

**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**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**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”) hereby moves the Trial Chamber to require Civil Parties to testify under oath, should the Trial Chamber allow them to testify as to their knowledge in the criminal case, rather than just their claim in reparations. This motion is made necessary in the interests of procedural certainty and consistency. The OCP has listed Civil Parties to be summoned to give testimony<sup>1</sup> in order “to prove the vast matrix of crimes and modes of individual criminal responsibility alleged in the Indictment beyond reasonable doubt.”<sup>2</sup> The Criminal Procedure Code of Cambodia (“CPC”), however, states that “[a] Civil Party may never be heard as a witness”<sup>3</sup> and the Internal Rules (“Rules”) are silent on the issue. The Defence submits that the CPC may violate the rights of the Civil Parties by forcing them to make a Hobson’s choice:<sup>4</sup> choosing between testifying as a witness or being a Civil Party in this Case. The Defence supports the Civil Parties right to be heard regarding any matter in the case, but submits that if the Trial Chamber decides to allow this, in contradiction to applicable Cambodian law, the Civil Parties *must* be required to testify under oath.

#### I. BACKGROUND: THE ROLE OF CIVIL PARTIES IN CASE 001

1. During the trial in Case 001, the Civil Parties’ undefined mandate to “support the prosecution”<sup>5</sup> caused numerous debates and disruptions to the proceedings. According to Civil Party lawyers, the right to participate in proceedings granted by Rule 23(1) is limited only by the obligation, “not to ask repetitive questions and not to have questions outside the scope of the matter.”<sup>6</sup> The *Duch* Defence objected to this position, stating “Civil Parties do not have the remit to do the same job as the prosecutors. Their role is

<sup>1</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Annex 4 OCP Civil Party List, 28 January 2011, E9/4.4, ERN: 00640830-00640835.

<sup>2</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, 28 January 2011, E9/4, ERN: 00640669-00640676, para. 8. The Civil Parties and NUON Chea Defence Team have also listed Civil Parties as witnesses who they wish to testify on their knowledge of the criminal case. *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Civil Party lead Co-Lawyers’ rule 80 witness, expert and Civil Party lists, including confidential annexes 1, 2a, 2b, 3a, 3b, and 4, 14 February 2011, E9/4/3, ERN: 00645265-00645270, para. 8. *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Annex C: Proposed list of Civil Parties (where no protective measures are sought) – NUON Chea defence team, 15 February 2011, E9/4/4.3, ERN: 00644444-00644444.

<sup>3</sup> CPC, Art. 312.

<sup>4</sup> “Hobson’s Choice” is commonly referred to when no meaningful choice is being afforded. It is defined by the Oxford English Dictionary as “the option of taking the one thing offered or nothing.” The definition is available at <http://www.oed.com/view/Entry/32111?redirectedFrom=hobson's%20choice#eid9544746>.

<sup>5</sup> Rule 23(1) states in pertinent part: “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 by supporting the prosecution.”

<sup>6</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 22 June 2009, E1/35.1, ERN 00344105-00344225, p. 93.

completely distinct ... You can only support the prosecution in demonstrating the guilt of the accused when such demonstration enables you thereafter to refer to the suffering of the victims.”<sup>7</sup>

2. The first debate was sparked off when Civil Party representatives requested to make opening statements.<sup>8</sup> This request was opposed by the Co-Prosecutors<sup>9</sup> and the Defence<sup>10</sup> and rejected by the Trial Chamber.<sup>11</sup> The reasons given by the Trial Chamber were limited to pointing out that the right to make opening statements is not granted to Civil Parties by the Rules or the CPC.<sup>12</sup> The Trial Chamber also held that responding to the Co-Prosecutors’ opening statement would go beyond their mandate to “support the prosecution.”<sup>13</sup>
3. On 5 August 2009 the Trial Chamber issued a memorandum on the conduct of Civil Party testimonies. The Trial Chamber emphasized that statements by Civil Parties must be clearly relevant to the facts of Case 001 and in particular to their suffering. Any questions from a Civil Party to the Accused “should be confined to relevant facts linked to their suffering of the Civil Party [sic].”<sup>14</sup>
4. On 9 October 2009, The Trial Chamber finally underlined the unique nature of criminal proceedings before the ECCC and acknowledged that the traditional model of Civil Party participation found in Civil Law jurisdictions was devised for “less complex proceedings with fewer victims.”<sup>15</sup> The Trial Chamber observed: “As the ECCC Law and the nature

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<sup>7</sup> *Id.*, p. 94-96.

<sup>8</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Urgent Request of Co-Lawyers for Civil Parties Concerning their Right to Submit an Opening Statement During the Substantive Hearing, 16 March 2009, E23, ERN: 00287870-00287876.

