

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

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**CO-PROSECUTORS' REPLY TO NUON CHEA'S RESPONSE REGARDING HIS
SECOND FAILURE TO COMPLY WITH THE TRIAL CHAMBER'S ORDERS TO
PROVIDE THE LIST OF DOCUMENTS AND EXHIBITS WHICH HE INTENDS TO
PUT BEFORE THE TRIAL CHAMBER**

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I. INTRODUCTION

1. The Co-Prosecutors submit this reply to the Counsel for Nuon Chea's (the "Defence") response regarding Nuon Chea's second failure to comply with the Trial Chamber's orders to provide a list of documents and exhibits which he intends to put before the Trial Chamber (the "Response").¹ The Defence requests the Trial Chamber to dismiss the Co-Prosecutors' Request on the basis that the sanctions requested are unlawful under Cambodian law or alternatively, they request that the Trial Chamber should refer the matter through the Supreme Court to the Constitutional Council of the Kingdom of Cambodia ("Constitutional Council")² to await the decisions of those institutions before deciding on the Request. Additionally, the Defence requests a public hearing on this Request.³
2. The Defence attempts to contest once again the constitutional legality of the Internal Rules. On this occasion, they assert that Rule 80(3)(b) and (d), "at least when considered in connection with the relief sought" for this breach, would violate the protections afforded by Article 334 of the CCPC⁴ and the Constitution of the Kingdom of Cambodia.⁵ They characterise the Request as concerning "the constitutionality of Rule 80(3)(b) and (d) and the subsequent Preparation Orders",⁶ and the adoption of the Rules as an unlawful delegation of the legislative authority of the National Assembly,⁷ seeking to impugn the constitutionality of the Plenary Session of the ECCC.⁸ It is submitted the Defence submissions are repetitive and lack a legal basis.

II. LAW

3. The relevant applicable law includes provisions of the Agreement, the ECCC Law, the Internal Rules ("Rules") and Cambodian procedural law.

¹ E109/5/1 Response to Co-Prosecutors' request regarding Nuon Chea's second failure to comply with the Trial Chamber order to provide their list of documents and exhibits which they intend to put before the Trial Chamber, 15 August 2011, ERN 00725817-29 ("Response").

² As governed by the *Law on the organisation and functioning of the Constitutional Council*, Reach Kram No. CS.RKM0498.06, 8 April 1998.

³ E109/5/1 Response, *supra* note 1 at paras. 1, 34-37.

⁴ E109/5/1 Response, *supra* note 1 at para. 20.

⁵ E109/5/1 Response, *supra* note 1 at paras. 21-26.

⁶ E109/5/1 *Ibid.* at para. 28.

⁷ E109/5/1 *Ibid.* at paras. 22-23.

⁸ E109/5/1 *Ibid.* at para. 32.

4. The Agreement provides:

Art. 12: Procedure

1. 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.

2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.

5. The ECCC Law provides:

Art. 33 new:

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 these 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.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

Suspects who have been indicted and arrested shall be brought to the Trial Chamber according to existing procedures in force.

The Royal Government of Cambodia shall guarantee the security of the Suspects who appear before the court, and is responsible for taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law enforcement elements of the Royal Government of Cambodia, including the armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

6. The Rules provide:

Rule 80(3)(b), (d):

3. The Chamber may order the parties, within a prescribed time limit prior to the Initial hearing, to file documents including the following: [...]

b). A list of exhibits they intend to offer in the case, containing a brief description of their nature and contents. [...]

d). A list of new documents which they intend to put before the Chamber with a brief description of their contents and a list of documents already on the case file, appropriately identified;

7. The Cambodian Code of Criminal Procedure (“CCPC”) provides:

Art. 334:

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.

The written submissions shall be stamped by the presiding judge and the court clerk and be attached to the case file.

III. ARGUMENT

A. The constitutionality of the Internal Rules and Plenary is fully settled and needs no further judicial elaboration

8. The Pre-Trial Chamber and Trial Chamber have consistently upheld the constitutionality of the Internal Rules and the Plenary in reasoned decisions on

submissions from the Defence.⁹ As the Defence observes,¹⁰ the Constitutional Council has upheld the constitutionality of the ECCC Law, which provides the enabling Cambodian domestic law framework for the independent operation of the ECCC.¹¹ Article 1 of the Constitutional Council’s reasoned decision states that the Law on the Establishment of ECCC “is declared to be in accordance with the Constitution (...)”.¹² Therefore the constitutional character of the Internal Rules and the Plenary are now fully settled matters and require no further judicial elaboration. The Trial Chamber should not allow a further rehearsal of such submissions in determining the Request.

