

សំណុំរឿង: ០១៩/១៩/០៧

BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/OCIJ Party Filing: The Defence for IENG Sary
Filed to: Co-Investigating Judges Original language: ENGLISH
Date of document: 30 July 2009

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by OCIJ or Chamber:

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ទទួល បាន (Date of receipt/date de reception):	
30 / 07 / 2009	
ម៉ោង (Time/Heure) : 15:00	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: C.A.M.	

IENG SARY'S REPLY TO THE CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPLICATION FOR SANCTIONS AGAINST THE CO-PROSECUTORS FOR MISLEADING THE COURT IN THEIR SUPPLEMENTARY OBSERVATIONS ON JOINT CRIMINAL ENTERPRISE

Filed by:

The Co-Lawyers:

ANG Udom
Michael G. KARNAVAS

Distribution to:

The Co-Investigating Judges:

YOU Bun Leng
Marcel LEMONDE

ឯកសារច្បាប់ចម្លងត្រឹមត្រូវតាមច្បាប់ដើម	
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME	
ថ្ងៃ ខែ ឆ្នាំ ទៃការបញ្ជាក់ (Certified Date/Date de certification):	
31 / JUL / 2009	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: SAN N RA DA	

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Rule 35(1) of the ECCC Internal Rules (“Rules”), this Reply to the Co-Prosecutor’s Response to Ieng Sary’s Application for Sanctions Against the Co-Prosecutors for Allegedly Misleading the Court Regarding the Law on Joint Criminal Enterprise, filed on 16 July 2009 (“OCP Response”). The OCP in its Response deliberately avoids responding to the direct allegation put forward by the Defence in its Request that Professor Scharf and members of the OCP had knowingly and willfully misled the OCIJ.¹ The OCP seeks to distract the OCIJ from this serious allegation by questioning the source upon which the information which formed the basis of the allegation was made. No vague assertions regarding the OCP’s “understanding of the law on JCE”² should deflect the OCIJ from undertaking its fundamental task of ensuring that the proceedings are “fair and adversarial”,³ and sanctioning any party who knowingly and willfully interferes with the administration of justice.⁴

I. ARGUMENT

1. The central allegation in the Request is that Professor Scharf publically admitted that the OCP deliberately withheld relevant legal authority concerning the acceptance and scope of the principles from the Nuremberg Charter and judgments (“Nuremberg Principles”). The legal authority was withheld – as admitted by Professor Scharf during his lecture - because it undermined the status of JCE in customary international law contained within its Supplementary Observations on Joint Criminal Enterprise.⁵ This is, undeniably, the crux of the controversy as to whether JCE is applicable at the ECCC: “a fundamental issue in this litigation is whether JCE was part of customary international law in 1975-79 [...] and [u]nless this question is answered in the affirmative, this form of liability simply cannot be applied against those persons charged before the ECCC.”⁶
2. Instead of directly addressing the allegation - namely that that the OCP discussed and subsequently decided to withhold from the OCIJ the existence of United Nations General

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Ieng Sary’s Request for Sanctions Under Internal Rule 35 Due to the Co-Prosecutors Misleading the Court in their Supplementary Observations on Joint Criminal Enterprise Filed on 31 December 2008, 29 June 2009 (“Request”).

² OCP Response, para. 3.

³ Rule 21(1)(a).

⁴ Rule 35(1).

⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise, 31 December 2008 (“OCP Supplementary Observations”) as cited in Request, para.1.

⁶ Request, para. 2.

Assembly Resolution 488(V) (“subsequent UNGA Resolution”)⁷ which would have undermined the status of JCE in customary international law - the OCP Response offers a host of bland, incomplete or obfuscating statements, all of which require clarification.

