

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

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**CO-PROSECUTORS' RESPONSE TO THE DSS REQUEST TO SUBMIT
AN *AMICUS CURIAE* BRIEF TO THE SUPREME COURT CHAMBER**

Filed by:

Office of the
Co-Prosecutors
CHEA Leang
Andrew CAYLEY
YET Chakriya
William SMITH

Distribution to:

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Counsel for the Civil Parties
KONG Pisey
HONG Kimsuon
YUNG Panith
KM Mengkhy
MOCH Sovannary
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Accused/Respondent
Kaing Guek Eav *alias* DUCH

Counsel for the
Accused/Respondent
KAR Savuth
KANG Ritheary

SUMMARY OF ARGUMENT

1. The Defence Support Section (“DSS”) is not authorized under the Internal Rules (“the 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 be from an *independent* individual or organization with the expertise to address the issues raised. Consequently, for these reasons the application for the DSS to file an *amicus curiae* brief should be dismissed.

[1] THE RULES PROHIBIT DSS FROM FILING SUBMISSIONS BEFORE CHAMBERS

2. The Rules specifically excludes the DSS from making legal submissions to the Chambers. Their role is expressly defined and limited by Rule 11 which authorizes the DSS to perform functions which can be placed into three main categories (1) the administration of legal representation at the ECCC, (2) the provision of legal support to the Defence including legal and documentary research and (3) training for ECCC Defence Lawyers. Neither this rule, nor any other rule, authorizes the DSS independently from the Defence to make submissions to the Chambers.
3. The scope of this rule has already been considered by the Plenary of the ECCC Judges. At the Plenary the right of the DSS to make legal submissions to Chambers was *expressly rejected*. The Draft Internal Rules dated 3 November 2006 proposed a “Principal Defender” who would head the Defense Unit/Office,¹ with such office being authorized to “[assist] in the protection of the rights of suspects, Charged Persons and Accused”² and “[appear] before

¹ Extraordinary Chambers in the Courts of Cambodia Draft Internal Rules, 3 November 2006, rule 12.1 [hereinafter “Draft Rules”].

² Draft Rules, rule 12.2 (a).

the ECCC in respect of specific issues”.³ This proposed rule was rejected and consequently did not become part of the rules that were finally adopted in June 2007.⁴ Any interpretation of these rules that allows the DSS to make Submissions before the Chambers would be in direct contravention to the plain meaning and intent of the Rules.

**[2] INTERNATIONAL PRACTICE DOES NOT SUPPORT DSS APPEARING AS AMICUS CURIAE
WHEN AN ACCUSED IS REPRESENTED**

4. In cases where Accused have been represented, practice at the ECCC and other international or hybrid criminal tribunals⁵ has supported the approach of inviting individuals or organizations to provide amicus briefs who are *independent*⁶ of the Registry or the Tribunal in question when necessary. At the ECCC, in determining the Co-Prosecutors appeal of the Closing Order in this case, despite the Accused being represented by international and national counsel, the PTC deemed it necessary to request *amicus curiae* briefs on the theory

³ Draft Rules, rule 12.2 (g).

⁴ If that proposed rule had been adopted by the ECCC, it would have created a Principal Defender and Defence Office with functions similar to those established by Rule 45 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone. In contrast to the role of the DSS established here under ECCC Rule 11, the core function of the SCSL Defence Office is “ensuring the rights of suspects and accused,” to which end they are expressly allowed by SCSL Rule 45(A) & (C) to represent suspects and accused persons and to act as their counsel in court proceedings. Special Court for Sierra Leone, Rules of Procedure and Evidence, adopted 16 January 2002, amended 28 May 2010, rule 45 [hereinafter “SCSL Rules”].

