SEVERING JUSTICE FOR AN EXPEDITIOUS TRIAL: A CALL FOR REPRESENTATIVE JUSTICE IN CASE 002 AT THE KHMER ROUGE TRIBUNAL

Vani Sathisan*

ABSTRACT

The Khmer Rouge Tribunal (“KRT”) is the first internationalized hybrid tribunal to recognize victims of mass atrocities as “civil parties” empowered to cross-examine certain witnesses, participate in trial proceedings and seek reparations. A Severance Order by the Trial Chamber on 22 September 2011, however, split the ongoing Case 002 into separate trials addressing discrete aspects of the Khmer Rouge regime and severely limiting the evidence to be put forward by civil parties. For example, civil parties were forced to be strictly confined to the facts of forced transfer in their testimony without being able to highlight their plight in the cooperatives in great detail. Having severe legal and procedural consequences on the civil parties’ fundamental rights, the Severance Order threatened to affect the representative manner in which the “totality of the criminal conduct” of the accused persons could be reflected. This paper questions, from a juridical perspective, the power that the Trial Chamber had assumed for itself in deciding an artificial separation.

* Vani Sathisan is a Litigation Associate of Access to Justice Asia LLP representing genocide survivors at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), a Research Associate of the Asian Business & Rule of Law initiative at Singapore Management University, School of Law, and Hon. Secretary of the Society of International Law Singapore A commentary version of this article, which I have co-written with my colleague, Ms. Jenny Holligan, is available on http://ilawyerblog.com/have-a-trial-by-relevance-not-severance-the-ecccs-case-002/. This paper also informed my presentation to J.D. students at the Santa Clara University’s Summer Course on Transitional Justice in ASEAN, on 30 May 2013. The author would like to thank Assistant Professor Mahdev Mohan, Singapore Management University, School of Law, for his guidance and helpful comments provided.
between the parts of the charges to be included or excluded in the Closing Order, thus resulting in a less representative selection of charges against the accused.¹ 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 trials could be open to the organic development of civil party participation. This paper will argue that the litmus test for the ECCC’s Trial Chamber is its willingness to obtain credible ‘representative’ testimony in relation to historical crimes and not shirking that responsibility because of inertia, fatigue and a preference for expeditious trials. Further, this paper will seek to propose ways in which the representativeness of civil party evidence in the ECCC could be achieved through common sense and judicial discretion.

I. INTRODUCTION

The Extraordinary Chambers in the Courts of Cambodia (“ECCC”) scored a ‘double-first’ when it was established in 2003, almost three decades after the ultra-Maoist Khmer Rouge regime and its policies of repression, exploitation and slaughter between 1975-1979 led to the execution and death of almost a quarter of the Cambodian population. A result of sustained international efforts and a law passed in 2001 by the Cambodian National Assembly to hold perpetrators of the Khmer Rouge regime accountable for their crimes under law, the ECCC, also commonly referred to as the Khmer Rouge Tribunal (“KRT”), is the first United Nations-backed internationalized hybrid criminal tribunal and also the first of its kind to recognize victims of mass atrocity as “civil parties”² who will play a central role in the criminal

² “Civil Parties are formal participants in the proceedings against those allegedly
proceedings.\(^3\) Aiming to be less divisive and to help build local legal capacity,\(^4\) the KRT also hoped to uphold a dimension of representative justice by conferring the civil parties with the power to cross-examine certain witnesses, participate in trial proceedings and seek reparations.\(^5\) Apart from physical harm, these civil parties are also victims of grave economic loss and emotional affliction.\(^6\) By giving these victims of gross violations of human rights and international humanitarian law a voice\(^7\) in court, the KRT hoped to advance international justice by bringing a sense of closure to the civil parties’ sufferings, restoring their dignity and consequently promoting reconciliation in Cambodia.

