

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RULE 92 SUBMISSION REGARDING CIVIL PARTY  
TESTIMONY**

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## I. INTRODUCTION

1. During trial proceedings on 24 January 2013, counsel for Ieng Sary, and for the Civil Parties discussed the matter of the weight to be given to statements by Civil Parties who do not testify under oath. Counsel for Ieng Sary recognized “the vital role of the civil parties[,] ... that they are entitled to give statements that are not under oath ... [and] that the Trial Chamber is perfectly permitted to consider their statements along with all other evidence and to provide the appropriate weight that those statements should be given.”<sup>1</sup> Judge Cartwright noted that:

*As to the discussion about whether or not civil parties should take the oath and the consequences of that, we have had this discussion on many occasions, and the Chamber is fully aware of the responsibilities that it has and we do not wish to have this argument repeated ad nauseum – or “frequently” to omit the Latin.<sup>2</sup>*

2. The Co-Prosecutors, being mindful of Judge Cartwright’s admonition, respectfully offer the following brief observations regarding the weight to be afforded to Civil Party testimony in the hope and belief that the information provided herein goes beyond the prior discussions and aids the Chamber more substantively.
3. A substantial number of civil parties have been selected by the Trial Chamber to testify, primarily in the forced movement segment of Case 002/01.<sup>3</sup> During this segment of the trial, the Civil Parties will provide key evidence that will be important in establishing the crimes of forced movement and the context in which they were committed. The testimony of the Civil Parties provides an important addition to the other evidence presented during the trial.
4. The ECCC has followed the Civil Law Framework and differentiates between witnesses, on the one hand, and Civil Parties, Accused and relatives of Civil Parties or Accused. Civil Parties, like other parties to the proceedings, are not required to testify under oath.<sup>4</sup> Civil Parties may give statements to the Court, and can be questioned

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<sup>1</sup> Draft Transcript, 24 January 2013, p. 73.

<sup>2</sup> Draft Transcript, 24 January 2013, p. 75.

<sup>3</sup> **E236/1** Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01, 2 October 2012.

<sup>4</sup> Internal Rule 23(4) (“The Civil Party cannot be questioned as a simple witness in the same case and, subject to Rule 62 relating to Rogatory Letters, may only be interviewed under the same conditions as a Charged Person or Accused”); see also Rule 24(2), which provides that close family members of an Accused, Charged Person, or Civil Party do not testify under oath.

about their statements by other parties in the proceedings with permission of the President.<sup>5</sup>

5. The Trial Chamber has previously stated that unsworn testimony given by Civil Parties, as well as the Accused, is evidence before the Chamber.<sup>6</sup> The Co-Prosecutors submit that the weight and probative value of Civil Party testimony should be assessed by the Trial Chamber under the same standards as testimony provided by witnesses.

## II. PROCEDURAL BACKGROUND

6. In Case 001, 22 Civil Parties gave testimony before the Trial Chamber.<sup>7</sup> In accordance with ECCC Internal Rules, none of those Civil Parties testified under oath.<sup>8</sup> The Trial Chamber assessed the Civil Party statements as evidence before the Chamber, and considered the testimony in reaching its judgement.<sup>9</sup>
7. On 24 February 2011, the Ieng Sary Defence filed a motion requesting that Civil Parties testify under oath when selected to testify regarding substantive issues.<sup>10</sup> The motion argued that a statement by a Civil Party can only be used to determine his or her claim in reparations,<sup>11</sup> and that if a Civil Party is called to give testimony on “issues relating to the criminal case,” he or she must testify under oath.<sup>12</sup>
8. The Co-Lead Lawyers for the Civil Parties filed an observation on Ieng Sary’s motion, emphasizing that Civil Parties are fully equal parties in the proceedings, and under the rules may provide evidence under the same conditions as a Charged Person.<sup>13</sup> To require Civil Parties to testify under oath when giving evidence would be a significant modification of the Internal Rules.<sup>14</sup>

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<sup>5</sup> Internal Rule 91.

<sup>6</sup> **E188** Judgment, 26 July 2010, para. 51 (“The Accused’s responses constituted evidence”) and para. 52 (“These individuals [Civil Parties] may nevertheless testify and have their statements put before the Chamber and assessed as evidence where relevant and probative”).

