BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' REQUEST FOR DIRECTION ON THE FILING OF REPLIES TO REPLIES

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I. INTRODUCTION

1. On 18 August 2011 the Ieng Sary defence ("Defence") filed *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* ("Observations").[1] The Observations purport to correct a number of "misstatements, misleading statements and mischaracterizations of law and fact"[2] allegedly contained in the *Co-Prosecutors' Consolidated Reply to Defence Responses to Co-Prosecutors' Requests to Recharacterise Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes against Humanity* ("Consolidated Reply").[3]

2. The Co-Prosecutors submit that the Observations essentially constitute a reply to the Consolidated Reply and are without any basis in the *Internal Rules* ("Rules")[4] or the *Practice Direction on Filing of Documents before the ECCC* ("Practice Direction")[5]. Accordingly, the Co-Prosecutors request that the Trial Chamber issue a directive clarifying that parties are not permitted to file replies to replies without leave of the Chamber and identifying the circumstances under which such leave is likely to be granted.

II. ARGUMENT

A. The Observations constitute a reply to the Consolidated Reply and is not permitted under the Rules or Practice Direction

3. As is clear from the face of the document the Observations constitute a reply to the Consolidated Reply. The Observations directly address points made in the Consolidated Reply and, as such, can only be characterised as a reply to a reply, regardless of the title of the document.

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1 **E95/7** Observations, 18 August 2011, ERN 00725884-93.
2 *Ibid.*
3 **E95/6** Consolidated Reply, 11 August 2011, ERN 00725270-307.
4 Rules (Rev. 8), as revised on 3 August 2011.
5 Practice Direction (Revision 7), as revised on 17 August 2011.

4. The filing of replies to replies, howsoever entitled or described, has no basis in the Rules or Practice Direction. Rule 92 allows the parties to make written submissions "as provided in the Practice Direction on filing of documents." The Practice Direction in turn sets out, in Article 8, the rules in relation to the filing of responses and replies to pleadings and applications. Specifically, Article 8.3 makes provision for parties to file a response to a pleading or application within 10 days of the filing of the latter. Article 8.4 provides a more limited right of reply, stating that a "reply to a response shall only be permitted where there is to be no oral argument" and setting a 5 day time limit for such filing. [6]

5. In a directive dated 10 March 2011, the Trial Chamber clarified the application of the Practice Direction with respect to replies stating that "replies to responses are contemplated only in relation to matters subject to adversarial argument, and as an alternative to oral argument" and that "the Chamber considers it to be in its discretion to determine when replies to responses are required."[7]

6. Neither the Practice Direction nor the Trial Chamber's directive contemplates the filing of a reply to a reply. If such a further right of reply were allowed, then it would surely have been mentioned in the Practice Direction or the Trial Chamber's directive. In fact, given the Trial Chamber's clarification that the right of reply is itself a limited one, it can be concluded that any filings in reply to a reply are affirmatively not allowed.

B. The Co-Prosecutors have not previously filed replies to replies nor is there any accepted practice of permitting such filings

7. The Observations note that "the Trial Chamber has previously accepted and placed on the Case File observations filed by the OCP"[8] and cite three previous filings by the Co-Prosecutors to defence requests relating to deadlines[9] as well as civil party

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6 Articles 8.3 and 8.4 were in identical form in the previous version of the Practice Direction (Revision 6) which was in place until 16 August 2011.

7 **E64** Trial Chamber directive regarding responses, replies to responses and filing in one language only under exceptional circumstances (Articles 7.2, 8.3 and 8.4 of the amended ECCC Practice Direction on Filing of Documents, 10 March 2011, ERN 00650894-5.

8 **E95/7** Observations, at note 3 and accompanying text.

9 **E14/1** Co-Prosecutors' Observations on Ieng Thirith and Nuon Chea's Urgent Defence Request to Determine Deadlines, 26 January 2011, ERN 00640189-93; **E24/1** Co-Prosecutors' Observations on Ieng Thirith's Request for Additional Time and Pages for Preliminary Objections, 31 January 2011, ERN 00641065-8.

participation.[10] Presumably, the reference to the three previous filings of the Co-Prosecutors is intended to support the Defence's right to file the Observations either on an "equality of arms" or an "accepted practice" basis.

8. The three previous filings by the Co-Prosecutors cannot, however, be equated with the Observations. Whilst the previous filings may have been entitled "Observations", it is clear from their substance that they constitute the Co-Prosecutors' first response to the defence requests in question. The previous filings were thus made in accordance with Article 8.3 of the Practice Direction which at the relevant time provided (as it still does) parties with a right of response to pleadings and applications. The fact that the previous filings were entitled "Observations" has no bearing on the actual nature of the filings or the Co-Prosecutors' right to file them. It could not therefore be argued that the Trial Chamber has previously condoned the filing by the Co-Prosecutors of documents similar in nature to the current Observations and that a similar right must now be extended to the Defence. Likewise, the Co-Prosecutors have not been able to identify any other instance of a party making a filing in reply to a reply such that filing replies to replies could now be said to be an "accepted practice" at the ECCC.