<sup>9</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Co-Prosecutors’ Response to Urgent Request of Co-Lawyers for Civil Parties (Group 2) Concerning their Right to Submit an Opening Statement During the Substantive Hearing, 24 March 2009, E23/3, ERN: 00291070-00291075.

<sup>10</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Defence Response to Urgent Request of Co-Lawyers for Civil Parties (Group 2) Concerning their Right to Submit an Opening Statement During the Substantive Hearing’, 24 March 2009, E23/2, ERN: 00291063-00291065(FR).

<sup>11</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on the Request of the Co-Lawyers for Civil Parties Group 2 to Make an Opening Statement During the Substantive Hearing, 27 March 2009, E23/4, ERN: 00293329-00293333.

<sup>12</sup> *Id.*, paras. 4, 7.

<sup>13</sup> *Id.*, para. 9.

<sup>14</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Memorandum on the Hearing of Civil Parties, 5 August 2009, E115, ERN: 00358682-00358684, para. 8.

<sup>15</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, ERN: 00387022-00387047, para. 12.



of the criminal proceedings are limitations which the Trial Chamber must acknowledge, a restrictive interpretation of rights of Civil Parties in proceedings before the ECCC is required.”<sup>16</sup> In an attempt to clarify the purpose and limits of Civil Party action, the Trial Chamber established the following principles:

- a. The Accused’s right to a fair trial in criminal proceedings includes the right to face one prosecuting authority only.<sup>17</sup>
- b. The meaning of the Civil Parties’ role as participants in proceedings to support the prosecution in Rule 23(1) must be interpreted restrictively and “does not confer a general right of equal participation with the Co-Prosecutors” (or as additional prosecutors).<sup>18</sup>
- c. Civil Parties are entitled to support the prosecution in establishing the truth and the criminality of the actions of the accused which affect them only as a foundation for a claim in reparations.<sup>19</sup>
- d. Civil Parties do not have the right to make submissions on sentencing.<sup>20</sup>
- e. Civil Parties do not have the right to question witnesses, experts or the Accused as part of an enquiry into the character of the Accused for the purpose of sentencing.<sup>21</sup>

5. In Case 001, only 93 Civil Parties were permitted to take part in the proceedings.<sup>22</sup> In Case 002, there are currently 2,123 Civil Parties.<sup>23</sup>

## II. ARGUMENT

### A. A Civil Party’s speech must be restricted to solely assist his or her claim in reparations

6. In Cambodian courts, the statement of a Civil Party can only be used to determine his or her claim in reparations.<sup>24</sup> A witness at a trial is someone who can testify about matters

<sup>16</sup> *Id.*, para. 13.

<sup>17</sup> *Id.*, para. 26.

<sup>18</sup> *Id.*, paras. 25-26.

<sup>19</sup> *Id.*, para. 33 (emphasis added).

<sup>20</sup> *Id.* paras. 34-35.

<sup>21</sup> *Ibid.*, paras. 45-47.

<sup>22</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Judgment in Case 001, 26 July 2010, E188, ERN: 00572517-00572797, para. 637.

<sup>23</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246, para. 12.

relevant to the trial, such as what he or she has personally seen, heard or otherwise observed, what he or she knows about a subject (an expert witness) or even his or her opinion (as an expert witness or a character witness).<sup>25</sup> A Civil Party can never be heard as a witness.<sup>26</sup> As a party to the proceedings, who does not testify, a Civil Party does not take an oath in Cambodian courts.<sup>27</sup>

7. In France, whose legal system the Cambodian system is modelled after,<sup>28</sup> a private claimant, being a party in the criminal proceedings, cannot be heard as a witness.<sup>29</sup> The rationale is that a Civil Party has an interest in the outcome of the case; a guilty verdict can lead to a successful claim in reparations for the Civil Party. Consequently, a Civil Party is biased.
8. The Agreement, and Establishment Law<sup>30</sup> are both silent on the participation of victims in the proceedings before the ECCC. Although the Rules state that Civil Parties are there to assist the Co-Prosecutors, the precise meaning of “assisting the prosecution” has not been defined.<sup>31</sup>
9. Regarding Civil Party participation at trial, the Rules only explicitly mandate that the actions of a Civil Party are limited to his or her civil interests.<sup>32</sup> Case 001 mandates that “a restrictive interpretation of rights of Civil Parties in proceedings before the ECCC is required.”<sup>33</sup> A restrictive interpretation of rights of Civil Parties would entail that a Civil Party may only speak regarding his or her claim in reparations. The Civil Parties

<sup>24</sup> “[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 Cambodian Defenders Project, 2000 (“Resource Guide”), section 4.40.

<sup>25</sup> *Id.*, section, 4.07.

<sup>26</sup> CPC, Art. 312.

<sup>27</sup> CPC, Art. 328 only provides that oaths are to be taken by witnesses.