<sup>7</sup> **E188** *Ibid.* at para. 54.

<sup>8</sup> **E188** *Ibid.* at para. 53.

<sup>9</sup> **E188** *Ibid.* at paras. 52-55.

<sup>10</sup> **E57** Ieng Sary’s Motion for Civil Parties to Testify Under Oath if They Are Permitted to Testify as to Their Knowledge of the Criminal Case, 24 February 2011.

<sup>11</sup> **E57** *Ibid.* at para. 6, 9.

<sup>12</sup> **E57** *Ibid.* at para. 11.

<sup>13</sup> **E57/1** Observation des Parties Civiles sur la Demande Présentée par Ieng Sary aux fins de Prestation de Serment par les Parties Civiles préalablement à leur témoignage, 17 March 2011, para. 21.

<sup>14</sup> **E57/1** *Ibid.* at para. 5.

9. The Trial Chamber addressed Ieng Sary's motion during the 5 April 2011 Trial Management Meeting, stating: "If a civil party elects to take the oath, no procedural defect results. Internal Rules 24 and 31 however, already indicate those parties before the ECCC for whom an oath must be administered under the ECCC legal framework."<sup>15</sup> The Trial Chamber affirmed this oral ruling in a Memorandum dated 8 April 2011.<sup>16</sup> In this ruling, the Trial Chamber thus affirmed that Civil Parties do not need to testify under oath in order for their testimony to be considered evidence by the Chamber. As evidence, testimony by Civil Parties must be considered under the same standards as all other evidence heard by the Chamber.
10. As noted above, on 24 January 2013, the defence for Ieng Sary, the Lead Co-Lawyers, and Judge Cartwright again revisited this issue.<sup>17</sup>

### III. SUBMISSIONS

#### A. Origin of Rule that Civil Parties Do Not Testify Under Oath

11. The Cambodian legal system is modelled after the French Civil Law System. In the French legal tradition, Civil Parties, the Accused and close family members of the Accused and Civil Parties are not required to testify under oath.<sup>18</sup> This rule is based on the concept that no one can be both a witness and a party to the same proceeding.<sup>19</sup> The origin of this rule appears to be based on the consideration that the Accused and Civil Parties, as parties to the proceeding, have an interest in the outcome of the case and thus are not impartial. In France, Civil Parties have the potential to recover monetary damages as part of such proceedings.
12. The justification for this rule is less applicable in the situation of the ECCC, where the court is addressing charges of crimes against humanity, war crimes, and genocide that took place on a massive scale, in which the entire surviving population could be viewed as both victims and potential witnesses. Concepts of victimhood and bias are

<sup>15</sup> E1/2.1 Transcript of Hearing of Trial Management Meeting, 5 April 2011, p. 100, ln. 8-13.

<sup>16</sup> E74 Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 Following the Trial Management Meeting of 5 April 2011, 8 April 2011, p. 1.

<sup>17</sup> Draft Transcript, 24 January 2013, pp. 62, 70-75.

<sup>18</sup> French Code of Criminal Procedure (translated in English by LegiFrance) updated 1 January 2006, article 335-336. See also similar articles in the Codes of Criminal Procedure of The Kingdom of Cambodia (Khmer-English Translation 2008), Articles 156 (Witness without Swearing), 312 (Incompatibility of Status of Civil Party and Witness), 326 (Hearing of Parties), 327 (Objection to Hearing of Witness).

<sup>19</sup> Crim., 28 Janv. 1958, B.C., 91, cited in Jean-Francois, Renucci, *Code de Procédure Pénale* (2007), p. 640.

different in this context. Furthermore, the Civil Parties before the ECCC are not entitled to individual monetary damages, and instead are limited to collective and moral damages.<sup>20</sup> This feature of Civil Party participation at the ECCC also limits the rationale for a substantive differentiation between witnesses and Civil Parties.

