

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

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**RESPONSE TO CO-PROSECUTORS' REQUEST REGARDING NUON CHEA'S
SECOND FAILURE TO COMPLY WITH THE TRIAL CHAMBER'S ORDERS TO
PROVIDE THEIR LIST OF DOCUMENTS AND EXHIBITS WHICH THEY
INTEND TO PUT BEFORE THE TRIAL CHAMBER**

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I. INTRODUCTION

1. Pursuant to Article 8.3 of the Practice Directions counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits its Response to the ‘Co-Prosecutors’ Request regarding Nuon Chea’s second failure to comply with the Trial Chamber’s orders to provide their list of documents and exhibits which they intend to put before the Trial Chamber’ (the ‘OCP Request’). For the reasons stated below, the Defence requests the Trial Chamber to dismiss the OCP Request, as the relief requested is in violation of Article 334 of the Cambodian Code of Criminal Procedure (the ‘CCP’). If the Trial Chamber is not inclined to dismiss the OCP Request outright, it should refer the matter to the Constitutional Council of the Kingdom of Cambodia.

II. PROCEDURAL HISTORY

2. On 17 January 2011 the Trial Chamber filed its ‘Order to File Material in Preparation for Trial’,¹ in which it ordered the parties to provide, no later than 13 April 2011, lists of (in short) documents and exhibits which the parties intended to rely on during trial. During the Initial Hearing, the Trial Chamber issued its second preparation order, ordering (in short) the parties to provide a list of documents and exhibits relevant to the ‘early trial segments’ no later than 22 July 2011.² The two orders will together be referred to as the ‘Preparation Orders.’
3. On 5 August 2011 the OCP filed its ‘Request regarding Nuon Chea’s second failure to comply with the Trial Chamber’s orders to provide their list of documents and exhibits which they intend to put before the Trial Chamber.’ The OCP requested the Trial Chamber to ‘preclude the Nuon Chea Defence from introducing at trial documents that were not identified pursuant to the Trial Preparation Orders. Alternatively, the Trial Chamber should direct the Accused to file a proper list of documents and exhibits within two weeks, failing which he would be subject to such preclusive sanctions.’³
4. On 8 August 2011, in separate but related proceedings, the Trial Chamber issued its ‘Decision on Nuon Chea’s Preliminary Objections Alleging the Unconstitutional

¹ Doc. No. E9, Order to File Material in Preparation for Trial, 17 January 2011, ERN 00635754-00635759

² Doc. No. E1/4.1, Public Transcript of Initial Hearing, 27 June 2011, at ERN 00712161

³ Doc. No. E109/5, OCP Request, 5 August 2011, ERN 00722647-00722659

Character of the ECCC Internal Rules’ (the ‘Preliminary Objection Decision’), in which it declared the Preliminary Objection inadmissible, and to lack merit, and in which it rejected the nullification of the Preparation Order.⁴

III. RELEVANT LAW

A. Constitution of the Kingdom of Cambodia

5. Articles 51 and 90 of the Constitution hold that ‘[t]he Legislative, Executive, and the Judicial powers shall be separate [...]’⁵ and that ‘[t]he Assembly shall be the *only* organ to hold legislative power. This power *shall not be transferable* to any other organ or any individual. [...]’⁶
6. Article 38 of the Constitution holds that ‘[t]he prosecution, arrest, or detention of any person shall not be done except in accordance with the law.’ Article 110 of the Constitution holds that ‘[t]rials shall be conducted in the name of the Khmer citizens in accordance with the legal procedures and laws in force.’ Article 31 of the Constitution guarantees the human rights of Nuon Chea as provided for in numerous international human rights conventions.

