



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

F16/2

TO: Supreme Court Chamber
 H.E. Kong Srim, President of the Supreme Court Chamber
 Judge Som Sereyvuth
 Judge Sin Rith
 Judge Ya Narin
 Judge Motoo Noguchi
 Judge Agnieszka Klonowiecka-Milart
 Judge Chandra Nihal Jayasinghe

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Ratanak	

Rupert Abbott
 9 February 2011

RE: DSS reply to the Co-Prosecutors' response to the DSS request for the Supreme Court Chamber to exercise its power under ECCC Internal Rule 33

Dear Judges:

1. The Defence Support Section ("DSS"), in accordance with Article 8.4 of the Practice Direction on Filing Documents Before the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), files its Reply to the Co-Prosecutors' response to the DSS request for the Supreme Court Chamber to exercise its power under ECCC Internal Rule 33 ("Co-Prosecutors' Response").¹
2. On 26 January 2011, the DSS submitted a letter to the Supreme Court Chamber ("SCC"), requesting the Chamber to exercise its power under ECCC Internal Rule 33 by inviting independent third parties to submit *amicus curiae* briefs to ensure a full airing of legal arguments with regard to issues raised by the Co-Prosecutors on appeal that have not been addressed by the Co-Lawyers in proceedings thus far, and in particular the issue of sentencing ("DSS Request").²
3. On 4 February 2011, the DSS received notification of the Co-Prosecutors' Response. In their Response, the Co-Prosecutors acknowledge that "if the SCC believes that additional briefing on particular issues would assist the Chamber in adjudicating the parties' appeals" they would "support an invitation for an *amicus curiae* brief from an appropriate independent third party."³ Nevertheless, the Co-Prosecutors consider it inappropriate "for the SCC to request that an *amicus curiae* argue on behalf of the Accused",⁴ and allege that the DSS "appears to encourage the *de facto* appointment

¹ 'Co-Prosecutors' response to the DSS request for the Supreme Court Chamber to invite the submission of *amicus curiae* briefs', 3 February 2011, F16/1.

² 'DSS request for the Supreme Court Chamber to exercise its power under ECCC Internal Rule 33', 26 January 2011, F16.

³ Co-Prosecutors' response, para. 2.

⁴ Co-Prosecutors' response, para. 3.

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of international counsel for the Accused [...] where the Accused has voluntarily chosen not to instruct international counsel".⁵

Reply to the Co-Prosecutors' Arguments

- (i) On the Co-Prosecutors' assertion that the DSS "appears to encourage the *de facto* appointment of international counsel for the Accused"
4. The DSS respectfully submits that the Co-Prosecutors have mischaracterised the DSS Request. There is no basis in the wording of the DSS Request to support the Co-Prosecutors' assertion.
 5. By requesting the SCC to invite the submission of *amicus curiae* briefs from independent third parties "in order to ensure a full airing of legal arguments in regard to issues raised by the Co-Prosecutors on appeal,"⁶ the DSS is explicitly deferring to the SCC's discretion to decide the nature and scope of the requested invitation.
 6. It is clear from a plain reading of the DSS Request that its purpose is to ensure that issues raised in the Co-Prosecutors' appeal and not addressed to date, including the Co-Prosecutors' arguments on sentencing, cumulative convictions, and enslavement as a crime against humanity,⁷ are addressed in written submissions. It is in the interests of all parties to these proceedings that there is a full airing of issues to ensure a fair determination of the appeal. The DSS Request does not explicitly or implicitly suggest that international counsel should be appointed for the Accused.
 7. The Co-Prosecutors refer to paragraph 11 of the DSS Request as evidence of a DSS attempt to encourage the *de facto* appointment of international counsel. To the contrary, this paragraph was intended solely to inform the SCC of international practice on the full range of options available to a Chamber in the exercise of its discretion to invite *amicus* briefs.⁸

⁵ Co-Prosecutors' response, para. 4.

⁶ DSS request, para. 16.

⁷ Co-Prosecutors' appeal against the judgement of the Trial Chamber in the case of Kaing Guek Eav alias Duch, 10 October 2010, F10, para. 22-209.

⁸ Article 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea states, "Where 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, guidance may be sought in procedural rules established at the international level."

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- (ii) On the Co-Prosecutors' request 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"
8. The DSS observes that the Co-Prosecutors are willing to support an invitation for an *amicus curiae* brief so long as the invitation requests an impartial briefing on a specific issue.⁹ By stating that "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",¹⁰ the Co-Prosecutors appear to suggest that the SCC does not have the discretion to invite *amicus curiae* briefs to assist the Chamber with reaching a balanced appreciation of arguments raised by the Co-Prosecutors in their Appeal Brief which were not addressed by the Co-Lawyers for the Accused.
 9. The Co-Prosecutors' request would limit the Chamber's discretion, and is inconsistent with the wording of ECCC Internal Rule 33, which vests the Chamber with sole discretion to invite or grant leave to an organisation or person to submit an *amicus curiae* brief concerning *any* issue. On a plain reading of ECCC Internal Rule 33, an ECCC judicial Chamber enjoys the requisite discretion to frame an invitation for *amicus* briefs in a way that it considers most desirable "for the proper adjudication of the case."¹¹
 10. The DSS reiterates that its position is supported by jurisprudence and best practice established at the international level. In *Krajisnik*,¹² the ICTY¹³ Appeals Chamber ordered the appointment of an *amicus curiae* "to put forth grounds of appeal seeking reversal of convictions or reduction on sentence and to argue against grounds of appeal advanced by the Prosecution",¹⁴ emphasising that "the Appeals Chamber can ask the *amicus curiae* to argue in favour of the interests of a particular party where this approach will serve the interests of justice."¹⁵
 11. The Co-Prosecutors' attempt to distinguish the present case by claiming that the ICTY jurisprudence cited in the DSS request involved 'self-represented' Accused¹⁶ amounts to an artificial distinction. The overriding purpose for the Chamber's authority to invite the submission of *amicus* briefs is to ensure the 'proper adjudication of the case' and to serve the interests of justice by securing a fair trial. The ICTY Appeals Chamber made this clear in *Krajisnik*, holding that the Accused was not entitled to an *amicus* because he was self-represented, but that the issue

⁹ Co-Prosecutors' response, para. 5(b).