B. Referral of this issue through the Supreme Court to the Constitutional Council is not possible in law

9. The Defence submit that if the Trial Chamber is not inclined to accept the Co-Prosecutors’ Request, it should suspend its consideration pending referral to the “‘regular’ Cambodian Supreme Court”¹³ and thereby to the Constitutional Council,¹⁴ of “at least” three questions. These questions concern the constitutionality of: (1) the preclusive sanctions; (2) the Plenary’s adoption of Rule 80(3)(b) and (d); and (3) Rule 80(3)(b) and (d) and the First and Second Trial Preparation Orders themselves.¹⁵
10. There is no provision in the Agreement, the ECCC Law or the Internal Rules for the referral of issues under judicial consideration at the ECCC to courts within the regular Cambodian judicial system, or institutions such as the Constitutional Council. The ECCC is an “entirely self-contained,”¹⁶ independent¹⁷ and temporary¹⁸ “special

⁹ **D55/I/8** Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 26 August 2008 (Pre-Trial Chamber), ERN 00219322-33 (“Decision on Annulment Appeal”); **E51/14** Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, 08 August 2011 (Trial Chamber), ERN 00707531-35 (“Decision on Preliminary Objection”).

¹⁰ **E109/5/1** Response, *supra* note 1 at note 33.

¹¹ Case No. 038/001/2001 (17 January 2001), Decision No. 040/002/2001, 12 February 2001, Constitutional Council of the Kingdom of Cambodia, Article 1.

¹² *Ibid.*

¹³ **E109/5/1** Response, *supra* note 1 at note 36.

¹⁴ *Ibid.* at paras. 27-33.

¹⁵ *Ibid.* at para. 32.

¹⁶ **C5/45** Decision on appeal against provisional detention order of Kaing Guek Eav, alias “Duch”, 3 December 2007, ERN 00154284-302 para. 18 (“*Duch* provisional detention appeal”).

¹⁷ **C5/45** *Ibid.* at para. 19.

¹⁸ Art. 47, ECCC Law: “The Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings.”

internationalised tribunal,¹⁹ “within the existing court structure of Cambodia”²⁰ that operates on the basis of a specialised, self-contained procedural law.²¹ Assessing the relationship between the ECCC and regular domestic Cambodian courts, the Pre-Trial Chamber has held that a party has “no right to have any decision of the ECCC reviewed by courts outside its structure, and equally there is no right for any of its Chambers to review decisions from courts outside the ECCC.”²² The Trial Chamber has made a similar finding in *Duch*: “There is no line of authority between the ECCC and other courts in the Cambodian judicial system.”²³ Consequently, there is no legal basis for the referral sought by the Defence, whether on a “liberal standard of review”²⁴ or otherwise.

C. Rule 80(3)(b) and (d), read with Rule 87(4), is consistent with Article 334 CCPC and provides the more specific applicable law on the submission of document and exhibit lists prior to trial proceedings

11. The Defence relies on Article 334 of the CCPC as the “cardinal provision” to be applied to the issue of “submission of documents and exhibits up until the end” of the trial proceedings.²⁵ In making this assertion, the Defence suggests that as this “particular matter” is explicitly regulated by Cambodian Law, Article 12 of the Agreement and Article 33 new of the ECCC Law do not allow the Chamber to look to international standards apart from the right of an accused to enter relevant evidence at trial.²⁶
12. This line of argument fails to acknowledge the relevance and necessity of the more specific applicable standards (*lex specialis*) relating to the right of the Trial Chamber to effectively manage large, complex criminal cases to ensure the trial is both fair and

¹⁹ C5/45 *Duch* provisional detention appeal, *supra* note 16 at para. 19, citing with approval the submissions of the Co-Prosecutors.

²⁰ Fourth recital, Preamble to the Agreement.

²¹ D55/I/8, Decision on annulment appeal, *supra* note 9 at para. 14.

²² C5/45 *Duch* provisional detention appeal, *supra* note 16 at para. 18. The Pre-Trial Chamber accepted however that in relation to an allegation of illegal detention of a suspect in a national court prior to transfer to the ECCC this factor could be considered and taken into account at a later stage in the ECCC proceedings. See para. 25.

²³ E39/5 Decision on request for release, 15 July 2009, ERN 00338832-46 at para. 12, citing art. 36 new, ECCC Law.

²⁴ E109/5/1 Response, *supra* note 1 at para. 33.

²⁵ E109/5/1 Response, *ibid.* at paras. 9, 12; see generally paras. 10-17.

²⁶ E109/5/1 Response, *ibid.* at paras. 12-13.

expeditious. Some of these standards are recognised in Rule 80 generally, but particularly in Rule 80(3)(b) and (d) concerning document management at trial.²⁷ The line of argument advanced by the Defence is also inconsistent with principles upheld by both the Pre-Trial and Trial Chamber.