However, the trial proceedings for the KRT’s current case – commonly referred to as first mini trial ‘002/01’ – and related judicial decisions have fallen short of victims’ expectations in several respects. A decision by the Trial Chamber (“Severance Order”) on 22 September 2011 to split the ongoing Case 002 into separate trials addressing discrete aspects of the Khmer Rouge regime severely limited the evidence to be put forward by civil parties and threatened to affect the “representative and focused manner” in

---


\(^6\) Trial Chamber I Decision on Victims’ Participation, ICC-01/04-01/06-1119, para. 92.

which the “totality of the criminal conduct” of the accused persons could be reflected.\(^8\) The Severance Order, on an appeal by the Co-Prosecutors, was subsequently overturned by the Supreme Court Chamber which emphasized the importance of ensuring that the mini trial was representative of the entire Closing Order and that Case 002 proceedings have lacked the representativeness that is required of proceedings of this gravity.\(^9\) Yet, the Trial Chamber disregarded the Supreme Court’s direction to give due consideration to the concept of representativeness, choosing instead to conclude that none of the proposals made by the parties enable it to improve the representativeness of Case 002/01 as it understands the notion.

This paper questions, from a juridical perspective, the power that the Trial Chamber had assumed for itself in deciding an artificial separation between the parts of the charges to be included or excluded in the Closing Order, thus resulting in a less representative selection of charges against the accused.\(^10\) 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 trials could be open to the organic development of civil party participation. This paper will argue that the litmus test for the ECCC’s Trial Chamber is its willingness to obtain credible ‘representative’ testimony in relation to historical crimes and not

---

\(^8\) To assist the reader in finding the relevant decisions, ECCC cases have been cited using the website citation method. ‘Co-Prosecutors’ Notice of Request for Reconsideration of the terms of “Severance Order Pursuant to Internal Rule 89TER”’ (ECCC, 23 September 2011), para. 4, <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E124_1_EN.PDF> accessed 7 October 2013.


shirking that responsibility because of inertia, fatigue and a preference for expeditious trials. Further, this paper will seek to propose ways in which the representativeness of civil party evidence in the ECCC could be achieved through common sense and judicial discretion.

II. “VICTIM” PARTICIPATION AT THE ICC

Contrary to their predecessor tribunals, the Rome Statute initiated the victims’ participation scheme in the International Criminal Court (“ICC”), aspiring to recognize victims’ sufferings, give them a voice in the judicial proceedings, establish the truth, and promote rehabilitation, reconciliation and healing. At the ICC, victims can be “participants” in proceedings before the judges and also have the right to make representations to the Chambers if the Prosecution initiates investigations propria motu. In the Situation in the Democratic Republic of the Congo, Prosecutor v. Lubanga Dyilo, the ICC’s first case and what was seen to be the ICC’s first test of victim participation, representative evidence had led to calls for a “re-classification” of charges as lawyers for the victims made an application to add charges of sexual slavery

---

11 Examples would include the ad-hoc International Criminal Tribunals for the former Yugoslavia and Rwanda.


14 The Prosecutor v Thomas Lubanga Dyilo (Decision on victims' participation) ICC-01/04-01/06 (13 December 2013).

and cruel and inhumane treatment to the indictment. 16 This application was initially upheld by the Trial Chamber only to be dismissed later by the Appeals Chamber in 2009. Lawyers for victims had argued that seeking to ensure the charges were rectified to reflect the “actual experiences of the victims” underscored the very purpose, and significance, of victim participation. 17 According to one such lawyer, “without the presence of victims... the procedure would have been seen by many people of Ituri as a surrealist event.” 18 Significantly limiting victim representation is another case at the ICC – The Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Kirimimuthaura and Uhuru Muigaikenyatta. 19 In a ruling on victims’ legal representation on 3 October 2012, Trial Chamber V ordered the ICC’s own Office of Public Counsel for Victims to represent the victim lawyers’ inside the courtroom, 20 provoking protests that by “restricting the procedural rights of victims at trial and leaving them even more disenfranchised than before”, it was “the least victim-friendly decision that the ICC Chambers had ever issued.” 21

Over at the ECCC, the Severance Order restricted the first trial in Case 002 to comprise only of population movement phases 1 and 2, limiting civil party testimony relating to forced transfers and enforced disappearances only

17 ibid.
18 ibid, quoting Luc Walleyn, a lawyer for the victims in the Lubanga trial.
19 The Prosecutor v. Francis Kirimimuthaura and Uhuru Muigaikenyatta, ICC-01/09-02/11.
insofar as they pertain to phases 1 and 2. While victim representativeness still remains a concern for the ICC and the ECCC, Case 002 has been able to see some important and innovative ways in which evidence can be satisfactorily presented by civil parties.

