

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

FILING DETAILS

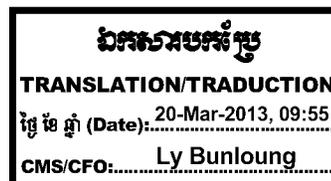
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Reply to Co-Prosecutors' Rule 92 Submission Regarding Civil Party Testimony

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MAY IT PLEASE THE TRIAL CHAMBER

I. Introduction

1. On 21 February 2013, le Co-Prosecutors filed a submission requesting the Trial Chamber (“the Chamber”) to give the same weight to civil party testimony as is given to the testimony of witnesses in Case 002.¹
2. On the basis of the special nature of the ECCC procedure and the idiosyncrasies of the current trial, the Co-Prosecutors erroneously assert that there is no real difference between the testimony of civil parties and that of witnesses. They submit that both can be used indiscriminately to prove the facts of their case.²
3. The KHIEU Samphan Defence challenges the submission, which confuses the roles of the different parties to the proceedings by conflating the role of the witnesses with that of the civil parties.

II. The civil parties as party to the proceedings

4. Joining as a civil party implies that the person so doing participates in the criminal trial with various rights. These rights highlight the role played by a private party in criminal proceedings. They come into force as soon as the person joins as a civil party. They guarantee the right to a judge, the right to be assisted and the right to participate in the proceedings.
5. These rights are enshrined in French and Cambodian law, and in the law applicable before the ECCC. In their full capacity as parties, the civil parties participate in the legal process in its totality. They may propose witnesses and experts, and intervene in all matters relating to the facts of their case.

¹ *Co-Prosecutor’s Rule 92 Submission Regarding Civil Party Testimony*, 21 February 2013, E267.

² *Ibid.* paras. 21 and 22.

6. Rule 23(1) of the ECCC Internal Rules sets the principles of civil party participation and states that: *“The purpose of Civil Party action before the ECCC is to: Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC **by supporting the prosecution**”*^{3,4}
7. The Internal Rules of the ECCC award the civil parties a place in the proceedings equal to that given to the Defence and to the Co-Prosecutors. Rule 91 provides that *“[t]he Judges may ask any questions [...] The Co-Prosecutors and all the other parties and their lawyers may object to the continued hearing of the testimony of any witnesses, if they consider that such testimony is not conducive to ascertaining the truth.”*⁵
8. These provisions are consistent with criminal procedure in civil law countries which provides for victims joining as civil parties and for their participation in the proceedings as parties. In keeping with their status as parties to the proceedings, civil parties are not required to take an oath before testifying.
9. Under French law, it is not possible to be both a party to the proceedings and a witness. A civil party, once he or she has joined as such, can thus not be heard as a witness. Pursuant to articles 152, 335 and 422 of the French Code of Criminal Procedure, a civil party does not take an oath before testifying.
10. In the same way, article 312 of the Code of Criminal Procedure of the Kingdom of Cambodia stipulates that: *“A civil party may never be heard as a witness.”*
11. Moreover, Rule 23 of the Internal Rules of the ECCC also states that: *“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.”*
12. Contrary to what the Co-Prosecutors assert, the exemption from taking an oath is not a

³ Emphasis added.

⁴ Internal Rules of the ECCC as revised on 12 August 2011.

⁵ Internal Rules of the ECCC as revised on 12 August 2011.

consequence of the fact that, under domestic law, civil parties are liable to receive financial compensation for harm suffered.⁶ The exemption arises from their status as parties to the proceedings, the rights attached to such status, and the role that they play in the course of the trial. The KHIEU Samphan Defence furthermore recalls that the civil parties maintain close contact with their lawyers, just as the Accused persons do. The fact that the civil parties before the ECCC are not liable to receive any form of financial compensation is of absolutely no consequence in this regard.

13. The parties to the proceedings demonstrate a natural partiality that springs directly from their interests in the case. As the Civil Party Lead Co-Lawyers in Case 002 said, drawing the logical conclusion from Rule 23(1): [TRANSLATION] *“The exemption [from the obligation to take an oath] is granted to them in their capacity as parties to the proceedings seeking the conviction of the Accused Persons, a necessary premise for their claims to reparation. As with the Defence, the Civil Parties’ interest in a specific outcome to the trial puts them in a radically different position to that of the Witnesses.”*⁷
14. The position of the KHIEU Samphan Defence team is therefore consistent with that of the Civil Party Lead Co-Lawyers, namely that the inherent partiality of a party to the proceedings is neither necessarily “[TRANSLATION] *synonymous with nor resultant from an attitude that is harmful to the proceedings, dishonest, mendacious or disingenuous.*”⁸ In other words, being a party to the proceedings, whether as Prosecution, Defence or civil party, necessarily entails partiality, yet this partiality does not automatically discount the credibility and veracity of the statements and positions of each of the parties.
15. As such, the KHIEU Samphan Defence does not challenge the Co-Prosecutors submission that the weight to be given to the testimonies of the civil parties and of the Accused must be assessed on a case-by-case basis, in light of the credibility of each party testifying before the Chamber.

⁶ *Ibid.*, para. 12.

⁷ [TRANSLATION]: *Civil Party submissions on Ieng Sary’s motion regarding Civil Parties taking an oath prior to their testimonies, 17 March 2010, E57/1*, para. 24.

⁸ *Ibid.*, para. 27.

16. However, the KHIEU Samphan Defence objects to abolishing the distinction between parties to the proceedings and witnesses and to indiscriminately applying the same standards to the testimonies of witnesses and of civil parties.

17. **FOR THESE REASONS**, the KHIEU Samphan Defence requests that the Trial Chamber to:

- **DISMISS** the Co-Prosecutor's request that the probative value of witness and civil party testimonies be assessed by the same standards.
- **ASSESS** the probative value of the testimonies by the Accused persons as well as of the civil parties on a case-by-case basis, taking into account their status as parties to the proceedings.

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