

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 4 March 2013**CLASSIFICATION****Classification of the document
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**IENG SARY'S RESPONSE TO CO-PROSECUTOR'S' RULE 92 SUBMISSION
REGARDING CIVIL PARTY TESTIMONY**

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Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby responds to the Co-Prosecutors’ (“OCP”) Rule 92 Submission Regarding Civil Party Testimony.¹ This Response is made necessary because: **a.** the Submission is untimely; and **b.** through its request that the Trial Chamber assess the weight and probative value of Civil Parties’ testimony in the same manner as witnesses’ testimony, the OCP seeks to circumvent the ECCC’s legal framework. The role of Civil Parties is make statements concerning harm suffered and / or reparations. The weight and probative value of a Civil Party’s testimony concerning issues beyond the scope of harm suffered or reparations *cannot* be considered in the same manner as a witness’s testimony unless the Civil Party takes an oath, as a witness does. The Defence incorporates by reference all prior relevant submissions made to the Trial Chamber.²

I. LAW

1. ECCC Internal Rule (“Rule”) 23 states, in relevant part:

1. The purpose of Civil Party action before the ECCC is to:
 - a) participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC; and
 - b) Seek collective and moral reparations, as provided in Rule 23*quinquies*.

[...]

4. *The Civil Party cannot be questioned as a simple witness in the same case...*³

2. Rule 23*bis* (1) states, in relevant part:

In order for Civil Party action to be admissible, the Civil Party applicant shall:

- a) be clearly identified; and
- b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

3. Rule 24 states, in relevant part:

1. Before being interviewed by the Co-Investigating Judges or testifying before the Chambers, *witnesses shall take an oath or affirmation in accordance with their religion or beliefs to state the truth.*
2. The following witnesses shall make a statement without taking an oath:

¹ Co-Prosecutors’ Rule 92 Submission Regarding Civil Party Testimony, 21 February 2013 (“Rule 92 Submission”), E267.

² See IENG Sary’s Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23; 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 (“IENG Sary’s Motion for Civil Party Testimony Under Oath”), E57.

³ Emphasis added.

- a) The father, mother and ascendants of the Charged Person, Accused or Civil Party;
- b) The sons, daughters and descendants of the Charged Person, Accused or Civil Party;
- c) The brothers and sisters of the Charged Person, Accused or Civil Party;
- d) The brother-in-laws and sister-in-laws of the Charged Person, Accused or Civil Party;
- e) The husband or wife of the Charged Person, Accused or Civil Party, even if they have been divorced; and
- f) Any child who is less than 14 (fourteen) years old.⁴

4. Rule 36 states:

1. The Co-Investigating Judges or the Chambers may, on their own initiative or at the request of a party, remind a witness of their duty to tell the truth and the consequences that may result from failure to do so.
2. If the Co-Investigating Judges or the Chambers have grounds for believing that a witness may have knowingly and wilfully given false testimony, they may follow the procedure, as applicable, in Rule 35(2).
3. Cambodian Law shall apply in respect of sanctions imposed for false testimony under solemn declaration.

5. Article 2 of the Cambodian Code of Criminal Procedure (“CPC”) states:

Criminal and civil actions are two separate kinds of legal actions. The purpose of a criminal action is to examine the existence of an offense, to prove the guilt of an offender, and to punish the person according to the law. The purpose of a civil action is to provide compensation to victims of an offense and to allow victims to receive sufficient damages corresponding to the injuries they suffered.

6. Article 13 of the CPC states:

A civil action shall be brought by the victim of an offense. In order to be compensated, the injury must be:

- A direct consequence of the offense;
- A complainant’s personal damage;
- Occurred and current.

An injury can be a property or physical or emotional damage.

7. Article 312 of the CPC states: “A civil party cannot be interviewed as a witness.”

⁴ Emphasis added.

