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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 002/19-09-2007-ECCC/SC

Before:

Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele MWACHANDE-MUMBA
Judge YA Narin

Date:

08 April 2015

Language(s):

Khmer/English

Classification:

PUBLIC

**DECISION ON REQUESTS TO INTERVENE OR SUBMIT *AMICI CURIAE* BRIEFS
 IN CASE 002/01 APPEAL PROCEEDINGS**

Co-Prosecutors

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Co-Lawyers for NUON Chea

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Accused

KHIEU Samphân
NUON Chea

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1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber”, and “ECCC”, respectively) is seized of a request filed on 14 January 2015 by the Defence for a suspect in Case 004 (“Case 004 Defence” and “Case 004 Suspect”, respectively) to submit an *amicus curiae* brief on the applicability of the third form of joint criminal enterprise (“JCE III”) at the ECCC,¹ as well as a similar request filed on 20 January 2015 by the Defence for a suspect in Case 003 (“Case 003 Defence” and “Case 003 Suspect”, respectively) to intervene in the Case 002/01 appeal proceedings or, in the alternative, file an *amicus curiae* brief on the same subject.²

A. BACKGROUND

2. On 7 August 2014, the Trial Chamber issued its judgment in Case 002/01 (“Trial Judgement”),³ convicting both KHIEU Samphân and NUON Chea of the crimes against humanity of extermination (encompassing murder), persecution on political grounds, and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity), and sentencing them each to life imprisonment.⁴

3. On 29 September 2014, the Co-Prosecutors filed a notice of appeal against the Trial Judgement (“Notice of Appeal”),⁵ followed by their appeal brief on 28 November 2014 (“Appeal”).⁶ The Appeal argues that the Trial Chamber erred in law by holding that JCE III was not part of customary international law during the temporal jurisdiction of the ECCC.⁷ In

¹ Request to Submit *Amicus* Brief on Joint Criminal Enterprise, F19, 14 January 2015 (“Case 004 Request”).

² 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, F20, 20 January 2015 (“Case 003 Request”).

³ Case 002/01 Judgement, E313, 7 August 2014.

⁴ Trial Judgement, p. 622.

⁵ Co-Prosecutors’ Notice of Appeal of a Decision in Case 002/01, E313/3/1, 29 September 2014.

⁶ Co-Prosecutors’ Appeal Against the Judgment of the Trial Chamber in Case 002/01, F11, 28 November 2014. The Trial Judgement was also appealed by NUON Chea and KHIEU Samphân. See NUON Chea’s Appeal Against the Judgment in Case 002/01, F16, 29 December 2014; [Corrigé 1] *Mémoire d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, F17, 29 December 2014 (corrected version filed on 31 December 2014). See also Notice of Appeal Against the Judgment in Case 002/01, E313/1/1, 29 September 2014; *Déclaration d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, E313/2/1, 29 September 2014.

⁷ Notice of Appeal, paras. 2-3.

their Notice of Appeal, the Co-Prosecutors state that they “do not intend to appeal the dispositive part of the [Trial Judgement] or any factual or legal findings” contained therein.⁸

B. SUBMISSIONS

1. Request of Case 004 Defence

4. The Case 004 Defence contends that the Co-Prosecutors’ Appeal is inadmissible and requests that the Supreme Court Chamber declare it as such or, in the alternative, grant leave to submit an *amicus curiae* brief on the applicability of JCE III at the ECCC.⁹ The Case 004 Defence submits that the Appeal seeks to have a mode of liability declared applicable at the ECCC, and thereby also applicable to the Suspect, which did not exist in customary international law during the ECCC’s temporal jurisdiction.¹⁰ The Case 004 Defence argues that, should the Supreme Court Chamber admit the Appeal, the *amicus curiae* brief should also be admitted so that the Suspect may adequately defend himself on a potentially detrimental matter.¹¹

2. Request of Case 003 Defence

5. The Case 003 Defence contends that, should the Supreme Court Chamber decide to hear the Co-Prosecutors’ Appeal, despite the fact that it appears “manifestly inadmissible”,¹² the Supreme Court Chamber must allow the Case 004 Defence to intervene orally and in writing or,¹³ in the alternative, to submit an *amicus curiae* brief on the applicability of JCE III at the ECCC.¹⁴ The Case 003 Defence submits that its intervention as an interested party in Case 002 is justified because the outcome of the issue will significantly affect the Case 003 Suspect, who is alleged to have committed crimes through JCE III,¹⁵ and argues that refusal to allow the intervention in Case 002 on the basis that JCE III can be challenged in Case 003 at a later time would neither sufficiently protect the Case 003 Defence’s interests nor be in the interest of judicial economy.¹⁶

⁸ Notice of Appeal, para. 10.