⁵ On all the occasions where the Pre-Trial Chamber has accepted *amicus* briefs, the authors have been persons or entities independent of the court, a factor which the Pre-Trial Chamber has taken into account explicitly. See *Case of Kaing Guek Eav alias DUCH*, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias “Duch”, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), D99/3/42, ERN 00249846-00250636, 5 December 2008, para. 20. Similarly, the ad hoc tribunals have accepted *amicus* briefs from external persons or entities – such as legal scholars, universities, and institutions with particular expertise in criminal law. See, e.g. *Prosecutor v. Nikolic*, Sentencing Judgement, Case No. IT-94-2-S, ICTY Trial Chamber, 18 December 2003, para. 38. (referencing the Trial Chamber’s request that the Max Planck Institute submit an *amicus* brief on sentencing practices to assist its consideration of a plea bargain agreement).

⁶ See Extraordinary Chambers in the Courts of Cambodia Internal Rules as Revised on 9 February 2010, rule 33 [hereinafter “ECCC Rules”]. Although some jurisdictions have broadened the traditional role of an *amicus* as a “friend of the court,” the widespread assumption remains that an *amicus* is meant to provide impartial information to the court. See, e.g., *Prosecutor v. Milosevic*, Case No. IT-02-54, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, ICTY Appeals Chamber, 20 January 2004, Separate Opinion of Judge Shahabuddeen, para. 15 (opining 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”). The Co-Prosecutors note that the defence support role played by *amicus curiae* in the *Milosevic* case provides no guidance in the consideration of the issue at hand. See *Case of Kaing Guek Eav alias DUCH*, DSS Request to Submit an *Amicus Curiae* Brief to the Supreme Court Chamber, Case No. 001/18-07-2007-ECCC/SC, F7, ERN 00602073-75, 10 September 2010, para. 4 [hereinafter “DSS Request”]. In that case, *amici curiae* appointed by the court were instructed to play an unusually—and controversially—adversarial role in the proceedings in a wholly different context, i.e. a situation where the defendant had refused to appoint counsel and where the defendant’s refusal or failure to make submissions on both procedural and substantive issues had contributed to delay in the proceedings. See Sarah Williams & Hannah Woolaver, *The Role of the Amicus curiae before International Criminal Tribunals*, 6 INT’L L. CRIM. L. REV. 151, 162 (2006).

of joint criminal enterprise. In their decision, the PTC explicitly noted that such submissions were “from specific *amicus curiae*, *unaffiliated* with the court or any of its offices.”⁷

5. There is no case at the international level dealing with large scale human rights abuses where a Court has invited or accepted an *amicus curiae* brief from an office performing a similar role as the DSS when an Accused is represented by Counsel. The reasons are obvious. First, the DSS position on the law and arguments may in fact be in conflict with the Defence. This would call into question the role of the DSS and its authority under the rules when it argues *against* the Defence it is *obliged to support*. Second, regardless of any potential conflict between the DSS and the Defence, in practice, allowing such submissions will have the effect of creating two independent Defence teams rather than one which is supported by the DSS. Third, the legal advice offered will necessarily *lack the independence* that is expected of an *amicus curiae* brief. Such lack of independence will logically reduce the ability of the submission to assist the Supreme Court Chamber in the “proper adjudication of the case.”⁸ Given the role of the DSS to support the Defence, as part of the Administration of the ECCC, it will not be in a position to make genuinely independent submissions as a third party *amicus curiae*.

6. In support of its application, DSS refers to the case of *Kallon* at the Special Court of Sierra Leone.⁹ In *Kallon*, the SCSL DSS’s application was rejected for similar reasons to that argued above. The Trial Chamber decision¹⁰ was noted with approval by the Appeals Chamber when hearing a separate application of a third party to appear as *amicus curiae*:

The actual decision to deny leave [to the DSS] turned, quite unexceptionally, upon the fact that all interested defendants were at that time represented by counsel, whom the Defence

⁷ See *Case of Kaing Guek Eav alias DUCH*, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias “Duch”, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), D99/3/42, ERN 00249846-00250636, 5 December 2008, para. 20 (emphasis added).

⁸ ECCC Rules, rule 33.

