



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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: Judge YA Sokhan, Presiding Judge
Judge Jean-Marc LAVERGNE
Judge YOU Ottara
Judge Claudia FENZ
Judge THOU Mony

Date: 13 September 2016
Original language(s): Khmer/English/French
Classification: PUBLIC

ឯកសារដើម ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 13 / 09 / 2016
ម៉ោង (Time/Heure) : 14:45
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: SAN RADA

**DECISION ON THE REQUEST FOR LEAVE TO SUBMIT *AMICUS CURIAE* BRIEF ON
FORCED MARRIAGE**

Co-Prosecutors
CHEA Leang
Nicholas KOUMJIAN

Accused
NUON Chea
KHIEU Samphan

Civil Party Lead Co-Lawyers
PICH Ang
Marie GUIRAUD

Lawyers for the Defence
SON Arun
Victor KOPPE
KONG Sam Onn
Anta GUISSÉ

Applicants
Annie BUNTING
Jean ALLAIN
Izevbuwa IKHIMIUKOR
Luke MOFFETT
Joel QUIRK

1. INTRODUCTION

1. The Trial Chamber is seised of a request by a group of international legal scholars and researchers (“Applicants”) filed on 24 June 2016 for leave to submit an *amicus curiae* brief on the topic of Forced Marriage (“Request”).¹ On 4 July 2016, the NUON Chea Defence and the KHIEU Samphan Defence each filed a response to the Request.²

2. SUBMISSIONS

2.1. The Applicant’s Request

2. The Applicants submit that they are independent international researchers who will provide impartial advice to the Chamber. They assert they can provide the Chamber with unique, unpublished analysis and information based on eight years of experience in the development of the law on forced marriage as a crime against humanity as well as experience working with groups in a number of countries where forced marriage occurred within armed conflicts. They submit that their proposed *amicus curiae* brief will add value to the proceedings in Case 002/02 through comparative analysis.³ The Applicants also contend that the submission of the brief is appropriate at this stage of the proceedings because the Chamber is about to start hearings on this topic, and that it will not delay Case 002/02 because the full brief is ready to be submitted should leave be granted by the Chamber.⁴

3. The Applicants seek leave to submit an *amicus curiae* brief which will:

- 1) Undertake an analysis of the legal characterization of forced marriage as a crime against humanity of other inhumane acts; and
- 2) Set out the distinction between forced marriages and arranged marriages.

2.2. The NUON Chea Response

4. The NUON Chea Defence submits that the Request is premature because the parties in Case 002 have not yet had the opportunity to present their submissions on matters related to

¹ Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage, E418, 24 June 2016 (“Request”).

² NUON Chea’s Response to Request for Leave to Submit *Amicus Curiae* Brief on Forced Marriage, E418/1, 4 July 2016 (“NUON Chea Response”); *Opposition de la Défense de KHIEU Samphân à l’admission d’un mémoire d’amicus curiae sur les mariages forcés (E418)*, E418/2, 4 July 2016 (“KHIEU Samphan Response”).

³ Request, paras 6-7, 10.

⁴ Request, paras 8, 10.

forced marriage. It submits, based on a decision by the Supreme Court Chamber, that the primary role of the *amicus curiae* on matters of law is “to sufficiently add to the arguments already received from the parties” to the case in question.⁵ It contends that the Applicants fail to show what supplementary value the *amicus curiae* brief will add to the potential arguments of the Parties in Case 002. Specifically, the NUON Chea Defence submits that the Applicants’ experience working with survivors of forced marriage from other countries is irrelevant to Case 002/02, and that an analysis of why forced marriages should be criminalised will not contribute to the proper adjudication of the Case because the retroactive application of subsequent developments in the law contradicts the fundamental principle of legality.⁶

5. The NUON Chea Defence submits that the Request lacks objectivity and professionalism, as shown by misquoting a decision cited therein and misspelling the name of one of the professors on the cover page, and that the expertise of each individual applicant is unclear.⁷ Moreover, it is submitted that admitting the *amicus curiae* brief would effectively require the Defence to respond to three counterparts, as the brief clearly benefits the Co-Prosecutors and the Civil Parties. Finally, the NUON Chea Defence contends that the admission of the *amicus curiae* brief will delay the proceedings in Case 002/02 because Parties are entitled to receive additional time to respond to the brief after the closing submissions.⁸

2.3. The KHIEU Samphan Response

6. The KHIEU Samphan Defence opposes the Request.⁹ It submits that the proposed *amicus curiae* brief is irrelevant because it does not address the state of the law at the relevant time and the Applicants do not have relevant experience in or knowledge of Cambodia, particularly with respect to the time period which concerns the ECCC.¹⁰ It contends that the *amicus curiae* brief attempts to advocate for the recognition of forced marriage in international criminal justice generally.¹¹ Finally, it submits that the submission of the *amicus*

⁵ NUON Chea Response, para 8 *citing* Decision on the Request to Intervene or Submit *Amici Curiae* Brief in Case 002/01 Appeal Proceedings (SCC), F20/1, 8 April 2015, para 8 (“SCC Decision”).

