BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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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 AND ARMED CONFLICT TO PROVE CRIMES AGAINST HUMANITY

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits these Observations to the Co-Prosecutors' Consolidated Reply to Defence Responses to Co-Prosecutor's [sic] Requests[1] to Recharacterise Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes Against Humanity ("Reply").[2] These Observations are made necessary because the Reply contains a number of misstatements, misleading statements and mischaracterizations of law and fact. These Observations are made to assist the Trial Chamber, and are limited to addressing these misstatements, misleading statements and mischaracterizations. In the interests of justice, it behooves the Defence to alert the Trial Chamber to these misstatements, misleading statements and mischaracterizations, since the OCP has argued that no oral hearings should be held on these issues and given the possibility that no oral hearings will be held. The Trial Chamber has previously accepted and placed on the Case File observations filed by the OCP.[3]

A. Admissibility of the OCP Requests

1. Paragraph 19

OCP assertion: The Defence "conceded" during the Initial Hearing that the question of to what extent crimes against humanity would apply is "not necessarily" a jurisdictional issue, while "the application of crimes against humanity was a 'jurisdictional issue' within the scope of Rule 89."

Observation: This is a mischaracterization of the Defence's position. Co-Lawyer Michael G. Karnavas actually stated:

> It is our understanding that these [the Defence's preliminary objections which were not scheduled to be heard during the Initial Hearing] fall within the ambit of jurisdictional issues and, therefore, can or should -- more in the way of should -- be heard as jurisdictional issues, even though when dealing with the contours under Rule 89.1(a) and 89.1(b). But even if -- even if -- the Trial Chamber were

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[1] Co-Prosecutors' Request for the Trial Chamber to Recharacterize the Facts Establishing the Conduct of Rape as the Crime against Humanity of Rape Rather than the Crime against Humanity of Other Inhumane Acts, 16 June 2011, E99 ("OCP Rape Request"); Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 15 June 2011, E95 ("OCP Armed Conflict Request"); Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 17 June 2011, E100 ("OCP JCE Request") (together "OCP Requests").

[2] 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.

[3] *See, e.g.*, Co-Prosecutors' Observations on IENG Thirith and NUON Chea's Urgent Defence Request to Determine Deadlines, 26 January 2011, E14/1; Co-Prosecutors' Observations on IENG Sary's Motion Requesting guidelines for Civil Party Participation, 4 February 2011, E23/1; Co-Prosecutors' Observations on IENG Thirith's Request for Additional Time and Pages for Preliminary Objections, 31 January 2011, E24/1.

> to find that these are not necessarily jurisdictional issues because it's not a matter of whether they apply but whether to what extent they would apply, then we feel that these are the sort of issues that need to be fully resolved prior to the commencement. Now, with respect to JCE, since we're dealing with JCE 3, it is our respectful submission that this is, indeed, a jurisdictional issue; we're not talking about the contours because JCE 3 is distinct. A decision was made that it doesn't fall within customary international law during the temporal jurisdictional period of this particular Tribunal. The parties had 30 days to file the jurisdictional issues. The prosecution did not avail itself, nonetheless, they filed this one."[4]

Put in context, Co-Lawyer Karnavas's statement shows that the Defence's primary position is that issues relating to the existence of crimes against humanity or certain elements (i.e. contours) of crimes against humanity should be considered as jurisdictional issues under Rule 89. Co-Lawyer Karnavas argued in the alternative that even if the Trial Chamber found these issues not necessarily to be jurisdictional issues, they are still the sort of issues that need to be fully resolved prior to the commencement of trial. The Defence's position can be seen by reviewing the entire text of Co-Lawyer Karnavas's statement, rather than extracted phrases, as well as its past submissions.[5]

2. **Paragraph 20**

OCP assertion: "If all requests for recharacterisation were to be considered preliminary objections on jurisdiction, Rule 98(2) which allows for recharacterisation would have no meaning."

Observation: This is a misstatement. Not all requests for re-characterization which fall under Rule 98(2) are jurisdictional issues. For example, if the Trial Chamber were to find that it has jurisdiction over international crimes and national crimes, it could consider a request pursuant to Rule 98(2) that certain facts be re-characterized as murder as a crime against humanity instead of murder as a national crime.[6] Requests, however, which challenge the jurisdiction of the ECCC must be raised as preliminary objections pursuant to Rule 89.