⁹ Case 004 Request, paras. 4-20, p. 10.

¹⁰ Case 004 Request, p. 1, paras. 1-3, 20.

¹¹ Case 004 Request, paras. 2-3, 20.

¹² Case 003 Request, paras. 1, 5. Arguments on the inadmissibility of the Appeal are contained at fn. 4.

¹³ Case 003 Request, pp. 1, 8, paras. 1-8.

¹⁴ Case 003 Request, pp. 1, 8, paras. 9-17.

¹⁵ Case 003 Request, p. 1, paras. 1, 3-4, 6-7.

¹⁶ Case 003 Request, paras. 2-5.

6. Alternatively, the Case 003 Defence requests to act as an *amicus curiae* under Internal Rule 33.¹⁷ It argues that no party would be prejudiced by such submission, and that the *amicus curiae* brief is not intended to assist the defence for NUON Chea or KHIEU Samphân, but rather in the resolution of a legal issue that will affect Case 003.¹⁸ In this respect, the Case 003 Defence adds that international jurisprudence shows that *amici curiae* might legitimately include parties with an interest in the matter under adjudication.¹⁹

C. DISCUSSION

7. At the outset, the Supreme Court Chamber specifies that any arguments pertaining to the admissibility or merits of the Co-Prosecutors' Appeal will not be addressed in the present decision, and the Supreme Court Chamber's disposal of the Case 003 and Case 004 Requests to intervene or act as *amici curiae* (in the alternative to finding the Appeal inadmissible) should not be interpreted as an indication of the *prima facie* admissibility of the Appeal.

8. Rule 33 of the Internal Rules²⁰ provides that "at any stage of proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organisation or person to submit an *amicus curiae* brief in writing concerning any issue". Based on similarly articulated rules,²¹ the jurisprudence of international criminal courts and tribunals establishes a broad range of persons or entities that may act as *amici curiae* and the criteria to which the content of their submissions should generally conform.²² However, the primary role of an *amicus curiae* in

¹⁷ Case 003 Request, para. 9.

¹⁸ Case 003 Request, paras. 10-11.

¹⁹ Case 003 Request, paras. 12-17.

²⁰ Internal Rules of the ECCC, Revision 9, 16 January 2015 ("Internal Rules").

²¹ See Rule 103(1) of the Rules of Procedure and Evidence of the International Criminal Court: "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."; Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber."; Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda contains an identical provision.

²² See, *inter alia*, International Criminal Court, *Situation in the Republic of Kenya*, ICC-01/09, Decision on Application for Leave to Submit *Amicus Curiae* Observations, Pre-Trial Chamber II, 18 January 2011 (*Ruto Amicus Decision*"), para. 6; *Prosecutor v. Gbagbo*, ICC-02/11-01/12, Decision on "Request for leave to submit *amicus curiae* observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence", Pre-Trial Chamber, 17 December 2013 ("*Gbagbo Amicus Decision*"), para. 9; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Karadžić*, IT-95-5/18-AR98bis.1, Decision on Application for Leave to Submit an *Amicus Curiae* Brief, Appeals Chamber, 21 September 2012 ("*Karadžić Amicus Decision*"), p. 2; International Criminal Tribunal for Rwanda, *Prosecutor v. Bagosora*, ICTR-96-7-T, Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium, 6 June 1998, p. 2.

international criminal law matters is to provide assistance to the court in the determination of a case; primarily this concerns matters of law relevant to the current proceedings,²³ with content that will sufficiently add to the arguments already received from the parties to that case.²⁴

