released on 2 May 2013, the Trial Chamber granted the Defence's request that Mr. Chau Ny be recalled, but respected Mr. Chau Ny's lawyers' additional request to limit the questioning of the Civil Party upon recall to only new allegations made against the Accused in the statement of suffering. Importantly, the Trial Chamber's decision also granted the Civil Party Lead Co-Lawyers' request to permit statements of suffering to be made pertaining to the *entirety*

of the Khmer Rouge period. In doing so, the court accepted arguments from the Co-Prosecutors and Lead Civil Party Co-Lawyers that a "compartmentalization of suffering between Case 002/01 and the rest of Case 002 would be artificial, especially as Civil Party applications were deemed admissible on the basis of the entirety of the Case 002 Closing Order." This is a sensible decision and is significant for the remaining Case 002/01 Civil Parties who will make similar statements of suffering in May and June2013 in order to show how the crimes alleged in Case 002/1 have impacted their lives.

After years of research, analysis of extensive evidentiary documents and interviews with civil parties, it was a momentous day for us, as young international criminal lawyers, to see Mr. Chau Ny take the stand at the Tribunal and vindicate the dignity and desires of the Khmer Krom victims of mass crimes through his powerful testimony.

Significantly, Trial Chamber Judges Nil and Lavergne demonstrated that, rather than constrain the process through legal strictures at every turn, judicial discretion and latitude can pave the way for authentic evidence and testimony to be presented to the court. That evidence can then, quite independently, be carefully assessed and weighed as the Chamber deems fit. Without this, these trial proceedings would be devoid of meaning for their chief constituents – the victims of the Khmer Rouge.

The Access to Justice Asia LLP Team in the Khmer Rouge Tribunal, Phnom Penh, 23 November 2012: Photo by Vani Sathisan - From L-R: Mahdev Mohan, Vinita Mohan, Mr. Chau Ny and Mrs. San Sophum, Jennifer Holligan and Vani Sathisan

Lessons for Cases 003 & 004

Further, Mr. Chau Ny's testimony could set the stage for putative cases 003 and 004 that are before the Tribunal's investigating judges and concern other former high-level Khmer Rouge cadre. During UN Secretary-General Ban Ki-moon's visit to Phnom Penh in 2010, Cambodian Prime Minister Hun Sen informed him that "Case 003 will not be allowed….[t]he court will try

the four senior leaders successfully and then finish with Case002." The message was clear – the Cambodian government had no interest in the trials extending beyond Case 002.

Despite this, efforts to move forward with these further proceedings are underway. In 2010, for example, the ECCC's International Co-Prosecutor Mr. Andrew Cayley QC travelled to Pursat Province in June 2010 to meet with Khmer Krom survivors, on the grounds of a pagoda where members of the community had been executed, to express his acknowledgement of targeted and heinous atrocities specifically committed against the Khmer Krom. Subsequently Mr. Cayley filed a 'Request for Investigative Action and Supplementary Submission' which expanded the scope of the Tribunal's Case 004 to include new genocide charges against two defendants for crimes committed against the Khmer Krom population in Takeo and Pursat Provinces during the regime. Mr. Cayley's action was prompted by and based primarily on extensive evidence submitted by Khmer Krom civil parties.

Newly appointed International Co-Investigating Judge Mark Harmon too has honoured his investigative obligations by insisting on the transparency of the proceedings. He has published details of the crime sites under investigation for Cases 003 and 004 and has encouraged victims to contact the ECCC if they have any information relating to relevant crimes sites.

The Khmer Krom may be key players in Cases 003 and 004, if these critically important cases are to proceed further. As published press releases suggest, Case 004 may ultimately include a specific genocide charge regarding the treatment of the Khmer Krom under the Khmer Rouge regime. Similarly, given that significant numbers of Khmer Krom reside in Vietnam close to the border with Cambodia, they may be able to play a crucial role in shedding light on the charges of war crimes that appear, again from the published press releases, to be a core element of Case 003.

Conclusion

Obtaining credible 'representative' testimony in relation to historical crimes is not an easy task, but it should nevertheless be undertaken by the ECCC's Trial Chamber in the light of successes in these trials (or others); not shirked because of inertia or fatigue. It requires these judges to call for and to be able to hear evidence that does not just look reasonable on paper or practicable for the court's donors, but that requires on-site analysis, and the trust and confidence of victims of mass crime to be able to speak to the authorities safe in the knowledge that their evidence will be acted upon, and they themselves will be protected if necessary.

Civil parties are in a unique position to use their statements of the impact of their suffering to express details of the suffering they endured during the regime as well as any testimony they wish to give in connection with the entire Indictment and Closing Order for Case 002. This provision empowers civil parties to speak about suffering they experienced during the regime without the usual attendant strictures. In addition, it has now been established from Mr. Chau Ny's testimony that civil parties can direct questions towards the defendants and the defendants can take that opportunity to respond, without the question having to go through their defence counsel.

Behind the scenes of Mr. Chau Ny's testimony in court lies several years of painstaking investigation, research and analysis of extensive evidence of mass crime required to press the case of the Khmer Krom. We have benefited from the *pro bono* support of investigators and lawyers/students associated with Access to Justice Asia LLP, the Singapore Management University School of Law's Asian Peace-building and Rule of Law programme as well as International Human Rights Law Clinics from Yale & Berkeley Law Schools, who have interviewed the civil parties, analyzed witness evidence, conducted complex research and drafted legal submissions to support the litigation before the court. Berkeley's Professor Laurel Fletcher puts it best when she says that the goal is "to ensure that the harm suffered by the Khmer Krom as a distinctive group is acknowledged, documented, and redressed through this justice process".

**The authors are international lawyers associated with Access to Justice Asia LLP and are part of a legal team led by Civil Party lawyer Mahdev Mohan representing civil parties at the Extraordinary Chambers in the Courts of Cambodia.*