

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

Criminal Case File N°: 002/19-09-2007-ECCC/OCIJ  
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**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**  
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<b>ឯកសារត្រឹមត្រូវតាមច្បាប់ដើម</b>	
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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests, pursuant to Rule 35(1) of the Internal Rules (“Rules”), the Co-Investigating Judges (“OCIJ”) to find that members of the Office of the Co-Prosecutors (“OCP”) were responsible for knowingly and willfully interfering with the administration of justice by misleading the OCIJ concerning assertions set out in their Supplementary Observations on Joint Criminal Enterprise.<sup>1</sup> During a lecture delivered by Professor Michael Scharf on 24 June 2009 entitled “To JCE or not JCE? Insights from the Cambodia Tribunal,”<sup>2</sup> he publically admitted that the OCP deliberately withheld information concerning the acceptance and scope of the principles from the Nuremberg Charter and judgments (“Nuremberg Principles”), which would have undermined the status of JCE in customary international law.<sup>3</sup>

## I. INTRODUCTION

1. The Defence filed its opposition to the application of joint criminal enterprise liability (“JCE”) at the ECCC on 28 July 2008.<sup>4</sup> A response to this opposition was filed by the OCP on 11 August 2008.<sup>5</sup> Recognizing the importance of this issue and the effect it has on all the Charged Persons, the OCIJ requested supplementary submissions on this issue from all parties to Case File 002 to be filed by 31 December 2008.<sup>6</sup> The Defence filed its supplementary observations on 24 November 2008<sup>7</sup> while the OCP filed its supplementary observations on 31 December 2008.
2. A fundamental issue in this litigation is whether JCE was part of customary international law in 1975-79. This issue was raised by the Defence in the JCE Motion<sup>8</sup> and Defence

<sup>1</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise, 31 December 2008 (“OCP Supplementary Observations”).

<sup>2</sup> Michael Scharf, Professor of Law of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law, Supranational Criminal Law Lecture Series “To JCE or not JCE? Insights from the Cambodia Tribunal”, 23 June 2009 (“Scharf Lecture”).

<sup>3</sup> The lecture was attended by the Legal Consultant working for the Ieng Sary Defence team, Geoff Roberts, together with Shona Grundy, an intern working for the Defence team of Jadranko Prlić before the International Criminal Tribunal for the former Yugoslavia. The observations made by Professor Scharf which are repeated in the body of this Request are based on their shared recollections.

<sup>4</sup> *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion Against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 28 July 2008 (“JCE Motion”).

<sup>5</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors’ Response to Ieng Sary’s Motion on Joint Criminal Enterprise, 11 August 2008 (“OCP Response”).

<sup>6</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 16 September 2008 (“Order”).

<sup>7</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Ieng Sary’s Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECC, 24 November 2008 (“Defence Supplementary Observations”).

<sup>8</sup> JCE Motion, paras. 18-24.

Supplementary Observations,<sup>9</sup> and responded to at length by the OCP in the OCP Response<sup>10</sup> and OCP Supplementary Observations.<sup>11</sup> Unless the question of whether JCE is customary international law is answered in the affirmative, this form of liability simply cannot be applied against those persons charged before the ECCC.

## II. LAW

### A. The Cambodian *Code of Ethic for Judges 2007*<sup>12</sup>

Article 1 provides “In this Code of Ethics “judges” refers to sitting judge and prosecutors.”

Article 18 provides that “a judge shall be an honest person.”

### B. The District of Columbia *Bar Rules of Professional Conduct*

Rule 3.3 provides that:

“(a) A lawyer shall not knowingly

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6;

[...]

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client.”<sup>13</sup>

### C. The Barreau du Quebec *Code of ethics of advocates*<sup>14</sup>

Article 2.01.01 provides that advocates practicing in Quebec “shall support the authority of the courts” and “may not act in a manner which is detrimental to the administration of justice.”

<sup>9</sup> Defence Supplementary Observations, paras. 30-54.

<sup>10</sup> OCP Response, paras. 18-30.

<sup>11</sup> OCP Supplementary Observations, paras. 9-25.

