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

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Civil Party Co-Lawyers' Joint Request for Reconsideration of the Pre-Trial Chamber's assessment of the legal status of the Internal Rules in the Decision On Nuon Chea's Appeal Against Order Refusing Request For Annulment

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I. PROCEDURAL BACKGROUND

1. On 25 February 2008, the Defense of Nuon Chea appealed¹ ("*Appeal*") against the order refusing request for annulment by the Office of the Co-Investigating Judges ("*OCIJ*"). The Defense submitted, *inter alia*, that Cambodian law i.e. the Cambodian Criminal Procedure Code ("*CPC*") has priority in the case of inconsistency.²
2. On 26 August 2008, the Pre-Trial Chamber ("*PTC*") ruled on this appeal ("*decision*") and stated with regard to the relationship between CPC and Internal Rules that the latter constitutes the primary instrument in the proceedings before the PTC and that the CPC applies only in the case that the Internal Rules do not deal with a matter.³

II. SUMMARY OF THE ARGUMENTS

3. The Plenary has no authority to adopt Internal Rules that amount to a self-contained regime of procedural law. Only the National Assembly has legislative power. Neither the Agreement on the Establishment of the Extraordinary Courts of Cambodia nor the ECCC Law delegates such law-making power to the Plenary. Likewise, the power of ECCC Judges to amend the main part of the Internal Rules is not in accordance with the ECCC law.
4. Even if the Internal Rules were valid they rank below the CPC under the principle that *lex superior* has primacy over *lex inferior*. Thus, the request for reconsideration should be successful because the determination by the PTC in the Nuon Chea annulment decision is erroneous and unjust for the Civil Parties.

¹ *Case of Nuon Chea*, Appeal against order refusing request for annulment, 25 February 2008, D55/I/1, ERN 00165047-00165056.

² *Ibid*, para 12.

³ *Case of Nuon Chea*, Decision on Nuon Chea's Appeal against order refusing request for annulment, 26 August 2008, D55/I/8, ERN 00219322-00219333, para 14, 15.

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III. PRE-LIMINARY REMARKS

A. Admissibility of the Request

5. The right to a request for reconsideration of a decision or part of a decision has been acknowledged by the PTC.⁴ The PTC adopts the approach of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and thus concludes that, particularly for a judicial body of last resort, this request for reconsideration is the only opportunity to overturn (final) decisions. Such a request will be successful:
- (i) where circumstances have changed and new facts or arguments have arisen; or
 - (ii) where it is realized that the previous decision was erroneous; or
 - (iii) where the previous decision has caused an injustice.
6. The International Criminal Tribunal for Rwanda (“ICTR”) has likewise observed⁵ that “...*the Appeals Chamber has an inherent discretionary power to reconsider its own previous decisions other than a final judgment if the existence of a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice...*”.
7. This general principle that every court may vary or rescind an earlier order has also been recognized by the Special Court for Sierra Leone (“SCSL”).⁶
8. Considering these principles, the Co-Lawyers for the Civil Parties submit that reconsideration is the most appropriate and necessary course in relation to this request given:
- (i) one party did not file a submission on the substance of the appeal
 - (ii) the decision of the PTC has a major impact on the right of civil parties and governs a fundamental issue for the whole proceedings, namely the

⁴ *Case of Ieng Sary*, Decision on application for reconsideration of civil party’s right to address Pre-Trial Chamber in person, 28 August 2008, C22/I/68, ERN 00221475-00221484, para 25.

⁵ *Prosecutor v. Aloys Simba*, ICTR-01-76-A, Decision on the Appellant’s request for reconsideration of the order concerning Aloys Simbas’ Appellant’s brief, 8 November 2006.

⁶ *Prosecutor v. Norman et al.*, SCSL-04-14-T-507, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, 7 December 2005, para 9 to 14.

general relationship between the Internal Rules (“IR”) and the Criminal Procedure Code of Cambodia (“CPC”).