⁹ DSS Request, para. 9. The DSS points to a decision of the Appeals Chamber of the Special Court for Sierra Leone (“SCSL”) as support for the proposition that their proposed *amicus* brief would fall within the proper role of a Defence section. See DSS Request, para. 9, n.9. The *dicta* in *Kallon* is inapposite here because the role of the Defence Office at the SCSL—as established in its Rules of Procedure and Evidence—is much broader than the role of the Defence section at the ECCC. Specifically, as the core function of the SCSL Defence Office is “ensuring the rights of suspects and accused,” it is expressly authorized to represent suspects and accused persons where those individuals would otherwise be unrepresented. SCSL Rules, rules 45, 61.

¹⁰ *Prosecutor v. Kallon*, Decision on the Application for Leave to Submit Amicus Curiae Briefs, Case No. SCSL-2002-07, SCSL Trial Chamber, 17 July 2003.

*Office could instruct to present its arguments without the need for any separate appearance.*¹¹

7. However, the Appeals Chamber held that such representation may be appropriate when dealing with *unrepresented defendants* in specific circumstances. It noted the Defence Office's

*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.*¹²

8. Consequently, the case of *Kallon* does not support the proposition that the DSS should intervene as an *amicus curiae* in an Appeal where the Accused is represented by counsel and where the Rules governing the function of the DSS preclude it from making independent representations to Chambers.

[3] THE DSS CAN PROVIDE THE LEGAL SUPPORT NECESSARY TO THE DEFENCE WITHOUT APPEARING AS AN AMICUS CURIAE

9. The Rules specifically allow the DSS to provide legal assistance to this Defence. In fact, they oblige the DSS to provide the Defence with basic legal assistance and support which includes legal and documentary research. Therefore, the DSS can provide the Defence with arguments and authorities it believes will be of assistance in this Appeal. Such assistance could include participation in the drafting of the Defence's Appeal and Response Briefs.
10. Consequently, the "complex and technical issues of international law" the DSS believe are likely to be raised by the Co-Prosecutors can and should be addressed by the Defence with the full assistance of the DSS. The assertion by DSS that the international law issues raised by the Co-Prosecutors are unlikely to be addressed in detail presumes that the Defence will not substantively respond to the Co-Prosecutors Appeal Brief even with the assistance of the DSS. Yet there is nothing in the DSS application that supports this assertion. The DSS is obliged to provide such legal assistance to support the Defence in the whole appeal process. Whether the Defence chooses to utilize such arguments is a matter for them. However, it is

¹¹ *Prosecutor v. Kallon*, Decision on the Application of the Redress Trust and Lawyers Committee for Human Rights for Leave to File Amicus Curiae Brief and to Present Oral Submissions, Case No. SCSL-2003-07, SCSL Appeals Chamber, 1 November 2003, para. 9 (emphasis added).

¹² *Ibid.* para 10 (emphasis added).

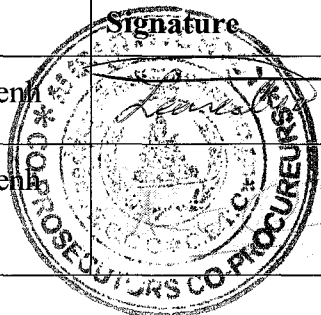
not the function of the DSS under the Rules to independently seek to advance those arguments under the appearance of an *amicus curiae*.

11. Further, to the extent that the DSS's request is motivated by the fact that the Accused has chosen not to have international co-counsel¹³, which is a right of the Accused under Rule 22, it is not the role of DSS to serve as a substitute for international counsel through the submission of an *amicus curiae* brief. The fact that the Accused has chosen not to appoint an international lawyer does not mean that he will not be properly represented particularly with the Defence's ability to employ the assistance of the DSS in this appeal process. The authorized role of DSS is for it to provide legal support to the *counsel of the Accused's choosing* and thereby assist in ensuring a fair trial for the Accused.

CONCLUSION

12. For the above reasons, the Co-Prosecutors request that the Supreme Court Chamber reject the DSS's request to submit an *amicus curiae* brief. Any such submission will expressly contravene the rules, will create a conflict of interest, will lack the independence required and will be untimely. However, 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 on reading the briefs and responses of all parties.

Respectfully submitted

Date	Name	Place	Signature
21 September 2010	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor	Phnom Penh	

¹³ It is important to note that 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).