

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**IENG SARY'S REQUEST FOR LEAVE TO REPLY
&
REPLY TO THE CIVIL PARTIES' BRIEF IN SUPPORT OF THE CO-PROSECUTORS' REQUEST FOR THE TRIAL CHAMBER TO CONSIDER JOINT CRIMINAL ENTERPRISE III AS AN ALTERNATIVE MODE OF LIABILITY**

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All Civil Parties

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REQUEST FOR LEAVE TO REPLY

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests leave to reply to the Civil Parties’ Brief in Support of the Co-Prosecutors’ Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability (“Brief”).¹ A Reply is made necessary because the Brief misleads the Trial Chamber into concluding that all the Civil Parties support the assertions by the Office of Co-Prosecutors (“OCP”) concerning the applicability of JCE, and in particular JCE III, at the ECCC. The Brief states that “[t]he Civil Party Lead Co-Lawyers and Civil Party Lawyers are of the view that the three forms of Joint Criminal Enterprise apply as a mode of liability for crimes charged against the Accused.”² This belies what the Case File (record) reflects. Certain Civil Parties have expressed *in this case* as well as in Case 001, that they do not consider JCE liability in all its forms, and as promoted by the OCP, to be applicable at the ECCC.³ Indeed, these Civil Parties have taken a position consistent with what the Pre-Trial Chamber held concerning the inapplicability of JCE III,⁴ and with what the Defence teams have submitted in response to the OCP’s request to “re-characterize” facts to include JCE III liability.⁵ The Brief makes no mention of the disparate positions held amongst the Civil Parties, and provides no explanation as to how these past held positions are reconciled with the current position set out in the Brief. For the sake of accuracy, integrity and completeness, it merits bringing to the Trial Chamber’s attention the positions argued by some of the Civil Parties in the past. Presumably, when these Civil Party Lawyers made representations to judicial organs of the ECCC concerning issues of law, specifically on the applicability of JCE at the ECCC, they did so with due deliberation and in good faith. In the interest of judicial economy and expeditiousness, the Defence has affixed hereto its Reply.

¹ Brief in Support of the Co-Prosecutors’ Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability, 20 July 2011, E100/4.

² *Id.*, para. 2.

³ See Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4; *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC-OCIJ (PTC02), Response of Foreign Co-Lawyer for the Civil Parties to the *Amicus Curiae* Briefs, 17 November 2008, D99/3/32; *Case of Kaing Guek Eav “Duch”*, 001/18-07-2007-ECCC/TC, Transcript of Trial Proceedings - Kaing Guek Eav “Duch” Public – Redacted, 23 November 2009, E1/78.1, p. 6, l.1- 9. See *infra* Reply for a more detailed discussion.

⁴ Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15.

⁵ 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; [KHIEU Samphan] Réponse à la Demande des Co-Procureurs Relative à la Troisième Catégorie d’Entreprise Criminelle Commune, 22 July 2011, E100/3; [IENG Thirith] Defence Response to Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/1; [NUON Chea] Response to Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/5.

REPLY

I. Background

1. On 28 July 2008, the Defence submitted a motion in Case 002 to the OCIJ against the application of all forms of JCE at the ECCC.⁶
2. On 11 August 2008, the OCP responded to the Defence's motion, arguing that all forms of JCE liability were applicable at the ECCC.⁷
3. On 16 September 2008, the OCIJ issued an order inviting the parties to file supplementary submissions on the applicability of JCE liability at the ECCC by 31 December 2008.⁸
4. On 23 and 25 September 2008, the Pre-Trial Chamber in Case 001 sought outside assistance concerning the OCP's argument on appeal that JCE liability should be included in the Case 001 Closing Order by requesting *amicus curiae* briefs from Professor Antonio Cassese and members of the Board of Editors of the Journal of International Criminal Justice,⁹ the Center for Human Rights and Legal Pluralism of McGill University and Professor Dr. Kai Ambos of the Georg-August Universität Göttingen.¹⁰ Their briefs were filed on 27 October 2008.¹¹

⁶ IENG Sary's Motion Against the Application at the ECCC of the Form of Liability Known as *Joint Criminal Enterprise*, 28 July 2008, D97.

