

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

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**RESPONSE TO IENG SARY'S MOTION REQUESTING
GUIDELINES FOR CIVIL PARTY PARTICIPATION**

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Before:

The Trial Chamber:

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 Judge Silvia CARTWRIGHT
 Judge YA Sakhan
 Judge Jean-Marc LAVERGNE
 Judge THOU Mony

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INTRODUCTION AND REQUEST

1. Mr Ieng Sary has filed a Motion¹ with the Court, a filing which neither constitutes a pleading nor qualifies as such. The so-called motion, which comes prior to the commencement of the trial, can only be considered as an informal request and does not set any time running. It does not qualify as a pleading or an application within the meaning of Article 8 of Practice Direction ECCC/01/2007/Rev.5. While emphasizing that Civil Parties play an integral part before the ECCC, a submission he made earlier in his Response² to the appeal against the Co-Investigating Judges' order on the admissibility of Civil Party applications,³ Mr Ieng Sary is requesting restriction of their participation by means of guidelines to be enacted before the start of trial, in the form of a practice direction.
2. It will not escape the Trial Chamber's attention that the request lacks consistency. Moreover, the guidelines sought are clearly illegal and would infringe the rights of the Civil Parties. What would Mr Ieng Sary think of guidelines on defence participation in the trial? The parties have equal entitlement to equality of arms and autonomy, a right that must be safeguarded without discrimination.⁴ In fact, the Defence request stems from a misunderstanding – deliberate or not – of the applicable procedure, which derives from civil law; the Defence still continues to erroneously reason in terms of common law principles, even though the common law is not applicable. Civil Parties before the ECCC, through their Lawyers, have the right to participate as parties in all stages of the proceedings; they are therefore entitled to the same rights as the other parties; established by law, those rights cannot be called into question.
3. Both the Civil Party Lawyers and Mr Ieng Sary are mindful of the need for a fair and expeditious trial, to which such a Motion is not conducive. The Civil Parties feel compelled to respond to the Motion, even though they consider that it is clearly without merit. Therefore, their response will be brief.

¹ Ieng Sary's Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23.

² Ieng Sary's Response to the Appeal of Civil Party Applications Rejected by the OCIJ, D399/2/2.

³ Appeal against Order on the Admissibility of Civil Party Applicants from Current Residents of Takeo, 10 September 2010, D399/2/1.

⁴ See Internal Rule 21(1)(a).

4. First and foremost, the Civil Parties submit that the Trial Chamber has no jurisdiction to determine the Motion.
5. Secondly, and in the alternative, they request that the Motion be dismissed outright.

A – GROUND 1: MAIN SUBMISSION: THE TRIAL CHAMBER HAS NO JURISDICTION

6. The Trial Chamber clearly has no jurisdiction to set guidelines or rules on civil party participation in the trial, to the extent that such guidelines would entail extensive amendment of the Internal Rules. The ECCC Law and the Internal Rules govern the role and participation of the various parties; they also set out the procedure for amending the existing rules. The Plenary has exclusive jurisdiction over amendments. The Trial Chamber has no such powers and must therefore decline jurisdiction.

B – GROUND 2: ALTERNATIVE SUBMISSION: ON THE MERITS:

7. For the sake of clarity, the Civil Parties will review the Defence arguments *seriatim*.

I. THE APPLICABLE LAW

8. The Lawyers for Mr Ieng Sary list a number of applicable provisions concerning equality of arms, the right to be tried within a reasonable time, the role of Civil Parties and the role of Civil Party Lead Co-Lawyers. Those provisions undoubtedly apply. However, the Lawyers for Mr Ieng Sary fail to demonstrate how they support his submissions in this instance.
9. The Civil Parties observe that the following provisions can be added to the rules governing parties' rights:

- Rule 91 of the Internal Rules, which provides:

“1. The Chamber shall hear the Civil Parties, witnesses and experts in the order it considers useful.

2. The Judges may ask any questions and the Co-Prosecutors and all the other parties and their lawyers shall also be allowed to ask questions (...);

3. 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. In such cases, the President shall decide whether to take the testimony.” (emphasis added)

These rules effectively prove that all parties have equal rights before the Court.