B. Law on the Organization and Functioning of the Constitutional Council

7. Article 19 of the Law on the Organization and Functioning of the Constitutional Council reads: ‘A party to a trial, who considers that any provision of the law enforced by a court or decision of any other institution violates his fundamental rights and liberties, may submit the case regarding the unconstitutionality thereof before the court. The court, where it finds the request well grounded, shall submit the case to the Supreme Court within 10 days. The Supreme Court shall examine and forward the case to the Constitutional Council within a maximum period of 15 days, except [if] the request is deemed inadmissible.’⁷

⁴ Doc. No. **E51/14**, Trial Chamber Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 08 August 2011, ERN 00707531-00707535

⁵ Article 51 Constitution of the Kingdom of Cambodia (excerpt)

⁶ Article 90 Constitution of the Kingdom of Cambodia (emphasis added)

⁷ Law on the Organization and Functioning of the Constitutional Council 1998, Royal Kram No. CS.RKM 0498.06, Article 19. (This is the unofficial translation of Article 19 provided by ITU to the Defence on 12

C. Code of Criminal Procedure of the Kingdom of Cambodia

8. Article 334 of the Code of Criminal Procedure of the Kingdom of Cambodia (the ‘CCP’) stipulates: ‘*Until the end of the trial hearing*, the accused, the civil party, and civil defendants may make written statements and submit *all documents and evidence that they think will be conducive to ascertain the truth*. [...]’⁸

IV. ARGUMENT

A. The Relief Requested by the OCP is Unlawful

9. The OCP Request fails to appreciate the cardinal provision governing these proceedings, which is Article 334 of the Cambodian Code of Criminal Procedure. This provision stipulates that ‘[u]ntil the end of the trial hearing, the accused [...] may make written statements and submit all documents and evidence that they think will be conducive to ascertain the truth.’⁹
10. This is a clear and unambiguous provision, which provides an explicit and enforceable right for any defendant before a Cambodian court. There is no legal justification for violating the clear provisions of this article, or to otherwise undermine the protection it offers.
11. Article 12(1) of the ECCC Agreement provides that ‘[w]here 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.’ Article 33 (new) of the ECCC law contains the same language.¹⁰

August 2011; this version differs slightly from the version that can be found in the Legal Compendium for the Extraordinary Chambers by the Secretariat Task Force, and appears to be the more accurate one).

⁸ Code of Criminal Procedure for the Kingdom of Cambodia (‘CCP’), Article 334 (emphasis added)

⁹ CCP, Article 334 (excerpt)

¹⁰ See also Doc.No. E96/1, the Nuon Chea Defence Response to OCP Submission Regarding the Admission of Written Witness Statements, 21 July 2011, ERN 00716969-ERN00716978, n5.

12. The ‘particular matter’ that is at issue in the current proceedings is whether Nuon Chea may be prevented from submitting documents and exhibits up until the end of his trial hearing. Cambodian law deals *explicitly* with this matter in Article 334 of the CCP; there is *no* uncertainty regarding the interpretation or application of this article (Article 334 of the CCP is an eminently clear legal provision); and it is consistent with international standards.
13. The consistency of Article 334 of the CCP with international standards is self-evident. The article is consistent with international fair trial standards, as it provides the Accused a robust right to enter relevant evidence into trial. The Defence submits that these fair trial standards are the only relevant ‘international standards’ for the purpose of Article 12 ECCC Agreement. But even if one is to look at international procedural standards for the admission of evidence, there is no doubt as to the consistency of Article 334 CCP with those. In order to be ‘consistent’, Article 334 need not be *identical* or even similar to procedures dealing with the admission of evidence at some international tribunals. The article need only be ‘consistent’ with these procedures in the sense of being ‘compatible’ with them.¹¹ The Trial Chamber may find that Article 334 of the CCP provides a *stronger* protection for the defendant than can be found at certain international tribunals, since it provides that evidence may be submitted to the Trial Chamber until the end of the trial hearing.¹² However, this does not render the provision ‘inconsistent’, and certainly not ‘incompatible’, with those international standards.¹³