13. Despite the rule that Civil Parties do not testify under oath, French courts still assess Civil Party testimony as evidence and assess the weight and probative value of the statements after all evidence has been heard, based on the principle of freedom in the establishment of proofs and evidence.<sup>21</sup> Pursuant to this principle, the judge is not limited to any particular means of proof,<sup>22</sup> but instead bases his or her deliberation on the whole set of proofs submitted during the proceedings.<sup>23</sup> Thus, “all evidence is admissible,”<sup>24</sup> including statements made by Civil Parties or the Accused. Under the principle of free evaluation of evidence, “offences may be proved by any mode of evidence and the judge decides according to his inner most conviction.”<sup>25</sup> At the end of the trial, the Judge considers all evidence freely in order to assess whether he or she is “inwardly convinced.”<sup>26</sup> Therefore, even though Civil Parties do not take an oath, their testimony is not considered to be inherently of lesser value in the French civil law system.

### B. Civil Parties Have a Right to Give Evidence

<sup>20</sup> Internal Rules 23(1)(B), *23quinquies* (“These benefits shall not take the form of monetary payments to Civil Parties”).

<sup>21</sup> French Code of Criminal Procedure (translated in English by LegiFrance) updated 1 January 2006, art. 427. Although Article 427 concerns the ‘correctional’ procedure (procedure before the criminal court), it is unanimously accepted that the article is applicable before all the jurisdictions of instruction and of judgments, even before the police officers conducting investigations. See Jean Pradel, *Manuel de Procédure Pénale* (2006) at 364-365. See also Crim. 13 janvier 1970, B.C., num. 21 and Crim., 1er décembre 1990, B.C., num. 289, cited in Jean Pradel, *Manuel de Procédure pénale* (2006), pp. 364-365.

<sup>22</sup> Crim., 24 Janvier 1973, B.C., num. 23 and 34, cited in Jean Pradel, *Manuel de Procédure pénale* (2006), p. 786. See also Corinne Renault-Brahinskym *Procédure Pénale* (2007) pp. 106-108.

<sup>23</sup> French Code of Criminal Procedure (translated in English by LegiFrance) updated 1 January 2006, Article 428.

<sup>24</sup> Jean Pradel, *Manuel de Procédure Pénale* (2006) p. 364.

<sup>25</sup> French Code of Criminal Procedure (translated in English by LegiFrance) updated 1 January 2006, art. 427.

<sup>26</sup> French Code of Criminal Procedure (translated in English by LegiFrance) updated 1 January 2006, Article 353: “Before the assize court retires, the presiding judge reads out the following instruction which is also put up in large type in the most visible part of the deliberation chamber: ‘The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defence. The law asks them but this single question, which encloses the full scope of their duties: are you inwardly convinced?’” See also Crim., 3 janvier 1978, arret num.2 as cited in Jean Pradel, *Manuel de Procédure Pénale* (2006) p. 786.

14. Under the Cambodian Code for Criminal Procedure and the Internal Rules, Civil Parties have a right to participate in criminal proceedings before the ECCC.<sup>27</sup> Internal Rule 23(1) states: “Civil Parties have the right to participate in the criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution.”<sup>28</sup>
15. The right to participate in these proceedings includes the right to present evidence. The Trial Chamber in Case 001 recognized Civil Parties “have the right during trial to assist the Prosecution in establishing the truth.”<sup>29</sup> Internal Rule 12ter(6) allows Civil Party Lawyers to provide support including the “examination of their clients and witnesses.”<sup>30</sup> The right of victims (and thus Civil Parties) to be heard is also recognized by the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>31</sup> Similarly, under European Union law, Member States must “ensure that victims may be heard during criminal proceedings and may supply evidence.”<sup>32</sup>
16. This right of the Civil Parties to be heard is analogous to the right of an Accused to testify and present evidence on his or her own behalf. That right is protected in international law as part of the basic and fundamental right to a fair trial.<sup>33</sup> It is also

<sup>27</sup> Cambodian Code of Criminal Procedure Art. 13 (“A civil action can be brought by the victim of an offense”); ECCC Internal Rule 23(1).

<sup>28</sup> Internal Rule 23(1).

<sup>29</sup> **E72/3** Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Parties Lawyers to Make Submission on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, para. 41.

<sup>30</sup> Internal Rule 12ter(6). Under French law, an admitted civil party has the right to request the investigating judge “to be heard or interrogated.” French Code of Criminal Procedure (translated in English by LegiFrance) updated 1 January 2006, article 82-1.