8. Article 328 of the CPC states, in relevant part: “Before answering the questions, *each witness* shall swear according to their religion or believe [sic] that he/she shall only speak the truth.”⁵

II. ARGUMENT

A. The Submission is untimely

9. The OCP’s submission that Civil Parties’ testimony should be accorded the same weight and probative value as testimony that is given under oath is untimely and should be rejected. In February 2011, the Defence filed a Motion requesting that, if Civil Parties were to make statements relating to their knowledge of the criminal case (thereby assuming the role of witnesses), rather than restricting their statements to their reparations claims, then the Civil Parties should first take an oath to tell truth.⁶ The OCP did not respond to the Motion. When the issue was raised again during trial proceedings on 6 December 2011 and 25 January 2013, the OCP did not make submissions.⁷ The OCP should not now – two years after the issue was first raised by the Defence – be permitted to do so.

B. The nature of the ECCC proceedings favor distinguishing Civil Party testimony from witness testimony

10. The OCP asserts that the origin of the French Civil Law rule that Civil Parties are not required to testify under oath stems from the consideration that Civil Parties (as with Accused) are parties to the proceedings, and no one can be both a party and witness in the same proceeding.⁸ The OCP states that the justification for this rule is that parties have an interest in the outcome of the case and, therefore, are not impartial.⁹ The OCP asserts that this rule is less applicable at the ECCC because “[c]oncepts of victimhood and bias are different in this context”¹⁰ due to the scale of the alleged offenses, and the types of damages to which Civil Parties are limited.¹¹ The OCP cites no authority for these assertions. To the contrary, the scale of the alleged offenses at issue in Case 002 would unequivocally lead to the conclusion that Civil Parties, as parties to the proceedings,

⁵ Emphasis added.

⁶ See IENG Sary’s Motion for Civil Party Testimony Under Oath.

⁷ Transcript, 6 December 2011, E1/17.1, p. 34-36; Transcript, 24 January 2013, E1/164.1, p. 70-75.

⁸ Rule 92 Submission, para. 11.

⁹ *Id.*

¹⁰ *Id.*, para. 12.

¹¹ *Id.*

would have a *greater* interest in the outcome of the case and thus are not impartial, regardless of the damages for which they may be eligible. The justification for the rule that a Civil Party may not be heard as a witness – and, therefore, does not have to take an oath – is no less relevant simply because of the kinds of offenses and / or Civil Party damages that are at issue.

C. A Civil Party’s statement, in contrast to a witness’s testimony, is limited to harm suffered and reparations

11. The OCP asserts that Civil Parties have the right to participate in the proceedings, which includes the right to present evidence, and that this right “is analogous to the right of an Accused to testify and present evidence on his or her own behalf.”¹² The OCP cites no authority for this assertion. While the Defence agrees that Civil Parties have a right to be heard and to present evidence, this right is limited to statements related to any alleged harm suffered as a result of the Accused’s alleged criminal conduct and / or reparations.¹³
12. As the Trial Chamber established in Case 001, Civil Parties may support the OCP in establishing the criminality of the Accused’s actions “which affect them and which create the foundation for a claim for reparation.”¹⁴ Civil Parties “cannot contribute to the establishment of the truth by providing direct information concerning the crime alleged.”¹⁵ The Trial Chamber’s findings reflect the role of Civil Parties in Civil Law-based systems, including the ECCC: Civil Parties are individuals who claim to have suffered harm as the result of an Accused’s alleged conduct, and are permitted to seek reparations and make statements in court as to that harm.¹⁶
13. In the Cambodian legal system, Civil Parties’ statements are only used to determine reparations.¹⁷ A witness, in contrast, testifies about issues that are relevant to the trial proceedings, such as what he has personally seen, heard or observed, what he knows

¹² *Id.*, para. 16. *See also id.*, paras. 14-15, 17.

¹³ *See* IENG Sary’s Motion for Civil Party Testimony Under Oath, paras. 6-9.

¹⁴ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Civil Party Co-Lawyers’ Request for a Ruling on the Standing of Civil Party Lawyers to Make Submission on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, para. 33.

¹⁵ *Id.*, para. 34.

¹⁶ Rules 23, 23bis(1), 91. *See also* Cambodian Code of Criminal Procedure (“CPC”), Arts. 2, 13; French Code of Criminal Procedure (updated 1 January 2006, *available at* <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>), Arts. 2, 85, 418.

