

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

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**PRELIMINARY OBJECTION CONCERNING THE
LEGALITY OF THE INTERNAL RULES AND EFFECT
OF THE TRIAL CHAMBER'S ORDER OF 17 JANUARY 2011**

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I. INTRODUCTION

1. Pursuant to Rule 89 of the ECCC Internal Rules (the 'Rules'), counsel for the Accused Nuon Chea (the 'Defence') submit this preliminary objection concerning the legality of the Rules. For the reasons contained herein, the Defence submits that: (i) the objection is admissible; (ii) the original adoption and subsequent amendments of the Rules at ECC 'Plenary' Sessions is unconstitutional and *ultra vires*; (iii) further and continued application of certain Rules—in particular those regulating trial and appellate proceedings¹—will infringe Nuon Chea's right to a fair trial and legal certainty; and (iv) this Chamber's 'Order to File Material in Preparation for Trial' (the 'Preparation Order')² is null and void because it has been issued pursuant to *ultra vires* Rules.

II. RELEVANT FACTS

2. On 6 June 2003, the United Nations (the 'UN') and the Royal Government of Cambodia (the 'RGC') concluded an agreement 'Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea' (the 'ECCC Agreement'). The stated purpose of this bilateral treaty was to provide 'the legal basis and the principles and modalities'³ for conducting the current criminal proceedings '*within the existing court structure of Cambodia*'.⁴ As required by its terms,⁵ the ECCC Agreement entered into force on 29 April 2005 following adoption by the Cambodian legislature, ratification by the acting head-of-state, and promulgation by King Norodom Sihanouk.⁶ According to Article 2(2), the ECCC Agreement 'shall be implemented in Cambodia through 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]' (the 'ECCC Law').⁷

¹ Section E of the Rules (Rules 79–103) putatively governs 'Proceedings Before the Trial Chamber', and Section F (Rules 104–114) ostensibly covers 'Appeals from the Trial Chamber'.

² Document No E-9, 17 January 2011, ERN 00635754–00635759, paras 1–4.

³ ECCC Agreement, Article 1.

⁴ ECCC Agreement, preambular para 4 (emphasis added).

⁵ ECCC Agreement, Article 30 ('To be binding on the parties, the present Agreement must be approved by the General Assembly of the United Nations and ratified by Cambodia.');

see also ibid, Article 31 ('The present Agreement shall apply as law within the Kingdom of Cambodia following its ratification in accordance with the relevant provisions of the internal law of the Kingdom of Cambodia regarding competence to conclude treaties.');

Article 32 ('The present Agreement shall enter into force on the day after both parties have notified each other in writing that the legal requirements for entry into force have been complied with.')

⁶ *See* Reach Kram NS/RKM/1004/04, 19 October 2004; Instrument of Ratification, 19 October 2004.

⁷ The ECCC Law was promulgated on 10 August 2001 and amended on 27 October 2004. *See* Reach Kram NS/RKM/0801/12; Reach Kram NS/RKM/1004/06.

3. On 3 November 2006, the Secretariat of the ECCC Rules and Procedure Committee circulated a set of 113 draft Rules for public comment (the 'Draft Rules').⁸ Notably, this document did not contain any explanation as to what methodology was applied to the drafting process or how the drafters reached the conclusion that existing Cambodian procedure should not be directly and exclusively applied. Nor did the Draft Rules explain the basis for the ECCC's exercise of legislative power. They did, however, include 190 footnotes, containing (in most instances) very short references to sources of both Cambodian and international criminal procedure. From these mixed references, which included the Statutes and Rules of Procedure and Evidence of the Special Court for Sierra Leone (the 'SCSL') and the International Criminal Court (the 'ICC'), it was apparent that no serious effort had been made to interpret and apply Article 12(1) of the ECCC Agreement in light of its object and purpose: to ensure the primacy of Cambodian law.
4. The current Code of Criminal Procedure of the Kingdom of Cambodia (the 'CCP') was adopted by the National Assembly on 7 June 2007. According to Article 1, the CCP 'aims at defining the rules to be *strictly followed and applied* in order to clearly determine the existence of a criminal offense. The provisions of [the CCP] shall apply to criminal cases unless there are special rules set forth *by separate laws*'.⁹
5. At a so-called 'Plenary Session' held in June 2007, various ECCC officials gathered to, among other things, approve the Rules. The putative purpose of this exercise was two-fold: (i) 'to consolidate applicable Cambodian procedure for proceedings before the ECCC' and (ii) 'to adopt additional rules' pursuant to the relevant provisions of the ECCC Law and Agreement (the 'Constituent Instruments').¹⁰ The Rules were revised at similar sessions held in February 2008, September 2008, March 2009, September 2009, February 2010, and September 2010. None of the many 'consolidated procedures' and 'additional rules' adopted at these extra-judicial conferences has ever been subjected to the legislative process envisaged by the Constitution of the Kingdom of Cambodia (the 'Constitution');¹¹ nor have the Rules been endorsed by the