III. “CIVIL PARTY” REPRESENTATION AT THE ECCC

The representative evidence of civil parties in the ECCC has brought to light the sheer magnitude of the horrific atrocities unleashed upon Cambodians by the Khmer Rouge in creating an agrarian and classless society. Their testimonies highlight forced evacuations from urban centres, separations from families, transfers to the countryside to be subjected to overwork, starvation, untreated disease and torture, eliminations of intellectuals, religious persecutions of the Vietnamese, Khmer Krom and Cham minorities, and executions. The ECCC, which was established to give new momentum to issues of accountability, justice and reconciliation in Cambodia, has jurisdiction over certain crimes set out in its National Penal Code including murder, international crimes of genocide, war crimes and crimes against humanity. In fact, the 1991 Paris Agreements on Cambodia require that Cambodia recognize its obligations under the Genocide Convention to prosecute those responsible for genocide. These crimes are included in the Closing Order and Indictment in Case 002 against four former senior leaders of the regime for their involvement in the atrocities.24

23 Agreements on a Comprehensive Political Settlement of the Cambodia Conflict (signed 23 October 1991) 31 ILM 183, art. 15(2).
24 The Khmer Rouge’s “Brother No 2” Nuon Chea, Defence Minister Ieng Sary, his wife and Social Affairs and Action Minister Ieng Thirith, who was also the Khmer Rouge’s
However, the scope of the current trial proceedings has been arbitrarily limited by a decision issued by the Trial Chamber (“Severance Order”) on 22 September 2011, which effectively excludes civil parties with full procedural rights.

### A. Making Case 002 ‘Representative’

#### i. 22 September 2011 Severance Order

The Trial Chamber issued the Order separating the proceedings in Case 002 into several distinct trials and each trial would end with a verdict, a sentence or an acquittal. The Co-Prosecutor, Andrew Cayley QC and Deputy Co-Prosecutor Yet Chakriya, in their Notice of Request for Reconsideration of the terms of the Order, underscored their alarm that the first trial would be limited to the following:

(a) the issues already specified by the Trial Chamber for the first phase of the trial, namely the structure of Democratic Kampuchea ("DK"), the roles of the Accused prior to and during the DK government and DK policies on the "issues raised in the Indictment" ("First Phase Issues");

(b) the factual allegations concerning the movement of the population from Phnom Penh (phase 1) and from the Central; (old North), Southwest, West and East Zones (phase 2); and

(c) crimes against humanity of murder, extermination, persecution (except on religious grounds), forced transfer and

---

highest-ranking woman, and Chairman of the State Presidium Khieu Samphan, all stand accused of crimes against humanity, genocide, grave breaches of the Geneva Convention and crimes under the 1956 Penal Code.

25 Co-Prosecutors (n 8).
enforced disappearance, insofar as these crimes pertain to phases 1 and 2 of the population movement.

The Chamber stated that the “separation of proceedings will enable the Chamber to issue a verdict following a shortened trial, safeguarding the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial.”26 The rationale behind the Severance Order made little sense to the civil parties and their lawyers, given the legal and procedural consequences on their fundamental rights. The Order excluded from the first trial (a) all co-operatives, worksite, security centers and execution sites; (b) all facts relevant to population movement from the East Zone (phase 3); and (c) the crimes of genocide, the crimes against humanity of persecution on religious grounds and grave breaches of the Geneva Conventions of 1949.27 In profoundly limiting the evidence put forward by witnesses and civil parties at trial, and favouring an expedited yet “compromised” form of restorative justice, the Severance Order did very little for accountability and reconciliation.28

Cognizant of the limits, the lead co-lawyers and civil party lawyers put in a “Request for Reconsideration of the Terms of the Severance Order” on 18 October 2011,29 stating reasons for the inclusion of crimes, such as forced marriage and rape, and highlighting how the Communist Party of Kampuchea’s policy of forced movement of population included all three

27 Supreme Court (n 9), para 3.
28 Jill Clayton (n 15).
phases. Significantly, they noted that “restricting their testimony to part of their memories, while artificial and counterproductive in terms of trial management, may also risk serious re-traumatizing in suggesting that highly sensitive aspects of their martyrdom would be considered irrelevant.”

The Co-Prosecutors too 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.”