⁶ NUON Chea Response, paras 9-13.

⁷ NUON Chea Response, paras 14-17.

⁸ NUON Chea Response, paras 18-19.

⁹ KHIEU Samphan Response, paras 2, 12.

¹⁰ KHIEU Samphan Response, paras 7-8.

¹¹ KHIEU Samphan Response, para 9.

curiae brief at this stage is premature because the brief should merely add to the arguments of the parties in Case 002/02, which will only be submitted in their respective closing briefs.¹²

3. APPLICABLE LAW

7. Internal Rule 33 provides that “the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organisation or person to submit an *amicus curiae* brief in writing concerning any issue”. An *amicus curiae* is traditionally an independent and impartial adviser to the court whose role is simply to inform and not to advocate.¹³ The Supreme Court Chamber has clarified that *amicus curiae* briefs shall be limited to questions of law and may not include factual evidence relating to elements of a crime charged or indicted.¹⁴ The primary consideration in granting leave to file an *amicus curiae* brief is whether the interest of the court in properly adjudicating the case will be served.¹⁵ Internal Rule 33 further provides that, in the event that leave to file an *amicus brief* is granted, the Chamber shall determine the time limits for the filing of such briefs and the other parties shall be afforded the opportunity to respond.

4. FINDINGS

8. The Chamber notes that pursuant to Internal Rule 33 it is within its discretion to evaluate whether a proposed submission is desirable for the proper adjudication of the case. The Accused in Case 002 are charged with the crime against humanity of other inhumane acts through Forced Marriage.¹⁶ The issues sought to be briefed, namely (1) the development of the law of forced marriage as a crime against humanity and (2) the factual and legal difference between arranged marriage during peace time and forced marriage under an oppressive

¹² KHIEU Samphan Response, para 10.

¹³ Decision on request for leave to file *amicus curiae* brief, E306/3/1, para 5, *See also* Decision on request for leave to file *amicus curiae* briefs or to participate as intervener on the admissibility and use of torture-tainted evidence, E350/7, 23 June 2015, para 5; IENG Sary’s Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial committee of the Journal of International Criminal Justice from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutor’s Appeal of the Closing Order Against KANG Guek Eav “DUCH”, D99/3/18, 3 October 2008, para 11.

¹⁴ Information Concerning the Submission of *Amicus Curiae* Briefs to the Supreme Court Chamber of the ECCC, para 5(b).

¹⁵ SCC Decision, para 11.

¹⁶ Closing Order, 002/19-09-2007-ECCC-OCIJ, D427, 15 September 2010, para 1442-1447, *see also* Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia, 27 October 2004, Article 5.

regime or in times of armed conflict, are directly relevant to these charges.¹⁷ Therefore the brief may be of assistance in assessing the law applicable to these charges in the Closing Order. Although the Applicants may lack experience in the Cambodian context, this does not preclude the submission of an *amicus curiae* brief on purely legal issues.

9. The responses of the Defence teams raise concerns about the relevance of the proposed *amicus brief* either because it does not address the state of the law at the relevant time or because it is used to advocate for specific developments in the law on forced marriages in potential violation of the principle of legality. In order to prevent such violation submissions in the proposed brief would need to be restricted to the development and state of the law concerning 1975-1979. Such submissions would clearly be relevant to the instant case.

10. The Chamber also notes that the NUON Chea Defence questions the relevance of a discussion of the factual testimony and experience of forced marriage survivors from other countries, including Sierra Leone.¹⁸ However, the NUON Chea Defence, in a related context, submits that it wishes to discuss the situation in Sierra Leone with a coming expert because the Special Court for Sierra Leone (SCSL) was “the first and only international criminal jurisdiction to rule on the question of forced marriage” and the conflict in Sierra Leone is referenced in the expert’s report.¹⁹ The Chamber accepts the latter argument and considers that it may be appropriate for the *amicus curiae* to reference the Sierra Leone conflict and the jurisprudence of the SCSL.

11. Further, the Chamber finds that the Defence have not established that the Applicants lack of objectivity and professionalism. The Applicants clearly fall within the scope of *amici curiae* as defined by the SCC, having no interest in the outcome of the proceedings.²⁰ Further,

¹⁷ Request, paras 13, 17.

¹⁸ See NUON Chea Response, para. 12.

¹⁹ See NUON Chea’s Rule 87(4) and Rule 93 Requests Related to 2-TCE-82 (NAKAGAWA Kasumi), E431/3, 31 August 2016, para. 16.