<sup>12</sup> Code of Ethics for Judges, adopted by the Supreme Council of Magistracy on 5 February 2007.

<sup>13</sup> Revised, effective February 1, 2007. (Emphasis added) See also Rule 3.3. Model Rules of Professional Conduct produced by the American Bar Association.

<sup>14</sup> An Act respecting the Barreau du Québec, (R.S.Q., c. B-1, s. 15), Professional Code, (R.S.Q., c. C-26).

- D. The Australian *Model Rules of Professional Conduct and Practice in Australia*  
 Section 14.1 provides that “a practitioner must not knowingly make a misleading statement to a court.”<sup>15</sup>
- E. The British *Code of Conduct of the Bar of England and Wales*  
 Section 1: Code of Conduct – Part VII – Conduct of Work by Practising Barristers, Article 708 provides in pertinent parts:  
 “A barrister when conducting proceedings in Court:  
 [...] (c) must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues;”<sup>16</sup>
- F. The international Criminal Tribunal for the former Yugoslavia
1. *Standards Of Professional Conduct, Prosecution Counsel*<sup>17</sup>  
 Prosecution Regulation 2(d) provides that Prosecutors “exercise the highest standards of integrity and care, including the obligation always to act expeditiously when required and in good faith;”  
  
 Prosecution Regulation 2(e) provides that Prosecutors “demonstrate respect and candor before the Tribunal, and not knowingly to make an incorrect statement of material fact to the Tribunal, or offer evidence which prosecution counsel knows to be incorrect or false.”
  2. *Code of Professional Conduct for Counsel*<sup>18</sup>  
 Article 23(b) provides that “counsel shall not knowingly make an incorrect statement of material fact or law to the Tribunal.”

<sup>15</sup> Model Rules of Professional Conduct and Practice, Law Council of Australia, March 2002.

<sup>16</sup> Code of Conduct of the Bar of England and Wales, 2004 available at:

<http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/tableofcontents/>

<sup>17</sup> Prosecutor’s Regulation No. 2 (1999), Standards of Professional Conduct for Prosecution Counsel; *See also* Article 24(3) International Criminal Court Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1 which provides that “Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.”

<sup>18</sup> As amended on 12 July 2002, (IT/125 Rev. 1) (emphasis added).

- G. The Special Court for Sierra Leone *Code of Professional Conduct for Counsel*<sup>19</sup>
- Article 8(B) provides that Prosecution and Defence Counsel “shall not deceive or knowingly or recklessly mislead the Special Court. Counsel shall take all necessary steps to correct an erroneous statement made by Counsel or his team as soon as possible after becoming aware that the statement was erroneous.”

### III. ARGUMENT

3. In its Supplementary Observations, the OCP relied extensively upon United Nations General Assembly (“UNGA”) Resolution 95(I) which the OCP asserted “unanimously affirmed the principles from the Nuremberg Charter and judgments,”<sup>20</sup> thus bolstering its claim that JCE was part of customary international law. For the OCP, “this action affirmed as customary international law both the substantive theory of individual criminal liability (including “common plan” liability) codified in the Nuremberg Charter and applied by the Nuremberg Tribunal.”<sup>21</sup> The OCP later confirmed its reliance upon UNGA Resolution 95(I) in stating that “it was the universal and unqualified endorsement of the Nuremberg Principles as early as 1946 [...] which crystallized this doctrine into a mode of individual criminal liability under customary international law.”<sup>22</sup> The OCP has also, for a second time, sought to introduce JCE into the Duch case presently before the Trial Chamber.<sup>23</sup> In the OCP Request, reliance is placed on supposedly “comprehensive memoranda” filed by the OCP in Case File 002 in response to the JCE Motion which includes the OCP Supplementary Observations.<sup>24</sup> These memoranda are attached as an annex to the OCP Request. Consequently, the OCP has sought to equally rely upon its interpretation of UNGA Resolution 95(I) before the Trial Chamber as well as before the OCIJ.
4. In his lecture Professor Scharf revealed 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. He was tasked with working almost exclusively on the OCP Supplementary

<sup>19</sup> Adopted on 14 May 2005 Amended on 13 May 2006.

