



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

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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មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier:	
Ratanak	

26th January 2011

RE: DSS request for the Supreme Court Chamber to exercise its power under ECCC Internal Rule 33

Dear Judges:

Introduction:

1. In light of the filing of all appeal briefs and responses in the appeal proceedings concerning Mr. Kaing Guek Eav, alias Duch (the "Accused"), the Officer-in-Charge ("OiC") of the Defence Support Section ("DSS") at the Extraordinary Chambers in the Courts of Cambodia ("ECCC") observes that the Co-Lawyers for the Accused (the "Co-Lawyers") have not addressed a number of issues of law raised on appeal by the Co-Prosecutors. Noting the decision of the Supreme Court Chamber (the "SCC") dated 9th December 2010,¹ the DSS OiC respectfully requests that in accordance with ECCC Internal Rule 33 the SCC considers inviting appropriate independent third parties to submit *amicus curiae* briefs to ensure that all relevant legal issues receive a full airing in the current appeal proceedings.

Background:

2. On 26th July 2010, the Accused, was convicted and sentenced by the Trial Chamber ("TC") of the ECCC.² On 24th August 2010, the Co-Lawyers filed their Notice of Appeal.³ It was apparent from the Notice of Appeal that the Co-Lawyers intended to limit submissions to matters relating to the personal jurisdiction of the ECCC.
3. On 14th September 2010, former Chief of the DSS Mr. Richard Rogers filed a request for leave from the SCC for the DSS to submit an *amicus curiae* brief in order to

¹ Decision on 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, 9 September 2010, F7/2 ("Decision on DSS Request")

² Judgement, Case File No. 001/18-07-2007-ECCC/TC, TC, 26 July 2010, E188.

³ Notice of Appeal by the Co-Lawyers for Kaing Guek Eav Alias Duch against the TC Judgement of 26 July 2010, Case File No. 001/18-07-2007-ECCC/TC, TC, 24 August 2010, E188/8.

address, among other things, the issue of sentencing and ensure that the SCC was "fully briefed on certain aspects of international law" (the "DSS Request").⁴

4. On 21st September 2010, the Co-Prosecutors filed a response to the DSS Request, opposing the DSS Request.⁵ The Co-Prosecutors argued that such a submission would be in contravention of the ECCC Internal Rules, would create a conflict of interest, and would lack the independence required of an *amicus curiae* brief.
5. However, the Co-Prosecutors stated that they "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 on reading the briefs and responses of all parties."⁶
6. On 13th October 2010, the Co-Prosecutors filed their appeal against the Judgement of the TC. The Co-Prosecutors appealed on several grounds, including on the ground that the TC committed an error in the exercise of its sentencing discretion by imposing a manifestly inadequate sentence. The Co-Prosecutors appealed also on the grounds that the TC erred in convicting the Accused for only a sub-set of the crimes for which he was found responsible; and that the Accused should have been convicted for the enslavement of all detainees at S-21.
7. The Co-Lawyers chose not to submit a response to the Co-Prosecutors' appeal brief and have thus far not addressed the Co-Prosecutors' arguments concerning the adequacy of the sentence imposed on the Accused.
8. The SCC dismissed the DSS Request in a decision dated 9th December 2010, stating that an *amicus curiae* "should be unaffiliated with the court or any of its offices".⁷ The Chamber did not address the possibility of requesting an *amicus curiae* brief from an independent third party.

Necessity and Scope of amicus curiae assistance:

9. By focusing exclusively on issues of personal jurisdiction in appeal proceedings to date, the Co-Lawyers have not addressed all of the legal issues raised on appeal by the Co-Prosecutors. As a result, it is unlikely that there will be a full airing of all relevant legal issues, particularly in regard to the issue of sentencing.
10. Moreover, the current appeal proceedings will be the first to be adjudicated before the SCC. As such, a number of novel and complex international criminal law issues will be argued and determined. The appeal judgment will set precedents that will influence future trials at the ECCC. Accordingly, it is imperative that all relevant legal

⁴ DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber, Case No. 001118-07-2007-ECCC/SC, Supreme Court Chamber, 10 September 2010, F7

⁵ Co-Prosecutors' Response to the DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber, Case No. 001118-07-2007-ECCC/SC, Supreme Court Chamber, 21 September 2010, F7/2 ("the Co-Prosecutors' Response").