⁸ See *CETC Projet de Reglement Interieur*, 3 November 2006; see also ECCC Internal Rules – Confidential 'Draft for Discussion', 27 October 2006.

⁹ Emphasis added.

¹⁰ Rules, preambular para 5.

¹¹ *N.B.* Since its adoption in September 1993, the Constitution appears to have been amended on more than one occasion. However, the Defence has been unable to locate an authoritative English version of the

Constitutional Council. Furthermore, it has never been made clear to what degree any particular Rule is the inevitable and compelling result of the application of Article 12(1) of the ECCC Agreement. Finally, given the progress made in Cambodian criminal procedure,¹² including important legislative developments,¹³ the extent to which certain Rules have become obsolete—in the sense that the CCP currently provides for proper and workable procedural solutions—has never been seriously addressed.

6. Nuon Chea was arrested and detained by ECCC officials on 19 September 2007. Shortly thereafter, the Defence argued that where the Rules contravene an applicable provision of the CCP, the latter should be given effect and the former considered invalid.¹⁴ The Pre-Trial Chamber (the ‘PTC’) disagreed with this position and announced that, at the ECCC, the Rules have primacy over the CCP:

The Internal Rules therefore 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 [CCP] but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized 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 [CCP].¹⁵

Provisions of the [CCP] should only be applied where a question arises which is not addressed by the Internal Rules.¹⁶

The PTC provided no support, in law, for this *general* departure from the application of established Cambodian procedure. Moreover, it failed to interpret and apply Article 12(1) of the ECCC Agreement in accordance with its ordinary meaning and in light of its object and purpose. In fact, the PTC managed to turn Article 12(1) on its head. Rather than suggesting that provisions of the CCP should apply only where a question arises which is not addressed by the Rules (the PTC’s view), Article 12(1) *mandates* the exact opposite: Rules should only be adopted and applied where a question arises which is not addressed by existing Cambodian procedure—in particular, the CCP. By

current document in force. Accordingly, reference is made herein to the version contained in the official ECCC Legal Compendium (Document No C070E-1993).

¹² See paragraph 4, *supra*.

¹³ For example, a new Penal Code was adopted in 2010.

¹⁴ See Document No D-55/I/1, ‘Appeal Against Order Refusing Request for Annulment’, 25 February 2008, ERN 00165047–00165056 (the ‘Annulment Appeal’), para 12.

¹⁵ Document No D-55/I/8, ‘Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment’, 26 August 2008, ERN 00219322–00219333 (the ‘Annulment Decision’), para 14.

¹⁶ Annulment Decision, para 15.

adopting the reverse approach, the PTC has disregarded the primary law in force and applicable at this tribunal: namely, Cambodian law.

7. The judicial investigation proceeded to completion in accordance with the Rules and the PTC's (erroneous) interpretation as to their place within the Cambodian legal framework. On 13 January 2011, Nuon Chea was indicted and sent to trial for genocide, crimes against humanity, war crimes, and violations of the 1956 Penal Code.¹⁷ This Chamber was officially seised of the case file on 14 January 2011.¹⁸

III. RELEVANT LAW

A. Admissibility of the Objection

8. According to Rule 89, '[a] preliminary objection concerning [...] nullity of procedural acts made after the indictment is filed shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible'.¹⁹ After 'afford[ing] the other parties the opportunity to respond to the application',²⁰ the Trial Chamber 'shall, as appropriate, issue its reasoned decision either immediately or at the same time as the judgment on the merits'.²¹

B. Lawmaking Authority in the Kingdom of Cambodia

9. The Constitution, which endorses the well-known democratic principle of separation of powers,²² entrusts lawmaking authority in Cambodia to the *exclusive* province of the National Assembly: 'The National Assembly shall be the only organ to hold legislative power. This power shall not be transferable to any other organ or any individual.'²³ All laws and government decisions 'shall have to be in strict conformity with the Constitution'.²⁴ A hierarchy of 'main legal norms' exists in Cambodia: (i) the Constitution; (ii) constitutional law (i.e. revisions or amendments to the Constitution;

¹⁷ See Document No D-427/2/12, 'Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order', 13 January 2011, ERN 00634916–00634922; see also Document No D-427, 'Closing Order', 16 September 2010, ERN 00604508–00605246.

