E51/3

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CONSOLIDATED PRELIMINARY OBJECTIONS

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I. INTRODUCTION

1. Pursuant to Rule 89(1) of the ECCC Internal Rules (the 'Rules') and this Chamber's various memoranda to the parties,[1] counsel for the Accused Nuon Chea (the 'Defence') hereby submits its consolidated preliminary objections.[2]

2. Prior to 15 February 2011, the Defence filed three separate objections, each corresponding to one of Rule 89(1)'s discrete prongs: (i) 'Preliminary Objection Concerning the Jurisdiction of the Trial Chamber',[3] filed pursuant to Rule 89(1)(a); (ii) 'Preliminary Objection Concerning an Issue Requiring the Termination of Prosecution – Lack of a Fair Investigation',[4] filed pursuant to Rule 89(1)(b); and (iii) 'Preliminary Objection Concerning the Legality of the Internal Rules and Effect of the Trial Chamber's Order of 17 January 2011',[5] filed pursuant to Rule 89(1)(c). As directed, these distinct objections are hereby consolidated for consideration by this Chamber in advance of the Initial Hearing.

3. For the reasons contained herein, the Defence submits that each of its objections is admissible; and, with regard to substance: (i) extension of the statute of limitations for crimes contained in the 1956 Penal Code as well as the trial of Nuon Chea for the alleged commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949 (hereinafter, 'war crimes')—by way of the various modes of liability recognized in the Indictment[6]—would contravene Cambodia's strict principle of legality; (ii) fundamentally flawed and manifestly unfair, the judicial investigation of Case 002 resulted in objective errors which, individually and *a fortiori* considered in combination, have resulted in irreparable harm to Nuon Chea's rights under Cambodian and applicable international law; and (iii) because the original adoption and subsequent amendments of the Rules at ECCC 'Plenary' Sessions was

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1 *See, e.g.*, Document No **E-51**, Memorandum from Susan Lamb to all parties in Case 002 regarding the 'Trial Chamber's amended procedures for the filing of preliminary objections and clarification of envisaged response deadlines', 14 February 2011, ERN 00644105-00644106 (the 'Preliminary Objection Memo').

2 *N.B.* Nuon Chea was formally indicted by the Office of the Co-Investigating Judges (the 'OCIJ') on 16 September 2010. Four months later, the Closing Order was affirmed on appeal by the Pre-Trial Chamber (the 'PTC') and the Indictment became final. This Chamber was officially seised of the Case File on 14 January 2011. *See* Document No **E-9**, 'Order to File Material in Preparation for Trial', 17 January 2011, ERN 00635754–00635759 (the 'Preparation Order').

3 Document No **E-36**, 'Preliminary Objection Concerning the Jurisdiction of the Trial Chamber', 8 February 2011, ERN 00642561–00642576 (the 'Jurisdiction Objection').

4 'Preliminary Objection concerning an Issue Requiring the Termination of Prosecution – Lack of a Fair Investigation' (the 'Fair Trial Objection'). *N.B.* This document, filed in English on Monday, 14 February 2011, was not placed on the Case File nor assigned an official document number.

5 Document No **E-42,** 'Preliminary Objection Concerning the Legality of the Internal Rules and the Effect of the Trial Chamber's Order of 17 January 2011', 11 February 2011, ERN 00643756-00643767 (the 'Rules Objection').

6 *See* Document No **D-427**, 'Closing Order', 16 September 2010, ERN 00604508–00605246, para 1299. *N.B.* The Closing Order became final on 13 January 2011. *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 (the 'Closing Order Decision').

unconstitutional and *ultra vires*, and continued application of certain Rules—in particular those regulating trial and appellate proceedings[7]—as well as enforcement of this Chamber's Preparation Order[8] will infringe Nuon Chea's right to legal certainty and a fair trial.

II. RELEVANT FACTS

A. An Inherently Tainted System of Justice

4. Since the commencement of judicial proceedings against Nuon Chea, the Defence and many independent observers have expressed serious concerns regarding the ability and/or willingness of the Cambodian judiciary to act independently of the executive branch of the Royal Government of Cambodia (the 'RGC' or the 'Government').[9] Such anxiety is based on a historical pattern of judicial subservience in the Kingdom,[10] as well as the consistent and open expressions of hostility by RGC officials toward the work of this tribunal.[11] With regard to the former, the passage of time has done little to dispel initial predictions that trials in such 'politically charged cases' as the instant one could only deliver 'approximations' of fairness, at best.[12] Indeed, an ongoing spate of highly politicized cases[13] demonstrate that the Cambodian judicial system remains reliably (if, perhaps, reluctantly) at the service of the RGC's political agenda.