<sup>31</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc A/RES/40/34 (29 November 1985) at Art. 6(b) (“Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”).

<sup>32</sup> Directive of 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Official Journal of the European Union L 315/57 (14 November 2012) at Article 10(1).

<sup>33</sup> UN General Assembly Resolution 217A(III), *Universal Declaration of Human Rights*, adopted 10 December 1948, art. 11(1); International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, art. 14(3)(e) (“To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”); Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”) 213 U.N.T.S. 221, 4 November 1950, art.6(3)(d); American Convention on Human Rights, 21 November 1969, 1144 U.N.T.S. 143, art.8(2)(f) (“right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts”).

specifically protected under the ECCC Establishment Law, which guarantees the Accused's right to "obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them."<sup>34</sup>

17. Like the Accused, the Civil Parties are parties to these proceedings, and it would be a violation of their right to participate and give evidence if the weight or probative value of their testimony was automatically presumed to be lower merely because they do not testify under oath.

**C. The Weight Given to Civil Party Testimony Should Be Determined Based on the Same Criteria Applied to the Testimony of Witnesses**

18. It is ultimately the responsibility of the Trial Chamber to assess the weight and probative value that will be given to the evidence presented before it.<sup>35</sup> Under the principle of free evaluation of evidence, the probative value and weight assigned to evidence is an inquiry that happens once all the evidence has been admitted in the case. This inquiry takes place with the purpose of determining whether the evidence, taken in context, tends to prove or disprove the allegations in the case.
19. Other international criminal tribunals have affirmed that the probative value of evidence is assessed after all the evidence has been heard. For example, ICTY Trial Chamber I has stated that evidence should be evaluated "within the context of the trial record as a whole."<sup>36</sup> Similarly, the ICTR Appeals Chamber has stated that the

<sup>34</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, with inclusion of amendments as promulgated on 27 October 2004, Article 35<sup>new</sup>(e).

<sup>35</sup> **E188** Judgment, 26 July 2010, para. 42; *see also* **E43/4** Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009 at para. 7 ("Once produced before the Chamber, the probative value of this evidence, and hence the weight to be accorded to it, will then be assessed"); **E176** Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), 28 October 2009 at para. 3 ("Once produced, the Chamber will assess the probative value of all evidence and determine the weight to be accorded to it."); **E96/7** Decision on the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012, at p. 18 ("Declares that the criteria outline in Section 4.2 and 4.3 of this decision shall further be considered by the Chamber when assessing the probative value and thus weight to be accorded to evidence put before the Chamber in consequence of this decision."); **E1/51.1** Transcript, 20 March 2012 at p. 53 ln. 21-22 ("And in considering and assessing the weight of the testimony of any witness, it is the sole discretion of the Chamber."); **E1/134** Transcript, 18 October 2012 at p. 90 ln. 19-24 ("The Chamber recalls, by the way, that the probative value of comments made by an accused person, as is the case with all evidence presented during this trial, will be assessed in light of the Internal Rules. When the Chamber will hand down its verdict, the judgment that will be rendered in that regard will be reasoned.")

<sup>36</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Judgment (ICTY Trial Chamber I), 12 June 2007 at para. 30 (citing *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence (ICTY Trial Chamber I), 19 January 2006 at para. 6); *see also* *Prosecutor v. Vujadin Popović et al.* Case No. IT-05-88, Decision on Admissibility of Intercepted Communications (ICTY Trial Chamber II), 7 December 2007 at para. 36

“assessment of the probative weight to be attached to evidence is an assessment to be made by the Trial Chamber at the end of the case.”<sup>37</sup>