A. The OCP’s assertion that the Supplementary Observations correctly reflected their understanding of the law on JCE on the date of its filing.⁸

3. The OCP asserts that “while no legal pleading can claim to refer to all the available authorities on its subject matter [...] the Supplementary Submission contained a comprehensive review of authorities to support the Co-Prosecutors’ submission that JCE was part of customary international law during 1975-9.”⁹ This clearly misses the point. The allegation made in the Request was not that the OCP had failed to refer to all available authorities on every aspect of JCE. Instead, the precise allegation was that the OCP had asserted that UNGA Resolution 95(I) “unanimously affirmed the principles from the Nuremberg Charter and judgments”¹⁰ while deliberately failing to include in its Supplementary Observations the known existence of a subsequent UNGA Resolution which “obviously was adverse to its position concerning the applicability of JCE.”¹¹ By categorically relying upon UNGA Resolution 95(I) as the controlling/applicable UNGA Resolution, the OCP created an obligation upon itself to bring to the attention of the OCIJ any subsequent UNGA Resolution which undermined it. This was not done; intentionally.
4. Revealingly, the OCP intimates as to why it declined to alert the OCIJ to the existence of this subsequent UNGA Resolution: it chose to provide only authorities “to support their submission that JCE was part of customary international law in 1975-79.”¹² Members of the OCP and Professor Scharf are blissfully or deliberately ignorant of their positive obligation to disclose to the Court authorities which do not support the OCP’s central submission; an obligation set out in practically all codes of professional conduct binding on members of the OCP.¹³ To do otherwise amounts to a dereliction of their duty not to

⁷ United Nations General Assembly Resolution 488(V), 320th plenary meeting, adopted on 12 December 1950.

⁸ OCP Response, para. 3.

⁹ OCP Response, para. 3.

¹⁰ OCP Supplementary Observations para 12.

¹¹ Request, para. 5.

¹² OCP Response, para. 3 (emphasis added).

¹³ Request, Section II and paras. 3-9. Interestingly, Professor Scharf in an interview with the *Cambodia Daily*, argues that if certain legal precedents which are contrary to ones position are notorious, it need not be disclosed to the Court. The issue is not whether the omitted UNGA resolution is obscure or notorious, but rather whether the OCP had an ethical obligation to bring it to the OCIJ’s attention. The Bar Rules of Professional Conduct of the District of Columbia (Revised, effective 1 February 2007) clearly places an obligation on Professor Scharf.

mislead the Court.¹⁴ While the OCP may have found this subsequent UNGA Resolution inconvenient and disquieting as it dramatically weakened its argument regarding JCE, it was under a clear duty to bring this to the attention of the Court. By knowingly and willfully failing to do so, the OCP must be sanctioned under Rule 35(1).

B. The OCP's assertion that neither the Co-Prosecutors nor any of their staff members withheld, or advised anyone else to withhold, relevant legal authority from the Court.¹⁵

5. Professor Scharf announced in the lecture he gave that "he was employed by the OCP as a special assistant to the International Co-Prosecutor, Robert Petit, for approximately 5 or 6 weeks in late 2008."¹⁶ He appears to no longer be working for the OCP. It is unclear from the OCP Response whether Professor Scharf is included within the group of OCP "staff members" who were apparently innocent of withholding information from the Court.¹⁷ To the extent that Professor Scharf is excluded from this group because he is no longer employed by the OCP, this statement is entirely disingenuous.
6. Indeed, it is utterly unclear from the OCP Response whether Professor Scharf was consulted about the Defence's allegations at all. It would have been very simple for the OCP to provide an affidavit from Professor Scharf wherein he denounces the representations made in the Request. The OCP does not address whether Professor Scharf was involved in the drafting of the Supplementary Observations, and does not comment on the aforementioned lecture given by Professor Scharf. Indeed, the OCP completely avoids addressing whether Professor Scharf's rendition of the events is accurate and whether the OCP did in fact discuss UNGA Resolution 95(I) and the subsequent UNGA Resolution that directly undermined it. It would not have been difficult for the OCP to have contacted Professor Scharf, as even a local Cambodian newspaper was able to contact Professor Scharf for comment. The *Cambodia Daily* published an article wherein Professor Scharf was directly quoted as denying that he had said or implied that "anyone in the [prosecution] deliberately misled the judges."¹⁸ Ineluctably, had the OCP acted

Thus, it is rather surprising that a Professor of law of such renown would blatantly ignore his ethical obligations. See Douglas Gillison, *Cambodia Daily*, 'Lawyer Denies Helping to Deceive ECCC', 18-19 July 2009.

