



## Impact of Severance on Individual Civil Parties' Legal Status and Right to Reparations

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At the request of the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Civil Party Co-Lead Lawyers (CLLs) have recently identified a prioritized list of reparations projects under development for Case 002/01.<sup>1</sup> However, their filing was nearly simultaneous with the Supreme Court Chamber's decision annulling the severance of Case 002 into smaller trials.<sup>2</sup> With the subject matter of Case 002/01 now uncertain, the CLLs are "reserv[ing] the right to subsequently reformulate their reparation requests in accordance with the final determination on the scope of Case 002/01, once that determination has been made."<sup>3</sup>

In Case 002, involving the most senior surviving leaders of the Democratic Kampuchea regime, nearly 4,000 victims applied to be Civil Parties and most were accepted on appeal. Noting that the Internal Rules do not require a link between the injury and the facts investigated but instead between the injury and "one of the crimes alleged[.]"<sup>4</sup> the Pre-Trial Chamber (PTC) found that in the context of Case 002:

While the facts investigated are limited to certain areas or crime sites, the legal characterizations of such facts ... include crimes which represent mass atrocities allegedly committed by the Charged Persons by acting in a joint criminal enterprise together and with others against the population and *throughout* the country.<sup>5</sup>

The PTC ruled that it was therefore unnecessary for applicants to link their injuries to crime sites in the Closing Order, which "serve only as examples in order to demonstrate how all these centres and sites functioned *throughout* Cambodia."<sup>6</sup> As a consequence, Case 002 includes Civil Parties who suffered from the implementation of one or more of the criminal policies charged in the indictment but not necessarily in areas of the country where specific crime sites were investigated.<sup>7</sup>

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<sup>1</sup> Lead Co-Lawyers' Indication to the Trial Chamber of the Priority Projects for Implementation As Reparations (Internal Rule 80bis(4) with Confidential Annexes (Feb. 12, 2013) [hereinafter Indication to the Trial Chamber]. See also Expert Commentary on Legal Filings: *Civil Parties Identify Reparations Projects for Case 002/01* (Feb. 15, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>2</sup> Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01 (Feb. 8, 2013) [hereinafter SCC Severance Decision]. See also Expert Commentary on Legal Filings: *Supreme Court Chamber Invalidates Case 002 Severance* (Feb. 13, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>3</sup> Indication to the Trial Chamber, *supra* note 1, ¶ 6.

<sup>4</sup> Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 29 (June 24, 2011).

<sup>5</sup> *Id.* ¶ 42 (emphasis in original).

<sup>6</sup> *Id.* ¶ 75. See also *id.* ¶ 72.

<sup>7</sup> *Id.* ¶ 77.

After the PTC decision, the Trial Chamber severed the Case 002 indictment in anticipation of holding more than one trial on the crimes charged. The first smaller trial (Case 002/01) has thus far been limited to “population movement phases 1 and 2,” including the forced evacuation of Phnom Penh beginning on April 17, 1975. All other criminal policies charged in the indictment—genocide, forced marriage, cooperatives, worksites, security centers, and forced movement from the Eastern Zone—were excluded. In making the decision to sever, the Trial Chamber determined that because Civil Parties no longer participate as individuals at trial (as they did in Case 001), but instead as a consolidated group with collective interests, “limiting the scope of the facts to be tried during the first trial ... has no impact on the nature of Civil Party participation at trial[.]”<sup>8</sup>

The CLLs and Civil Party lawyers disagreed:

[T]he Severance Order has immediate impact on the rights of Civil Parties in the first [Case 002] trial 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.* ... The Case 001 Judgment ... clearly stated that—to be admissible—Civil Parties need to substantiate that their sufferings were the direct results of the criminal conduct of the Accused.”<sup>9</sup>

Because Case 002/01 addresses only a limited number of offenses—rather than the policies “throughout Cambodia” referenced by the PTC—numerous Civil Parties could (and according to the Defense should) be excluded from the consolidated group.<sup>10</sup> Out of the nearly 4,000 victims taking part, only around 750 were admitted due to harm related to the charges of forced movement at issue.<sup>11</sup> However, the legal status of those Civil Parties whose harms are unconnected to that policy has never been addressed. The PTC’s admissibility decisions appear to be final under the Internal Rules,<sup>12</sup> and the Trial Chamber has not responded to Civil Party filings requesting a reasoned decision on the matter.<sup>13</sup>

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<sup>8</sup> Severance Order Pursuant to Internal Rule 89*ter*, Case No. 002/19-09-2007-ECCC/TC, ¶ 8 (Sept. 22, 2011) [hereinafter Severance Order].