B. Scope of the request for reconsideration

9. This request is limited to the PTC’s determinations related to:
- (i) the characterization of the Internal Rules as a procedural law;
 - (ii) their relation to the CPC; and
 - (iii) the conclusion that the Internal Rules are the primary instrument in case of a difference between the CPC and the Internal Rules.

The decision itself is not requested to be reconsidered by the PTC.

10. The request for reconsideration refers explicitly to the following assertions of the PTC:

"The Internal Rules form a *self-contained regime of procedural law* related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the CPC but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialised system. Therefore, the Internal Rules constitute the *primary instrument* to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC. *Provisions of the CPC should only apply where a question arises which is not addressed by the Internal Rules.*"⁷

C. Impact of PTC’s assertion on Civil Parties

11. The Internal Rules deviate from the CPC in many provisions. The impact of the PTC decision will thus be real. The difference between CPC provisions and Internal Rules may be due to some extent to the fact that at the time of the adoption of the Internal Rules (June 2007), the CPC was not yet in force (August 2007). However, the draft of the CPC, which was very similar to the ultimately

⁷ See fn 3; emphasis added.

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enacted law, was already available and the National Assembly adopted the CPC during the Plenary Session. Likewise, the PTC opines that the differences between normal Cambodian Court proceedings and the proceedings before the ECCC demand specific Rules, so that differences from the CPC are justified to the extent that the CPC only applies if a question is not addressed by the Internal Rules.

It can therefore be concluded that the differences between IR and CPC have been made deliberately, the drafters of the IR being fully cognizant of the CPC (draft) provisions.

12. The Internal Rules restrict Civil Party rights in a number of situations already governed by the CPC. For example;
- (i) Civil Party action is admissible under the CPC until the prosecution gives the last statement.⁸ Rule 23 (4) IR, however, establishes a deadline of 10 days before the initial hearing of the case.
 - (ii) Under the CPC, a Civil Party may appeal the closing order.⁹ Under Rule 74 (4) Civil Parties are not granted the right to appeal the closing order.

IV. RELEVANT LAW AND PROVISIONS

13. The Agreement¹⁰ between the United Nations and the Royal Government of Cambodia concerning the prosecution *under Cambodian law*¹¹ of crimes committed during the period of Democratic Kampuchea ("*Agreement*") provides in article 2 (2):

"The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement."

⁸ See article 311 (2) CPC.

⁹ See article 268 (9) CPC.

¹⁰ The Agreement¹⁰ between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, 6 June 2003, signed and ratified on 19 October 2004.

¹¹ Emphasis added.

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14. Article 12 (1) of the Agreement states:

“The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.”

15. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (“ECCC Law”)¹² stipulates in Article 33 (new) (1)¹³:

“The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If the existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, guidance may be sought in procedural rules established at the international level.”

16. Under the Constitution, the National Assembly and the Senate are the legislative bodies. Article 90 (new) (1) states:

“The National Assembly shall be the organ to hold legislative power. This power shall not be transferable to any other organ or individual.”

17. The Preamble of the Internal Rules¹⁴ states in its last paragraph:

“Now Therefore the ECCC have adopted the following Internal Rules, the purpose of which is to *consolidate* applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Article 20 new, 23 new, and 33 new of the ECCC Law and Article 12 (1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is a question regarding their consistency with international standards.”

18. By way of comparison, The Agreement between The United Nations and Sierra Leone provides in Article 1 the following:

Establishment of the Special Court
1. [...]

¹² The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, signed on 6 June 2003, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

¹³ See Article 20 (new) for the Co-Prosecutor and Article 23 (new) for the Co-Investigating Judges.

¹⁴ Internal Rules, (Rev2), 5 September 2007.

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2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.
19. The Statute of the Special Court for Sierra Leone ("*SCSL*") provides in Article 14:
 Rules of Procedure and Evidence
 1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.
 2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.
20. The importance of these provisions of Cambodian law as well as the illustrative comparison of the Statute of the Special Court for Sierra Leone will be discussed below.