II. Submissions of the Lawyers for Mr Ieng Sary

10. The Lawyers for Mr Ieng Sary aver that enacting guidelines “clarify[ing the] role of the Civil Parties” will safeguard both his rights and those of the Civil Parties.

A. On equality of arms

11. First, the Lawyers for Mr Ieng Sary cite⁵ Rule 23, asserting that it transforms Civil Parties into an additional prosecutor. This interpretation totally misconstrues the role and place of Civil Parties in a trial. In fact, the role of Civil Parties is to present the facts of which they were the victims and to describe what they experienced, their suffering and the consequences of the facts on them and on all the victims in general. For that, they participate in their own right in ascertaining the truth and bring an insight about certain events and evidentiary matters which are consistent with the prosecution case. In that sense, and with regard to that specific aspect, it is fair to argue that Civil Parties support the prosecution.
12. The goal of the Civil Parties is to obtain reparation for the injury they have suffered; this necessarily entails establishing the facts and the guilt of the Accused in relation to those facts. However, their role is quite different from that of the Co-Prosecutors.
13. The Lawyers for Mr Ieng Sary cite⁶ Rule 23, indicating that this Rule implies that the Co-Prosecutors have the “role of representing the general interests of victims” which the Civil Parties may simply support. This is a peculiar reading of the Rule. The truth of the matter is that while the Co-Prosecutors undeniably represent the interests of society as a whole, and, by implication, the interests of all victims in a

⁵ Ieng Sary’s Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23, paras. 7, 10 and 12.

⁶ Ieng Sary’s Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23, para. 12 and ECCC Internal Rule 87(1).

broad sense, this does not mean that they represent the specific interests of the victims, as that is the exclusive responsibility of Civil Party lawyers.

14. The Lawyers for Mr Ieng Sary hold the view⁷ that creating the post of Civil Party Lead Co-Lawyers does not remedy the inequality of arms which he claims is prejudicial to him without proof. On this point, the Lawyers for Mr Ieng Sary seem to be concerned about the number of lawyers they will have to face. The post of Civil Party Lead Lawyers was created for the purpose of facilitating the coordination and organisation of civil party representation by their lawyers so as to ensure that their rights are fully safeguarded, in a properly conducted trial. Article 12 *ter* is crystal clear; it states, *inter alia*, that the Lead Co-Lawyers are responsible for coordinating civil party representation. Collaboration between the Civil Party Lead Co-Lawyers and Civil Party Lawyers, and the latter's action under Rule 12 *ter* (6) provide the best guarantee for and representation of Civil Party rights, given the relationship of trust and knowledge of the facts by the Civil Party Lawyers, which they share with the Lead Co-Lawyers.
15. It is clear that, read together, Rules 12*ter* and 91 very clearly set out the rights of the Civil Parties; they do not need to be supplemented. Conversely, enacting guidelines would lead to an intolerable infringement of Civil Party rights and deprive them of the equality of arms, in violation, *inter alia*, of Rule 21(1)(a) of the ECCC Internal Rules.

B. The right to be tried within a reasonable time

16. The Lawyers for Mr Ieng Sary speculates that by alleging that by their conduct, the Civil Parties could deny him the enjoyment of this right. Besides the fact that speculation has never constituted proof, it is important to recall that the President has, vis-à-vis the parties, the right to lead the proceedings. Significant changes have been made in the intervening period between Cases 001 and 002, in order to avoid confusion and delays. Reference is made to the ECCC Internal Rules. Each party must be mindful of the need to avoid wasting trial time, a rule that must be followed

⁷ Ieng Sary's Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23, paras. 6, 10 and 11.

by all concerned. The Civil Party Lawyers do not need lectures from the Defence on this or any other subject;