¹¹ The fact that the word ‘consistent’ must be understood in the sense of ‘compatible’ rather than identical or similar is supported by the French version of the Agreement, which uses the word ‘compatibilité.’ The French dictionary provides the following definition of *compatibilité* and *compatible*: **Compatibilité** [...] *de compatible*. Caractère, état de ce qui est compatible. [...] **Compatible** [...] Qui peut s'accorder avec autre chose, exister en même temps. > **Conciliable**. Des caractères compatibles. La fonction de préfet n'est pas compatible avec celle de député. Médicaments compatibles, pouvant être administrés en même temps. [Le nouveau Petit Robert de la Langue Française 2009, Educa Books / Le Robert; Le Robert edition.] Clearly, Article 334 of the CCP and the international evidentiary regimes that exist at the international tribunals *can* ‘exister en même temps.’

¹² For the sake of brevity, the Defence furthermore incorporates by reference its submissions on this issue as contained (*mutatis mutandis*) in Doc No. **E96/1**, the Nuon Chea Response to OCP Submission Regarding the Admission of Written Witness Statements, 21 July 2011, ERN 00716969-ERN00716978, pp. 6-8, currently before the Trial Chamber.

¹³ This holds *a fortiori* true when one considers that the Trial Chamber finds support for the adoption of the Internal Rules, which include the evidentiary regime at issue in the current proceedings, in the ECCC’s obligation ‘enshrined in Article 33 new of the ECCC Law, to conduct proceedings in accordance with international standards of justice, fairness and due process of law *as expressed in Articles 14 and 15 of the ICCPR*.’ (Preliminary Objection Decision, para. 7.) It would be legally perverse, then, for the Trial Chamber to rely on Article 14 and 15 of the ICCPR, the undeniable aim of which is to provide the defendant with certain robust fair trial rights, in abolishing a clear defence right by declaring it ‘inconsistent’ with those very international fair trial standards.

14. Furthermore, it should be remembered that the issue is *not* whether the evidentiary regime prescribed by Internal Rule 80 is consistent with international standards;¹⁴ the issue is whether Article 334 of the CCP is *not* consistent (in the sense of compatible) with international standards. It clearly is.
15. Accordingly, *none* of the possible justifications that are found in Article 12 ECCC Agreement or Article 33 ECCC Law (new) for departing from the relevant Cambodian legal provisions apply, and patently the Defence should be able to invoke the protections of Article 334 of the CCP. The OCP attempts, not for the first time,¹⁵ to undermine clear and unambiguous rights that pertain to Nuon Chea as a Cambodian citizen before a Cambodian court, for the sake of expediency. And like before,¹⁶ the OCP tries to create confusion where there is none.
16. In its request, the OCP claims that Cambodian law ‘does not legislate’ on this particular matter.¹⁷ While this may be true if one considers ‘the particular matter’ to be the pre-trial submission of document lists, it is incorrect if one considers ‘the particular matter’ to be the question as to until what moment in time the defendant may submit documents and exhibits to the Trial Chamber.¹⁸ Cambodian law legislates explicitly and clearly on

¹⁴ The Trial Chamber stated in its Preliminary Objection Decision (in the context of assessing the Preparation Order and a different subsection of Rule 80, para. 9), that ‘[t]he Preparation Order is consistent with international practice dealing with cases of this magnitude and complexity’ and later reiterates that Rule 80(3)(e) is ‘consistent with both prevailing practice before other tribunals and the Accused’s fundamental fair trial rights.’ While this may be true (the Defence takes no position on this at this time), it is not the issue in the current proceedings. The issue at hand is whether Article 334 of the CCP is consistent (or in French: *compatible*) with international standards and the Accused’s fundamental fair trial rights.

¹⁵ See Doc. No **E96**, Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, 15 June 2011, ERN ERN00706071-00706086, and specifically, Doc.No. **E96/1**, the Nuon Chea Defence Response to OCP Submission Regarding the Admission of Written Witness Statements, 21 July 2011, ERN 00716971-ERN00716975

¹⁶ *Ibid.*

¹⁷ OCP Request, para 30.

