

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**NUON CHEA'S RESPONSE TO REQUEST FOR LEAVE TO SUBMIT *AMICUS CURIAE* BRIEF ON FORCED MARRIAGE**

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## I. INTRODUCTION

1. Pursuant to Article 8.3 of the Practice Direction on Filing of Documents before the ECCC, the Co-Lawyers for Mr. Nuon Chea (the “Defence”) submit the instant response to the Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage filed by a group of scholars.

## II. BACKGROUND

2. On 14 June 2016, a group of international scholars and researchers (the “Applicants”) filed a Rule 33(1) request before the Trial Chamber (the “Request”) seeking leave to submit an *amicus curiae* brief on forced marriage (the “*Amicus Curiae* Brief”).<sup>1</sup> The Request was notified to the parties on 24 June 2016.
3. The Applicants seek to discuss two issues in their *Amicus Curiae* Brief: (1) the legal characterisation of forced marriage as the crime against humanity of other inhumane acts; and (2) the distinction between forced marriage and arranged marriage, with an emphasis on the concept of consent in an armed conflict or under an oppressive regime.<sup>2</sup> The Applicants argue that their expertise and research “offers the Trial Chamber [...] synthesized information not readily available to the Court or general public” which derives from the Applicants’ work with “community-based partners” and interactions with “victims in countries that have recorded incidences of forced marriages”.<sup>3</sup>

## III. APPLICABLE LAW

4. Internal Rule 33(1) provides that:

At any stage of the 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 organization or person to submit an *amicus curiae* brief in writing concerning any issue. The Co-Investigating Judges and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs.

5. The Trial Chamber has held that “[a]n *amicus curiae* is traditionally an independent and impartial adviser to the court whose role is simply to inform and not to advocate”.<sup>4</sup>

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<sup>1</sup> E418, ‘Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage’, 14 Jun 2016 (the “Request”).

<sup>2</sup> E418, Request, paras. 13-19.

<sup>3</sup> E418, Request, para. 2.

<sup>4</sup> E350/7, ‘Decision on Requests to for Leave to File *Amicus Curiae* Briefs or to Participate as Intervener on the Admissibility and Use of Torture-Tainted Evidence (E350/5 and E350/6)’, 23 Jun 2015 (“TC Decision on *Amicus Curiae*”), para. 5.

6. The Supreme Court Chamber has held that an *amicus curiae* in international criminal law matters is to provide the court with assistance that primarily concerns matters of law relevant to the current proceedings, “with content that will sufficiently add to the arguments already received from the parties to that case”.<sup>5</sup>
7. The ECCC chambers have previously rejected Rule 33 requests to submit *amicus curiae* briefs on the basis that the chambers were adequately informed of the matter and that the *amici curiae* would not add new arguments to the submissions already available to the chambers.<sup>6</sup>

#### IV. RESPONSE

##### A. The Request to Submit the *Amicus Curiae* Brief Is Premature

8. As previously held by the Supreme Court Chamber, an acceptable *amicus curiae* brief on matters of law has to “sufficiently add to the arguments already received from the parties” to the case in question.<sup>7</sup> It is, therefore, premature for the Trial Chamber to accept the *Amicus Curiae* Brief at this stage – namely, before the parties to the present case have even had an opportunity to put forward their submissions on matters related to forced marriage.

##### B. It Is Unlikely for the *Amicus Curiae* Brief to Constitute a Desirable Supplement to the Potential Arguments of the Parties Conducive to the Proper Adjudication of the Present Case

9. The Applicants explain that the *Amicus Curiae* Brief will:
  - (a) “present the arguments leading to the assumption of this international consensus” that forced marriage shall be charged and convicted as a crime against humanity of other inhumane acts;<sup>8</sup> and
  - (b) “present an in-depth analysis of international jurisprudence on what factual circumstances constitute a coercive environment where consent is no longer possible”.<sup>9</sup>

<sup>5</sup> **F20/1**, ‘Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings’, 8 Apr 2015 (“SCC Decision on *Amicus Curiae*”), para. 8.

<sup>6</sup> *See, e.g.*, **F20/1**, SCC Decision on *Amicus Curiae*, para. 14; *Case 001*, **D99/3/17**, ‘Decision on Request for Leave to File *Amicus Curiae* Brief’, Case No. 001/18-07-2007-ECCC/OCIJ (PTC02), 2 Oct 2008, para. 3; **D158/5/1/14**, ‘Decision on Request for Leave to File *Amicus Curiae* Brief’, 4 Aug 2009, para. 3; **E350/7**, TC Decision on *Amicus Curiae*, para. 5.

<sup>7</sup> *Supra*, para. 6, citing **F20/1**, SCC Decision on *Amicus Curiae*, para. 8.

<sup>8</sup> **E418**, Request, para. 15.