<sup>9</sup> See generally Lead Co-Lawyers and Civil Party Lawyers Request for Reconsideration of the Terms of the Severance Order E124, Case No. 002/19-09-2007-ECCC/TC, ¶¶ 7-8 (Oct. 18, 2011) (quoting Internal Rules r. 23*bis* (1)(b), emphasis in original).

<sup>10</sup> See Urgent Request on the Scope of Trial One and the Need for a Reasoned Decision Following the Civil Parties Request for Reconsideration of the Severance Order, Case No. 002/19-09-2007-ECCC/TC, ¶ 8 (Nov. 17, 2011) [hereinafter Urgent Request on the Scope of Trial One]. See also *id.* ¶ 9 (requesting that the Trial Chamber “clarify the legal criteria and threshold that must be met in order for Civil Parties to participate in the first trial of Case 002”); Doreen Chen, *Defense Teams Argue for the Hearing of Entire Case 002, Severance of Case against Khieu Samphan*, (Feb. 20, 2013), at <http://www.cambodiatribunal.org/blog/2013/02/defense-teams-argue-hearing-entire-case-002-severance-case-against-khieu-samphan>.

<sup>11</sup> See Lead Co-Lawyers Urgent Request on the 19 October 2011 Hearing Following the Chambers’ Memorandum E125, ¶¶ 12-13 (Trial Chamber, Oct. 7, 2011).

<sup>12</sup> See Internal Rules, r. 23*bis*(2),(3).

<sup>13</sup> See generally Urgent Request on the Scope of Trial One, *supra* note 10. See also SCC Severance Decision, *supra* note 2 (noting that Civil Party concerns have not been the subject of a reasoned decision and “remain unresolved to date”).

Of major concern is the right to reparations of Civil Parties whose harms are unconnected to the subject matter of Case 002/01. The Internal Rules limit reparations awards to measures that “a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and b) provide benefits to the Civil Parties which address this harm.”<sup>14</sup>

Since the severance of Case 002, the Trial Chamber has said that reparations requests should take account of these requirements—which would require a nexus between the harm suffered by Civil Parties and the crimes convicted in Case 002/01.<sup>15</sup> Nevertheless, in the Case 001 appeals judgment, Supreme Court Chamber indicated that reparations should “favour those measures that benefit as many victims as possible.”<sup>16</sup> In crafting their reparations priorities, the Co-Lead Lawyers have thus been confronted with the need to suggest reparations that are both specific to Civil Parties whose harms are the subject matter of Case 002/01, and also the broader victim population—including those Civil Parties whose harms will not be addressed in Case 002/01. Although this balancing of interests gives the Trial Chamber some ability to hedge on the legal repercussions of severance, there is at least one reparation award (one of only two provided in Case 001) about which it will be impossible to equivocate: the listing of the names of Civil Parties in the judgment.

Last week’s hearings on the consequences of the Supreme Court Chamber’s nullification of the severance decision may result in limited expansion of the scope of Case 002/01, but unless all charged criminal policies are tried, the underlying problem for Civil Party lawyers will remain: how to explain to clients with unrelated harms their legal status in the case, and to prepare them for the likelihood that they will not be officially recognized by having their names listed in the final judgment. Because Civil Party and Defense teams are again highlighting the consequences of severance for civil party status, the Trial Chamber’s new decision on the scope of the case can be expected to bring some finality to this outstanding issue.

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<sup>14</sup> Internal Rules, r. 23 *quinquies*(1).

<sup>15</sup> See Severance Order, *supra* note 8, ¶ 8.

<sup>16</sup> *Duch* Appeal Judgment, ¶ 659 (Feb. 3, 2012).