¹⁸ The Defence furthermore reiterates its comments in its Response to the to OCP Submission Regarding the Admission of Written Witness Statements, where it stated: ‘By the OCP’s logic, in every case where the rules of the ICTY (for example) deal with a matter to a greater degree of specificity than the analogous provisions of Cambodian procedure, the latter would be considered a *lacuna* to be filled by the former. Such overzealous ‘hole-filling’--clearly not the process envisaged by the drafters of the ECCC Agreement and Law--would displace perfectly serviceable domestic provisions on the basis that they lack the purported sophistication of their international analogues.’ Doc.No. **E96/1**, the Nuon Chea Defence Response to OCP Submission Regarding the Admission of Written Witness Statements, 21 July 2011, at ERN 00716973

this matter in CCP Article 334, and accordingly there is no room for ‘seeking guidance in international practice.’

17. For these reasons, the relief requested by the OCP (in short: the exclusion of evidence after the start of the actual trial) must be considered to be in direct violation of the protection afforded to the defendant by Article 334 CCP. There is furthermore no justification to depart from the clear regime as laid down in this important Cambodian provision. Accordingly, the OCP Request must be dismissed.

**B. The Trial Chamber’s Decision on the Preliminary Objection
Regarding the Illegality of the Rules is Inapposite**

18. The recent Decision by the Trial Chamber on the Defence’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules (the ‘Preliminary Objection Decision’) touches upon the issues raised by the OCP in its request, but is inapposite. In its Preliminary Objection Decision, the Trial Chamber decided that nothing prohibits ‘the adoption of the Internal Rules by a Plenary Session convened for that purpose,’¹⁹ and that therefore the request to nullify the Internal Rules in their entirety was denied. The request for annulment of the Preparation Order was also rejected, as ‘the sole portion of the Preparation Order specifically addressed by the Accused concerns the section requiring parties to produce a list of uncontested facts pursuant to Rule 80(3)(e), and this rule is both consistent with both prevailing practice before other tribunals and the Accused’s fundamental fair trial rights.’²⁰
19. First of all, it should be observed that the relief the OCP is requesting is a type of sanction (essentially the exclusion of evidence) for non-compliance with the Preparation Orders. Such a sanction is *not* provided for by either Rule 80 or the Preparation Orders themselves, and is at the same time in direct contravention of the applicable Cambodian provision (CCP 334). In other words, *regardless* of the status or legality of either Rule 80 or the Preparation Orders, the relief sought by the OCP is not supported by these sources on the one hand, and is unlawful as per Cambodian law on

¹⁹ Preliminary Objection Decision, para 5.

²⁰ Preliminary Objection Decision, para 9.

the other hand. This observation in and of itself determines the outcome of these proceedings, and the OCP Request must accordingly be dismissed.

20. Also, the Defence does not claim, *for the purpose of this Response*, that the Plenary Session lacked the authority to adopt a system of Internal Rules as such ('in their entirety').²¹ Rather, the Defence submits that a *specific* provision²² of the Internal Rules is unlawful, at least when considered in combination with the relief sought, as it violates the protection offered by the CCP, violates the fundamental fair trial rights of our client, and results in a violation of the Cambodian Constitution.²³ Accordingly, the issue is a different one to the issue that was decided in the Preliminary Objection Decision.²⁴

C. Relief Sought by OCP Would Result in a Violation of the Constitution

21. The granting of the relief sought by the OCP (the exclusion of evidence, ultimately based on Rule 80(3)(b) and (d) and the Preparation Orders) would result in violations of the Constitution.²⁵ In that scenario (of granting the relief), the combination of the adoption of Rule 80(3)(b) and (d), the adoption of the Preparation Orders, and the subsequent granting of the relief requested by the OCP would not only violate Article 334 CCP, but would also violate multiple provisions of the Cambodian Constitution.