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7 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'.

8 Preparation Order, paras 1–4.

9 *See, e.g.*, Document No **C-11/21**, 'Urgent Application for Disqualification of Judge Ney Thol', 29 January 2008, ERN 00159595–00159618 (the 'Ney Thol Disqualification Application'), paras 28–48.

10 *See, e.g.*, Statement of Lao Mong Hay, Institutions for the Rule of Law and Human Rights in Cambodia, 21 March 2006, p 8.

11 *See* paras 6–12, *infra*.

12 *See* Steven Heder, Open Society Justice Initiative, 'The Extraordinary Chambers, Players: The Senior Leaders and Those Most Responsible', 18 April 2006, p 53 ('The first problem is that the tribunal will probably conduct only approximations of fair trials, given the very real potential for illegal interference by politicians, including Cambodian government officials [...]. I say "probably" based on past experience of the Cambodian judiciary, which is so lacking in impartiality and independence that a fair trial in politically charged cases has been virtually impossible. In only one instance in the past decade was a court trying a politically sensitive case allowed to do the right thing—to weigh the evidence and make judgments based on evidence alone.'); *See also* UN Doc A/57/769, 'Report of the Secretary-General on Khmer Rouge Trials', 31 March 2003, paras 28–29 ('[I]n view of the clear finding of the General Assembly in its resolution 57/225 that there are continued problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary, I would very much have preferred that the draft agreement provide for both [sic] of the extraordinary Chambers to be composed of a majority of international judges.') These sentiments were echoed by then UN High Commissioner for Human Rights, Louise Arbour, at a press conference held in Phnom Penh on 19 May 2006. According to her, a 'lack of professional training, insufficient guarantees of independence and a lack or perception of lack of integrity are at the heart of what needs to be addressed, both by legislation and by a change of the culture'. Open Letter to the UN Secretary-General from the Asian Human Rights Commission, 'Cambodia: Khmer Rouge Trial – a request to advance judicial independence in Cambodia', 26 May 2006.

13 *See, e.g.*, Human Rights Watch, 'Cambodia: End Assault on Opposition, Critics', 14 July 2009, available at: http://www.hrw.org/en/news/2009/07/14/cambodia-end-assault-opposition-critics.

B. Political Interference in the Work of the Tribunal

1. Corruption at the ECCC

5. Suggesting that allegations of corruption at the tribunal threatened to undermine its legitimacy and arguing that such an organized regime of institutional graft was symptomatic of the larger issue of Government interference, the Defence sought to uncover any RGC involvement by instituting proceedings in the national courts and at the ECCC.[14] To date, the affair has not been credibly resolved, and 'cumuli of corruption'[15] continue to hover ominously over the tribunal.[16] Apart from the imposition of certain cosmetic solutions,[17] there has been no indication that the RGC, the United Nations (the 'UN'), the donors, or indeed the judicial officers of this court, have ever been willing and/or able to take the necessary steps to truly clear the air. In any event, such minimal efforts as have been undertaken are overshadowed by the fact that the widespread regime orchestrated and initiated by Sean Visoth and his deputies over four years ago likely remains in place to this day,[18] filling the RGC's private coffers will ill-gotten gains and potentially impacting the integrity of all those involved. In short, as far as the Defence and many independent commentators are concerned, the ECCC remains a tainted institution. In this regard, it cannot be repeated too often that the Cambodian justice system is considered to be among the world's most corrupt;[19] and the ECCC is, after all, a part of that system.[20]

2. Government Interference in Case 002

6. Generalized Defence concerns regarding RGC interference eventually progressed from the speculative to the concrete. Emboldened perhaps by the UN's tentative approach to the corruption issue, the Government demonstrated that its assault on justice at the tribunal could take the form of far more overt and tangible manifestations:

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14 *See* Document No **D-158**, 'Eleventh Request for Investigative Action', 27 March 2009, ERN 00294816–00294830 (the 'Eleventh Request'), paras 4–12; Document No **D-158/5/1/1**, 'Appeal Against Order on Eleventh Request for Investigative Action', 4 May 2009, ERN 00323238–00323255 (the 'Corruption Appeal'), paras 5–6. *N.B.* On 8 January 2008, three members of the Nuon Chea Defence Team lodged a complaint with the Phnom Penh Municipal Court alleging corrupt activities at the ECCC. Dismissed in the first instance, the case has been on appeal to the Prosecutor-General's Office of the Court of Appeal for nearly three years.