9. Noting that international case law shows some inconsistency as to whether the *amicus curiae* is required to be impartial,²⁵ and that a requirement of “absolute” impartiality is practically unattainable, the Supreme Court Chamber is of the view that for the fulfilment of the *amicus* function of assisting the court it is still preferable that person’s or entity’s motives in making submissions lie rather in an abstract interest in a particular question than in promoting or producing any particular outcome in relation to the criminal case. For this reason, the Supreme Court Chamber has previously held that an *amicus curiae* should be unaffiliated with the Court or any of its offices.²⁶ Moreover, submissions from persons or entities with an abstract interest in the matter under adjudication might legitimately be accepted, as long as they are considered desirable for the proper adjudication of the case. For reasons developed more fully below, the Supreme Court Chamber finds that, in addition to the fact that the Case 003 and Case 004 Defence clearly have an interest in the present matter and its outcome, they could not offer any further submissions in addition to those already submitted to shed further light on the matter. The Supreme Court Chamber therefore does not consider it desirable for the proper adjudication of the case to grant the leave sought to submit *amicus curiae* briefs on JCE III applicability, and accordingly rejects the Case 003 and Case 004 Requests in this regard.

10. In contrast to the role of *amicus curiae*, which is overall established before the international criminal courts and tribunals and the ECCC, there is no specific provisions in the Internal Rules, in the Cambodian Code of Criminal Procedure or in the rules of procedure and evidence of international criminal courts and tribunals regarding the admission of

²³ *Karadžić* Amicus Decision, p. 2.

²⁴ *Gbagbo* Amicus Decision, para. 9.

²⁵ The Pre-Trial Chamber of the International Criminal Court has stated that “[t]he core rationale underlying an *amicus curiae* submission is that the Chamber be assisted in the determination of the case by an independent and impartial intervener having no other standing in the proceedings”. See *Ruto* Amicus Decision, para. 6. By contrast, the Trial Chamber of the International Criminal Tribunal for Rwanda has noted that “the general definition of *amicus curiae* does not call for impartiality on the part of the filing party” and 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”. See *Prosecutor v. Bagosora*, ICTR-96-7-T, Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium, 6 June 1998, p. 2 (italics added).

²⁶ Decision on DSS Request to submit an *Amicus Curiae* Brief to the Supreme Court Chamber, F7/2, 9 December 2010, para. 9.

interveners in proceedings. Jurisprudence from international criminal courts and tribunals provides little insight into the criteria required to accept a third-party intervention. In support of its request to intervene, the Case 003 Defence points to the case of *Kallon and Kamara* before the Special Court for Sierra Leone (“SCSL”), in which the Appeals Chamber recognized that its decision on the validity of the Lomé Accord amnesty would affect two defendants from another case, and therefore allowed them to intervene as third parties.²⁷ The practice of affording an intervener’s status in international criminal proceedings appears to be limited to this case – possibly as a result of the aforementioned broad role played by *amici curiae* in making submissions on the affected interests.

11. The Supreme Court Chamber nonetheless considers the example of the *Kallon and Kamara* case, albeit isolated, to represent the clear distinction that should be made between *amici curiae* and interveners, namely that the former are preferably persons or entities with no interest in the outcome of proceedings whereas the latter are those who have such an interest, thereby playing a role akin to the parties to the proceedings. Different standards should therefore apply to those seeking *amicus curiae* status and those requesting leave to intervene. In particular, the primary consideration in granting *amicus curiae* status is whether the court’s own interest in properly adjudicating the case will be served. By contrast, the primary consideration in allowing an intervention is whether it is in the legitimate interests of the requesting entity, and denial thereof could cause them prejudice.

12. The interests of the Case 003 and Case 004 Suspects in the outcome of the Co-Prosecutors’ Appeal coincide with those of NUON Chea and KHIEU Samphân. Nevertheless, although interventions may be permissible, the Supreme Court Chamber does not consider that an imperative exists for parties in other ECCC proceedings to be heard on questions of law that might conceivably affect them.²⁸ Such applications are to be granted, if at all, on a case-by-case basis where the interests of justice so dictate.