B. 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, holding that the Trial Chamber committed an error of law and an error in the exercise of its discretion in determining the scope of the trial, and concomitantly emphasizing the importance of ensuring that this mini trial is representative of the entire Closing Order. It also observed that Case 002 trial proceedings have lacked the ‘representativeness’ that is required of proceedings of this gravity. 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

---

30 Phnom Penh (Phase 1), the Central, Southwest, West and East Zones (Phase 2) and the East Zone (Phase 3).
31 ibid, para. 13.
32 Supreme Court (n 9), para. 4.
33 Co-Prosecutor (n 8), para. 6.
already passed, effectively rendering the scope of Case 002/01 as shaped there by a fact 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.

C. 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. 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 beneficial 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.

It is legally possible to construct a representative case, and while it is not perfect and perhaps even lengthy, it ought not to be avoided by the ECCC on the belief that it can never be done. 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, I refer to the testimony of Chau Ny who was the first civil party representative of the Khmer Krom population to have given evidence at the ECCC thus far. His compelling testimony, and the important and innovative ways in which his evidence was presented, led to a critical procedural ruling on the scope of a civil party’s closing statement and a confirmation that civil parties had a right to address questions at the accused during their closing statements, and it kick-started a critical process of defendants addressing the court on concerns directly raised by other civil parties. Such standards set by the representative evidence of civil parties would not have been possible had the Severance Order been upheld.

IV. ‘REPRESENTATIVE’ EVIDENCE ON KHMER KROM PERSECUTION IN CASE 002

A. Establishing a Policy of Discrimination against the Khmer Krom

“The older you become, the more the history of the genocide comes back to you in an insidious way, a bit like poison that has been distilled into your body bit by bit. The only way to relieve things is to testify.”

---

The Khmer Krom were a minority ethnic group who were singled out and slaughtered en masse, under a “clear and pronounced policy,” for having “Khmer bodies but Vietnamese minds” (khluon Khmer, kuo kbal Yuan). They were targeted for forced transfers, persecution and elimination after 1975 by the Khmer Rouge, when relations between the two countries became strained and Pol Pot turned against Vietnam. In the purge of paranoia that followed, the Khmer Krom were “indiscriminately killed” for suspicion of being spies, CIA agents or former Lon Nol soldiers. The Communist Party of Kampuchea (“CPK”) had arrested, interrogated and executed high-ranking officials and intellectuals, and those who were “separate or special class types” such as the Buddhist monks and all nationalities.”

Civil party and witness evidence corroborates that in attempting to “dry up the people from the enemy” the CPK considered the Khmer Krom, as well as other minority groups including the Cham and Chinese minorities and those related to the Lon Nol regime, as “remnant crud” or “skin in which dirt is impregnated,

---

36 Ben Kiernan, *Cambodia the Eastern Zone Massacres: A Report on Social Conditions and Human Rights Violations in the Eastern Zone under the Rule of Pol Pot's Communist Party of Kampuchea* (Center for the Study of Human Rights 1980) (“Thus began, on 25 May 1978, the massive conventional suppression campaign, known in the East since then as "the coup" (rot praha). Eastern Zone resistance to this Centre imposition of control provoked the enormous massacres of the eastern population in the second half of 1978. The Centre [CPK Leaders] described the entire population of the Zone as having "Khmer bodies with Vietnamese minds" (khluon khmer kuo kbal yuon) and set about eliminating it either through mass evacuation or mass murder.”)


39 ibid, page 2.

40 ibid, page 53.
that you have to sort of scrub off if you want to get rid of the dirtiness.”

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.

Since the ECCC has been set up, hundreds of Khmer Krom clients from several provinces have come seeking justice and to have their voices heard through their civil party lawyers and civil society activists. These efforts paid off finally, on 23 November 2012, when the first Khmer Krom civil party, Chau Ny, testified in court about his community’s suffering under the Pol Pot regime. Although his evidence was confined to the prescribed subject matter and geographical scope of Case 002/01, they have made a significant and lasting positive contribution to the Khmer Krom community, other victims of the Khmer Rouge, and the court’s jurisprudence.