¹⁰ Co-Prosecutors' response, para. 4.

¹¹ A wide judicial discretion on this issue is also consistent with the established culture of judge-led proceedings within the Civil Law legal tradition.

¹² *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-A, Decision on Momcilo Krajisnik'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, 11 May 2007 ("Krajisnik decision of 11 May 2007").

¹³ International Criminal Tribunal for the former Yugoslavia ("ICTY").

¹⁴ *Krajisnik* decision of 11 May 2007, para 19.

¹⁵ *Krajisnik* decision of 11 May 2007, para 17; see also *The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-96-7-T, Decision on the Amicus Curiae application by the government of the Kingdom of Belgium, 6 June 1998: "As a preliminary matter, we [The Trial Chamber] note that the general definition of *amicus curiae* does not call for impartiality on the part of the filing party".

¹⁶ Co-Prosecutors' response, footnote 4.

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was "whether, in being 'particularly attentive to its duty of ensuring that the [appeal] be fair,' the Appeals Chamber deems the appointment of *amicus curiae* to be warranted."¹⁷ The Chamber's authority under ECCC Internal Rule 33 cannot be so narrowly interpreted as to depend on the nature of the Accused's representation.¹⁸

12. Furthermore, the Co-Prosecutors point out that past invitations to submit *amicus* briefs by the ECCC Pre-Trial Chamber ("PTC") have not amounted to "requests that *amicus* argue in support of a particular party".¹⁹ In framing its requests for *amicus* briefs, the PTC exercised its discretion by choosing the most appropriate wording for the purposes of the proper adjudication of the specific issues before it. To suggest that the SCC is bound by the wording used by the PTC would unreasonably and unjustifiably limit the SCC's discretion on these matters.
13. Finally, the Co-Prosecutors submit that "in order to effectively represent the interests and preferences of an Accused, counsel needs to be instructed by the Accused himself."²⁰ In advancing this argument, the Co-Prosecutors once again misinterpret the fundamental purpose of the Chamber's authority to invite submissions of *amicus* briefs.²¹
14. Where the Chamber considers that all arguments on a specific issue necessary for the proper adjudication of the case have been insufficiently addressed, it may invite independent external parties to supplement the lacuna in the arguments. Briefs submitted on such an invitation do not amount to 'party' submissions on behalf of the Accused,²² and the Chamber is not obliged to address all arguments raised therein. Such briefs are intended solely for the purpose of aiding the Chamber to assess "whether the interest of justice requires the Appeal Chamber to consider, *proprio motu*, issues not raised by [the Accused's] appeal or in his responses to the Prosecution's appeal."²³ It should be noted that the appeal judgement in these

¹⁷ *Krajisnik* decision of 11 May 2007, at para. 18; see also *The Prosecutor v. Morris Kallon*, Case No. SCSL-2003-07, 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 ("Kallon decision of 1 November 2003"), para. 5.

¹⁸ See *Kallon* decision of 1 November 2003: The Appeals Chamber grants leave to *amici* whose arguments would clearly benefit the interests of the Accused, to intervene in the case despite the fact that the Accused is assisted by Defence Counsel.

¹⁹ Co-Prosecutors' response, para. 3.

²⁰ Co-Prosecutors' response, para. 4: The Co-Prosecutors do not cite any authority in support of this statement.

²¹ See *Kallon* decision of 1 November 2003, para 5: "[The rule on *amicus* briefs] does not discriminate between the different interests of parties seeking to intervene: it focuses on the potential assistance they can provide to the Court. The 'proper determination' of the case refers, quite simply, to the Court reaching the decision which most accords with the end of justice".

²² See *Prosecutor v Slobodan Milosevic*, Case No. IT-02-54, Order inviting designation of *Amicus Curiae*, 30 August 2001: "The Trial Chamber therefore considers it desirable and in the interests of securing a fair trial that an *amicus curiae* be appointed as permitted by the Rules of Procedure and Evidence, not to represent the accused but to assist in the proper determination of the case" (the Trial Chamber goes on to invite the *amicus* to assist the Trial Chamber by making submissions by way of motions, cross-examination of witnesses, drawing the Trial Chamber's attention to exculpatory or mitigating evidence and "acting in any other way which designated counsel considers appropriate in order to secure a fair trial"); see *Kallon* decision of 1 November 2003, para 5.

²³ *Krajisnik* decision of 11 May 2007, para. 20.

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proceedings will constitute the final judgement from which there will be no further appeal.

Request

15. For all of the above reasons, the DSS respectfully:

- a. Requests the SCC to dismiss the Co-Prosecutors' argument that an invitation for the submission of an *amicus curiae* brief under ECCC Internal Rule 33 should be limited to a request for an independent and impartial briefing on particular issues or matters of concern; and
- b. Reiterates its original request for the SCC to exercise its discretion under ECCC Internal Rule 33 and invite the submission of *amicus* briefs from independent third parties in order to ensure a full airing of legal arguments with regard to issues raised by the Co-Prosecutors on appeal that have not been addressed by the Co-Lawyers in proceedings thus far, including the issue of sentencing.

Yours sincerely,



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Officer-in-Charge
Defence Support Section