C. Mr Ieng Sary's suggestions

17. First, Mr Ieng Sary attempts to compare Cambodian procedure, in relation to that of the ECCC to the procedure before the International Criminal Court.⁸ However, the ECCC has established a unique system among Courts and Tribunals which deal with mass crimes; the system recognises victims as parties to the proceedings, following the French judicial system, a principle also adopted by Cambodian law. There is no such system at the International Criminal Court; victims there are simply participants and have only limited rights under the Rome Statute. There are no civil parties before the International Criminal Court; only victims.⁹ The two Statutes have nothing in common. Therefore, they cannot be interpreted in the same way, as the Defence is once again attempting to do in this instance. Accordingly, the specific case of *The Prosecutor v. Katanga* cannot be cited as an authority in this instance. It is not.
18. The Lawyers for Mr Ieng Sary then invoke limits and restrictions to the rights of Civil Parties. Some of them are open to such broad interpretation that they would deprive the Civil Parties of any right to intervene, based on undefined criteria. So for example, each and every sentence uttered by the Civil Party Lawyers could be viewed as a waste of trial time (...). (Could this ever be held against the Defence?) Owing to their general nature, and to the fact that they would deprive one party of its inalienable right to take part in the proceedings, the limits proposed by the Lawyers for Mr Ieng Sary constitute a serious and impermissible infringement of Civil Party rights; this cannot be tolerated in a just and fair trial.
19. Finally, the Lawyers for Mr Ieng Sary are proposing¹⁰ that a practice direction restrict Civil Parties from making submissions on sentencing, and from questioning experts and the Accused on the character of the Accused. Not only is it not possible

⁸ Ieng Sary's Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23, paras. 17-20.

⁹ Article 68 of the Rome Statute of the International Criminal Court of 17 July 1998.

¹⁰ Ieng Sary's Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23, para. 21.

to enact such guidelines in the form of a practice direction, requesting them runs counter to the rights of the Civil Parties.

20. Regarding sentencing, the Civil Parties refer to the arguments they raised in their Joint Request dated 9 June 2009 in Case 001.¹¹ They also refer to Articles 3(c) and 12(c) of the “Fundamental principles and guidelines on the right to recourse and reparations for victims of flagrant violations of international human rights law and serious breaches of international humanitarian law”.¹² This text clearly reveals that Civil Parties can contribute to rendering justice and, by implication, to setting an appropriate sentence, given the obvious link between the sentence and the gravity of the crimes committed against the victims.
21. As for the possibility to enquire into the character of the Accused, while the Trial Chamber ruled against granting such a right in Case 001 in its decision of 9 October 2009,¹³ this position is inconsistent with the earlier practice of the Trial Chamber, and this is no doubt due to a peak period in the proceedings that was specific to that case. Judge Lavergne’s Dissenting Opinion stresses that the rights granted to civil parties under the law, be it under the Code of Criminal Procedure of Cambodia or the ECCC Internal Rules, allow them to intervene on all matters, without distinction as to whether such matters relate to facts or to character. Introducing restrictions on this point in Case 002 would severely infringe Civil Party rights. Needless to say, if this issue were raised again and the right called into question, the Civil Parties would maintain their position, namely that their right to enquire into the character of the Accused must be upheld, as stipulated by law. Moreover, while facts are often easily distinguishable from character, there are some grey areas where they may be indistinguishable or where they overlap.

¹¹ Ieng Sary’s Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23, para. 15; Case No. 001 against Kaing Guek Eav, 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, E72/3.

¹² Fundamental principles and guidelines on the right to recourse and reparations for victims of flagrant violations of international human rights law and serious breaches of international humanitarian law, UN GA resolution 60/147 of 16 December 2005.

¹³ Ieng Sary’s Motion Requesting Guidelines for Civil Party Participation, 24 January 2011, E23, para. 15. Case No. 001 against Kaing Guek Eav, 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, para. 26.

22. In concluding, the limitations and restrictions sought by the Lawyers for Mr Ieng Sary constitute an intolerable infringement of the rights of one of the parties to the trial, in utter disregard for the laws and rules applicable before the ECCC. Moreover, such limitations and restrictions would amount to discrimination between the various parties, which is unacceptable.

CONCLUSION

23. The Civil Party Lawyers request the Trial Chamber to decline jurisdiction over Mr Ieng Sary's Motion.
24. In the alternative, the Civil Parties request that the Motion be dismissed outright, on the ground that it is without merit and constitutes an intolerable infringement of their rights.

Date	Name	Place	Signature
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	Elisabeth SIMONNEAU-FORT Lead Co-Lawyer	Phnom Penh	<i>(Signed)</i>