15 Ian Andrews, *l'Osservatore Romano*, 'Swiss Guard implicated in Vatican kick-back scandal', 19 June 1974.

16 *See* Eleventh Request, paras 18–19.

17 *See, e.g.*, the creation of the Office of the Independent Counselor.

18 *N.B.* This is based on various reports of confidential informants.

19 *See, e.g.*, Transparency International, Global Corruption Report 2009, table 13, p 402 (ranking Cambodia the world's fifteenth most corrupted country), available at http://www.transparency.org.

20 Sebastian Strangio, 'Corruption may undermine Khmer Rouge justice', 23 February 2009 (available at http://www.eurekastreet.com.au/article.aspx?aeid=11895) (quoting the UN Secretary-General's former human-rights envoy to Cambodia Yash Ghai: 'the weakness and corruption within the national legal system have infected the ECCC, instead of the ECCC influencing the [...] local [system]').

a. In July 2009, Kong Sam Ol, the RGC's Minister to the Royal Palace, actively interfered with attempts by the Office of the Co-Investigating Judges (the 'OCIJ') to interview King Father Norodom Sihanouk, effectively depriving the parties at the ECCC of the opportunity to hear his singularly important testimony.[21] Moreover, National Co-Investigating Judge You Bunleng—himself a senior RGC official—refused to sign OCIJ letters seeking an interview with the former king.[22]

b. In September 2009, RGC Prime Minister Hun Sen publicly indicated that he was opposed to the hearing of six high-ranking RGC officials (the 'Six Insiders') as witnesses in Case File 002.[23] Public comments made by RGC spokesperson Khieu Kanharith in October 2009 echoed the Prime Minister's view, and there is ample reason to believe that the Government's stated position led—directly or indirectly—to the failure of the Six Insiders to appear.[24] Unspecified 'court sources' confirm this suspicion.[25]

7. On 30 November 2009, the Defence formally raised these issues with the OCIJ and urged the Co-Investigating Judges (the 'CIJs') to investigate the probability of willful interference with the administration of justice by RGC officials and to take appropriate action under Rule 35.[26] No remedial action was taken by the OCIJ.[27] On appeal, such failure was ultimately condemned in a separate decision (the 'Dissenting Opinion') of the international judges in the Pre-Trial Chamber (the 'PTC');[28] unsurprisingly, their

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21 *See* Document No **D-254**, 'Request for Investigation', 30 November 2009, ERN 00410838–00410848 (the '2009 Rule 35 Request'), para 5.

22 *See* Case File 002/17-06-2010-ECCC-PTC(09), Document No 1, 'Application for the Disqualification of Judge You Bunleng', 17 June 2010, ERN 00535168–00515181 (the 'You Bunleng Disqualification Application'), para 5.

23 *See* 2009 Rule 35 Request, para 6.

24 *See* 2009 Rule 35 Request, para 7.

25 *See* 2009 Rule 35 Request, para 4; *See also* Document No **D-314/2/9**, 'Further Submissions in the Appeal against the OCIJ Order on Nuon Chea and Ieng Sary's Request to Summon Witnesses', 22 June 2010, ERN 0539820–0539827, paras 13–16.

26 2009 Rule 35 Request; *See also* Document No **D-254/2**, 'Addendum to "First Request for Investigation"', 7 December 2010, ERN 00410958–00410960.

27 *See* Document No **D-314**, 'Order on Nuon Chea & Ieng Sary's Request to Summon Witnesses', 13 January 2010, ERN 00446652–00446658. On 8 June 2010, the PTC ruled that the OCIJ erred in law in dismissing the Request based on an erroneous interpretation of Rule 35. *See* Document No **D-314/2/7**, 'Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summons Witnesses', 8 June 2010, ERN 00527392–00527420. On 11 June 2010, the OCIJ issued a new Order (Document No **D-314/3**, 'Order in Response to the Appeals Chamber's Decision on Nuon Chea's and Ieng Sary's Request to Summon Witnesses', 11 June 2010, ERN 00532792–00532794), in response to which further written submissions were filed by the Defence on 22 June 2010. *See* n 25, *supra*.