V. ARGUMENTS

A. The authority of the Plenary to adopt Internal Rules

20. The first Internal Rules were adopted at the Plenary Session of the ECCC on 12 June 2007. According to its Rule 18, the Co-Investigating Judges, Judges of the Chambers, Co-Prosecutors, the Head of the Defense Support Section, the Head of the Victims Unit and the Director and Deputy of the Office of Administration may participate in the Plenary session.
 The sessions are not open to the public. According to Rule 18 (3) (b), *only* the Co-Investigating Judges and the Judges of the Chambers are allowed to vote on the Rules of the main Chapter III of the IR, thus on Rule 21 to Rule 114, being the core part of the Internal Rules.
 Parties to the proceedings are neither allowed to participate nor permitted to suggest their own proposals as amendments.

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21. The Constitution of Cambodia¹⁵ envisages the establishment of a liberal democratic system and structure that encompasses the principal of separation of powers between the executive and the legislature, between the legislature and the judiciary and between the executive and the judiciary. The Constitution of Cambodia provides for such separation of power.
22. This categorical assertion in the Constitution rules out any other institution or individual(s) making any laws.¹⁶
However, there may be a delegation of power to any minister or any government authority to make rules under any law passed by the National Assembly. Yet in all such cases, it is necessary that such rules be approved by the National Assembly. Therefore, any rules made by the government or any department that are not approved by the National Assembly are considered unconstitutional. The power to make rules, being a delegated power, has to be exercised strictly in accordance with the law passed by the Assembly and not otherwise, as per the Constitution.
23. The Internal Rules were neither approved by the National Assembly nor legitimately delegated to the Plenary. Furthermore, it follows that under the principle of the separation of powers in force in the Kingdom of Cambodia that Judges are not allowed to adopt special procedure rules.
24. Recent academic criticism has also argued that the Agreement, the ECCC Law, the Constitution and Cambodian law generally do not authorize the Plenary to adopt Rules and afterwards to amend those Rules.¹⁷
25. The practice of the ICTY, ICTR and ICC, whereby judges adopt and amend rules of procedure cannot, be transferred or be taken as a precedent with regard to ECCC practice. The above-mentioned tribunals differ from the ECCC in their establishment and moreover do not deal with national law or work within a national criminal procedure system as does the ECCC.

¹⁵ Constitution of The Kingdom of Cambodia, compiled and published in English and French by the Secretariat General of the Senate, 24 March 2008.

¹⁶ See Art 90, Constitution of the Kingdom of Cambodia).

¹⁷ See Guido Acquaviva, *New Paths in International Justice?*, 6 J. Int'l Crim. Just. 129, p. 132. Civil Party Co-Lawyer's Request for Reconsideration of Nuon Chea's Request for Annulment

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26. In the case of the SCSL, the Special Court acts on the basis of an Agreement between the UN and Sierra Leone explicitly grants Judges the right, under certain circumstances, to adopt and amend Rules of Procedure and Evidence.¹⁸

27. Therefore, the Co-Lawyers for the Civil Parties submit that the Plenary lacks the authority to adopt rules of procedure as provided for under Rule 18 of the Internal Rules that differ from the provisions of the CPC in force.

The Co-Lawyers for the Civil Parties further submit that Rules promulgated in an unconstitutional manner and without any delegated rule-making authority on the part of judicial officers cannot be considered¹⁹ as

“a self-contained regime of procedural law”.

Those Rules cannot amount to “procedural law” and cannot be considered equal to Cambodian law, such as the constitutionally valid Code of Criminal Procedure of Cambodia.

B. The scope and the limits of the Internal Rules, their relationship to the CPC and conflicts/ differences between them

28. Even if the enactment of the Internal Rules were in accordance with the Cambodian Constitution and thus valid, the status of Internal Rules in the hierarchy of Cambodian law serves to limit the Rules’ field of application.

29. The wording of the title of the Agreement²⁰ clearly suggests that the prosecution of the concerned crimes will take place *under Cambodian Law*.

Furthermore, Art. 12 of the Agreement clearly states

“The procedure shall be in accordance with Cambodian law.”

Likewise, Article 20 (new), 23 (new), 33 (new) of the ECCC Law stipulate that the Co-Prosecutors, the Co-Investigating Judges and the Chambers will deal

“...in accordance with existing procedures”.