¹⁷ “[T]he judge hears the civil plaintiff (who is usually also the victim of the crime charged against the accused) as to damages...” Stuart Coghill, Resource Guide to the Criminal Law of Cambodia, International Human Right Law Group Cambodia Defenders Project, 2000, section 4.40.

about a particular subject (if he is an expert witness) or his opinion (if he is an expert witness or a character witness).¹⁸

14. Although the Agreement and Establishment Law are silent as to the role of a Civil Party during trial proceedings, neither the Rules nor the CPC permit a Civil Party to be heard as a witness.¹⁹ The Trial Chamber has found that “a restrictive interpretation of the rights of Civil Parties in proceedings before the ECCC is required.”²⁰ A restrictive interpretation of Civil Parties’ rights entails that a Civil Party may only make statements regarding his claim for reparations and that, if a Civil Party cannot be heard as a witness, his testimony cannot be assessed the same weight or probative value as a witness.

D. If Civil Parties make statements concerning issues beyond harm suffered or reparations without first taking an oath, then their testimony should have less weight and probative value than testimony given under oath

15. The OCP asserts that a Civil Party’s testimony should not be of inherently less value simply because it was not given under oath; rather, the Trial Chamber should assess the testimony on a case-by-case basis, considering the same factors that are considered by international *ad hoc* tribunals when assessing a witness’s testimony.²¹ The OCP cites no authority for these assertions. In making these assertions, the OCP attempts to circumvent the ECCC’s Civil Law-based legal framework by blurring the demarcation between Civil Parties’ unsworn testimony and witnesses’ sworn testimony. Although the Trial Chamber has the ultimate responsibility of assessing the weight and probative value

¹⁸ *Id.*, section 4.07. See CPC, Art. 153, describing a witness as an individual who provides information that “may be useful to the revelation of the truth”; French Code of Criminal Procedure, Art. 444, describing a witness as an individual summoned to court to make statements “either on the matters of which the defendant is accused or on his personality and morals.”

¹⁹ Rule 23(4); CPC, Art. 312. See also French Code of Criminal Procedure, Arts. 91-1, 422, which only permit Civil Parties to be heard as witnesses with regard to the payment of expenses.

²⁰ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Civil Party Co-Lawyers’ Request for a Ruling on the Standing of Civil Party Lawyers to Make Submission on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, para. 13.

²¹ Rule 92 Submission, para. 21, referring to the witness’s demeanor; the consistency of the witness’s statements and whether any inconsistencies relate to material facts; ulterior motives for the testimony; and whether the witness’s testimony is corroborated. See also *id.*, para. 13.

of all evidence that comes before it,²² the Trial Chamber *should not* treat a Civil Party's testimony in the same manner as it would a witness's testimony.²³

16. Witnesses are required to take an oath to tell the truth before giving evidence.²⁴ If a witness violates this oath by making any false statements, he may be subject to criminal charges, i.e., perjury charges.²⁵ The requirement of an oath adds additional weight to a witness's testimony. Civil Parties, in contrast, are not required to take an oath to tell the truth before making statements to the Trial Chamber.²⁶ Civil Parties thus face no punishment if they make false statements. While the Defence is not suggesting that Civil Parties would give false statements unless they took an oath, the Defence submits that testimony *not* given under oath concerning matters beyond the traditional scope of Civil Party statements should not be viewed with the same weight and reliability as testimony given under oath.²⁷ If Civil Parties desire to give testimony concerning matters outside of

²² *See Id.*, para. 18.