C. No leave was sought from, or granted by, the Trial Chamber

9. The stated justification for the Observations is that the Consolidated Reply contains "misstatements, misleading statements, and mischaracterizations of law and fact" which must be brought to the attention of the Trial Chamber. As addressed further below, the allegation that the Consolidated Reply contained "misstatements, misleading statements, and mischaracterizations of law and fact" is ill-founded. However, even if it were true, this would not justify the filing of a reply to the Consolidated Reply absent leave of the Trial Chamber.

10. The Co-Prosecutors recognise that the Trial Chamber may have the discretion to permit parties to file written submissions that are not specifically contemplated by the Rules or Practice Direction in exceptional circumstances. However, in the present case the Trial Chamber did not grant leave to the Defence to submit the Observations. Indeed, the Defence did not even seek leave from the Trial Chamber to file the Observations.

[10] **E23/1** Co-Prosecutors' Observations on Ieng Sary's Motion Requesting Guidelines for Civil Party Participation, 4 February 2011, ERN 00641748-50.

Rather the Defence proceeded on the basis that it was entitled to file the Observations stating that the Observations were "necessary" and "in the interests of justice".

11. The approach taken by the Defence in filing the Observations is in contrast to the approach it took in filing a reply to the civil party Lead Co-Lawyers' response to the Co-Prosecutors Requests. This reply was filed on 1 August 2011 together with a specific request for leave to reply or in the alternative an oral hearing.[11] However, it is noted that as the reply was joined to the request for leave, the reply was placed on the public section of the case file at the same time as the request even although no determination of the request has yet been made by the Trial Chamber. The Co-Prosecutors submit that this defeats the purpose of a request for leave and that the correct procedure would have been for leave to reply to have been filed prior to and separately from the actual reply.

12. In the present case, the Defence's assumption of its entitlement to file the Observations, without even purporting to request leave, undermines the Trial Chamber's authority to determine whether to accept written submissions that are not specifically covered by the Practice Direction.

D. No exceptional circumstances exist to justify leave to file the Observations in any event

13. Even if leave had been requested to file the Observations by the Defence, the alleged "misstatements, misleading statements, and mischaracterizations of law and fact" would not provide sufficient basis on which to grant the leave.

14. The statements in the Consolidated Response that are called into question in the Observations cannot properly be defined as "misstatements", "misleading statements" or "mischaracterizations". Rather they are legitimate interpretations by the Co-Prosecutors of matters of law and fact relating to the substantive issues in dispute between the parties.

15. The issues in dispute arise from the Co-Prosecutors' three requests filed in June 2011: *Request for the Trial Chamber to exclude the armed conflict nexus requirement from the*

[11] **E99/1**/1 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-characterise the facts establishing the conduct of rape as a crime against humanity, 1 August 2011, ERN 00721466-73.

definition of crimes against humanity;[12] *Request for the Trial Chamber to re-characterise the facts establishing the conduct of rape as the crime against humanity of rape rather than the crime against humanity of other inhumane acts*;[13] and *Request for the Trial Chamber to consider JCE III as an alternative mode of liability*[14] (collectively "the Requests"). In accordance with standard practice the Defence had an opportunity to file responses to each of the Requests and did in fact do so on 22 July 2011.[15] The Co-Prosecutors, in accordance with the direction of the Trial Chamber,[16] submitted their Consolidated Reply to the Defence responses (in addition to the responses of the other defence teams). The Consolidated Reply did not raise new substantive issues on which the Defence has not previously had an opportunity to respond. Accordingly, the Defence can not now reopen the debate on issues in dispute arising from the Requests under the guise of correcting "misstatements, misleading statements, and mischaracterizations of law and fact" contained in the Consolidated Reply.

16. It is a fundamental aspect of the present legal process that parties will have different views on substantive issues before the Chamber. Issues in dispute between the parties will naturally be argued based on competing interpretations of law and fact. Such interpretations are matters of submission, which it is the proper right of each party to make within the limits allowed by the Rules and the Practice Direction. Inherent in the right of each party to make submissions is the right to articulate interpretations of the law or refer to segments of other materials for the purpose of supporting its unique position, without necessarily presenting a context that is also favorable to the opposing party. Failure to include such a context does not amount to a "misstatement, misrepresentation, or misleading statement", as the Defence contends in this case. The right of each party to make its own submissions envisions this approach, and adequately provides for a balanced context of the competing interpretations to be presented.

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12 **E95** Armed Conflict Request, 15 June 2011, ERN 00716026-37.

13 **E99** Rape as a Crime against Humanity Request, 16 June 2011, ERN 00708301-15.

14 **E100** JCE III Request, 17 June 2011, ERN 00708242-56.