<sup>20</sup> *Id.*, para. 12.

<sup>21</sup> *Id.*

<sup>22</sup> OCP Supplementary Observations, para. 14 (emphasis added).

<sup>23</sup> *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC/TC, Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise, 8 June 2009 (“OCP Request”).

<sup>24</sup> OCP Request, para. 40.

Observations. Professor Scharf was seemingly enticed to work for the OCP by Prosecutor Petit's statement that this was the most important brief that would be filed before the ECCC. Scharf was no doubt also enticed by the Prosecutor's admission that the OCP needed the ECCC to apply JCE as there was simply a lack of direct evidence of any orders or witnesses who could prove that the "Senior Leaders" of Democratic Kampuchea were directly responsible for the alleged crimes. Both of these facts were revealed during his lecture.

5. Professor Scharf revealed that in addition to UNGA Resolution 95(I), relied upon so heavily by the OCP, there was a subsequent UNGA Resolution 5 years later which casted doubt on the acceptance and scope of the Nuremberg Principles. According to Professor Scharf, members of the OCP strategized as to whether they were ethically obliged to disclose to the OCIJ this subsequent UNGA Resolution – which quite obviously was adverse to its position concerning the applicability of JCE - by referencing it in their Supplementary Observations. The OCP decided that there was no ethical obligation to reveal this discrepancy in precedential value of UNGA Resolution 95(I) despite the fact that the OCP was relying solely on it for its absolute assertion that common plan liability was part of the Nuremberg Principles.
6. From research conducted by the Defence, it appears that this subsequent resolution referred to (but coyly not revealed by) Professor Scharf was UNGA Resolution 488(V) adopted on 12 December 1950.<sup>25</sup> UNGA Resolution 488(V) referred to UNGA 95(I), as well as UNGA 177(II) of 21 November 1947<sup>26</sup> which had directed the International Law Commission to formulate the Nuremberg Principles. Resolution 488(V) provided that "the International Law Commission has formulated certain principles recognized, according to the Commission, in the charter and judgment of the Nuremberg Tribunal, and that many delegations have made observations during the fifth session of the General Assembly on this formulation."<sup>27</sup> The Nuremberg Principles formulated by the International Law Commission, as set out in the report by the Special Rapporteur J. Spiropoulos of 12 April 1950,<sup>28</sup> and reinforced by the subsequent report of the International Law Commission of July 1950<sup>29</sup> do not include common plan liability for

<sup>25</sup> United Nations General Assembly Resolution 488(V), 320<sup>th</sup> plenary meeting, 12 December 1950.

<sup>26</sup> United Nations General Assembly Resolution 177(II), 123<sup>rd</sup> plenary meeting, 21 November 1947.

<sup>27</sup> *Id.* Emphasis added.

<sup>28</sup> Formulation of the Nuremberg Principles – Report by J. Spiropoulos, Special Rapporteur, 12 April 1950, A/CN.4/22.

<sup>29</sup> Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316).

war crimes and crimes against humanity.<sup>30</sup> While they do include the other principles mentioned by the OCP<sup>31</sup> no mention whatsoever is made of common plan liability for crimes against humanity and war crimes.

7. Professor Scharf openly admitted that he (in his capacity as a special assistant) and members of the OCP were well aware that there was a subsequent UNGA Resolution which appeared to dramatically undermine the OCP's arguments relating to the applicability of JCE. Professor Scharf also requested, at the end of his lecture, that the information he revealed in his lecture concerning the inner workings of the OCP not be revealed to anyone outside of the room, seemingly recognizing that the OCP had failed in its fundamental duty of candor towards the court. Simply, Professor Scharf and members of the OCP – assuming Professor Scharf's admissions are truthful – cavalierly conspired to deliberately mislead and deceive the OCIJ.
8. Professor Scharf has been a member of the District of Columbia Bar since 1989 according to his publicly accessible CV.<sup>32</sup> Since 1989, International Co-Prosecutor Robert Petit “served both as a provincial (Quebec) and federal prosecutor [in Canada]”<sup>33</sup> and before working at the ECCC was previously employed as “a Senior Trial Attorney in the Special Court for Sierra Leone”<sup>34</sup> Other members of the OCP, who the Defence believes were involved in the preparation of the OCP Supplementary Observations, were also previously employed by the ICTY. As set out above, provisions of each of these codes of ethics under which the OCP members are bound, prohibit knowingly and willfully misleading the Court, including the OCIJ.
9. As servants of the court, it is the fundamental duty of all lawyers practicing before any court (national, international, internationalized or hybrid) not to mislead it. The complexity of the issues surrounding JCE render the open and transparent assistance of Prosecution and Defence Counsel appearing before the ECCC indispensable. When