²⁰ SCC Decision, para 11; See also *Prosecutor v. Laurent Gbagbo*, ICC Pre-Trial Chamber III (ICC-02/11-01/11-50), Decision on the Application by Redress Trust for Leave to Submit Observation to Pre-Trial Chamber III of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence, 8 March 2012; See also *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC Pre-Trial Chamber II (ICC-01/05-01/08-401), Decision on Application for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 9 April 2009; Decision on Request for Leave to file *Amicus Curiae* brief, E306/3/1, 4 June 2014, para 5; see also IENG Sary’s Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial committee of the Journal of International Criminal Justice from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutor’s Appeal of the Closing Order Against KAINING Guek Eav “DUCH”, D99/3/18, 3 October 2008, para 11; Decision on request for leave to file *amicus curiae* briefs or to participate as intervener on the admissibility and use of torture-tainted evidence, E350/7, 23 June 2015, para 5.

all parties will have an opportunity to respond and identify significant errors or misstatements, if any, contained within any brief filed.²¹ The Chamber recalls that it is not bound by the submissions contained in the Applicant's brief.

12. The Chamber notes that Internal Rule 33 provides that *amicus curiae* briefs may be filed at any stage of the proceedings if desirable for the proper adjudication of the current case.²² Waiting until the parties have filed their closing submissions before determining whether to accept an *amicus curiae* brief, as suggested by the Defence, could further delay the proceedings. By contrast, accepting the brief now will provide the parties an opportunity to respond to any research or submissions put forward by the Applicants. The Chamber considers that this timing creates a more fair and efficient order of proceedings.²³

13. The Chamber notes that the Supreme Court Chamber has held that “the primary role of an *amicus curiae* in international criminal law matters is to provide assistance to the court in the determination of the case [...] with content that will sufficiently add to the arguments already received from the parties to that case.”²⁴ The Trial Chamber considers the Supreme Court Chamber's observation to relate to the content rather than the timing of *amicus* briefs. The issue presented before the Supreme Court Chamber was whether to accept further briefing of an issue (joint criminal enterprise) that had been extensively litigated at the Pre-Trial and Trial phases of the case. It considered that the proposed submission was repetitive of what was already before it and therefore had the potential for creating unnecessary delay.²⁵ By contrast, there are relatively few submissions on the Case File concerning the existence and contours of the other inhumane act of forced marriage. Therefore, the Chamber would benefit from further submissions on this topic.

14. In relation to the submissions of the NUON Chea Defence and the KHIEU Samphan Defence on the issue of equality of arms, the Chamber notes that other international criminal courts have accepted *amicus curiae* briefs on legal issues where the brief was considered relevant to the proceedings and contributed to a proper determination of the case.²⁶ The

²¹ See NUON Chea Response, paras 14-16; Information Concerning the Submission of *Amicus Curiae* Briefs to the Supreme Court Chamber of the ECCC, para 4.

²² Internal Rule 33 (emphasis added).

²³ Internal Rule 21.

²⁴ SCC Decision, para 13 (emphasis added).

²⁵ SCC Decision, paras 13-14.

²⁶ *Prosecutor v. Laurent Gbagbo*, ICC Pre-Trial Chamber III (ICC-02/11-01/11-50), Decision on the Application by Redress Trust for Leave to Submit Observation to Pre-Trial Chamber III of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence, 8 March 2012, para 7; *Prosecutor*

ascertainment of the status of the law of crimes against humanity is not a partisan issue which lends itself to creating an imbalance of resources. Indeed, the research contained in the proposed *amicus curiae* brief may be of assistance to all of the parties in this case.

15. Therefore, the Chamber finds that the issues that the Applicants propose to address in their *Amicus Curiae* brief are desirable for the proper adjudication of Case 002/02.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

GRANTS the Applicants leave to submit the *Amicus Curiae* brief;

REMINDS the Applicants that the *Amicus Curiae* brief shall only address the status of the law with regard to the crime against humanity of other inhumane acts through forced marriage from 1975-1979;

ORDERS the Applicants to submit a brief by 30 September 2016, of no more than 20 pages in English or French; and

NOTES the Parties may respond to the submitted brief within 30 days of its filing and/or in their closing briefs.

Phnom Penh, 13 September 2016

Presiding Judge



YA Sokhan

v. Laurent Gbagbo, ICC Appeal Chamber (ICC-02/11-01/11-516), Decision on the Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence, 1 October 2013, para 10; *Prosecutor v. Sainovic et al*, ICTY Appeal Chamber (IT-05-87-A), Decision on David J. Scheffer's Application to File an *Amicus Curiae* Brief, 7 September 2010; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC Pre-Trial Chamber (ICC-01/05-01/08-451), Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 17 July 2009, para 12; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC Pre-Trial Chamber II (ICC-01/05-01/08-401), Decision on Application for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 9 April 2009, para 12.