<sup>28</sup> See Closing Order, para. 1321. The OCIJ states that “Cambodian law is derived directly from French law.”

<sup>29</sup> CATHERINE ELLIOTT, FRENCH CRIMINAL LAW 33 (“ELLIOTT”) (Willan Publishing, 2001).

<sup>30</sup> Article 36 new of the Establishment Law gives “victims” the right to appeal Trial Chamber decisions before the Supreme Court Chamber.

<sup>31</sup> Rule 23(1) states: “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 by supporting the prosecution; and b) Seek collective and moral reparations, as provided in Rule 23*quinquies*.”

<sup>32</sup> Rule 80*bis*(4) states: “[At the initial hearing] the Trial Chamber may direct the Lead Co-Lawyers, within a deadline determined by the Chamber, to provide initial specification of the substance of the awards they intend to seek within the final claim for collective and moral reparation pursuant to Rule 23*quinquies* (3)(b). At a later stage, the Chamber will determine the date by which the Lead Co-Lawyers shall file the final claim for collective and moral reparation (emphasis added).”

<sup>33</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, 9 October 2009, E72/3, ERN: 00387022-00387047, para. 13.



themselves acknowledge that “that there is no legal basis for the [Trial] Chamber to simply ‘determine’ that Civil Parties testify as witnesses.”<sup>34</sup> For the purposes of trial proceedings, neither the Cambodian<sup>35</sup> nor French Procedural Codes explicitly provide for Civil Parties to act in a supporting role to the prosecution, nor do they grant them a platform to advocate the Accused’s guilt beyond establishing the connection between the Accused’s acts and the Civil Party’s injury.<sup>36</sup>

**B. If a Civil Party provides testimony as to his or her knowledge of the criminal case, he or she must do so under oath**

10. An oath adds extra weight to the testimony of a witness. Anything provided under oath which is intentionally false exposes the witness to perjury proceedings.
11. The CPC provides that a Civil Party may only speak regarding his or her claim in reparations. The Defence is of the view that the law *must* be followed, while recognizing the potential inequity that some Civil Parties may suffer. The rights of a Civil Party are not respected if he or she must make the choice between being a witness on issues relating to the criminal case and being a Civil Party. The Defence is of the view that, if necessary, Civil Parties can testify as witnesses. However, if a Civil Party does so, he or she is not limiting testimony to his or her claim in reparations, but is testifying on issues relating to the criminal case. As such, he or she must be treated as any other witness and must give testimony under oath.
12. The Trial Chamber’s Order to File Materials in Preparation for Trial (“Order”) states that the parties may, in their proposed lists of witnesses, list Civil Parties “who it is proposed should be heard at trial ... on the facts and/or those who are to be heard concerning the impact of the alleged crimes.”<sup>37</sup> The Trial Chamber appears to have accepted that a Civil Party should be able to testify on issues relating to the criminal case. However, by doing so, the Civil Party assumes the role of a witness rather than a Civil Party. From the Order, the Trial Chamber appears to agree that a Civil Party can assume the role of a

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<sup>34</sup> *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Civil Party Lead Co-Lawyers’ Rule 80 Summaries and Expert Qualifications with Points of the Indictment, including Confidential Annexes, 23 February 2011, E9/8, ERN: 00646563-00646568, para. 8.

<sup>35</sup> See CPC, Arts. 13-26, 334-35 which focuses Civil Party rights only to their interests in reparations.


<sup>36</sup> See ELLIOTT at 32-33.

<sup>37</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Order to File Material in Preparation for Trial, 17 January 2011, E9, ERN: 00635754-00635759, para. 1(ii).

witness. The Order was made under Rule 80.<sup>38</sup> Rule 80 only allows for witnesses to be placed on the witness list, and not Civil Parties.<sup>39</sup> Although not adherent to the CPC or the Rules, the Defence leaves it to the Trial Chamber's discretion as to whether a Civil Party may testify as a witness on issues relating to the criminal case. Should the Trial Chamber find that Civil Parties can testify as a witness on issues relating to the criminal case, then the Civil Party must be treated as any other witness: testify under oath and be subject to the penalty of perjury if false testimony is intentionally provided.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully MOVES for the Trial Chamber to require Civil Parties to testify under oath, should the Trial Chamber allow them to testify as to their knowledge in the criminal case, rather than just their claim in reparations.

Respectfully submitted,



ANG Udom
Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 24<sup>th</sup> day of February, 2011

<sup>38</sup> *Id.*, preamble.

<sup>39</sup> Rule 80(1) states in pertinent part: "The Co-Prosecutors shall submit to the Greffier of the Chamber a list of the witnesses, including a statement of any relationship referred to in Rule 24(2) and experts they intend to summon 15 (fifteen) days from the date the Indictment becomes final." (Emphasis added).