

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/SC**Party Filing:** Case 003 Defence**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 12 January 2015**CLASSIFICATION****Classification of the document
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**CASE 003 DEFENCE REQUEST TO INTERVENE IN THE APPEAL
PROCEEDINGS IN CASE 002/01 FOR THE PURPOSE OF ADDRESSING THE
APPLICABILITY OF JCE III AT THE ECCC**

OR, IN THE ALTERNATIVE,

**REQUEST FOR LEAVE TO SUBMIT *AMICUS CURIAE* BRIEF ON JCE III
APPLICABILITY**

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Co-Prosecutors:

CHEA Leang

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All Defence Teams**All Civil Parties**

The Case 003 Defence hereby requests to intervene, orally and in writing, in the matter of the Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in Case 002/01, in which the Co-Prosecutors appeal the Case 002/01 Judgement on the ground that the Trial Chamber excluded consideration of the extended form of joint criminal enterprise ("JCE III").¹ This request is made necessary because a decision on the applicability of JCE III at the ECCC will necessarily affect the Case 003 Defence as well as the parties to Case 002. In the alternative, pursuant to Rule 33 of the ECCC Internal Rules ("Rules"), the Case 003 Defence seeks leave to file the attached *amicus curiae* brief on the issue of whether JCE III is applicable at the ECCC. The brief demonstrates that JCE III did not exist as customary international law in 1975-79 and therefore should not be applied at the ECCC. The brief is intended to aid the Supreme Court Chamber.² This is an issue of general concern to all international criminal law jurists who have an interest in the proper identification and application of customary international law. A decision by the Supreme Court Chamber will have implications in other tribunals and will contribute to the development of international criminal law. The Case 003 Defence has extensive experience dealing with the issue of JCE's status in customary international law, with Co-Lawyer Michael G. Karnavas having researched and dealt with this issue in multiple cases since 2001, only two years following JCE III's creation by the *Tadić* Appeals Chamber.³

I. ARGUMENTS IN SUPPORT OF THE CASE 003 DEFENCE'S INTERVENTION AS AN INTERESTED PARTY IN CASE 002

1. Should the Supreme Court Chamber decide to hear the Co-Prosecutors' appeal concerning the applicability of JCE III – despite the fact that it appears manifestly

¹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in Case 002/01, 28 November 2014, F11.

² The Pre-Trial Chamber recognized the complexity of this issue, and invited *amicus curiae* briefs in Case 001. In Case 002, it granted the parties extensions of time and pages to address the issue. *See, e.g., Case of Kaing Guek Eav*, 001/18-07-2007-ECCC-OCIJ (PTC02), Invitation to *Amicus Curiae*, 23 September 2008, D99/3/12; *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC-OCIJ (PTC02), Invitation to *Amicus Curiae*, 25 September 2008, D/99/3/13 and D99/3/14; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC 35, 37, 38, 39), Decision on the Co-Prosecutors' Applications for Extension of Time and Page Limits to file a Joint Response to IENG Thirith, KHIEU Samphan, IENG Sary and Certain Civil Parties' Appeals Against the Order on Joint Criminal Enterprise, 9 February 2010, D97/16/4.

³ *See, e.g., Michael G. Karnavas, Joint Criminal Enterprise at the ECCC: A Critical Analysis of Two Divergent Commentaries on the Pre-Trial Chamber's Decision against the Application of JCE*, 21 CRIM. L. F. 445 (2010). *See also* IENG Sary Defence website, available at www.iengsarydefence.org, which lists all JCE filings made by the IENG Sary Defence.

inadmissible⁴ – the Supreme Court Chamber must allow the Case 003 Defence to intervene by participating in oral arguments and filing written submissions. There is no law or procedural rule preventing such intervention and this is an issue which will significantly affect Case 003: the Suspect in Case 003 is alleged by the Co-Prosecutors to be a member of a joint criminal enterprise and to have committed crimes imputed to him by way of JCE III.⁵