²³ Indeed, the Trial Chamber has consistently treated Civil Parties differently than witnesses. For example, a Civil Party, Klan Fit, was observed discussing his testimony with others during a court recess, with no repercussions from the Trial Chamber. Transcript, 7 December 2011, E1/18.1, p. 2-3. Another Civil Party, Romam Yun, was observed talking with his lawyer during a court recess, while in the process of giving evidence before the Trial Chamber. *Id.*, p. 22. When the Defence raised concerns as to the possibility of the intentional or unintentional influence or "coaching" of Mr. Romam Yun by his lawyer (*Id.*, p. 22, 24-25), concerns which were supported by the OCP (*Id.*, p. 22-23), President Nil Nonn responded that Civil Parties are not witnesses and that: "[a]ccording to our national practice and provisions and the Internal Rules, civil party is a party to the proceedings and, as a party, he or she shall be entitled to consult with his or her counsel at all stages during the proceedings." *Id.*, p. 27. President Nil Nonn distinguished Civil Parties from witnesses by referring to Rule 88(2), which "clearly refers to witnesses and experts and the accused persons, and not referring [sic] to a civil party." *Id.* Rule 88(2) requires witnesses to remain in a separate room where they cannot see or hear the proceedings, and prohibits witnesses from communicating with each other. *See also* CPC, Art. 322. Were these Civil Parties to be treated as witnesses, they would have had to follow the limitations placed upon witnesses. Further, in at least one instance, Civil Parties have completed their Civil Party applications together. Transcript, 11 January 2012, E1/25.1, p. 84-85. If these Civil Parties had been treated as witnesses, they would not have been interviewed together. Rules 59(2)-(3). *See also* CPC, Art. 150.

²⁴ Rules 24(1), 31(2). *See also* CPC, Arts. 154, 328; French Code of Criminal Procedure, Arts. 103, 109, 331, 437, 446.

²⁵ Rule 36; CPC, Art. 320; French Code of Criminal Procedure, Arts. 342, 457.

²⁶ *See* CPC, Art. 328, which only requires witnesses to take oaths.

²⁷ Analogous to the issue of the weight to be given to a Civil Party's unsworn testimony is the issue of the weight to be given to an Accused's unsworn statement. At the International Criminal Tribunal for the Former Yugoslavia, for example, Rule 84*bis* of the Rules of Procedure and Evidence permits the Accused to make a statement if he so desires, but provides: "(A) ...The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement. (B) The Trial Chamber shall decide on the probative value, if any, of the statement." This position was confirmed by the Trial Chamber in *Prlić et al.* regarding a statement by the Accused, Dr. Prlić: "[JUDGE Trechsel]: ...[Y]ou're quite aware of the fact that this declaration of Mr. Prlić will not be evidence in any way, and he cannot be cross examined, of course, ... [COUNSEL Michael G. Karnavas]: ...I don't share your opinion that even an unsworn statement is not evidence. It has less weight, but you may decide, and maybe that is your position ...It's my opinion it may have less weight. ... [JUDGE Trechsel]: ...I agree that the question of evidence is open. It's the mercy of the Chamber, I was tempted to say, but it's certainly a matter of mercy but of appreciation, dutiful appreciation. ... [JUDGE Antonetti]: ...I'm going to read paragraph (B) of Rule 84 bis of the Rules that states that: 'The Trial


the scope of harm suffered or reparations, then they become witnesses. Accordingly, they should be required to take an oath, as is required of *all* witnesses.

III. CONCLUSION AND RELIEF REQUESTED

17. The distinction between Civil Parties and witnesses in the ECCC legal framework and the Cambodian legal system militates against Civil Parties' testimony being assessed in the same way as a witness's testimony. Simply, if the Trial Chamber, the OCP or the Civil Party Co-Lawyers wish to treat a Civil Party as a witness, then the Civil Party should take an oath before giving testimony that extends beyond harm suffered or reparations. If the Civil Party gives such testimony without taking an oath, the Trial Chamber should accord this testimony less weight than testimony given under oath. To do otherwise would be to treat Civil Parties with more deference than witnesses with respect to their testimony, an approach that is not envisaged by the ECCC legal framework.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to **REJECT** the OCP's submission that the weight and probative value of Civil Parties' testimony should be assessed pursuant to the same standards as the testimony of witnesses.

Respectfully submitted,



 ANG Udom





 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **4th** day of **March, 2013**

Chamber shall decide on the probative value of the statement, if any.” *Prosecutor v. Prlić et al.*, IT-04-74-T, Transcript, 5 May 2008, p. 27455-27457.