Chau Ny’s evidence brought to the fore multiple key issues relating to the hitherto neglected Khmer Krom minority. In the course of the respective trial proceedings, he told the court about the Khmer Krom being victims of forced evacuations and a systematic policy of forced labour, starvation and persecution. He testified about the appalling conditions that his family members had to endure at the work sites as well as during the process of forced evacuations. Chau Ny also described his forced transfer from Phnom Penh to cooperatives and detention centres in various provinces, and stated

41 ibid.
42 On 4 June 2013, the second Khmer Krom civil party, Soeun Sovandy followed suit.
43 Another ECCC witness, Stephen Heder, a Khmer Rouge historian, explained to the court that several internally displaced persons during Phase 3 of the CPK’s forced transfers were moved “primarily by compulsion.” “Some people described being forcibly removed or described others being forcibly removed, and there were some who eventually managed to return, while others described not going exactly voluntarily but being willing to go under the circumstances of the time. There were some who were displaced persons... who had come into the Kampong Cham town area for various reasons and who were willing to go back to where they had come from.” See Stephen Heder (n 38) p. 4-5.
that the Khmer Krom who had attempted to cross the Cambodian-Vietnamese border had never made it across alive. This was consistent with the Closing Order’s descriptions of the CPK’s forced transfers of populations from late 1977. The Khmer Krom were screened and segregated based on their distinct family names, dialect and cultural practices. Pointing to the deliberate policy of discrimination introduced by the Khmer Rouge regime against the ethnic Khmer Krom population, Chau Ny explained having to hide his identity. Chau Ny described 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. “I had to hide my identity as a Khmer Krom. I felt that I would be killed and concealing my identity would spare me,” he said. Chau Ny also described the abysmal conditions in the detention centres and spoke of forced labour, and the fatal impact of starvation and insufficient medicine on their family members. He described being given only rabbit drop pellets as medicine and being fed only watery gruel and being beaten up or whipped by a “weapon” for attempting to add some leaves or vegetables into their gruel. He told the court that he helplessly watched his brother and young nephews being deprived of food and resorting to eating their own faeces, and eventually dying from starvation.

The representative evidence of Chau Ny underscored the Khmer Rouge’s deliberate policy of targeting and discriminating against the Khmer Krom minority, by mixing “extremist ideology with ethnic animosity.”\textsuperscript{45} However,

\textsuperscript{44} TCCP-187 Chau Ny, E1/146.1. Chau Ny provided evidence on how “17 April people” and the Khmer Krom would be targeted and killed, and so he decided hide his Khmer Krom identity and remained in Takeo province as opposed to returning to Kampuchea Krom. He headed toward National Road 2 where he could travel to Kampuchea Krom, but after walking for 10 days and arriving in Bati district, Trapeang Sab (Takeo province), he was told that “whoever came from Kampuchea Krom, when we reached the border, we would be killed… I decided to remain in Trapeang Sab for a few days.”

\textsuperscript{45} Please refer to Yale University’s Cambodia Genocide Program: http://www.yale.edu/cgp/.
when Chau Ny began to describe people being transferred to the cooperatives and their treatment there, a counsel for Ieng Sary objected to the questions on cooperatives as it was “not part of the matter to be discussed at the proceeding,”\textsuperscript{46} as a result of the Severance Order.

“Question to Chau Ny: And when you were in the cooperative with your family, were there many other people there, who were also there, in that cooperative, Chak Thum?

Counsel for Ieng Sary: Mr. President, according to document E124.7, cooperative is not part of the matter to be discussed during these proceedings as yet. I would like to take issue with the line of questioning concerning this fact, which is not relevant now.

Counsel for Chau Ny: We aren't going so much into the strictures or the specifics of the cooperatives, as much as we are speaking about what happened in the context of forced transfer two, where Mr. Chau Ny has just mentioned that he was forced on a train and headed to a railway unit to Battambang, where he was received by Khmer Rouge militia.

Mr. President: Indeed, the objection is not sustained.”