²¹ The Defence furthermore does not assert, for the purpose of this Response, that Rule 80(3)(e) (the provision regarding uncontested facts) infringes the rights of Nuon Chea, a claim which already has been considered (and dismissed) by the Trial Chamber in its Decision. The Trial Chamber has not yet ruled, though, on the lawfulness of Rule 80(3)(b) and (d), and the parts of the Preparation Orders that rely on these provisions.

²² Or rather, *two* specific provisions, Rule 80(3)(b) and 80(3)(d).

²³ See paras. 21-26 of this Response. To be accurate: it could be argued that the adoption of Rule 80(3)(b) and (d) *as such* did not violate Article 334 of the CCP; but the granting of the relief requested by the OCP would mean that Rule 80(3)(b) and (d) would be applied (or interpreted) in such a way as to lead to (or: facilitate) a violation of Article 334.

²⁴ The fact that a specific fair trial right is infringed in the current proceedings distinguishes this case from the issue at hand in the proceedings regarding the Preliminary Objections, as in that case the Trial Chamber considered only Rule 80(3)(e) which, in the opinion of the Trial Chamber, was consistent with both prevailing practice before other tribunals and the Accused's fundamental fair trial rights. Regardless of whether one agrees with this assessment by the Trial Chamber, it is clear that the right that pertains to accused persons before Cambodian courts to submit evidence until the end of the trial is infringed by the approach propagated by the OCP.

²⁵ One complication in formulating this Response is that the legal effects/consequences of Rule 80(b) and (d) and the subsequent Preparation Orders are unclear *as long as* the Trial Chamber has not ruled on the OCP Request (or makes its view on the matter known in some other way). Accordingly, in order to make its argument, the Defence is forced to consider, *arguendo*, the legal structure that would be put into place if the OCP relief is granted.

22. First of all, the adoption of Rule 80(3)(b) and (d) must be held (in that scenario) to violate Articles 51 and 90 of the Constitution, which hold that ‘[t]he Legislative, Executive, and the Judicial powers shall be separate [...]’²⁶ and that ‘[t]he assembly shall be the *only* organ to hold legislative power. This power *shall not be transferable* to any other organ or any individual. [...]’²⁷
23. The adoption of Rule 80(3)(b) and (d) must be considered an act of legislation by the Plenary Session. This holds true because the ultimate (purported) effect of this Rule, if the requested relief is granted, is the permanent *trumping* (and in essence: abolishment) of a clear provision of a prominent Cambodian legal code, the CCP.²⁸ Such a permanent trumping of a provision in an act of the National Assembly amounts to legislating.
24. The granting of the relief requested²⁹ would also violate Article 38 of the Constitution, which holds that ‘[t]he prosecution, arrest, or detention of any person shall not be done except in accordance with the law.’ ‘In accordance with the law’ must be understood to mean in accordance with *Cambodian* law. Article 334 CCP is Cambodian law, and very much in force today. It should thus be considered the applicable law in accordance with which the prosecution must be conducted. The prosecution should not be conducted in accordance with a provision of the Internal Rules of an internationalized court, at least where those provisions (or their effects) stand in direct opposition to protections afforded by the applicable Cambodian law. Similarly, granting of the relief requested would be in violation of Article 110 of the Constitution, which holds that ‘[t]rials shall be conducted in the name of the Khmer citizens in accordance with the legal procedures and laws in force.’ Again, ‘legal procedures and laws in force’ must be understood to mean the *Cambodian* legal procedures and laws.
25. More generally, Article 31 of the Constitution guarantees the human rights of Nuon Chea as provided in numerous international human rights conventions. Prosecution in

²⁶ Article 51 Constitution of the Kingdom of Cambodia.

²⁷ Article 90 Constitution of the Kingdom of Cambodia (emphasis added).

²⁸ This purported permanent trumping effect could only be achieved by Rule 80(3)(b) and (d) (and the subsequent Preparation Orders) if those particular provisions of the Internal Rules must be considered to have a status equal to or even higher than the CCP, a Cambodian law properly promulgated by the Cambodian National Assembly. Accordingly, the conclusion must be, in that scenario, that the Plenary Session legislated by adopting Rule 80(3)(b) and (d), in violation of the prohibitions contained in Articles 51 and 90 of the Constitution.