⁶ The Co-Prosecutors' Response, para. 12.

⁷ Decision on DSS Request, para. 9.

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issues receive a full airing to assist the SCC in making a full and proper determination of the appeal.

11. A Chamber may, "if it considers it desirable for the proper determination of the case", invite submissions from an *amicus curiae* "on any issue specified by the Chamber".⁸ A Chamber has the discretion also to ask the *amicus curiae* to argue in favour of the interests of a particular party where this approach will serve the interests of justice.⁹ For example, the Appeals Chamber at the International Criminal Tribunal for the former Yugoslavia ("ICTY") decided to appoint *amicus curiae* to work independently from the Accused and "to put forth grounds of appeal seeking reversal of convictions or reduction in sentence and to argue against grounds of appeal advanced by the Prosecution".¹⁰
12. Since an *amicus curiae* is not a party to the proceedings, the Chamber is under no obligation to address all arguments raised by *amicus curiae*. Rather, the Chamber has the discretion to examine arguments raised by *amicus curiae* in assessing whether the interest of justice requires the Chamber to consider, *proprio motu*, issues not raised in the Accused's appeal or in his responses to the Prosecution's appeal.¹¹
13. Consistent with international practice, the ECCC has received *amicus curiae* briefs on a number of occasions. For example, the Pre-Trial Chamber ("PTC") invited organisations to file *amicus curiae* briefs to assist in its deliberation on the issue of provisional detention;¹² the PTC invited Prof. Antonio Cassese, Prof. Kai Ambos, and the McGill Centre for Human Rights and Legal Pluralism to submit *amicus curiae* briefs on the applicability of joint criminal enterprise;¹³ the PTC also invited *amicus curiae* briefs from organisations and the public on the issue of civil party participation.¹⁴
14. The DSS OIC notes that the Co-Prosecutors opposed the DSS Request on the grounds that: the DSS is not authorised under the Internal Rules to file submissions before Chambers; a submission from the DSS could create a conflict of interest with

⁸ *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, para. 17

⁹ *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the Amici Curiae Against the TC Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 19.

¹⁰ *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, para. 19

¹¹ *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, para. 20

¹² Public Notice, (07-09-001 ECCC), PTC, 4 September 2007; Public Notice, (02/19-09-2007-ECCC-OCIJ), PTC 01, 27 November 2007; Public Notice, (02/19-09-2007-ECCC-OCIJ), PTC 02, 16 January 2008; Public Notice, (02/19-09-2007-ECCC-OCIJ), PTC 03, 4 February 2008.

¹³ Invitation to *Amicus Curiae*, (001-18-07-2007-ECCC/OCIJ), PTC 02, 25 September 2007.

¹⁴ 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*, (02/19-09-2007-ECCC-OCIJ), PTC 01, 12 February 2008.

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the defence team of the Accused; and the DSS did not have the required independence to submit an *amicus curiae* brief.¹⁵ The Chamber also found that the DSS would exceed its mandate by submitting an *amicus* brief.¹⁶

15. No such concerns arise in relation to the submission of an *amicus curiae* brief from an independent third party. Indeed, the Co-Prosecutors expressed their support for an invitation for an *amicus curiae* brief from an appropriate independent third party once the SCC is in a position to determine the necessity and scope of such further legal assistance.¹⁷ Now that all appeal briefs, responses and replies have been filed, the DSS OIC respectfully submits that the necessity and scope of such legal assistance is capable of being determined.

Request:

16. For the above reasons, the DSS OIC respectfully requests 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 in 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.

Yours Sincerely,



Rupert Abbott
Officer-in-Charge
Defence Support Section



¹⁵ The Co-Prosecutors' Response, paras. 2-3, 5.

¹⁶ Decision on DSS Request, para. 9.

¹⁷ The Co-Prosecutors' Response, para. 12.