3. **Paragraph 21**

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[4] Transcript, 30 June 2011, E1/7.1, p. 40-41.
[5] *See, e.g.*, IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 184-231.
[6] Nothing in this paragraph should be construed as a waiver of the Defence's preliminary objections to the Trial Chamber's jurisdiction to apply either murder as a national crime or murder as a crime against humanity. The example given is for illustrative purposes only.

OCP assertion: The *Duch* Trial Chamber ruled that requests for re-characterizations were not preliminary objections under Rule 89.

Observation: This is a mischaracterization of the *Duch* Trial Judgement. The *Duch* Trial Chamber made no such ruling. The Trial Chamber stated in its Judgement: "No preliminary objection to the jurisdiction of the ECCC as such was raised at the initial hearing pursuant to Internal Rule 89. In its closing statement, the *Duch* Defence made extensive submissions alleging the lack of jurisdiction of the Chamber on the ground that the Accused was not a senior leader or one of those most responsible for the crimes committed during the DK regime."[7] The Trial Chamber, quite simply, was pointing out that the *Duch* Defence was not due diligent having failed to raise a jurisdictional issue in a timely fashion. Put differently, the Trial Chamber was referring to the Defence's submissions concerning personal jurisdiction, belatedly and inappropriately made for the first time in closing arguments. Indeed, this is the exact thrust of the IENG Sary Defence argument as to why the Trial Chamber should dismiss the OCP Requests to re-characterize: the OCP, belatedly and inappropriately, is raising issues which should have been raised as preliminary objections. As previously argued,[8] consistent with what seemingly is the Trial Chamber's ruling in *Duch*, a specific rule has been enacted concerning the time limit for jurisdictional challenges so that they will be settled prior to the substantive trial. It is a mischaracterization for the OCP to suggest that the *Duch* Trial Chamber *ruled* that requests for re-characterization were not preliminary objections.

4. **Paragraph 22**

OCP assertion: Even if its Requests could have been submitted as Rule 89 preliminary objections, this does not preclude the Trial Chamber from considering them now.

Observation: This is a misstatement of the Rules. This assertion ignores the clear requirement in Rule 89 that jurisdictional issues "shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible."[9]

5. **Paragraph 26**

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[7] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 14.
[8] *See* 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, E100/2, paras. 5-6.
[9] Emphasis added.

OCP assertion: The Defence has previously "admitted" that the Trial Chamber's authority to change the legal characterization of the crimes may include changes to the applicable form of liability, specifically JCE.

Observation: This is a mischaracterization of the Defence's position. The Defence actually stated:

> In paragraphs 16 and 17 the OCP asserts that the fair trial rights of the Charged Person will not be violated as they 'will have a valid cause of action to bring a jurisdictional challenge before the Trial Chamber.' While the Trial Chamber may have 'the authority to change the legal characterization of the crimes,' by that stage of the proceedings, it will have effectively deprived Mr. IENG Sary of the ability to seek the sort of protection and relief he is currently entitled to enjoy. This is especially applicable (as opposed to academic) concerning Mr. IENG Sary's right to have 'adequate time for the preparation of his defence,' as enshrined in Article 14(3)(b) of the International Covenant on Civil and Political Rights ('ICCPR'), which is incorporated explicitly in Article 13 of the Agreement."[10]

The Defence did not "admit" that the Trial Chamber may re-characterize the facts to include JCE III after the Pre-Trial Chamber had unequivocally held that the ECCC has no jurisdiction to apply JCE III, as JCE III did not exist in applicable law in 1975-79 and liability would not have been foreseeable. The Defence simply quoted Rule 98(2) and explained that this is not a matter which may be left until the end of the proceedings. The Defence explained that the possibility of adding JCE liability through Rule 98(2) would effectively deprive the Defence of its right to raise this issue at the pre-trial stage by rendering this right meaningless. The Defence has remained consistent on this issue throughout the pre-trial and trial stages of Case 002. The Trial Chamber may be assisted by reviewing the Defence's entire position on this issue.[11]

6. **Paragraph 28**

OCP assertion: The OCP is aware that Cambodian courts routinely modify the legal characterizations of forms of responsibility by relying on the Cambodian Code of Criminal Procedure (which the OCP admits does not expressly provide for this). The

[10] IENG Sary's Reply to the Co-Prosecutors' Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, 18 March 2010, D97/14/14, para. 12 (emphasis added).

[11] In addition to the pleadings currently before the Trial Chamber, relevant pleadings include: IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010, D97/14/5, and IENG Sary's Reply to the Co-Prosecutors' Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, 18 March 2010, D97/14/14.