²⁹ Based on Rule 80(3)(b) and (d) and the subsequent Preparation Orders.

conformity with the applicable law should certainly be considered such a human right.³⁰ This also means that a suspect must be able to invoke the formal provisions in domestic legislation that provide him with solid defence rights concerning the submission of evidence. In other words, it is a fundamental right for a citizen to avail himself of the formal protections that his domestic law offers him. Granting of the Relief, together with Rule 80(3)(b) and (d) and the Preparation Orders, preclude Nuon Chea from doing so. These provisions accordingly violate his fundamental rights, and therefore Article 31 of the Constitution.

26. In short, the granting of the relief requested, based on the legal provisions set out in Rule 80(3)(b) and (d) and the Preparation Orders, would lead to untenable outcomes from a constitutional perspective. Also for this reason, the Request by the OCP must be dismissed.

D. The Constitutional Council Should be Consulted

27. If the Trial Chamber is not inclined to dismiss the OCP Request outright, the Defence arguments notwithstanding, it should consult the Constitutional Council³¹ pursuant to the Law on the Organization and Functioning of the Constitutional Council. Article 19 of this law provides that '[a] party to a trial, who considers that any provision of the law enforced by a court or decision of any other institution violates his fundamental rights and liberties, may submit the case regarding the unconstitutionality thereof before the court.'
28. In these proceedings, important constitutional questions are implicated, as well as important questions with regard to Nuon Chea's fundamental rights. It is undeniable that the relief requested by the OCP would undermine a clear and unconditional Defence right accorded to all Cambodian citizens by the CCP. It is furthermore arguable, at the very least, that the relief requested is in violation of the Constitution.³²

³⁰ See, e.g., Article 14(2) of the ICCPR, which requires a prosecution 'according to law' and article 11(1) of the Universal Declaration of Human Rights. This concept is also endorsed by the European Convention on Human Rights in Article 6(2), by Article 7(1)(b) of the African Charter on Human and Peoples' Rights, and by Article 8(2) of the American Convention on Human Rights.

³¹ The Trial Chamber can do so by way of submitting the case to the Supreme Court, with the request for further referral to the Constitutional Council.

³² See paras. 21-26 of this Response.

Moreover, it should be acknowledged that, at the very least, there exists a good faith disagreement between the parties regarding the status of (some of the provisions in) the Internal Rules, which has now come to a head in the current dispute regarding the constitutionality of Rule 80(3)(b) and (d) and the subsequent Preparation Orders.

29. Pursuant to Article 19 of the Law on the Organization and Functioning of the Constitutional Council, Nuon Chea submits that providing the relief requested by the OCP would violate his fundamental rights and liberties, as protected in CCP Article 334; it would furthermore result in multiple violations of the Constitution, for the reasons provided in paras. 22-26. Accordingly, he requests the Trial Chamber to consult the Constitutional Council to assess the constitutionality of the relief requested.³³
30. Nuon Chea furthermore submits that the adoption of Rule 80(3)(b) and (d) by the Plenary Session as well as the issuing of the Preparation Orders by the Trial Chamber violated his fundamental rights and liberties.³⁴ Moreover, the adoption as such of Rule 80(3)(b) and (d) violated the Constitution, as this provision was adopted in contravention of the prohibition on legislating by the judiciary.³⁵ Accordingly, he requests the Trial Chamber to consult the Constitutional Council to assess the constitutionality of the adoption of Rule 80(3)(b) and d, and the issuing of the subsequent Preparation Orders.
31. The Defence urges the Trial Chamber to submit these issues for consideration to the Supreme Court,³⁶ with the request for further referral to the Constitutional Council,

³³ Of course, the Constitutional Council has already ruled that the ECCC Law is ‘in accordance with the Constitution’, in its Decision dated 12 February 2001, No. 040/002/2001. The Defence does not aim to revisit this issue. Rather, it seeks to establish the constitutionality of the relief requested by the OCP, of Rule 80(3)(b) and (d) of the Internal Rules, and the subsequent reliance on these provisions in the adoption of the Preparation Orders.