¹⁸ See Art. 14 of the Statute.

¹⁹ See fn 3.

²⁰ “Agreement between the United Nations and the Royal Government of the Kingdom of Cambodia concerning the prosecution *under Cambodian law* of crimes committed during the period of Democratic Kampuchea” (emphasis added). In addition, according to Article 31 (1) of the Agreement, it applies as law within the Kingdom of Cambodia.

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30. The Agreement makes very clear in Articles 2 and 31 that the United Nations-Cambodia Agreement takes priority over the ECCC-made Law.²¹ For instance, any amendments of the ECCC Law “...*shall always be preceded by consultations between the parties.*”
31. A literal interpretation of the title of the Agreement and of the provisions therein shows that *only* Cambodian Law applies. Thus, the fact that the Internal Rules are neither “Cambodian” in the sense that non-Cambodian international staff vote upon their implementation and, more importantly, that the Rules are not approved by a constitutionally authorized body means that the Rules cannot be considered as “*Cambodian (Procedural) Law*”.
32. The ECCC Law refers to the term “existing procedure”. Assuming that the Internal Rules are valid and form a part of such “existing procedure”, the ECCC Law suggests that the Internal Rules are part of it and could apply concurrently with the CPC.
33. However, in light of the purpose of the Agreement and the ECCC Law and their ranking, the latter mirroring the spirit of the Agreement, the Co-Lawyers for Civil Parties suggest that the intention of the drafters of the Agreement was to apply *Cambodian* (procedural) Law. This was an eminent and disputed issue through the long-lasting negotiations between the UN and the Government of the Kingdom of Cambodia. Since the ECCC are intended to form part of the domestic judiciary of Cambodia, existing Cambodian procedural law should, in principle, apply.²²
34. The previous arguments and the genesis of the Internal Rules suggest that (if valid) they can have only a lower rank than any Cambodian procedural Code. Internal Rules are akin to a sub-decree or statutory regulation and thus rank below the CPC in the hierarchy of provisions.
35. The hierarchy of legislation in Cambodia is as follows:²³
- The Constitution;

²¹ See also Ernestine E. Meijer in: Cesare P.R. Romano, André Nollenkämper and Jann K. Kleffner, *Internationalized Criminal Courts*, Oxford (2004), p. 210.

²² See fn 16.

²³ See Council of Jurists, http://www.bigpond.com.kh/Council_of_Jurists/z/Typolg.htm, (visited on 22 September 2008).

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- Laws (*chbopp*) issued by the National Assembly;
 - Decrees/Sub-Decrees/Implementing Regulations issued by the Council of Ministers;
 - Implementing Legislation (*prakas*) issued by Ministries;
36. So far the relationship between the Internal Rules and the CPC has not yet been challenged but it has been considered by scholars to “be interesting to see how the relationship between Internal Rules and ‘ordinary’ Cambodian criminal procedure will work.”²⁴
- However, the literal interpretation of the Agreement and the ECCC Law, as well as the purpose of both, suggest that the Internal Rules rank below the CPC and the general principle of *lex superior derogat legi inferiori* applies.²⁵
- The principle of *lex specialis derogat legi generali* only applies for laws of identical status.
- In this spirit, the Preamble of the Internal Rules provides that they *consolidate* Cambodian procedural law applicable to the proceedings. The Internal Rules have been adopted, “*where these existing procedures do not deal with a particular matter, or if there is uncertainty with their interpretation or application, or if there is a question regarding their consistency with international standards*”.
37. Thus, the Preamble acknowledges the inferior character of the Internal Rules in filling gaps, uncertainties or questions of inconsistency with international standards and they should contribute to a united whole with the CPC.
38. Therefore, the Co-Lawyers for the Civil Parties submit that the Internal Rules cannot create additional rights or obligations for the parties or bodies nor restrict rights that are granted by the CPC.

²⁴ See fn 16.