Trial Chamber may take judicial notice of this "routine practice" as a fact of common knowledge.

Observation: This is misleading. The OCP provides no support for its assertion that this is a routine practice. The OCP also fails to acknowledge or argue against the Trial Chamber's ruling that it may not take judicial notice of facts of common knowledge since "there is no legal basis in the Law on the Establishment of the ECCC or in the Internal Rules for the Chamber to take judicial notice of adjudicated facts or for facts of common knowledge to be applied before the ECCC…"[12]

B. OCP Rape Request

7. **Paragraph 72**

OCP assertion: The Defence "contends that rape was not illegal, but rather regarded as 'the necessary reward for the fighting men' under international criminal law until the 1990s."

Observation: This is a mischaracterization of the Defence's position. The Defence made no such contention. The Defence quoted a commentator who stated: "[b]efore the 1990s, sexual violence in war was, with rare exception, largely invisible. If not invisible, it was trivialized; if not trivialized, it was considered a private matter or justified as an inevitable by-product of war, the necessary reward for the fighting men."[13] It is certainly not the Defence's position that rape was a necessary reward for fighting men until the 1990s.

8. **Paragraph 81**

OCP assertion: The Defence's reference to sources of law set out in Article 38(1) of the Statute of the International Court of Justice ("ICJ") is "not directly relevant to the use of ICTY decisions by the ECCC, nor indeed reference to the jurisprudence of international and internationalised criminal tribunals more generally."

Observation: This is misleading. The sources of law set out in the ICJ Statute are directly relevant to the use of ICTY and other decisions by the ECCC, as the ICJ

[12] Decision on IENG Sary's Motions Regarding Judicial Notice of Adjudicated Facts from Case 001 and Facts of Common Knowledge Being Applied in Case 002, 4 April 2011, E69/1, p 2-3.
[13] Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women Into International Criminal Law*, 46 McGILL L.J. 217, 220 (2000).

Statute's list of sources have themselves obtained customary international law status. The fact that Article 21 of the International Criminal Court's Statute contains these sources of law is evidence of this. Indeed, the OCP itself has relied upon the ICJ Statute's list of sources of law in past submissions.[14]

9. **Paragraphs 85-86**

OCP assertion: the OCP asserts that customary international law criminalizing rape as a crime against humanity can be established on the basis of the practice of a few States, absent objections from other States. It quotes an article by Professor Michael Akehurst and a book by Professor Malcolm Shaw.

Observation: This is a mischaracterization of the quote by Professor Shaw and a misstatement of the law. Professor Shaw stated that "custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice."[15] This statement does not support the assertion that rape as a crime against humanity may obtain customary international law status on the basis of the practice of a few States. There are more than "a few States" that are "intimately connected" with the issue of rape as a crime against humanity. Professor Akehurst, also relied upon by the OCP, explains that "the fact remains that the quantity of practice needed to create a customary rule is greater in some circumstances than in others."[16] For example, only States that have operational outer space programs will form the requisite State practice and *opinio juris* on the law of outer space.[17] In these circumstances, the *opinio juris* which binds only "a few States" is more easily accepted.[18] By contrast, as any State may criminalize rape as an enumerated crime against humanity or otherwise

[14] "The phrase 'general principles of law recognized by the community of nations' is a reference to the third source of international law found in Article 38 of the Statute of the ICJ. These principles represent an independent source of international law, and as such, are distinct from conventional and customary international law." Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, 19 November 2010, D427/1/17, para. 161.

[15] MALCOLM N. SHAW, INTERNATIONAL LAW 79 (Cambridge University Press 6th ed. 2008).

[16] Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH Y.B. INT'L L. 1, 19 (1974-75).

[17] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 75-76 (Cambridge University Press 2003) *citing* Bin Cheng, *United Nations Resolutions on Outer Space: 'Instant' International Customary Law*, 5 INDIAN J. INT'L L. 1, 23 (1965).

[18] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 75-76 (Cambridge University Press 2003).

contribute to the development of crimes against humanity as customary international law, the State practice and *opinio juris* of all States are relevant.[19]

C. OCP JCE Request

10. **Paragraph 96**

OCP assertion: The OCP "refer[s] the Trial Chamber to the following assessment in the very recent analysis of the legality of the application of JCE III by the Appeals Chamber of the Special Tribunal for Lebanon."