¹⁸ See Document No E-9, 'Order to File Material in Preparation for Trial', 17 January 2011, ERN 00635754–00635759, para 2.

¹⁹ Rule 89(1)(c).

²⁰ Rule 89(2).

²¹ Rule 89(3) ('In the latter case, the proceedings shall continue.')

²² See Constitution, Article 51 ('The Legislative, Executive, and the Judicial powers shall be separate.')

²³ Constitution, Article 90.

²⁴ Constitution, Article 131.

(iii) laws (*kram*); (iv) decrees (*kret*); (v) sub-decrees (*anukret*); (vi) regulations (*prakas*); and (vii) circulars (*sarachor*).²⁵

C. Applicable Procedure at the ECCC

10. The Constitution provides that the ‘prosecution, arrest, or detention of any person shall not be done except *in accordance with the law*’,²⁶ and any subsequent trial ‘shall be conducted [...] *in accordance with the legal procedures and laws in force*’.²⁷ Echoing this Constitutional mandate and the relevant provisions of the International Covenant on Civil and Political Rights²⁸ (the ‘ICCPR’), the Constituent Instruments provide an identical guarantee: The ‘procedure’ applied at the ECCC ‘*shall be in accordance with Cambodian law*’;²⁹ and the prosecution, investigation, and trial of any individual shall follow ‘*existing procedures in force*’.³⁰ These provisions demonstrate an overarching concern for compliance with established Cambodian procedure—to the extent that it conforms with accepted international practice and the Kingdom’s international treaty obligations.³¹
11. Acknowledging the need to ensure that ECCC proceedings adhere to universally accepted legal standards, the Constituent Instruments allow for the adoption of additional procedural rules in three limited cases, namely where: (i) existing Cambodian law or procedure does ‘not deal with a particular matter’; (ii) ‘there is uncertainty regarding’ the ‘interpretation or application’ of an existing provision; or (iii) ‘there is a

²⁵ See Council of Jurists website at http://www.bigpond.com.kh/Council_of_Jurists/z/Typolg.htm.

²⁶ Constitution, Article 38 (emphasis added).

²⁷ Constitution, Article 110 (emphasis added).

²⁸ See ICCPR, Articles 14(1) (‘In the determination of any criminal charge against him [...] everyone shall be entitled to a [...] hearing by a [...] tribunal *established by law*’), 14(2) (‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty *according to law*’), 14(5) (‘Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal *according to law*’), and 16 (‘Everyone shall have the right to recognition everywhere as a person *before the law*’) (emphasis added). *N.B.* All chambers of the ECCC ‘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 [ICCPR], to which Cambodia is a party’. ECCC Agreement, Article 12(2); *see also* ECCC Law, Article 35*new*.

²⁹ ECCC Agreement, Article 12(1) (emphasis added); *see also* Case File No 001/18-07-2007/ECCC/TC, Document No E-188, ‘Judgment’, 26 July 2010, ERN 00572517–00572797, para 35.

³⁰ ECCC Law, Articles 20 *new*, 23 *new*, 33 *new* (emphasis added).

³¹ Lily O’Neill and Göran Sluiter, ‘The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia’, (2009) 10 *Melbourne Journal of International Law*. (‘[T]he incorporation of the *UN Agreement* into Cambodian law through the *ECCC Law* was done by the Cambodian Government to ensure the Agreement’s legal status on the ECCC.’) (citing Helen Horsington, ‘The Cambodian Khmer Rouge Trials: The Promise of a Hybrid Tribunal’ (2004) 5 *Melbourne Journal of International Law* 462, 474).

question regarding' a provision's 'consistency with international standards'.³² In such cases—and *only in such cases*—'guidance' may be sought 'in procedural rules established at the international level'.³³ The recognition of new procedures or any departure from 'existing procedures in force' must therefore be justified by reference to one of these specific statutory exceptions. Any other approach—for example, the creation of new rules for the sake of convenience or more efficiency—is in direct violation of the terms of Article 12(1) of the ECCC Agreement.