13. The question of applicability of JCE III concept in the jurisdiction of the ECCC has been repeatedly litigated in both Cases 001 and 002. In the present case, KHIEU Samphân,

²⁷ Case 003 Request, para. 3, referring to *Prosecutor v. Kallon and Kamara*, SCSL-2004-15-AR72(e), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004.

²⁸ See e.g. PTC 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”, D99/3/19, 6 October 2008, para. 14, (“it is inherent to courts where several proceedings are pending that a decision in one case on a legal issue will guide the court in future similar cases” nevertheless “[i]t does not result from that situation that charged persons have the right to intervene in a case file to which they are not parties to submit their views on an issue”).

IENG Sary, and IENG Thirith have filed extensive written submissions before the Pre-Trial Chamber in opposition to an order by the Co-Investigating Judges' holding joint criminal enterprise to be applicable in all three forms before the ECCC,²⁹ which the Pre-Trial Chamber overturned in part, ruling that JCE III did not form part of customary international law during the temporal jurisdiction of the ECCC.³⁰ Subsequently, NUON Chea, KHIEU Samphân, IENG Sary and IENG Thirith made further written submissions on point at trial in opposition to the Co-Prosecutors' motion to include JCE III in Case 002,³¹ which the Trial Chamber refused, relying in part on the analysis of the Pre-Trial Chamber.³² Given that the Trial Chamber's decision forms the object of the Co-Prosecutors' Appeal, the Supreme Court Chamber is bound to consider all related submissions on the case file in addition to those made in conjunction with the Appeal.

14. Given the parallel and overlapping nature of the interests sought to be represented, and the extent to which the subject matter has already been litigated, it is inevitable that the content of the proposed intervention would be largely similar to those already offered in the past and now repeated by NUON Chea and KHIEU Samphân in their responses to the Appeal.³³ The Supreme Court Chamber further notes that all Co-Lawyers assigned to the Case 003 and Case 004 Defence were previously members of the Defence for IENG Sary. Given the fixed nature of the question of whether JCE III formed part of customary international law between 1975 and 1979, the Case 003 and Case 004 Defence are unlikely to be able to offer any new circumstances or arguments in addition to those previously submitted on behalf of IENG Sary to shed further light on the matter. These conclusions are supported by a review of the content of the proposed *amicus curiae* briefs annexed to the

²⁹ Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/13, 8 December 2009; *Appel contre l'ordonnance sur l'application devant les CETC de la responsabilité dite "Entreprise criminelle commune"*, D97/16/1, 18 January 2010 (confidential); IENG Thirith Defence Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise of 8 December 2009, D97/15/1, 18 January 2010; 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, D97/14/5, 22 January 2010.

³⁰ Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, D97/15/9, 20 May 2010.

³¹ Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100/5, 22 July 2011; *Réponse à la demande des co-procureurs relative à la troisième catégorie d'entreprise criminelle commune*, E100/3, 22 July 2011; IENG Sary's Response to the Co-Prosecutor[s]' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability and Request for an Oral Hearing, E100/2, 22 July 2011; Defence Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100/1, 22 July 2011.

³² Decision on the Applicability of Joint Criminal Enterprise, E100/6, 12 September 2011, para. 29.

³³ *Réponse de la Défense de M. KHIEU Samphân à l'appel des co-Procureurs*, F11/1, 28 January 2015; NUON Chea's Response to Co-Prosecutors' Appeal Against the Trial Judgement in Case 002/01, F11/2, 28 January 2015.

Case 003 and Case 004 Requests,³⁴ which are repetitive of previous submissions. The Supreme Court Chamber therefore finds that, in light of the plethora of submissions on file, the interests of the Case 003 and Case 004 Defence are already amply protected, rendering the relief that they seek superfluous.

D. DISPOSITION

15. For the foregoing reasons, the Supreme Court Chamber **DISMISSES** the Case 003 and Case 004 Requests.

Phnom Penh, 8 April 2015

President of the Supreme Court Chamber



KONG Srim

³⁴ Annex A, *Amicus* Brief on Joint Criminal Enterprise, F19.2, 14 January 2015; Case 003 Submission in Intervention or *Amicus Curiae* Brief on JCE III Applicability, F20.2, 20 January 2015.