As a result of the Order, we see even though Chau Ny was able to highlight the forced transfers from Phnom Penh to the cooperatives, he was not able to provide testimony about the plight of the Khmer Krom in these cooperatives in great detail. Only a small number of civil parties were admitted in relation to the first two phases of the forced transfer and on the basis of suffering multiple crimes. We see the immediate impact of the Order on the rights of

\textsuperscript{46} See ECCC Transcript of Trial Proceedings, 23 November 2012.
the civil parties as their participation is based on a demonstration that "as a
direct consequence of at least one of the crimes alleged against the Charged
Person, he or she has in fact suffered physical, material or psychological
injury upon which a claim of collective and moral reparation might be
based."\(^\text{47}\)

As the Lead Co-Lawyers and Civil Party Lawyers noted in their
Request for Reconsideration of Terms, it would be difficult for civil parties
to be strictly confined to the facts of forced transfer and not mention all the
cri mes they had suffered. The Lead Co-Lawyers and Civil Party Lawyers
highlighted Principle 10 of the Van Boven/Bassiouni principles which
require that a "victim who has suffered violence or trauma should benefit
from special consideration and care to avoid his or her re-traumatization in
the course of legal or administrative proceedings designed to provide justice
and reparation"\(^\text{48}\) and argued that “restricting their testimony to part of their
memories....may risk serious re-traumatizing in suggesting that highly
sensitive aspects of their martyrdom would be considered irrelevant.”\(^\text{49}\)

B. 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. In particular, the Trial Chamber’s Judge Jean-Marc Lavergne
showed a keen interest in the ordeals of the Khmer Krom community after
Chau Ny’s testimony. Picking up on Chau Ny’s examination by his Civil
Party lawyers and the Co-Prosecutors, Judge Jean-Marc Lavergne asked
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

\(^\text{47}\) Internal Rule 23bis(1)(b).
\(^\text{48}\) Co-Prosecutors’ (n 8).
\(^\text{49}\) ibid.
existed prior to, during and after the Khmer Rouge came to power and Chau Ny’s evacuation, and if his fears had been founded.\textsuperscript{50}

On the application of 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.\textsuperscript{51} Unlike other civil parties recounted their sufferings and requested for reparations, 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.\textsuperscript{52} Judge Nil authorized 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 Chau Ny. Though Mr. Samphan indicated an interest in doing so at one point, he was advised by his counsel not to.

\textbf{C. Truth-seeking in Statement of Suffering}

Chau Ny’s question was a powerful one. He asked the defendant to reveal where the remains of his late uncle, Mr. Chau Sao, a prominent Khmer Krom banker and community leader, could be found as Khieu Samphan allegedly knew and was close to him. Chau Ny stated that this request was not


\textsuperscript{51} ibid.

\textsuperscript{52} Khieu Samphan, Ieng Sary and Nuon Chea are charged with war crimes, crimes against humanity, genocide as well as charges of homicide, torture and religious persecution under the 1956 Cambodian Penal Code, which was in effect during the regime.
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 Chau Ny’s questions.

Disappointed with the defendant’s non-response, 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 Chau Ny’s testimony, the Khieu Samphan defence team recalled Chau Ny to further examine the statements and questions he put to Khieu Samphan, claiming that it would be in the interests of justice as their client’s rights had been violated by Chau Ny’s alleged new fact. Chau Ny’s lawyers, Mr. Kong Phalack and Mr. Mahdev Mohan, did not object to the recall of Chau Ny but asked that the scope of questioning by the Defence should be limited to matters raised in Chau Ny’s statement of suffering concerning his late uncle. The Co-Prosecutors supported the request to recall.

\[53\] ibid.

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 on 2 May 2013, the Trial Chamber granted the Defence’s request that Chau Ny be recalled, but respected 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 was a sensible decision and was significant for the remaining Case 002/01 Civil Parties, such as Soeun Sovandy, who made similar statements of suffering in May and June 2013 in order to show how the crimes alleged in Case 002/1 have impacted their lives. On 23 May 2013, Chau Ny reappeared before the court for an abbreviated hearing in Case 002. After being questioned by the defence, the prosecution and his civil party lawyers, he repeated his question of the whereabouts of his missing uncle to the accused.

His testimony this time prompted Khieu Samphan to respond – a move never before seen in the courtroom of the Khmer Rouge Tribunal - and state that while he understood Chau Ny’s suffering, he was unable to furnish him with any information about his uncle’s fate.

“… I fully appreciate the suffering you and your family could have had… I would like to take this opportunity to talk to you in
person so that you understand my heart. I am taking this from the bottom of my heart so that everything is clear and that your mind is clear. I feel sorry that there is no way I can help you, to entertain your request, or to answer your request.”

The persuasive testimony provided by Chau Ny, and the representative evidence adduced, have kick-started a chain-reaction of civil parties putting questions to the accused and compelling responses from the defendants. This is a far cry from Case 001 where a restrictive interpretation of civil party participation led to the court’s rejection of many victims’ statuses as civil parties and a refusal to allow them to make opening statements.