¹⁴ References to "Court" in this Response refer to all the judicial organs, including the OCIJ, Pre-Trial Chamber, Trial Chamber and Appeals Chamber.

¹⁵ OCP Response, para. 4.

¹⁶ Request, para. 4.

¹⁷ OCP Response, para. 4.

¹⁸ *Supra*, note 13.

with any modicum of diligence, a reaction from Professor Scharf could have been included in its Response.

C. The OCP's assertion that the factual basis of the Request was wholly insufficient to envisage sanction under Rule 35(1).¹⁹

7. The OCP criticizes the Request for being an "unsubstantiated allegation of "shared recollections" of a Defence consultant and a third party."²⁰ This attempt to minimize the evidence against Professor Scharf is unfounded. These two witnesses provided first-hand and direct evidence of what was said by Professor Scharf. The Request was not based on hearsay, rumor or speculation, but on the words of Professor Scharf himself, as seen and heard by the Defence's legal consultant and another person.

II. CONCLUSION & RELIEF SOUGHT

8. The OCP's argument that the "nature of the adversarial proceedings"²¹ justifies its failure to disclose to the OCIJ the subsequent UNGA Resolution is without merit. The OCP claims that since the Defence has every opportunity to bring such information to the attention of the Court, the OCP is under no obligation to do so. In so doing, the OCP, relying on Rule 21(1)(a), argues that the ECCC operates as an adversarial system.²² This is a gross misinterpretation: Rule 21(1)(a) merely describes how the different components of the ECCC should operate independently of one another, and in a manner which is "fair and adversarial."²³ The ECCC is a Civil Law system,²⁴ and the use of the word "adversarial" in the Rules does not make it any less so, let alone transform it into a party-driven Common Law system.
9. It is beyond cavil, that regardless of whether the ECCC operates as a Civil or Common Law system, the Prosecutors have an unqualified obligation to be forthright with the Court at all times. This obligation includes the duty to present all relevant legal

¹⁹ OCP Response, para. 7.

²⁰ OCP Response, para. 7.

²¹ OCP Response, para. 5.

²² In contrast, the ICTY operates as an adversarial system. See *Prosecutor v Blaskic*, IT-95-12, Decision on the Defence Motion for "Sanctions for Prosecutors Repeated Violations of Rule 68 of the Rules of Procedure and Evidence, 29 April 1998, para. 16.

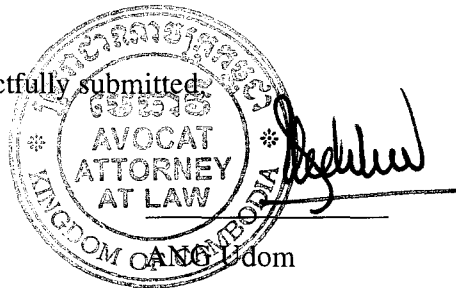
²³ Rule 21(1)(a).

²⁴ See *Case of IENG Sary*, 002/12-09-2007-ECCC/OCIJ, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, para 13, in which the OCIJ states: "The Defence may not raise a lack of knowledge of the civil law system applicable before the ECCC...".

authority to an issue in dispute, especially legal authority which is contrary to the authority which is being relied upon to advance ones position. The professional codes of conduct which bind all the Prosecutors of the OCP, as well as Professor Scharf, unequivocally mandates that they provide full disclosure of all legal authority to the Court. This obligation - which inexorably exists in order to assist the Court in ascertaining the truth - is not refuted by the OCP in its response. Effectively, in its Response the OCP engages in a diversionary tactic to deflect attention away from the undeniable fact that a) it was aware of legal authority which diluted its claim of JCE being part of customary international law, and b) it conspired to withhold this legal authority from the OCIJ. Regrettably, the OCP, in a very calculated move, chose gamesmanship over integrity, thus deceiving the OCIJ. Such conduct is unethical, contemptuous and must be sanctioned.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests that the relief sought in the Request be granted.

Respectfully submitted,



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 30th day of July, 2009