13. Both the Pre-Trial and Trial Chamber have confirmed that the Rules form a “self-contained regime of procedural law” related to the “unique circumstances of the ECCC, made and agreed upon the plenary of the ECCC, and that these Rules “do not stand in opposition to the Cambodian Criminal Procedure Code”.²⁸ Both Chambers further hold that the Rules are the “primary instrument to which reference should be made in determining procedures before the ECCC” in cases where “there is a difference” between the Rules and the CCPC.²⁹
14. The CCPC, the Agreement and the ECCC Law allow for special rules to be made by the ECCC that would apply to its proceedings. Article 1 of the CCPC states that while the CCPC aims at defining the rules to be followed and applied in relation to a criminal offense, “[t]he provisions of this Code shall apply to criminal cases unless there are special rules set forth by separate laws.” The Agreement and ECCC Law also envisage departure from the applicable Cambodian procedure in cases where “a particular matter” is not addressed or where there is uncertainty concerning interpretation or a question of consistency with international standards. The Defence fully acknowledges this in his Response.³⁰
15. The Defence then mischaracterises this issue as one concerning the “right to submit documents and evidence until the end of the trial hearing”,³¹ in order to suggest that Rule 80(3)(b) and (d), together with the First and Second Trial Preparation Orders, violate this supposed protection in Art. 334 CCPC. There is no such inconsistency. The relevant Rule and the Trial Preparation Orders under that Rule concern the effective judicial management of documentary and other evidence in a unique and complex criminal proceedings which apply primarily the principles of international law

²⁷ E109/5/1 Response, *supra* note 1, section IV(A).

²⁸ D55/I/8 Decision on Annulment Appeal, *supra* note 9 at para. 14; E51/14 Decision on Preliminary Objection, *supra* note 9 at para. 7

²⁹ D55/I/8 *Ibid.*; E51/14 *Ibid.*

³⁰ E109/5/1 Response, *supra* note 1 at para. 11.

³¹ E109/5/1 Response, *supra* note 1 at paras 8-9.

and which differ “substantially enough from the normal operation Cambodian criminal courts to warrant a specialised system.”³² The Co-Prosecutors’ Request refers to established international standards on evidence management before international and internationalised criminal tribunals with which Rule 80(3)(b) and (d) and the preparation orders are fully consistent.³³

16. Article 334 of the CCPC enshrines a general principle. It does not purport to specifically address complex cases involving thousands of documents where it is essential for the proper administration of justice that the parties make good faith efforts to identify the proposed witnesses and documents they intend to proffer. Nor can it restrict the Trial Chamber’s inherent power to make orders necessary to ensure the trial is conducted in a fair and expeditious manner.
17. Neither the Rules nor the Trial Preparation Orders preclude the Defence from submitting documents or other evidence at a later stage of proceedings in a reasoned submission with good cause (e.g. in cases of newly-discovered evidence). Rule 87(4) enshrines precisely such a right, and is compatible with Article 334 CCPC. Read with Rule 87(4), Rule 80(3)(b) and (d) sets out the more specific applicable law (*lex specialis*) concerning the submission of document and exhibit lists prior to trial proceedings.

D. The Trial Chamber may lawfully sanction repeated violations of Rules 80(3)(b) and 80(3)(d)

18. Where parties fail to follow the special procedural rules that apply to proceedings before the ECCC, including Rule 80, the Rules contain provisions for sanctions to be considered by the Chambers.³⁴ The Co-Prosecutors respectfully refer the Trial Chamber to their initial submissions in the Request concerning the imposition of sanctions, including preclusive sanctions concerning the introduction of documents and evidence at trial, and personal sanctions concerning the conduct of lawyers appearing before the ECCC.³⁵

³² D55/I/8, Decision on Annulment Appeal, *supra* note 9 at para 14; E51/14 Decision on Preliminary Objection, *supra* note 9 at para. 7.

³³ E109/5, Response, *supra* note 1 at paras. 16, 19-20.

³⁴ Rule 35(1)(b).

³⁵ E109/5 Request, *supra* note 1 at paras. 11-21, 31.

IV. RELIEF REQUESTED

19. For the reasons set out above and in their initial Request, the Co-Prosecutors respectfully requests the Trial Chamber:

- (a) to preclude the Defence from introducing at trial documents and other evidence that were not identified pursuant to the First and Second Trial Preparation Orders; or, in the alternative;
- (b) direct the Defence to comply with the First and Second Trial Preparation Orders within two weeks, failing which they would be subject to such preclusive sanctions; and
- (c) to decide on the Request on the basis of written submissions alone.

Respectfully submitted,

Date	Name	Place	Signature
22 August 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
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