



ព្រះរាជាណាចក្រកម្ពុជា  
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: ០០១/១៨ កក្កដា ២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

Case File/Dossier N°. 001/18-07-2007-ECCC/SC

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): ..... ០៩ / ១២ / ២០១០ .....	
ម៉ោង (Time/Heure): ..... ១៥ : ០០ .....	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: ..... Uch Arun .....	

**Before:** Judge KONG Srim, President  
 Judge Motoo NOGUCHI  
 Judge SOM Sereyvuth  
 Judge Agnieszka KLONOWIECKA-MILART  
 Judge SIN Rith  
 Judge Chandra Nihal JAYASINGHE  
 Judge YA Narin

**Date:** 9 December 2010

**Classification:** PUBLIC

**DECISION ON DSS REQUEST TO SUBMIT AN *AMICUS CURIAE* BRIEF TO THE  
SUPREME COURT CHAMBER**

**Defence Support Section**  
Rupert Abbott

**Co-Prosecutors**  
CHEA Leang  
Andrew CAYLEY

**Accused**  
KAING Guek Eav alias  
'DUCH'

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KANG Ritheary

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Christine MARTINEAU



**THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the “DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber” (“Request”).<sup>1</sup>

## I. PROCEDURAL HISTORY

1. On 26 July 2010, the Trial Chamber of the ECCC issued its Judgement against KAING Guek Eav *alias* Duch (“Judgement”).<sup>2</sup> The Co-Prosecutors, Accused, and Civil Parties Groups 1, 2, and 3 have filed appeals to the Supreme Court Chamber against the Judgement.<sup>3</sup>
2. On 10 September 2010, Mr. Richard J. Rogers, former Chief of the Defence Support Section at the ECCC (“DSS”), submitted the Request to the Greffiers of the Supreme Court Chamber. The Request was filed and notified on 14 September 2010.
3. On 21 September 2010, the Co-Prosecutors filed the “Co-Prosecutors’ Response to the DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber” (“Response”)<sup>4</sup> pursuant to Article 8.3 of the Practice Direction on Filing of Documents before the ECCC (“Practice Direction on Filing”).<sup>5</sup>

## II. REASONING

### A. Applicable Law

4. The Internal Rules provide as follows:

At any stage of the proceedings . . . the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or person to submit

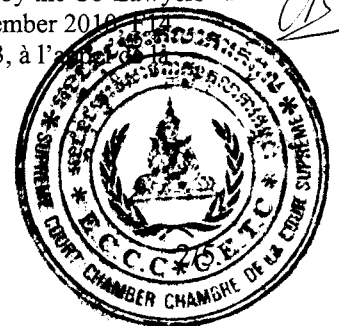
<sup>1</sup> 14 September 2010, F7.

<sup>2</sup> E188 (as corrected).

<sup>3</sup> “Group 1-Civil Parties’ Co-Lawyers’ Immediate Appeal of Civil Party Status Determinations from the Final Judgement,” 16 September 2010, F8; “Appeal of the Co-Lawyers for the Group 3 Civil Parties against the Judgement of 26 July 2010,” 6 October 2010, F9; “Co-Prosecutors’ Appeal against the Judgement of the Trial Chamber in the Case of KAING Guek Eav *alias* Duch,” 18 October 2010, F10; “Notice of Appeal of Co-Lawyers for Civil Parties (Group 2) and Grounds of Appeal against Judgment,” 6 September 2010, E188/12; “Appeal against Rejection of Civil Party Applicants in the Judgment Co-Lawyers for Civil Parties – Group 2,” 22 October 2010, F11; “Appeal against Judgment on Reparations by Co-Lawyers for Civil Parties – Group 2,” 2 November 2010, F13; “Appeal Brief by the Co-Lawyers for KAING Guek Eav *alias* ‘Duch’ against the Trial Chamber Judgement of 26 July 2010,” 18 November 2010, F14 (“Accused Appeal Brief”); and Mémoire en réponse du groupe d’avocats de parties civiles, groupe 3, à l’égard de la défense de Duch du Jugement rendu le 26 juillet 2010, 3 December 2010, F14/2.

<sup>4</sup> 21 September 2010, F7/1.

<sup>5</sup> ECCC/01/2007/Rev.5.



an *amicus curiae* brief in writing concerning any issue . . . [T]he Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs.

[*Amici Curiae*] Briefs under this Rule shall be filed with the Greffier of the . . . Chamber concerned, who shall provide copies to the Co-Prosecutors and the lawyers for the other parties, who shall be afforded the opportunity to respond.

. . .  
The Defence Support Section shall: . . . j) Provide basic legal assistance and support including legal research and document research and retrieval for defence lawyers appearing before the ECCC.<sup>6</sup>

## B. Merits

5. The DSS provided the following reasons as to why the Supreme Court Chamber should grant it leave to file an *amicus curiae* brief:

The Co-Prosecutor's notice [of Appeal] contains three grounds of appeal, all of which raise complex and technical issues of international law.

It is apparent from the Defence Notice [of Appeal] that the co-lawyers intend to limit their submissions to matters relating to jurisdiction and to concentrate on national law. Therefore, many issues involving international law, including those raised by the Co-Prosecutors in their Notice of Appeal, are unlikely to be addressed in detail by the defence.