20. The French Civil Law system also requires assessment of the probative value of the evidence at the conclusion of the trial. The principle of free evaluation of evidence and the notion of inner conviction (*intime conviction*) requires the trial judge to independently assess evidence to come to a decision.<sup>38</sup> Whether testimony was or was not given under oath does not bind the trial judge to reach a certain determination on the credibility of that testimony. Instead, the judge must assess the evidence freely. The triers of fact are experienced and trained judges, rather than lay jurors, and are capable of independently assessing the evidence.
21. When evaluating the evidence at the conclusion of trial, the Trial Chamber may look to international practice on the factors that may be considered in assessing the credibility and weight of witness testimony. The ICTY and ICTR, in assessing the credibility of witness testimony, have considered as factors: the demeanour of the witness;<sup>39</sup> the consistency of the witness’ statements, and whether any inconsistencies are in relation to material facts;<sup>40</sup> whether the witness had ulterior motivations for their testimony;<sup>41</sup> and corroboration of the witness’ testimony.<sup>42</sup> Testimonies of Civil

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(“If a document is admitted, evaluating its contents to assign each document the appropriate weight is a task for a later day, conducted...in the context of the totality of the evidentiary record created by the parties.”)

<sup>37</sup> *Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence (ICTR Appeals Chamber), 4 October 2004 at para. 6.

<sup>38</sup> Code de Procédure Pénale français, version consolidée au 29 octobre 2010, article 353.

<sup>39</sup> See *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, Judgement (ICTY Appeals Chamber), 5 May 2009 at para. 301 (“deference to the finder of fact is particularly appropriate where the factual challenges concern issues of witness credibility. The finder of fact, in this instance the Trial Chamber, is particularly well suited to assess these kinds of questions as it had the opportunity to directly observe the witness’ demeanor and assess his evidence in the context of the entire trial record.”); *Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-A, Judgement (ICTR Appeals Chamber), 26 May 2003 at para 21 (“the Trial Chamber has the advantage of observing witnesses in person and hearing them when they are testifying, and so are better placed to choose between divergent accounts of one and the same event”).

<sup>40</sup> *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84bis-T Judgement (ICTY Trial Chamber II), 29 November 2012 at para. 180; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement (ICTY Appeals Chamber), 23 October 2001 at para 31; *Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-A, Judgement (ICTR Appeals Chamber), 26 May 2003 at 178-182, 185-186 (approving *Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-A, Judgement (ICTR Trial Chamber), 6 December 1999 at paras. 19, 251-253); *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR 96-14-A, Judgement (ICTR Appeals Chamber), 9 July 2004 at para 95-96.

<sup>41</sup> See *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Judgement (ICTY Trial Chamber II), 27 September 2007 at para 300 (“The Chamber is also not able to accept his evidence in this respect, from its assessment of his credibility as it appears intended to avoid the conclusion that Karanfilov had knowledge of security problems for prisoners at the barracks.”); *Prosecutor v. Ramush Haradinaj*,





Parties should not be considered to be inherently of lesser value, merely due to the fact such testimonies are not given under oath. Rather, the Trial Chamber should consider the factors set forth above, among other indicia of reliability, in assessing the weight and probative value to be given to testimonies of Civil Parties. In doing so, the Chamber should take into account the fact that, like witnesses, Civil Parties who testify before the Chamber are subject to examination (and therefore, a testing of their evidence) by the Judges, Co-Prosecutors, Civil Party Lawyers and the Defence.

22. Based on such an analysis, the Trial Chamber may ultimately determine that certain testimony of a particular Civil Party or Accused was biased or otherwise not credible, and thus should not be given any significant weight. The Co-Prosecutors submit, however, that such determination must be made on a case-by-case basis, and that in-court testimony provided by the Civil Parties and Accused, where tested through examination by judges and counsel, cannot be deemed of lesser weight merely because such testimony is not provided under oath.

#### IV. CONCLUSION

23. The Co-Prosecutors thus respectfully request that the Trial Chamber consider these observations and assess the weight and probative value of testimony by the Civil Parties and Accused pursuant to the same standards as applied to the testimony of witnesses.

Respectfully submitted,

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21 February 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
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Case No. IT-04-84bis, Judgement (ICTY Trial Chamber II), 29 November 2012 at para. 180; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR 96-14-A, Judgement (ICTR Appeals Chamber), 9 July 2004 at para 98.

<sup>42</sup> *Prosecutor v. Zoran Kupreškić et al*, Case No. IT-95-16-A, Judgement (ICTY Appeals Chamber), 23 October 2001 at para. 220; *Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-A, Judgement (ICTR Appeals Chamber), 23 May 2003 at para. 27-29.