⁷ Co-Prosecutors' Response to IENG Sary's Motion on Joint Criminal Enterprise, D97/2, 11 August 2008.

⁸ Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 16 September 2008, D97/III.

⁹ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Invitation to *Amicus Curiae*, 23 September 2008, D99/3/12. On 3 October 2008, the Defence filed an application with the Pre-Trial Chamber in Case 001 to disqualify Professor Cassese and certain members of the Board of Editors, explaining that they were unqualified to render an impartial opinion on the issue of JCE. *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. The Defence moved against Professor Cassese because of a notorious conflict of interest – even though the other two *amici curiae* were not totally free from having opined on the legitimacy of JCE liability. Professor Cassese was one of the five Judges in the *Tadić* Appeals Chamber when the Judgement on 15 July 1999 introduced the concept of JCE into the International Criminal Tribunal for the former Yugoslavia's jurisprudence. Given Professor Cassese's role in fathering JCE and his tireless promotion of it as accepted customary international law, the Defence argued that the selection of Professor Cassese as an *amicus curiae* was akin to appointing a fox to guard the henhouse of JCE and, not incidentally, his legacy in the international legal lexicon. On 14 October 2008, the Pre-Trial Chamber rejected the Defence's application to disqualify Professor Cassese and certain members of the Board of Editors on the grounds that the Defence lacked standing in *Duch*. *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02) D/99/3/23, Decision on Ieng Sary's Motion to Disqualify *Amicus Curiae*, 14 October 2008.

¹⁰ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Invitation to *Amicus Curiae*, 25 September 2008, D/99/3/13.

¹¹ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008, D99/3/27; *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University, 27 October 2008, D99/3/25; *Case of Kaing Guek*

5. On 17 November 2008, in response to the *amicus curiae* briefs, Silke Studzinsky of Case 001 Civil Party Group Four submitted a Response to the Pre-Trial Chamber arguing against the applicability of JCE III liability.¹²
6. On 30 December 2008, in response to the OCIJ's request for supplementary submissions in Case 002, Civil Party lawyers Silke Studzinsky, Kim Mengkhy, Moch Sovannary, Martine Jacquin, and Philippe Canonne (the latter four of *Advocats Sans Frontières*) filed supplementary submissions against the applicability of JCE III.¹³

II. Argument

A. Case 002 Civil Parties have opposed the applicability of JCE III

7. The Case 002 Civil Parties who opposed JCE III considered three issues: 1. whether JCE liability exists in the Establishment Law; 2. whether JCE liability existed in Cambodian law in 1975-79; and 3. whether JCE liability existed in customary international law in 1975-79. They concluded:

JCE III is neither encompassed in Article 29 of the ECCC Law nor in the relevant articles of the Penal Code of Cambodia 1956 and thus is not applicable. The Co-Lawyers for the Civil Parties [also] submit that the doctrine JCE III is not applicable before the ECCC as it was not customary law at the relevant time, i.e. between 1975-1979.¹⁴

8. In considering the first issue, these Civil Parties noted that *amicus curiae* Professor Kai Ambos concluded in his brief to the Pre-Trial Chamber that specific elements of JCE I, II and III cannot be deduced from the Statute, but only from customary case law and stated that they shared this position.¹⁵ In considering the second issue, these Civil Parties stated

Eav "Duch", 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* Brief of Professor Antonio Cassese and Members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine, 27 October 2008, D99/3/24.

¹² *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Response of Foreign Co-Lawyer for the Civil Parties to the *Amicus Curiae* Briefs, 17 November 2008, D99/3/32, para. 15.

¹³ Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4.

¹⁴ *Id.*, paras. 4-5 (emphasis added).