The appeal against judgment in the DUCH case is the first to be adjudicated before Supreme Court Chamber. As such, a significant number of novel and complex international criminal law issues will be argued and determined for the first time: the final judgement will set precedents that will influence all future trials at the ECCC. Accordingly, it is imperative that the Supreme Court Chamber is 'fully briefed on certain aspects of international law.'

. . .  
Since the co-lawyers for DUCH intend to limit their submissions to matters relating to jurisdiction and to concentrate on national law, an *amicus* brief addressing some of the other aspects of international criminal law would be of assistance to the Supreme Court Chamber in the full and proper determination of the appeal.

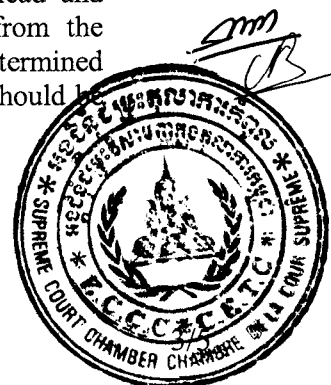
As the Section of the ECCC responsible for helping to ensure fair trials, the DSS is an appropriate organ to submit an *amicus* brief in this appeal.<sup>7</sup>

6. The Co-Prosecutors summarise the reasons for their opposition to the Request as follows:

[DSS] is not authorized under the Internal Rules . . . to file submissions before Chambers, either on behalf of the Defence or as an *amicus curiae*. This direct role was expressly rejected by the Judges of the ECCC when deciding on the rules governing the Court's procedure. Furthermore, the DSS, as an internal section of the ECCC, with a responsibility to support the Defence prohibits it from providing the independent legal advice expected of an *amicus curiae*. The DSS, however, in their role authorized under the rules can provide the Defence in this Appeal with the necessary legal assistance required to plead and respond on all relevant issues. The Co-Prosecutors support any invitation from the Chamber for an *amicus curiae* brief once its utility and scope can be properly determined after the filing of briefs and responses by the parties. Such *amicus curiae* brief should

<sup>6</sup> Internal Rules 33(1)-(2) and 11(2)(j) (Rev. 6).

<sup>7</sup> Request, paras. 2-3, 7-9 (footnotes omitted).



from an *independent* individual or organization with the expertise to address the issues raised.<sup>8</sup>

7. Both the DSS and the Co-Prosecutors rely on a decision of the Appeals Chamber of the Special Court for Sierra Leone to support their respective submissions.<sup>9</sup> In this decision, a unanimous Appeals Chamber stated:

As with all our rules, Rule 74 should not be construed narrowly or technically. The issue on which leave is sought may be specified by the Chamber directly, or simply be an issue specified in the substantive motion. The potential intervener is widely defined as “any State, organisation or person” and notwithstanding the doubts of the Trial Chamber on this point, we think that definition is broad enough to include, for example, the Defence Office. That Office has a duty to provide assistance to indigent defendants, and there may be occasions when it will be appropriate for it to seek to intervene to protect the interests of those indictees who are as yet unrepresented but who have a real interest in the outcome of another defendant’s application. Whether it would be given leave, however, will depend, as with all other such applications, on the Court’s assessment of the value of the assistance it is likely to render; an assessment easier for us to make the more the Court is told about the proposed submission.<sup>10</sup>

8. The Co-Prosecutors are correct to distinguish this decision of the Special Court for Sierra Leone from the circumstances of the Request because the Accused is represented by two national Co-Lawyers.<sup>11</sup> The Supreme Court Chamber agrees with the Co-Prosecutors that “it is not the role of DSS to serve as a substitute for international counsel through the submission of an *amicus curiae* brief.”<sup>12</sup>
9. The Supreme Court Chamber considers that the intention of the DSS in their Request is to supplement the Accused Appeal Brief. The Supreme Court Chamber finds that, since the Accused is represented by two national Co-Lawyers, the only appropriate capacity in which the DSS may fulfil its mandate is by offering legal assistance and support to the Accused and his Co-Lawyers in accordance with Internal Rule 11(2)(j). The Accused, through his Co-Lawyers, has the right to accept or decline the DSS’ offer of legal assistance and support. In such circumstances, the Supreme Court Chamber finds that an *amicus curiae* should be “unaffiliated with the court or any of its offices.”<sup>13</sup> For these reasons, the Supreme Court Chamber decides to reject the Request.

<sup>8</sup> Response, para. 1.

<sup>9</sup> *Prosecutor v. Kallon*, 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, SCSL-2003-07-PT-128, App. Ch., 4 November 2003 (“*Kallon* Decision”).

<sup>10</sup> *Kallon* Decision, para. 10.

<sup>11</sup> Response, paras. 6-8.

<sup>12</sup> Response, para. 11.

<sup>13</sup> Decision on Appeal against Closing Order Indicting KAING Guek Eav Alias “Duch,” Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), PTC, 8 December 2008, D99/3/42, para. 20 (describing the specific *amicus curiae* that the Pre-Trial Chamber had invited as “unaffiliated with the court or any of its offices”).



**III. DISPOSITION**

**FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER DECIDES:**

The Request is dismissed.

Phnom Penh, 9 Decemeber 2010

President of the Sumpreme Court Chamber



Kong Srim