³⁴ Rule 80(3)(b) and (d) provide the legal basis that would be used to exclude evidence proffered after the start of the trial; accordingly, these provisions would be instrumental in violating the protection offered by Article 334 CCP, resulting in a violating of Nuon Chea’s fundamental rights and liberties (the relevant threshold in Article 19). Also the mere *adoption* of both Rule 80(3)(b) and (d) and the Preparation Orders as such violated the fundamental rights and liberties of Nuon Chea, as they resulted in certain (purported) obligations that do not exist under Cambodian law, and which complicate his Defence. Submission of a list of documents would amount to compelling the Defence to provide the OCP with an insight into the Defence strategy, even before the OCP has presented its case. Such ‘disclosure’ may be a more accepted approach in common law systems, but it is not in civil law systems, as clearly reflected in Article 334 CCP. Also, it would amount to a violation of the presumption of innocence, recognized in Article 35 ECCC Law (new); simply put, Nuon Chea cannot be required at this stage to prove that the allegations against him are false, and accordingly cannot be compelled to submit evidence to support such a position.

³⁵ See paras. 22-23 of this Response.

³⁶ This should be the ‘regular’ Cambodian Supreme Court, not the ECCC Supreme Court Chambers.

pursuant to Article 19 of the Law on the Organisation and Functioning of the Constitutional Council.

32. The Defence requests that the Trial Chamber pose at least the following questions to the Constitutional Council:
- Does the relief sought by the OCP violate the ‘fundamental rights and liberties’³⁷ of Nuon Chea, as this relief would be in direct contravention of CCP Article 334? Is the relief sought by the OCP unconstitutional in any other sense?
 - Does the adoption of Rule 80(3)(b) and (d) amount to a violation by the Plenary Session of the National Assembly’s monopoly on legislating (Article 90 of the Constitution of the Kingdom of Cambodia)?
 - Did the adoption of Rule 80(3)(b) and (d) and the subsequent preparation orders violate the fundamental rights and liberties of Nuon Chea as protected under Cambodian law? Are these provisions unconstitutional in any other sense?
33. Considering that fundamental questions of Cambodian Constitutional law are at stake, these questions are plainly best assessed by the Cambodian Constitutional Council. Accordingly, the Defence urges the Trial Chamber to apply a liberal standard of review when assessing this Defence request for referral.

VI. CONCLUSION & REQUEST

34. For the foregoing reasons, the Defence hereby requests this Chamber to dismiss the OCP Request, as the relief sought is in direct violation of the Cambodian Code of Criminal Procedure.
35. In case the Trial Chamber is not inclined to dismiss the OCP Request outright, partly or in full, the Defence requests the Trial Chamber to consult the Constitutional Council to assess the constitutionality of (a) the relief sought by the OCP, and (b) the adoption of both Rule 80(3)(b) and (d) and the Preparation Orders, and (c) to more generally assess

³⁷ See Article 19 of the Law on the Organization and Functioning of the Constitutional Council.

the compatibility of the suggested relief and relevant legal provisions with the fundamental rights and liberties of Nuon Chea.

36. For this purpose, it should submit the questions as formulated in paragraph 32, together with any other questions or comments it may deem relevant, to the Supreme Court, with a request for further referral to the Constitutional Council. The Defence furthermore requests the Trial Chamber to await a decision by the Supreme Court and/or the Constitutional Council on this issue, before ruling on the OCP Request.
37. The Defence requests a public hearing on the OCP Request, as these proceedings involve fundamental questions of Cambodian Constitutional law as well as fundamental Defence rights; issues of such magnitude must be debated in open court during a public hearing.

CO-LAWYERS FOR NUON CHEA



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