¹⁵ *Id.*, para. 12. These Civil Parties noted that the *Tadić* Appeals Chamber had relied upon the object and purpose of the ICTY Statute in finding that JCE III could be a form of commission, but stated that they could not accept this view because it "work[s] backwards from the proposition that the defendants must be punished. Since the defendants must be punished, the Statute must be read in such a way that it will yield the desired result. This argument is circular." *Id.*, para. 13. They further noted, "Despite the existence of ICTY jurisprudence on JCE and Article 25 (3) (d) of the Rome Statute at the time when the ECCC Law was drafted and adopted, the Law does not explicitly mention JCE as a mode of liability. Furthermore, the explicit omission of JCE in the ECCC Law, leads to the conclusion that JCE is not encompassed as a mode of liability." *Id.*, para. 14. Professor Cassese's *amicus curiae* brief came to the opposite conclusion to that reached by Professor Ambos and the Civil Parties, but, as Silke Studzinsky noted in Case 001: "The purpose of an *amicus curiae* brief is to assist the judges in properly adjudicating the case. Therefore, independent and neutral experts should be invited. The Co-Lawyer for the Civil Party notes that the PTC invited Prof. Dr. Antonio Cassese who was Judge in the Appeals Chamber in the *Tadić* case before the International Criminal Tribunal for Former Yugoslavia (*ICTY*) where the doctrine of Joint Criminal Enterprise as mode of liability was first introduced in international criminal

that they could not identify any Cambodian law from 1975-79 which equates to JCE III.¹⁶ In considering the final issue – whether JCE III existed in customary international law at the relevant time – these Civil Parties concluded that the *Tadić* Appeals Chamber did not conduct a comprehensive analysis of either State practice or *opinio juris* from which to conclude that JCE III liability existed in customary international law:

It can be concluded, and the Co-Lawyers for the Civil Parties do thus submit that the examples referred to in *Tadic* do not establish JCE III as International Customary Law neither by international nor national jurisprudence. The Appeals Chamber in *Tadic* failed to demonstrate the existence, neither through former jurisprudence nor state practice, of JCE III as ‘International Customary Law’.¹⁷

9. These Civil Parties concluded that no international convention existing at the time supported the existence of JCE III liability and finally that:

The Principle of Legality, as a principle of justice, requires that the crime and the form of liability with which a defendant is charged existed and were foreseeable at the time of the alleged crimes. As it is not established that JCE III existed under Cambodian law nor was part of international customary law by 1975, its retroactive application constitutes a violation of the Principle of Legality.¹⁸

10. The position taken by these Civil Parties is consistent with what the Pre-Trial Chamber held concerning the inapplicability of JCE III,¹⁹ and with what the Defence teams have submitted in response to the OCP’s request to “re-characterize” facts to include JCE III liability.²⁰ The Pre-Trial Chamber held:

Having reviewed the authorities relied upon by *Tadić* in relation to the extended form of JCE (JCE III), the Pre-Trial Chamber is of the view that they do not provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002. The Pre-Trial Chamber concludes that

law. Obviously, Prof. Dr. Cassese is not free from bias when he submits an *amicus curiae* on the question of whether JCE applies before the ECCC and upholds and supports the Appeals Chamber’s ruling.” *Case of Kaing Guek Eav “Duch”, 001/18-07-2007-ECCC-OCIJ (PTC02), Response of Foreign Co-Lawyer for the Civil Parties to the amicus curiae briefs, 17 November 2008, D99/3/32, para. 5.*

¹⁶ Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4, paras. 16-17.

¹⁷ *Id.*, para. 26 (emphasis added).

¹⁸ *Id.*, para. 31 (emphasis added).

¹⁹ Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15.

²⁰ 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; [KHIEU Samphan] Réponse à la Demande des Co-Procureurs Relative à la Troisième Catégorie d’Entreprise Criminelle Commune, 22 July 2011, E100/3; [IENG Thirith] Defence Response to Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/1; [NUON Chea] Response to Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/5.