12. Moreover, such recognition or departure may only be exercised—on an *ad hoc* basis—by individual ECCC organs in the course of their respective duties; there is simply no provision in the Constituent Instruments or elsewhere for collective (that is to say, 'plenary') rule-making authority at this court.³⁴ Unlike the analogous instruments of the International Criminal Tribunal for the Former Yugoslavia (the 'ICTY'), the International Criminal Tribunal for Rwanda (the 'ICTR'), the Special Tribunal for Lebanon (the 'STL'), the SCSL, and the ICC, the ECCC Agreement and Law do not contain an express grant of power to convene plenary rulemaking sessions.³⁵ Like the Special Panels for Serious Crimes (the 'SPSC'), a special branch of the Dili District Court in East Timor, the ECCC is embedded within the national court structure and

³² ECCC Agreement, Article 12(1); Law, Articles 20 new, 23 new, 33 new; *see also* Judgement, para 35.

³³ ECCC Agreement, Article 12(1); Law, Articles 20 new, 23 new, 33 new; *see also* Judgement, para 35.

³⁴ *See* ECCC Law, Articles 20new, 23new, and 33new. *N.B.* Göran Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers', *Journal of International Criminal Justice* 4 (2006), 314–326, p 320 ('[T]he current legal framework [of the ECCC] does not provide the judges any power to legislate on procedural issues. However, nothing prevents the judges from pronouncing before the commencement of trials on the interpretation of Article 12 of the Agreement.')

³⁵ *See* O'Neill & Sluiter, n 27 *supra* ('[N]either the UN Agreement nor the ECCC Law provide for a basis of adoption of Internal Rules.'). Any comparison, therefore, between the lawfulness of the adoption of the Rules and equivalent practice at the international tribunals would be specious. The constituent instruments of each of those courts provide *express authority* for an extrajudicial rulemaking process. *See* ITCY Statute, Article 15 ('The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.');

ICTR Statute, Article 14 ('The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.');

SCSL Statute, Article 14 ('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.');

Rome Statute, Article 51(3) ('After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.')

therefore must rely on legislation in force. There is simply no general rule-making authority for international (or internationalized) criminal tribunals without an express statutory basis to that effect.

D. Equality Before the Law

13. According to the Constitution, every Cambodian citizen ‘shall be equal before the law, enjoying the same rights [...] regardless of [...] status’.³⁶ The same guarantee is enshrined in the ICCPR: ‘All persons shall be equal before the courts and tribunals.’³⁷

E. Nullity of Procedural Acts

14. In determining what constitutes an infringement of an Accused’s rights for purposes of the annulment analysis, the PTC has held as follows:

[T]he French version of Internal Rule 48, as well as the equivalent of this Rule in the Khmer, French, and English versions of the [CCP] (article 252), do not refer to an infringement of rights, but rather to a harmed interest. Seeking guidance in the [CCP], the [PTC] will interpret ‘an infringement of rights’ as ‘a harmed interest’.³⁸

The [PTC] finds that a proven violation of a right of the Charged Person, recognized in the ICCPR, would qualify as a procedural defect and would harm the interests of a Charged Person. In such cases, the investigative or judicial action may be annulled.³⁹ [...] [W]here a procedural defect would not be prescribed void in the text of the relevant provision, and where there has been no violation of a right recognized in the ICCPR, the party making the application will have to demonstrate that its interests were harmed by the procedural defect.⁴⁰

In short, a strict-liability standard applies to proven violations of fair-trial rights.

IV. ARGUMENT

A. The Objection is Admissible

15. The Closing Order became final on 14 January 2011. As the instant objection: (i) has been filed within thirty days of that date and (ii) concerns the validity of procedural acts made after the indictment was filed, it is admissible in accordance with Rule 89(1).

B. Adoption and Amendment of the Rules at ECCC ‘Plenary’ Sessions is Unconstitutional and *Ultra Vires*

³⁶ Constitution, Article 31.

³⁷ ICCPR, Article 14(1).

³⁸ Annulment Decision, para 36.

³⁹ Annulment Decision, para 40.