<sup>30</sup> The five principles set out in Part III of the International Law Commission's Report were: (1) Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefore and liable to punishment; (2) The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from responsibility under international law; (3) The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment; (4) The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires; (5) Any person charged with a crime under international law has the right to a fair trial on the facts and law.

<sup>31</sup> OCP Supplementary Observations, para. 12.

<sup>32</sup> See CV of Michael Scharf available on the website of Case Western Reserve University at <http://law.case.edu/faculty/cv/scharf.pdf/>.

<sup>33</sup> See the biography of Robert Petit on the ECCC website at <http://www.eccc.gov.kh/english/prosecutors.aspx>.

<sup>34</sup> *Id.*

deciding upon complex issues involving questions of international law the existence of a controlling authority is far from obvious. As such, it is virtually impracticable for one party to the proceedings to prove that the other party's omission of certain information is due to malevolent motives rather than simply not being aware of the contrary authority. In the present case, however, Professor Scharf admitted that the OCP – a party to the proceedings bound by professional and ethical constraints – was aware of the questionable nature of the authority being relied upon, and after careful deliberation, consciously opted to conceal the truth (presumably with Professor Scharf's unqualified endorsement)<sup>35</sup> by failing to make any reference to the subsequent UNGA Resolutions.

10. Sadly, this is a classic case of *situational ethics* where *the ends justify the means*: the OCP placing greater importance on applying JCE at the ECCC than adhering to its ethical obligations. Query, why Professor Scharf quite willingly, if not enthusiastically, agreed to surreptitiously *aid and abet* the OCP in its efforts to deceive the OCIJ, only to then publically admit to this unethical behavior before a group of young and impressionable law students. Query, the value of relying on Professor Scharf and the likes of him, who, as legal scholars, one would, if nothing else, expect intellectual integrity.

#### IV. RELIEF SOUGHT

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the OCIJ to:

- a. ORDER the OCP to file a corrigendum to its Supplementary Observations concerning the impact on UNGA Resolution 95(I) of the 1950 Report of the International Law Commission, UNGA Resolution 488(V) and any other UNGA Resolutions which have an impact on the status of the Nuremberg Principles; AND
- b. DEAL with the matter summarily under Rule 35(2) by sanctioning the International Co-Prosecutor or members of the OCP for deliberately

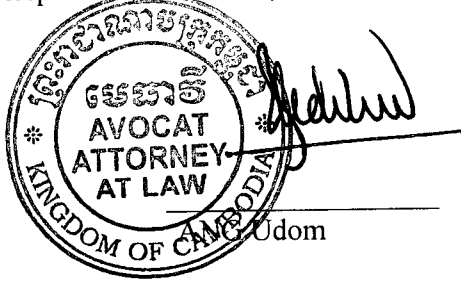
<sup>35</sup> From the impressions formed by those who attended the lecture, it seemed as if Professor Scharf took great pride and satisfaction in his participation with members of the OCP in strategizing on whether to be totally honest with the OCIJ and risk weakening their argument in support of the application of JCE before the ECCC or to simply conceal the truth in order to gain the advantage.



misleading the court and informing their respective Bar Associations of this finding;<sup>36</sup> OR

- c. CONDUCT further investigations into this breach of the OCP's ethical obligations including interviewing Professor Scharf and other members of OCP responsible for filing the OCP Supplementary Observations.

Respectfully submitted,



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 29<sup>th</sup> day of June, 2009

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<sup>36</sup> This power appears to be well within the OCIJ's jurisdiction and has been exercised previously. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, p. 7.