10. Given that forced marriage as a crime against humanity of other inhumane acts is charged as such in the Closing Order, and given that the factor of consent is inherent in any assessment of charges of *forced* marriage, the parties will surely address with diligence these basic and critical issues. The Applicants fail to demonstrate what supplementary value their brief can bring to the assistance of the Trial Chamber in these regards.
11. The Applicants argue that the Trial Chamber will benefit from their “*unique* expertise based on comparative, original research on sexual and gender-based violence, forced marriage and international criminal law”.<sup>10</sup> In an effort to substantiate the purported uniqueness of their expertise, the Applicants emphasise their “research through more than 250 interviews on experiences of survivors of forced marriage in the Democratic Republic of Congo, Liberia, Rwanda, Sierra Leone, and Uganda”,<sup>11</sup> as well as their possession of “a trove of materials on forced marriage derived from witness statements, testimonies, and transcripts of proceedings from justice mechanisms that have addressed the crime of forced marriage and its related crimes”.<sup>12</sup>
12. The Defence submits, however, that the factual testimony and experience of forced marriage survivors from other countries are irrelevant to the present case. The Defence fails to see how research through interviews with survivors and statements of witnesses of alleged crimes from other countries – as opposed to research on the relevant adjudication of criminal cases involving those survivors – would contribute to the proper adjudication of the present case. Apart from this unique yet irrelevant expertise, the Applicants fail to demonstrate what makes their *Amicus Curiae* Brief a desirable supplement to the potential arguments that the parties may mount.
13. The Applicants also argue that the “*Amicus Curiae* Brief will present analysis on the international law and practice as to *why* forced marriages, especially in armed conflict or under an oppressive regime, *should* be criminalized”.<sup>13</sup> The Defence notes that *lex ferenda* (*i.e.*, future law, depicting what the law should be) is not applicable to cases before the ECCC because, *inter alia*, it contradicts the fundamental principle of legality

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<sup>9</sup> E418, Request, para. 19.

<sup>10</sup> E418, Request, para. 13 (emphasis added).

<sup>11</sup> E418, Request, para. 1; *see also*, para. 9, “the Applicants submit that the present application for leave is admissible because the Applicants offer specific cumulative expertise and experience working with survivors of forced marriage in conflict situations”.

<sup>12</sup> E418, Request, para. 2.

<sup>13</sup> E418, Request, para. 17 (emphasis added).

(*nullum crimen sine lege*). Hence, analysis in this regard will not contribute to the proper adjudication of the present case.

### C. The Lack of Objectivity and Professionalism Evidenced by the Request

14. The Defence notes that the Applicants have misquoted the judgement in *Prosecutor v. Akayesu*. The Request presents as a direct quote the following sentence: “coercive circumstances *are inherent* in armed conflicts” (emphasis added).<sup>14</sup> However, the actual quote from the judgement is:

Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion *may be inherent in certain circumstances*, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.<sup>15</sup> (emphasis added).

15. The Defence submits that the misquote gives rise to an apprehension of the lack of objectivity and neutrality on the part of the Applicants. At the very least, this misquote shows an unacceptable lack of professionalism, raising questions as to the reliability, quality and value of the *Amicus Curiae* Brief the Applicants seek to submit.
16. Furthermore, the Defence notes that Dr. Luke Moffett’s name appears to have been misspelled on the cover page of the Request, which suggests inattention on the part of the Applicants.<sup>16</sup>

### D. The Relevant Expertise of the Individual Applicants Is Unclear

17. The Request vaguely describes the Applicants as “a group of international legal scholars and researchers with expertise on historical and contemporary forms of slavery, including conjugal slavery, forced marriage in war, and sexual and gender-based violence”.<sup>17</sup> The Request, however, does not outline the area of expertise of each of the Applicants in relation to the topic of forced marriage. To the best of the Defence’s knowledge, among the Applicants, only Dr. Annie Bunting has a publication directly relating to forced marriage.<sup>18</sup>

<sup>14</sup> E418, Request, para. 18.

<sup>15</sup> *Prosecutor v. Akayesu*, ‘Judgement’, Case No. ICTR-96-4-T, 2 Sep 1998, para. 688.

<sup>16</sup> E418, Request, p. 1.

<sup>17</sup> E418, Request, para. 1.

<sup>18</sup> Annie Bunting, “Forced Marriage” in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes’, (2012) 1(1) *Canadian Journal of Human Rights*, 165-185.

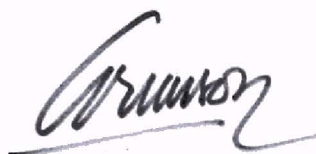
**E. Abuse of *Amici Curiae* Poses Threats to Equality of Arms**

18. The Defence notes that *amici curiae* should not be lightly resorted to as it may easily affect the proper balance between the parties to a case. The arguments that the Applicants seek to make clearly benefit the Co-Prosecutors and the Civil Parties to the present case. In such a circumstance, if the *Amicus Curiae* Brief is admitted, the Defence will effectively have to respond to three counterparts: the Co-Prosecutors, the Civil Parties, and the *amici curiae*. This undermines the fundamental principle of equality of arms, unfairly increases the burden of the Defence, and will eventually infringe upon the rights of Mr. Nuon Chea.
19. Moreover, pursuant to Internal Rule 33(2), if the Chamber decides to admit the *Amicus Curiae* Brief, the parties *shall* be afforded an opportunity to respond to the brief. Given that *amicus curiae* briefs on matters of law may only be accepted after the receipt of the parties' submissions on the same issues,<sup>19</sup> the admission of *amicus curiae* briefs will certainly result in a delay to the trial proceedings because the parties are entitled to extra time after the closing submissions to respond to such briefs. Therefore, contrary to the Applicants' submission,<sup>20</sup> regardless of whether the brief is already ready to be filed, the proceedings will nevertheless be delayed due to the admission of that brief.

**V. RELIEF**

20. Based on the above reasons, the Defence requests that the Trial Chamber dismiss the Request in its entirety.

CO-LAWYERS FOR NUON CHEA



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<sup>19</sup> *Supra*, para. 6, citing **F20/1**, SCC Decision on *Amicus Curiae*, para. 8.

<sup>20</sup> **E418**, Request, para. 8.