15 **E95/4** Ieng Sary's response to the Co-Prosecutors' request for the Trial Chamber to exclude the armed conflict nexus requirement from the definition of crimes against humanity & request for an oral hearing, 22 July 2011, ERN 00716010-25; **E99/4** Ieng Sary's response to the Co-Prosecutors' request for the Trial Chamber to recharacterise the facts establishing the conduct of rape as the crime against humanity of other inhuman acts & request for an oral hearing, 22 July 2011, ERN 00716026-37; **E100/2** Ieng Sary's response to the Co-Prosecutors' request for the Trial Chamber to consider JCE III as an alternative mode of liability & request for an oral hearing, 22 July 2011, ERN 00719826-41.

16 **E107** Decision on Extension of Time, 7 July 2011, ERN 00711953-4; **E107/3** Decision on the Co-Prosecutors' request for extension of time, 2 August 2011, ERN 00721799-801.

17. It is the role of the Trial Chamber to consider the parties' submissions and ascertain the correct interpretation of matters of law and fact relating to the issues in dispute. Assuming, as was the case with the Consolidated Reply, the parties' submissions are properly cited with references to any underlying source materials and do not (either intentionally or inadvertently) contain blatant errors of law or fact which would have the effect or likely effect of leading the Trial Chamber into error, the Trial Chamber is perfectly placed to analyse and make rulings on the competing submissions. In doing so, the Trial Chamber can also draw on its own ample contextual knowledge of the proceedings to date.

18. The Co-Prosecutors submit that leave for replies to replies should only be granted in exceptional circumstances such as where there is a blatant error of law or fact which the Trial Chamber could not itself reasonably assess or where the reply raises new substantive issues.

19. In this regard, it is noted that at the International Tribunal for the Former Yugoslavia (ICTY), replies to replies are not permitted as of right and the practice has been to grant leave to file such further replies only where the initial reply raises a new issue. In *Prosecutor v Kvočka,*[17] the Appeals Chamber had to determine a request by the prosecution to file a reply to a reply by the defendant. It first considered the appropriate standard for allowing replies to replies, stating:

> *Leave will usually be granted to file a further response where the reply raises a new issue. It is not sufficient that a matter raised in the reply may merely "call" for a reply (or more appropriately, a further response). A respondent, in his response to a motion, must give his full answer to the issues raised in that motion and, except where the interests of justice require, he will not be permitted the opportunity to give further answers or elaborate the answers already given to those issues.* [18]

20. On the basis of this standard, the Appeals Chamber granted leave to the prosecution to submit a reply in relation to "new" issues raised in the defendant's reply but not in

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[17] *Prosecutor v. Miroslav Kvočka et al*, Case No. IT-98-30/1-A, Decision on Application by Prosecution for Leave to file Further Response (ICTY Appeals Chamber), 6 June 2002.

[18] *Ibid.* at para 2 (citing *Prosecutor v Sainović and Ojdanić*, IT-99-37-AR65, Decision on Provisional Release (ICTY Appeals Chamber), 30 October 2002, para. 5; and *Prosecutor v Strugar et al,* IT-01-42-AR72, Decision on "Prosecution's Application for Leave to File a Reply to Defence's Reply to the Prosecution's Response to the Defence's Brief on Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber), 12 September 2002, page 2).

relation to previous issues where the party was "merely attempting to have the last say".[19]

21. Likewise, in the present case, the Co-Prosecutors submit that in the absence of new issues being raised in the Consolidated Reply or any blatant errors of law or fact being contained therein, the Defence should not be allowed to have "the last say" on issues of substance arising from the Requests. If each time a different interpretation of law or facts was put forward by a party amounted to a "misstatement", "misleading statement" or "mischaracterization" justifying a reply by the counter-party the debate on various issues before the Trial Chamber would continue indefinitely. This is precisely the scenario the Practice Direction seeks to avoid through the provision of limited rights of reply. To allow the Defence a unilateral discretion to deviate from the Practice Direction will create unlimited delay and uncertainty in the proceedings, undermine the right of parties to make submissions on legitimate matters in dispute, as well as the decision-making role of the Trial Chamber itself.

22. It is appropriate for the Trial Chamber to prohibit parties from filing replies to replies in order to maintain control over proceedings and ensure the expeditious administration of justice. The role of the Trial Chamber in maintaining control of the proceedings is specifically highlighted in the Rules with respect to calling of witnesses (Rule 80 bis) and to conduct during hearings (Rule 85) and, by virtue of Rule 21, can reasonably be seen to extend to all aspects of the proceedings.

III. REQUEST

23. For the reasons given above, the Co-Prosecutors request that the Trial Chamber issue a directive:

(a) clarifying that parties are not permitted to file replies to replies without leave of the Chamber;

(b) specifying that leave to file a reply to a reply must be filed prior to, and separately from the actual reply to a reply and that the request for leave must not contain the substance of the proposed reply to a reply;

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[19] *Ibid.* at para. 4.

(c) identifying the circumstances under which such leave is likely to be granted, and

(d) directing the Greffier not to place replies to replies on the case file unless and until leave to file the reply has been granted by the Trial Chamber.

Respectfully submitted,

Date	Name	Place	Signature
31 August 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		