

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:** 6 September 2011**CLASSIFICATION****Classification of the document
suggested by the filing party:** PUBLIC**Classification by OCIJ
or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**IENG SARY'S RESPONSE TO CO-PROSECUTORS' REQUEST FOR DIRECTIONS
ON THE FILING OF REPLIES TO REPLIES**

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby responds to the Co-Prosecutors’ Request for Direction on the Filing of Replies to Replies (“OCP Request”).¹ This Response is made necessary because the OCP erroneously equates IENG Sary’s Observations (“Observations”)² on the Co-Prosecutors’ Consolidated Reply to Defence Responses to Co-Prosecutors’ Requests to Re-characterize Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes Against Humanity (“Consolidated Reply”)³ with a reply to a reply. The Observations cannot be equated with a reply to a reply and they are admissible without leave from the Trial Chamber. Moreover, the acceptance of observations on the Case File is certainly an accepted practice.

I. RESPONSE

1. The Observations are not a reply to a reply. They are, as their title states, observations on certain misstatements, misleading statements, and mischaracterizations made by the OCP. They were filed in order to assist the Trial Chamber. The Defence did not “reopen the debate on issues in dispute”⁴ and did not address the points in the Consolidated Reply with which it merely disagreed. It carefully and strictly limited its Observations to addressing misstatements, misleading statements, and mischaracterizations of law and fact.
2. “Observations” are not referred to in the Practice Direction on the Filing of Documents before the ECCC (“Practice Direction”). The OCP has filed “observations” on numerous occasions (even filing observations in proceedings in which it was not a party).⁵ It has never sought leave to do so.
3. It cannot be concluded that a submission is prohibited if not expressly mentioned in the Practice Direction. Otherwise, most submissions which are routinely accepted, such as observations, requests and notices, would be prohibited, as they are not referred to in the

¹ Co-Prosecutors’ Request for Direction on the Filing of Replies to Replies, 31 August 2011, E112.

² IENG Sary’s Observations on the Co-Prosecutors’ Consolidated Reply to Defence Responses to Co-Prosecutors’ Requests to Re-characterize Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes Against Humanity, 18 August 2011, E95/7.

³ Co-Prosecutors’ Consolidated Reply to Defence Responses to Co-Prosecutor’s [sic] Requests to Recharacterise Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes against Humanity, 11 August 2011, E95/6.

⁴ See OCP Request, para. 15.

⁵ See Co-Prosecutors’ Observations on Defence Counsel’s Appeal on Warning by the Co-Investigating Judges, 9 April 2010, D367/1/2. In paragraph 1, the OCP states, “The Co-Prosecutors are not parties to the proceedings regarding misconduct of counsel.”

Practice Direction. While the Trial Chamber has clarified the Practice Direction concerning replies in its Directive Regarding Responses, Replies to Responses and Filing in One Language only under Exceptional Circumstances (“Directive”),⁶ the Directive did not address the filing of observations.

4. Filing a request for leave to reply together with a reply, as the Defence has done in other situations,⁷ is not incorrect procedure, nor is the Trial Chamber’s placement of it on the Case File incorrect. Filing a request for leave to reply together with a reply assists the Trial Chamber in determining whether leave should be granted and expedites proceedings. It would waste time to file a request for leave, wait for a decision and then file a reply. It is much quicker for the Trial Chamber to have both submissions before it at once and then determine whether it will accept the reply. All documents which are filed should be placed on the Case File, as this constitutes the record of the proceedings. Placement on the Case File does not equate with admissibility. Placement on the Case File furthermore does not defeat the purpose of seeking leave. The Trial Chamber maintains discretion to determine whether leave will be granted.
5. It is the Trial Chamber’s role to ascertain the correct interpretation of matters of law and fact relating to issues in dispute. The Defence filed Observations in order to assist the Trial Chamber in performing this role. Had the Defence chosen to request leave to file a reply instead, the OCP’s misstatements, misleading statements and mischaracterizations of law and fact would have provided sufficient basis for the Trial Chamber to grant leave to reply, especially since it appears there will be no hearings on these issues and therefore no other opportunity to correct the record before the Trial Chamber.
6. While failure to provide context for an assertion may not necessarily amount to a misstatement, misleading statement or mischaracterization of law and fact, there are instances where, without providing appropriate context, the OCP may completely misrepresent another party’s position. The OCP did this in several instances in its Consolidated Reply. For example, it asserted that the Defence contended that rape was

⁶ Trial Chamber Directive Regarding Responses, Replies to Responses and Filing in One Language only under Exceptional Circumstances, 10 March 2011, E64.

⁷ IENG Sary’s Request for Leave to Reply or in the Alternative an Oral Hearing & Reply to the Civil Party Lead Co-Lawyers’ Response to the Co-Prosecutors’ Request to Re-Characterize the Facts Establishing the Conduct of Rape as a Crime Against Humanity, 1 August 2011, E99/1/1.

not illegal, but was a “necessary reward for the fighting men.”⁸ If this statement were not corrected, the Trial Chamber, the other parties and the public at large might actually believe that the Defence had made such an outrageous assertion when it had not.

7. The OCP has a duty to be truthful and not to mislead the Chamber. As explained by Yale University Professor Daniel Markovits, the distinctive professional commitments of prosecutors may be understood “as reflecting the fact that rather than representing an ordinary client before a neutral tribunal, the prosecutor represents one arm of the state before another. At least in principle, the state has no proper interest in victory for its own sake because it should never pursue injustice; the state does not need a bulwark against authority because it is the authority. The prosecutor’s distinctive commitment to the truth and fairness therefore elaborate a role whose genetic structure departs from the structure of adversary advocacy.”⁹
8. The Defence requests the Trial Chamber to reject the OCP Request. A Directive on replies to replies is not necessary, as the Trial Chamber’s Directive on replies adequately addresses the situation which arises if a party seeks to file a reply to a reply, and such a situation has never occurred. The Defence filed Observations and did not file a reply to a reply. The Trial Chamber should reject the request to specify that leave to file a reply must be filed prior to and separately from an actual reply to a reply, as this will cause unnecessary delay. It should also reject the request to direct the Greffier not to place replies to replies on the Case File until leave to file the reply to a reply has been granted, as placement on the Case File is distinct from the admissibility of a reply to a reply. All filed submissions should be placed on the Case File, in order to make a record that they have been filed. The Trial Chamber retains its discretion as to whether it will find them admissible and whether it will accept their arguments on the merits.

II. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to **REJECT** the Co-Prosecutors’ Request for Direction on the Filing of Replies to Replies.

⁸ Consolidated Reply, para. 72.

⁹ DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 87 (Princeton University Press 2008).

Respectfully submitted,



ANG Udom





Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **6th** day of **September, 2011**