V. SIGNIFICANCE FOR CASES 003 & 004

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 Case 002.” 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

---

55 ibid.
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. It is therefore imperative for the ECCC to adopt a policy of strong and consistent commitment to exercising its jurisdiction over genocidal acts. 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.

Evidence indicating genocidal acts must be included at the upcoming trials especially if they will support convictions by shedding light on truth. As specified above, representative evidence by civil parties support charges of crimes against humanity, highlighting the crimes against humanity that the CPK had perpetrated against the Khmer Krom - whom they had considered to constitute a political group - through imprisonment, enslavement, and other inhumane acts that included forced labour, forced marriages, torture, extermination and persecution.59

What’s more, the desire to seek truth and closure ranks very high amongst Cambodians. In a comprehensive population-based survey by the Berkeley Human Rights Centre on Cambodians’ attitudes about social reconstruction and the ECCC, entitled “So We Will Never Forget,” the locals’ opinions and attitudes about accountability and justice were rightly captured.60 The survey results suggest that 43% of the respondents expect justice to mean the revealing or establishing of the truth behind the atrocities.61 64.3% of the respondents said that they would not be able to reconcile without such knowledge.62 Quite evidently, a significant majority of locals expect a truth-seeking process to be established by the ECCC without trampling on the court’s ability to have more representative trials.

59 Closing Order, para. 1350 (the policy implemented by the Democratic Kampuchea authorities between 17 April 1975 and 7 January 1979 consisted of a widespread and systematic attack against the entire civilian population of Cambodia, principally on political grounds.)


61 ibid.

62 ibid.
VI. GIVING EFFECT TO REPRESENTATIVENESS

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 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. A more organic development of civil party participation has thus been able to contribute to the criminal jurisprudence of the court.

Any claim for reparation must be linked to a crime for which an Accused is convicted and when certain crimes are omitted by the Severance Order, several requests for reparations too will be consequently rejected by the Trial Chamber. As such, the ECCC must ensure that judgment will include representation as an important aspect so that reparations too can be representative. The court ought to recognize its obligation to ensure that effective means are provided to enable representative participation and it should not renege on its promises to allow the victims to have ownership of the trials by conducting the case in a manner prejudicial to the rights of the civil parties.

When creating the Victims Register by the ECCC, it was highlighted that

---

63 See generally: http://iccforum.com/reparations
64 Severance Order (n 23), para. 19.
the court had important historical, cultural and social purposes in addition to judicial functions, namely in establishing the history of these crimes, contributing to public understanding behind the reasoning of the crimes committed and promoting healing of the victims.\textsuperscript{66} With the unwise severing of Case 002 into mini-trials, where only civil parties in the first two phases of forced transfer have legal standing as parties to the proceedings\textsuperscript{67} and crimes against humanity and genocidal acts are overlooked, the number of representative participation is exceedingly reduced. Such little admissible evidence undermines the creation of a Victims Register and its hope to create a permanent and accurate record of the sufferings of the Cambodians.

VII. CONCLUSION

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.

Since Case 001, 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. The Trial Chamber

\textsuperscript{66} Gregory Stanton, ‘Creation of a Victims Register by the ECCC’ (\textit{Genocide Watch}) <http://www.genocidewatch.org/images/By_Stanton_Creation_of_a_Victims_Register_by_the_ECCC.doc> accessed 7 October 2013.

\textsuperscript{67} Severance Order (n 23), para. 10.
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 his/her testimony refers to policies that came into effect later in 1977 or 1978 which he/she witnessed or has knowledge about that do not relate to these evacuations, the Trial Chamber has deemed this extraneous on its own instance. 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.

Since the establishment of the ECCC, lead co-lawyers for civil parties and their various litigation teams have spent years of research, analysis of extensive evidentiary documents and interviews with civil parties in Cambodia to press for genocide charges against the various religious and minority groups. Chau Ny’s testimony was a momentous day for the lawyers representing the Khmer Krom community, to see him take the stand at the Tribunal and vindicate the dignity and desires of the Khmer Krom victims of mass crimes through his powerful testimony. Without their participation, these trial proceedings would be devoid of meaning for their chief constituents – the victims of the Khmer Rouge.

***