²⁵ E. Vranes, *Lex Superior, Lex Specialis, Lex Posterior- Zur Rechtsnatur der “Konfliktlösungsregeln”*, ZaoeRV(2005), p. 397,398 “...so erscheinen die Sätze vom Vorrang der *lex superior*, *lex posterior* bzw. *lex specialis* in der Tat als bloße, aber notwendige Schlussfolgerungen, die sich aus der Struktur der Rechtsordnung ergeben: Soweit es in der Rechtsordnung höherrangiges und niederrangiges Recht gibt, muss die *lex inferior* im Grundsatz der *lex superior* weichen, wenn nicht die Struktur der Rechtsordnung ad absurdum geführt werden soll.”

Unauthorized translation: The primacy of *lex superior*, *lex posterior* or *lex specialis* seems to stem from the simple but necessary conclusion inherent in a legal system: where superior and inferior law exist within the same legal system, in principle, the superior law prevails over the inferior law if the structure of the legal system is not to be reduced to absurdity.

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39. Taking the genesis of the Internal Rules into account, the literal and teleological interpretation of the Agreement and of the ECCC Law result in the conclusion that, in the case of deviation of the Internal Rules from the CPC or in the case of conflict between the two, the CPC takes priority over the Internal Rules.

C. Final assessment of the disputed paragraphs of the PTC's Decision

40. The ruling of the PTC that the Internal Rules are the *primary source* of ECCC procedure is not consistent with Cambodian Law.
- The assertion that the CPC applies only where a matter is not covered by the Internal Rules clearly contravenes the explicit provisions of the Agreement and the ECCC Law. Moreover, the PTC's argument is in direct opposition to Cambodian Law and its spirit and to the role and character of the Internal Rules as expressed in the Preamble.
- Contrary to the assertion of the PTC, the Internal Rules do stand in opposition to the CPC. This is clearly proved by the examples provided above.²⁶
- Furthermore, the impugned statement by the PTC is not backed by any authority or reference.
41. The PTC has the power to interpret the law, but this power is limited to the law. The PTC has no authority to 'declare' the Internal Rules to be a self-contained regime and to raise them to the primary rank of applicable procedural law.
42. It must be concluded that the position of the PTC is not in accordance with the law and untenable.

D. The prerequisites for a successful request for reconsideration exist

43. From the prerequisites for a successful request for reconsideration mentioned above,²⁷ the decision in question should be reconsidered on two grounds:
- (i) the previous decision was erroneous; and
 - (ii) the previous decision has caused an injustice.

²⁶ See para 12 of this submission.

²⁷ See para 9 of this submission.

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44. The Co-Lawyers for the Civil Parties submit that the determination by the PTC is not in accordance with the Agreement, the ECCC Law or the Constitution of the Kingdom of Cambodia and is therefore an erroneous ruling and may thus be successfully reconsidered.
44. Additionally, the PTC's statement on the relationship between the Internal Rules and the CPC causes injustice to the Civil Parties because their rights granted by the national Cambodian procedure, i.e. the CPC, are unlawful curtailed.

For these reasons stated above,

the Co-Lawyers for the Civil Parties request the Pre-Trial Chamber

- (i) to reconsider the Pre-Trial Chamber's determination of 28 August 2008 concerning the relationship between the Internal Rules and the CPC; and
- (ii) in the case that the Internal Rules are held valid, to determine in accordance with the relevant law that the CPC prevails over the Internal Rules in the case of any conflict or difference between them.

Respectfully submitted by

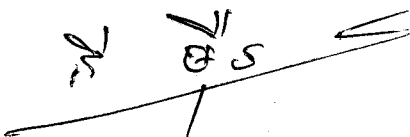
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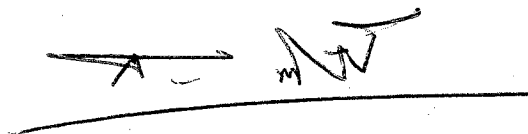
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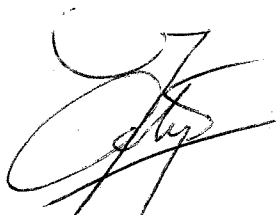
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Signed the 11 October 2008

Phnom Penh