

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RESPONSE TO THE DSS REQUEST
FOR THE SUPREME COURT CHAMBER TO INVITE THE
SUBMISSION OF *AMICUS CURIAE* BRIEFS**

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CO-PROSECUTORS' SUBMISSIONS

1. On 26 January 2011, the Defence Support Section ("DSS") at the Extraordinary Chambers in the Courts of Cambodia ("ECCC") submitted a letter to the Supreme Court Chamber ("SCC") requesting that the SCC "consider[] inviting appropriate independent third parties to submit *amicus curiae* briefs to ensure that all relevant legal issues receive a full airing" in the Case 001 appeal proceedings.¹ The DSS also appears to suggest that the SCC consider inviting *amicus curiae* to argue in favour of the interests of the Accused – Mr. Kaing Guek Eav, alias Duch – and therefore against the arguments put forth by the Co-Prosecutors.²
2. The Co-Prosecutors acknowledge that Mr. Kaing Guek Eav, alias Duch ("the Accused") has chosen not to address certain international law issues raised by the Co-Prosecutors, including those pertaining to sentencing. Thus, if the SCC believes that additional briefing on particular issues would assist the Chamber in adjudicating the parties' appeals, the Co-Prosecutors would support an invitation for an *amicus curiae* brief from an appropriate independent third party.³
3. However, contrary to the DSS's apparent suggestion, the Co-Prosecutors do not believe that it would be appropriate for the SCC to request that an *amicus curiae* argue on behalf of the Accused.⁴ Rather, the Co-Prosecutors believe that an invitation to any potential

¹ Letter from the Defence Support Section to the Supreme Court Chamber, entitled "DSS request for the Supreme Court Chamber to exercise its power under ECCC Internal Rule 33, 26 January 2011, F16 ("DSS Request"), para. 1.

² DSS Request, para. 11.

³ The Co-Prosecutors have consistently taken this position. See Co-Prosecutors' Response to the DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber, Case File No. 001/18-07-2007-ECCC/SC, Supreme Court Chamber, 21 September 2010, F7/1, para. 12 (noting that the Co-Prosecutors support an invitation for an *amicus curiae* brief from an appropriate independent third party "once the Supreme Court Chamber is in a position to determine the necessity and scope of such further legal assistance" after reading the briefs and responses of all parties).

⁴ The DSS cites two ICTY cases where a Chamber requested that *amicus curiae* argue in favour of the accused and against the prosecution's arguments. DSS Request, para. 11, notes 9-10 (citing *Prosecutor v. Milošević* and *Prosecutor v. Krajišnik*). However, both of these cases involved situations where the accused insisted on representing himself. See *Prosecutor v. Milošević*, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, Case No. IT-02-54-AR73.6, ICTY Appeals Chamber, 20 January 2004 (hereinafter "*Milošević* Decision"), para. 19 (noting that the accused was conducting his own defence, "relinquish[ing] many of the benefits associated with representation by counsel"); *Prosecutor v. Krajišnik*, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, IT-00-39-A, ICTY Appeals Chamber, 11 May 2007 (hereinafter "*Krajišnik* Decision"), paras. 17-19 (appointing *amicus curiae* to argue in favour of the accused where the accused had chosen to represent himself). These decisions are off point here since the Accused is not self-represented but rather is represented by two Co-Lawyers. See also *Krajišnik* Decision, Dissenting Opinion of Judge Schomburg, para. 80 (noting that an *amicus curiae* is meant to "assist the court only in relation to specific issues, usually on points of law" and that "[t]he artificial construct of an *amicus curiae* acting as *de facto* counsel must inevitably lead to a conflict of interest in the mind of any lawyer appointed

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amicus curiae should be limited to a request for independent and impartial briefing on particular issues or questions of concern to the Supreme Court Chamber. This approach is consistent with ECCC Internal Rule 33 – which envisions *amicus curiae* briefs on “any issue” where the Chamber “consider[s] it desirable for the proper adjudication of the case” – and with the widespread understanding of the role of an *amicus* as a “friend of the court.” It is also consistent with the practice of the Pre-Trial Chamber, which has requested *amicus* briefing from third party authorities on discrete legal issues as opposed to requesting that *amicus* argue in support of a particular party.⁵

4. The Defence Support Section appears to encourage the *de facto* appointment of international counsel for the Accused by suggesting that it would be appropriate for *amicus curiae* to argue for the Accused with respect to international law issues. The Co-Prosecutors note, however, that in order to effectively represent the interests and preferences of an Accused, counsel needs to be instructed by the Accused himself. Here, the Accused has voluntarily declined to retain and instruct international co-counsel, choosing instead to be represented by two Cambodian national attorneys with whom an appeal strategy has been designed that focuses on national law.⁶ Respectfully, it is not appropriate to solicit international representation for the Accused where the Accused has voluntarily chosen not to instruct international counsel.
5. Thus, for the abovementioned reasons, the Co-Prosecutors:
 - (a) support the Supreme Court Chamber in inviting an *amicus curiae* brief from an appropriate independent third party if the Chamber feels that such briefing would aid in its consideration of the issues raised by the parties on appeal;

as an *amicus curiae* who takes his role seriously”); *Milošević* Decision, Separate Opinion of Judge Shahabuddeen, para. 15 (arguing that the role of an *amicus curiae* at the ICTY “is limited to his essential function as a friend of the court, as distinguished from being a friend of the accused”).


⁵ See, e.g. Invitation to *Amicus Curiae*, Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Pre-Trial Chamber, 23 September 2008, D99/3/12 and 25 September 2008, D99/3/13 and D99/3/14 (requesting briefing on the development of the joint criminal enterprise theory and its applicability at the ECCC); Public Order on the Filing of Submissions on the Issue of Civil Party Participation in Appeals Against Provisional Detention Order and an Invitation to *Amicus Curiae*, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Pre-Trial Chamber, 12 February 2008, C11/36, para. 6 (requesting “focused submissions from *amici curiae*” addressing a defined issue, namely the proper balance between the accused’s fair trial rights and the rights of civil parties in the context of the ECCC Internal Rules).

⁶ The Accused has voluntarily chosen not to have international counsel. See Press Release, Defence Support Section, 9 July 2010 (reporting that the Accused had requested the withdrawal of his international co-counsel); Cheang Sokha & James O’Toole, *Duch appoints Cambodian lawyer*, PHNOM PENH POST, 9 August 2010 (reporting that the Accused had selected a second Cambodia attorney to replace his international co-counsel).

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(b) ask that any *amicus curiae* invitation be limited to a request for independent and impartial briefing on particular issues or matters of concern to the Supreme Court Chamber.

Respectfully submitted,

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