⁴⁰ Decision, para 42.

16. The Rules purport to have the force of law with respect to proceedings before this Tribunal,⁴¹ and the OCIJ, PTC, and Trial Chamber have thus far treated them as such. Nevertheless, the Rules were neither promulgated nor endorsed by the National Assembly; rather, they were merely *accepted* by the various participants to an ECCC Plenary Session—an exercise with absolutely no basis in law and without any determination as to which aspects of existing Cambodian procedure fall within the application of Article 12(1) of the ECCC Agreement. Because Article 90 of the Constitution expressly prohibits such a transfer of legislative authority,⁴² the Rules—to the extent their drafter’s have attempted to fashion a new consolidated procedural code—are unconstitutional and without binding legal effect.
17. While the Constituent Instruments indeed allow for departures from existing Cambodian procedures in certain instances, such divergence must be accompanied by *specific* reference to one of the statutory exceptions. In this regard, each of the individual provisions of the ECCC Law creates a mandate that is only capable of being exercised by a single ECCC organ. For example, the authority provided by Article 33~~new~~ may be exercised exclusively by the Trial Chamber and only in respect of trial proceedings. Inversely, members of the Trial Chamber have no power to create or apply rules in respect of, say, the conduct of the OCIJ. It follows that a body composed of various ECCC officials acting in concert cannot lawfully exercise plenary authority. Yet the Drafters of the Rules have attempted to do just that, referring—only in a general manner—to the need to create a ‘self-contained regime of procedural law related to the unique circumstances of the ECCC’.⁴³
18. Assuming (for the sake of argument) that the National Assembly could constitutionally delegate its lawmaking power to a certain body of ECCC officials, such an assignment has never been made. And neither the ECCC Agreement nor the Law mentions, let alone defines, the concepts of ‘Plenary Session’ or ‘Internal Rules’. Accordingly, the convening of extra-judicial conclaves in order to adopt procedures which purport to bind the parties to these proceedings is *ultra vires*. It has been suggested that, if valid, the Rules ‘are akin to a sub-decree or statutory regulation and thus rank below the CCP

⁴¹ See Rule 1(1) (‘These IRs shall enter into force upon official publication by the Office of Administration and no later than 10 (ten) days after adoption by the Plenary [...]’.)

⁴² See para 8, *supra*.

⁴³ Annulment Decision, para 14.

in the hierarchy of provisions'.⁴⁴ Yet there is no indication that the Rules have been enacted or adopted by any recognized law-making authority in this country. It is therefore inaccurate to suggest that they somehow exist as an 'inferior' body of law.⁴⁵

19. Unless and until a particular Rule either restates an existing procedure in force or has been justified by *specific* reference to one of the statutory exceptions listed above,⁴⁶ it is itself a nullity with no rank whatsoever in the Cambodian legal hierarchy and no binding effect at this Tribunal. As the express purpose of the Constituent Instruments is to reflect rather than subvert Cambodian criminal procedure, allowing convenience to trump considerations of legality would (further) undermine the legitimacy of the ECCC.⁴⁷

C. Further Application of the Rules Will Infringe Nuon Chea's Rights

20. Although the creation of a special tribunal to hold the trials of a particular class of defendant is constitutionally legitimate, the adoption of a completely different set of applicable procedures in the manner described above is problematic. While the Rules profess merely to 'consolidate applicable Cambodian procedure for proceedings before the ECCC',⁴⁸ they in fact go far beyond uniting or combining the existing procedures into a single document. Thereby, Nuon Chea is deprived of his right to be tried in accordance with Cambodian law, as provided in Article 12(1) of the ECCC Agreement. Because the CCP embodies the legal system he is most familiar with, its non-applicability without compelling reasons and accompanied by the *ultra vires* creation of vague and arbitrary standards is inconsistent with his entitlement to legal certainty and predictability. Accordingly, the Rules must be scrutinized for compliance with existing procedures in force and any departures properly justified as required by the Constituent Instruments.

⁴⁴ See Document No D-55/I/9, 13 October 2008, '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', ERN 00229453-00229466, para 34.

⁴⁵ *Ibid*, para 37.

⁴⁶ As noted above, the ECCC judges may depart from the CCP on an *ad hoc* basis but they cannot legislate generally.