E100/4/11

JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law...²¹

11. The Pre-Trial Chamber concurred with these Civil Parties in not being able to identify any provision of Cambodian law which equates to JCE III liability,²² and it could not find sufficient evidence of State practice or *opinio juris* to conclude that JCE III liability existed as customary international law.²³ The Defence and many scholars share this position. Former ICTY/ICTR Appeals Chamber Judge Wolfgang Schomburg has stated: "The cited (and limited) jurisprudence [in *Tadić*] was too divergent to hold that all three forms of JCE amounted to customary international law,"²⁴ while Professor Jens David Ohlin stated: "The case law foundation for JCE III is shaky.... Indeed, there is not a single *international* case cited in the *Tadic* opinion that includes the language of liability for actions that were reasonably foreseeable."²⁵
12. The Brief fails to assert, much less demonstrate, that the position set out by these Civil Parties is incorrect or should be departed from. The Brief has signature lines for the Lead Civil Party Co-Lawyers Ang Pich and Elisabeth Simmonneau Fort, and for Civil Party Lawyers Moch Sovannary, Kim Mengkhy and Isabelle Durand. Of these, only Moch Sovannary, Kim Mengkhy and Isabelle Durand signed the Brief. Moch Sovannary and Kim Mengkhy appear to have departed from their previously held position that JCE III liability is inapplicable at the ECCC (without explicitly renouncing this position), but there is no evidence that Silke Studzinsky has done so. In fact, the Brief has recently been corrected specifically in order to remove her name from the list of filing Civil Parties to the list of recipients on the cover page.²⁶ This indicates the lack of consensus between the Civil Parties as to the applicability of JCE III at the ECCC.

B. Case 001 Civil Parties have opposed the applicability of JCE III

13. In Case 001, certain Civil Party groups *also opposed* the applicability of JCE III liability. Of the four Civil Party groups in Case 001, two objected to its applicability.
14. Silke Studzinsky (of Civil Party Group Four) argued before the Pre-Trial Chamber, in response to *amicus curiae* briefs submitted on the applicability of all forms of JCE, that

²¹ Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, para. 77 (emphasis added).

²² *Id.*, para. 87.

²³ *Id.*, paras. 77-83.

²⁴ Wolfgang Schomburg, *Jurisprudence on JCE – Revisiting a Never Ending Story*, CAMBODIA TRIBUNAL MONITOR, 3 June 2010, p. 2.

²⁵ Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 707-08 (2011).

²⁶ See Request for correction on document E100/4 in English version, E100/4.Corr-1, 3 August 2011.

E100/4/1

“the doctrine of JCE, in particular in its extended form, did not form part of international customary law at the relevant time.”²⁷

15. Similarly, Civil Party Group One lawyer Karim Khan QC stated in his closing argument, in explaining that the Civil Parties were not merely extra prosecutors, that:

I do recall right at the beginning of these proceedings in February the attempt put forward by the prosecution to introduce the doctrine of Joint Criminal Enterprise. And on that occasion, I made my reservations known, and I do note that Mr. Roux and his defence team for the accused do, in their submissions, take issue with the doctrine of Joint Criminal Enterprise. Civil party group 1 has not filed any document supporting the insertion of that doctrine into these proceedings.²⁸

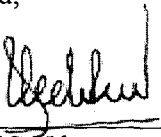
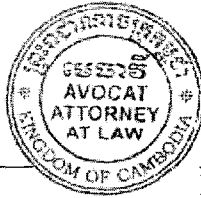
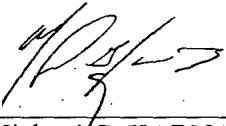
III. Conclusion and relief requested

16. The Brief misleads the Trial Chamber into concluding that *all* Civil Parties hold the position that JCE III liability is applicable at the ECCC. Prior submissions made by *some* Civil Parties show otherwise. No acknowledgement or explanations are provided. Indeed, certain Civil Parties in both Case 002 and 001 have thoroughly analyzed the issue and have determined that JCE III is inapplicable at the ECCC. The Brief does not acknowledge this, nor does it seek to explain this inconsistency with the position it sets out.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- a. NOTE the inconsistencies between the Brief and the arguments made by certain Civil Parties in Cases 001 and 002 regarding the applicability of JCE III liability; and
- b. COMPEL Civil Party Lawyers Moch Sovannary and Kim Mengkhy to explain whether they have indeed departed from their earlier representations against the applicability of JCE III, and if so, to articulate the legal reasoning upon which they *now* rely as the basis for their reversal.

Respectfully submitted,


 ANG Udom
 

 Michael G. KARNAVAS
 Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 5th day of August, 2011

²⁷ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Response of Foreign Co-Lawyer for the Civil Parties to the *amicus curiae* briefs, 17 November 2008, D99/3/32, para. 15.

²⁸ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC/TC, Transcript of Trial Proceedings - Kaing Guek Eav "Duch" Public – Redacted, 23 November 2009, E1/78.1, p. 6, 1.1- 9 (emphasis added).