2. Refusing to allow the Defence to intervene, on the basis that the applicability of JCE III may be challenged in Case 003 at a later time, does not sufficiently protect the Case 003 Defence's interests and would not be in the interest of judicial economy. The Supreme Court Chamber is unlikely to reach a different decision on this purely legal issue in Case 003 than it will reach in Case 002 (nor would this be proper, since it would violate the right to equal treatment).
3. The Pre-Trial Chamber's reasoning in Case 002 in disallowing the IENG Sary Defence to intervene in Case 001 to address the issue of the applicability of JCE does not apply presently. In that decision, the Pre-Trial Chamber stated that "[t]he Appeal lodged by the Co-Prosecutors *concerns the charges for which Duch will be sent for trial*. The decision to be delivered by the Pre-Trial Chamber will therefore not be directly applicable to Ieng Sary, who will still have the possibility to challenge the application of the theory of joint

⁴ Rule 104(1) allows appeals on errors of law invalidating the Judgement, and the Co-Prosecutors have admitted that they do not seek to overturn any portion of the Judgement. Rather, they rely on "procedural rules established at the international level" to argue that declaratory relief is available; however, Article 12(1) of the Agreement provides recourse to procedural rules at the international level only "[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards." The Co-Prosecutors have not demonstrated that these circumstances apply. Nor have they demonstrated that procedural rules at the international level would permit such an appeal. Rules at the International Criminal Tribunal for the former Yugoslavia do not expressly provide a right to appeal when seeking declaratory relief. Furthermore, the Notice of Appeal was filed to the incorrect Chamber. The Co-Prosecutors filed the Notice of Appeal to the Supreme Court Chamber, while Rule 106(2) requires Notices of Appeal to be filed to the Trial Chamber (and Rule 106(5) then requires the actual appeal briefs to be filed to the Supreme Court Chamber). This is the same procedure as with pre-trial appeals: notices of appeal are filed with the OCIJ and then the appeals themselves are filed with the Pre-Trial Chamber. *See* Rule 75(2)-(3). The Notice of Appeal should be rejected for failing to conform with the filing requirements.

⁵ This information is available on the publicly available Case 003 Introductory Submission. *See* http://img.scoop.co.nz/media/pdfs/1106/CambodiaSecond_Introductory_Submission.redacted.pdf. Paragraph 97 states (emphasis added and Suspects' names redacted): "Where ██████████ and ██████████ committed these crimes they did so individually or by participating in a JCE with other co-perpetrators identified in paragraphs 33 to 41 of this Submission. These crimes were the object of the JCE *or alternatively the natural and foreseeable consequences of the JCE*. Other members of the JCE acted on the basis of the common purpose, with shared intent."

criminal enterprise in the Case File 002/19-09-2007-ECCC/OCIJ to which he is a party.”⁶ In this instance, the Co-Prosecutors have *not* requested the Supreme Court Chamber to overturn any portion of the Case 002/01 Judgement. Instead, they seek declaratory relief; they wish the Supreme Court Chamber to declare JCE III applicable to “provide legal guidance to the Trial Chamber”⁷ – something only necessary if the Co-Prosecutors intend to apply JCE III in future trials.

4. The Co-Prosecutors have admitted that the real reason they have filed their Appeal before the Supreme Court Chamber is because they seek to influence the law applicable in future trials. In an email to the press, International Deputy Co-Prosecutor William Smith said the Trial Chamber should have considered foreseeable crimes, claiming: “Although both Accused were convicted, it was important to have this mode of liability recognized as it may impact future trials in relation to particular crimes such as rape which may not have been specifically instigated, ordered or planned but were foreseeable from an accused’s actions.”⁸
5. It is in the interest of judicial economy, if not to dismiss this manifestly inadmissible appeal outright, then to hear the arguments of the Case 003 (and, if requested, Case 004) Defence and resolve the issue of the applicability of JCE III one final time.
6. At the Special Court for Sierra Leone (“SCSL”), the Appeals Chamber allowed Augustine Gbao and Moinina Fofana (Accused in other cases at the SCSL) to intervene in the *Kallon & Kamara* case concerning the applicability of the Lomé Accord amnesty, in recognition of the fact that a decision on the validity of the amnesty would affect them as well.⁹ The Pre-Trial Chamber has also invited submissions from Civil Parties in Case 001 on an application made in Case 002, on the basis that determination of the application would lead to the issuance of general directions on the rights of unrepresented

⁶ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC-OCIJ (PTC 02), Decision on IENG Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch”, 6 October 2008, D99/3/19, para. 12 (emphasis added).

⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Co-Prosecutors’ Notice of Appeal of a Decision in Case 002/01, 29 September 2014, E313/3/1, para. 9.

⁸ Holly Robertson, *Prosecution Appeals to KR Tribunal to Widen Scope*, CAMBODIA DAILY, 4 December 2004, p. 4.

⁹ *Prosecutor v. Kallon & Kamara*, SCSL-2004-15-AR72(e), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 (see cover page, listing Gbao and Fofana as interveners, and p. 3, noting that Gbao and Fofana had filed written submissions with leave of the Court).

Civil Parties to address the Chamber, and thus would affect Civil Parties in Cases 001 and 002.¹⁰

7. Third party interventions in criminal appeals are common in other courts as well. In Canada, for example, “[t]hird party intervention has become the norm rather than the exception in cases before the Supreme Court of Canada,” with third party interventions being welcomed and encouraged so that the Court would have the widest variety of information, argument, and perspective available to it when making a decision.¹¹ It is also becoming a regular feature before the House of Lords in the United Kingdom.¹²
8. Intervention will not cause prejudice to any party since the Co-Prosecutors have sought only *declaratory relief*: no arguments made by the Case 003 Defence could in any way affect the Case 002/01 Trial Judgement. It would be in the best interest of all parties and the Supreme Court Chamber to have the benefit of the Case 003 Defence’s oral and written arguments on this complex matter.

II. ARGUMENTS IN SUPPORT OF THE CASE 003 DEFENCE ACTING AS AN *AMICUS CURIAE* IN CASE 002

9. Should the Supreme Court Chamber decide not to allow the Case 003 Defence to directly intervene in the appeal proceedings of Case 002/01 for the purpose of addressing the applicability of JCE III, the Case 003 Defence requests to act as an *amicus curiae*. Rule 33 places no limit on who may act as an *amicus curiae*; any person or organization may be granted leave to submit an *amicus curiae* brief if the Chamber considers it desirable for the proper adjudication of the case. No party will be prejudiced by the filing of this *amicus curiae* brief, as Rule 33(2) provides that the parties have a right to respond to the brief. No delay to the proceedings will be caused.
10. In Case 001, the Supreme Court Chamber rejected an application made by the Defence Support Section (“DSS”) requesting leave to file an *amicus curiae* brief on matters

¹⁰ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC 02), Decision on IENG Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch”, 6 October 2008, D99/3/19, para. 11, referring to these Civil Party directions, which appear to be confidential.

¹¹ Andrea C. Loux, *Hearing a ‘Different Voice’: Third Party Interventions in Criminal Appeals*, 53(1) CURRENT LEGAL PROBLEMS 449, 452-53 (2000).

¹² *Id.*, at 454.

relating to Duch's appeal against the Case 001 Judgement.¹³ Rather than fulfilling its mandate to offer legal assistance and support to the Defence teams as provided by Rule 11(2)(j), the Supreme Court Chamber found that it was DSS's intention to supplement Duch's Appeal Brief and to in effect serve as substitute counsel through the submission of an *amicus curiae* brief.¹⁴ The Supreme Court Chamber found that "in such circumstances" an *amicus curiae* should be unaffiliated with the Court or any of its offices.¹⁵

11. The present circumstances are unlike those in Case 001. The Case 003 Defence does not intend to and has no interest in serving as substitute counsel for NUON Chea or KHIEU Samphan. The attached *amicus curiae* brief is not filed for the purpose of assisting in their defence. The Case 003 Defence has no interest in the particular case against NUON Chea or KHIEU Samphan, but rather has an interest in the issue of JCE III's applicability generally, since any decision in Case 002 will affect Case 003 and may have wider reaching effects as well. The Case 003 Defence has no hidden agenda¹⁶ – its interest is obvious and transparent. The Supreme Court Chamber will no doubt take the Case 003 Defence's interest into account should it decide to accept the Case 003 Defence's *amicus curiae* submissions on JCE III.