⁴⁷ Sluiter, n 34 *supra*, pp 319-320 ('The international staff of the [ECCC] in particular may desire an internationally oriented set of Rules, inspired by the ICC and/or ICTY Rules, based on the position that the entire situation concerning the national applicable law is uncertain. This would clearly contradict the drafters' intentions to conduct proceedings in accordance with Cambodian law.')

⁴⁸ Rules, Preamble. *N.B.* According to the Random House Unabridged Dictionary (www.dictionary.com), consolidate means: (i) 'to bring together (separate parts) into a single or unified whole; unite; combine'; (ii) 'to discard the unused or unwanted items of and organize the remaining'; or (iii) 'to make solid or firm; solidify; strengthen'.

21. As a general matter, the Defence does not object to specific departures from existing Cambodian law—to the extent they are rooted in the express terms of Article 12(1) of the ECCC Agreement. However, the Defence especially takes issue with those Rules which cannot stand the test of Article 12(1) because: (i) Cambodian law *does* deal with the particular matter; (ii) there is *no* uncertainty regarding the interpretation or application of the relevant rule of Cambodian law; or (iii) there is *no* question regarding the consistency of such a rule with international standards. Such Rules have no basis in law and, for that reason alone, are *ultra vires*. To assist the Chamber in this regard, the Defence has prepared a chart identifying the specific Rules applicable to trial proceedings that do not meet the requirements of Article 12(1) and, accordingly, must be declared null and void. The chart is attached hereto as Annex A.⁴⁹
22. It bears noting here that the Defence is exclusively concerned with the legality of the Rules in respect of trial proceedings and does not intend any relief requested herein to have retroactive effect. Accordingly, in furtherance of the expeditious administration of justice, the Defence is prepared to accept the validity of pre-trial rulings and proceedings, even to the extent they may have been based on Rules which are inconsistent with the CCP and which are, in the application of Article 12(1) of the ECCC Agreement, *ultra vires*.

D. The Preparation Order Must Be Declared Null and Void As It Has Been Issued Pursuant to *Ultra Vires* Rules

23. The instant motion is not intended to raise theoretical issues. To the contrary, Nuon Chea suffers actual and direct harm from the application of the Rules relied upon by the Trial Chamber in its Preparation Order: specifically, Rules 23, 24, 29, 31, 79, 80, 80*bis*, 84, 85, 87, 89, and 91*bis*. To the extent these *ultra vires* provisions impose a number of prejudicial obligations upon the Accused, compliance with their terms raises a real and significant issue of legality. Accordingly, and as supported by the analysis contained in Annex A, the Preparation Order and the deadlines set out therein are null and void. Pending this Chamber's determination of the instant objection, the effect of the Preparation Order should be suspended. Moreover, any subsequent orders regarding

⁴⁹ *N.B.* The chart describes a number of examples where individual Rules amount to the unlawful application of Article 12(1) of the ECCC Agreement. As the Defence has conducted this preliminary analysis under time pressure, it hereby reserves the right to lodge additional objections (at any time) to these and other Rules where deviation from existing Cambodian procedure can be discerned without basis in law.

trial preparation should be properly grounded in Article 12(1) of the ECCC Agreement and set out periods for compliance consistent with existing Cambodian law.

**E. The Defence Reserves Its Right to Seek
Similar Relief From Additional Adjudicators**

24. The Defence is well aware that, on this fundamental issue of the proper determination and application of sources of law, the Trial Chamber will be acting as *iudex in sua causa*. From the perspective of separation of powers, such a result is highly undesirable. That the very judges who (among others) bear responsibility for the adoption of the Rules, and who thereby have acted in violation of the ECCC Agreement, must now be called upon to assess the legality of the process is deeply troubling. Accordingly, the Defence will explore other avenues within the Cambodian legal system in order to bring the matter before a truly impartial adjudicator.

V. CONCLUSION

25. For these reasons, the Defence requests the Trial Chamber to:
- a. admit the objection;
 - b. declare the Rules null and void for the purposes of the trial and subsequent proceedings;
 - c. in the alternative, indicate with precision the grounds on which departure from existing Cambodian procedure is justified, in terms of Article 12(1) of the ECCC Agreement;
 - d. declare the Preparation Order null and void and suspend its effect until a decision has been taken on the instant objection.

Given the nature of the instant application, the Defence requests the Chamber to treat it as a matter of urgency.

CO-LAWYERS FOR NUON CHEA



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