Observation: This is misleading. The Defence notes that Judge Antonio Cassese is the President of the Special Tribunal for Lebanon. He is also one of the Judges of the *Tadić* Appeals Chamber which created JCE liability. Given Professor Cassese's role in fathering JCE and his tireless promotion of it as accepted customary international law, Judge Cassese's pronouncements as to the justifications for JCE III should be considered in light of his interest in upholding JCE liability and be accorded little weight. The Defence has previously noted that the selection of Professor Cassese as an *amicus curiae* on the issue of the applicability of JCE before the ECCC – in light of the fact that he was responsible for creating this form of liability at the ICTY – was akin to appointing a fox to guard the henhouse of JCE and Professor Cassese's legacy in the international legal lexicon.[20]

11. **Paragraph 97**

OCP assertion: "Current trends in customary international law are shifting away from theories that adopt a subjective approach to the distinction between principal and accessorial liability (such as JCE) towards an objective 'control of the crime' approach" and this "trend" meets with the approval of the International Criminal Court and

[19] The Defence has addressed a similar argument by the OCP in the past, when the OCP argued that a "Grotian moment" occurred in relation to the formation of JCE as customary international law. *See* IENG Sary's Reply to the Co-Prosecutors' Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, 18 March 2010, D97/14/14, para. 21.

[20] *See Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), IENG Sary's Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the Journal of International Criminal Justice from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 3 October 2008, D99/3/18, para. 47. *See also* paras 25-32 which specifically show why Professor Cassese was unqualified to act as an *amicus curiae* in answering the Pre-Trial Chamber's question as to the applicability of JCE at the ECCC.

respected scholars. However, "such considerations are simply not relevant" to a consideration of whether JCE III liability may be applied at the ECCC.

Observation: This is a misstatement. The critique of JCE III by respected scholars is not a new trend. Scholars have consistently argued that JCE III was created by the *Tadić* Appeals Chamber and was never customary international law.[21]

12. **Paragraph 102**

OCP assertion: "[W]hile the Cambodian law clearly enshrines the principle of *nullum crimen sine lege,* no relevant jurisprudential treatment of the principle is available at the domestic level. Accordingly, the Trial Chamber may seek guidance from rules of procedure established at the international level." The OCP refers to Article 31 of the Constitution and Article 33 new of the Establishment Law.

Observation: This is a misstatement of the applicable Cambodian law. Different standards of the principle of legality operate at the national and international level, so there is no *lacuna* warranting consideration of "rules of procedure established at the international level." Article 6 of the 1956 Penal Code sets out the principle of legality in stricter terms than that established at the international level through the International Covenant on Civil and Political Rights.[22] Whether Article 6 applies at the ECCC to bar the application of crimes and forms of liability which were not set out in applicable Cambodian law in 1975-79 is a matter currently pending before the Trial Chamber.[23] The principle of legality is a substantive right (as opposed to a procedural rule) which

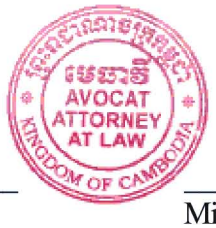
[21] *See* IENG Sary's Response to the Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability & Request for an Oral Hearing, 22 July 2011, E100/2, Annex 4, which lists scholars who have criticized JCE as a whole or JCE III in particular. Many of these scholars have explained that JCE III was never part of customary international law. Kitti Jayangakula, for example, explains that "importantly, JCE III did not have customary status, which has been recognised as customary international law at the relevant time and there was no sufficient foreseeable and accessible of the doctrine of JCE liability, in particular JCE III, to the defendants during 1975-1979 and the accused had no sufficient notice of this form of liability at the relevant time." Kitti Jayangakula, *Is the Doctrine of Joint Criminal Enterprise a Legitimate Mode of Individual Criminal Liability? – A Study of the Khmer Rouge Trials*, (2010), p. 68, *available at* http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1693741&fileOId=1693742.

[22] *See, e.g.*, IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 106-110.

[23] *See* Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4, which sets out Mr. IENG Sary's Rule 89 preliminary objection that the ECCC does not have jurisdiction to apply international crimes and forms of liability against Mr. IENG Sary.

does not warrant consideration of procedural rules established at the international level pursuant to Article 33 new of the Establishment Law.[24]

Respectfully submitted,



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Signed in Phnom Penh, Kingdom of Cambodia on this **18th** day of **August, 2011**

[24] *See* Article 252 of the Cambodian Criminal Procedure Code, which states that "rules and procedures which intend to guarantee the rights of the defense have a substantial nature."