12. Indeed, it is common for *amici curiae* to have an interest in legal issues raised in a case, regardless of whether they are concerned with the outcome of a particular case. At the International Criminal Tribunal for Rwanda, the *Bagosora* Trial Chamber explained:

As a preliminary matter, we note that the general definition of *amicus curiae* does not call for impartiality on the part of the filing party. Rather it takes into consideration that such briefs are filed by a party, not a part of the action, but one with strong interests in or views on the subject matter before the court.¹⁷

¹³ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Decision on DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber, 9 December 2010, F7/2.

¹⁴ *Id.*, paras. 8-9.

¹⁵ *Id.*, para. 9.

¹⁶ In a decision allowing *amici curiae* to intervene in writing and through oral argument, the SCSL Appeals Chamber stated: "We do not consider that they seek leave to intervene for any ulterior motive, for example to provide a publicity platform for themselves, or to use the Court's privileges and immunities to put declarations on the record or to promote some hidden agenda." *Prosecutor v. Kallon*, SCSL-2003-07-PT, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae Brief and to Present Oral Submissions, 1 November 2003, para. 7.

¹⁷ *Prosecutor v. Bagosora*, ICTR-96-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, 6 June 1998. In 2007, this Decision was vacated after the Belgian government failed to submit an *amicus curiae* brief and the taking of evidence had been completed. The Chamber determined that it had heard considerable evidence on the issue the Belgian government had initially requested to address and that

13. At the SCSL, the *Kallon* Appeals Chamber found:

More recently, the highest courts in the UK and Australia have been willing to grant leave to interested parties, such as corporations or NGOs, to make submissions on points of law arising in cases before them – a practice that has long been adopted by the US Supreme Court. The intervening parties may have a direct interest, insofar as this decision will be likely to create a precedent affecting them in the future. The intervener’s interest may be indirect, in the sense that a State or NGO or campaigning group may wish to have the law clarified or declared or developed in a particular way. An example of a grant of leave to intervene in a similar matter to this is provided by the House of Lords in the Pinochet cases, where Amnesty International was permitted to file submissions and develop them in oral argument, whilst other organizations such as Human Rights Watch (an NGO allied to the Lawyers Committee) were allowed to file written submissions.... The issue is whether it is desirable to receive such assistance, and “desirable” does not mean “essential” (which would be over-restrictive) nor does it have an over-permissive meaning such as “convenient” or “interesting”. The discretion will be exercised in favour of an application where there is a real reason to believe that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it.¹⁸

14. The *Kallon* Appeals Chamber further explained that an Appeals Chamber could afford to take a more generous view toward admitting *amicus curiae* briefs than a Trial Chamber, due to the fact that a Trial Chamber must be concerned with the need to proceed with the trial without disruption.¹⁹

15. Similarly, at the International Criminal Tribunal for the former Yugoslavia (“ICTY”), *amici curiae* are not excluded on the basis of having an interest in the case. They must simply notify the Chamber of their interest and of any contact or relationship they may have or have had with any party to the case.²⁰ ICTY Chambers have invited and have accepted *amicus curiae* briefs from the Association of Defence Counsel Practising Before the ICTY (“ADC-ICTY”). In the *Brđanin* case, for example, the ADC-ICTY was invited to submit an *amicus curiae* brief on the issue of whether the members of a joint criminal

an *amicus curiae* brief would no longer assist the Chamber in the proper determination of the case. See *Prosecutor v. Bagosora*, ICTR-98-41-T, Reconsideration of Earlier Decision on *Amicus Curiae* Application by the Kingdom of Belgium, 13 February 2007.

¹⁸ *Prosecutor v. Kallon*, SCSL-2003-07-PT, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File *Amicus Curiae* Brief and to Present Oral Submissions, 1 November 2003, paras. 4-5.

¹⁹ *Id.*, para. 6.

²⁰ See Information Concerning the Submission of *Amicus Curiae* Briefs, 27 March 1997, IT/122, para. 3(a) and (f), available at http://www.icty.org/x/file/Legal%20Library/Miscellaneous/it122_amicuscuriae_briefs_en.pdf.

enterprise must include the physical perpetrators of the crime.²¹ In the *Prlić et al.* case, the ADC-ICTY appeared as an *amicus curiae* regarding whether conduct of counsel constituted contempt of court, violation of the Rules of Procedure and Evidence, or misconduct.²²

16. *Amici curiae* who submit briefs before the United States Supreme Court – and such briefs are now filed in more than 90% of cases²³ – are required to state which party the brief supports and to either receive written permission from all parties *or* to set out their interest in the case when submitting briefs.²⁴ *Amici curiae* that file briefs may also argue orally on the side of a party with consent of that party.²⁵
17. The Case 003 Defence’s interest in the resolution of the issue before the Supreme Court Chamber is thus not a bar to the Supreme Court Chamber’s acceptance of its *amicus curiae* brief. The Supreme Court Chamber’s decision on whether to grant this leave to file the *amicus curiae* brief should turn only on whether acceptance of the brief would be desirable for the proper adjudication of the issue. The answer is yes. The Case 003

²¹ See *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal, 5 May 2005, p.5; *Prosecutor v. Brđanin*, IT-99-36-A, Amicus Brief of Association of Defence Counsel – ICTY, 5 July 2005. The ADC-ICTY was also invited to participate during the appeal oral arguments, with Michael G. Karnavas, as President of the ADC-ICTY, appearing to argue the *amicus curiae* brief on 8 December 2006. See *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005. See also *Prosecutor v. Brđanin*, IT-99-36-A, Appeal Judgement, Annex A: Procedural Background, 3 April 2007, paras. 24-27. Mr. Karnavas is a current member of the ADC-ICTY *amicus* committee, as well as a member of the ADC-ICTY Rules Committee and Training Committee, and the former ADC-ICTY President, from October 2006 to March 2009.

²² See *Prosecutor v. Prlić et al.*, IT-04-74-T, Order Appointing an Amicus Curiae, 3 July 2009; *Prosecutor v. Prlić et al.*, IT-04-74-T, Advisory Opinion of Amicus Curiae Disciplinary Council of the Association of Defence Counsel of the ICTY, 13 August 2009.

²³ See *To Assist the Court: Third Party Interventions in the UK*, JUSTICE, para. 5, available at <http://www.justice.org.uk/data/files/resources/32/To-Assist-the-Court-26-October-2009.pdf>: “The first case before the US Supreme Court involving a non-governmental organisation as intervener was in 1904, and amicus briefs are now filed in more than 90% of cases heard each year.”

²⁴ See Rules of the Supreme Court of the United States, Rule 37(2), available at <http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf>. As an example of an *amicus curiae* brief filed before the United States Supreme Court where the *amici curiae* clearly have an interest in the outcome of the proceedings, see *Ridley School Dist. v. M.R.*, Amici Curiae Brief of National School Boards Association, Pennsylvania School Boards Association, and National Association of State Directors of Special Education in Support of the Petition for a Writ of Certiorari. This *amicus curiae* brief begins with a section titled: “Interests of the Amici” which states, *inter alia*, that the “Amici and the state and local school officials they represent nationwide believe resolution of the issue at stake in this case is of exceptional importance, warranting this Court’s review. Amici are concerned that if left intact, the Third Circuit’s decision regarding the outer limits of the IDEA’s stay-put provision potentially could inflict substantial harms on school districts and the students they serve by creating an incentive for parents to engage in protracted litigation rather than working collaboratively with educators to resolve disputes without delay.”

²⁵ Rules of the Supreme Court of the United States, Rule 28(7).

Defence *amicus curiae* brief will assist the Supreme Court Chamber in resolving the complex issue of JCE III's applicability at the ECCC. Leave should be granted.

WHEREFORE, for all of the reasons stated herein, the Case 003 Defence respectfully requests the Supreme Court Chamber to allow it to intervene, orally and in writing, in the matter of the Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in Case 002/01. In the alternative, the Case 003 Defence seeks leave to file the attached *amicus curiae* brief on the issue of whether JCE III is applicable at the ECCC.

Respectfully submitted,


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Signed in Phnom Penh, Kingdom of Cambodia on this 12th day of **January, 2015**