28 *See* Document No **D-314/1/12**, 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 9 September 2010, ERN 00600748–00600774 (the 'PTC Witness Decision'); in particular, the 'Opinion of Judges Catherine Marchi-Uhel and Rowan Downing' (the 'Dissenting Opinion').

Cambodian counterparts adhered to the Government's political line.[29] Given the voting rules in place at the ECCC, the latter view prevailed and the international judges—who would have ordered a Rule 35 investigation into the 'grave' allegations[30]—were effectively vetoed.

8. Nevertheless, the Dissenting Opinion stands as a sharp rebuke to the OCIJ's 'unsatisfactory' attempt at 'deferral of [its] responsibility' to the PTC:[31]

> In surveying [the material submitted by the Defence] we are of the view that *no reasonable trier of fact could have failed to consider that the above-mentioned facts and their sequence constitute a reason to believe that one or more members of the RGC may have knowingly and willfully interfered with witnesses who may give evidence before the CIJs*. This finding stands irrespective of whether the witnesses in question may or may not have had more than one reason not to appear to testify. The single most important fact is the comment made by Khieu Kanharith, published in the *Phnom Penh Post*, "that [the] government's position was that they should not give testimony" made in reference to the Six Officials. The context in which this statement was made greatly contributed to the belief that it may amount to an interference or reflect other efforts to prevent the testimony of the Six Officials. [...] The comment by Khieu Kanharith satisfies us that there is a reason to believe he, or those he speaks on behalf of, may have knowingly and willfully attempted to threaten or intimidate the Six Officials, or otherwise interfere with the decision of the Six Officials related to the invitation to be interviewed by the International Co-Investigating Judge.[32]

Indeed, the PTC's international judges went so far as to suggest that the OCIJ, although 'the natural investigative body within the ECCC'[33], would be professionally unsuited 'to conduct an investigation into these allegations of interference'.[34]

9. Ultimately, neither the King Father nor the Six Insiders provided testimony to the OCIJ.

3. Government Interference in Cases 003 & 004

10. For over a decade, Hun Sen has repeatedly announced 'that no more than five suspects should be prosecuted by the [ECCC], warning on several occasions that this could rupture the negotiated peace of the 1990s and spark a new civil war'.[35] This overtly political line has been consistently and openly towed by senior RGC officials as well as 'Cambodian judicial officers at the court'.[36] Notably, national Co-Prosecutor Chea Leang—along with Cambodian members of the PTC—opposed the investigation of additional suspects put

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29 *See ibid*; in particular, the 'Opinion of Judges Prak Kimsan, Ney Thol, and Huot Vuthy'.

30 Dissenting Opinion, para 5 ('As a result of the repeated failure of the CIJs to act, we are of the view that given the grave nature of the allegations of interference the Pre-Trial Chamber must intervene.').

31 Dissenting Opinion, para 4; *See also ibid*, para 11 ('Once a judge is satisfied that information before him or her establishes a reason to believe that an interference as defined in the Internal Rules may have occurred, the exercise of judicial discretion is curtailed.')

32 Dissenting Opinion, para 6 (emphasis added).

33 Dissenting Opinion, para 8.

34 *Ibid*, para 8.

35 Douglas Gillison, 'KRT Begins Investigation of Five New Regime Suspects', *The Cambodia Daily*, 8 June 2010, p 26.

36 Douglas Gillison, 'KRT Judge Does Not Sign On To New Investigations', *The Cambodia Daily*, 9 June 2010, p 26.

forward by UN prosecutors on grounds strikingly similar to those consistently and vocally advanced by the Government.[37]

11. In June 2010, Cambodian CIJ You Bunleng demonstrated his professional allegiance to the RGC cause: after having signed rogatory letters which would have effectively commenced certain crime base investigations, Judge You Bunleng 'unsigned' the documents and returned them to his international counterpart Judge Lemonde.[38] By way of explanation, he offered only the following justification: '[U]pon more attentive and deeper consideration of the question, I think that it is not yet opportune to take action in Cases 003 and 004.'[39] That evening, Reach Sambath, the tribunal's Cambodian spokesman 'issued a statement announcing Judge Bunleng's dissociation from the rogatory letters'.[40] Notably, the letters were renounced *after* '[RGC] Interior Ministry spokesman Lieutenant General Khieu Sopheak publicly repeated the [Government's] opposition to the new investigations [...], citing Hun Sen's continued warnings of unrest: "Just only the five top leaders [are] to be tried," Lt. Gen. Sopheak said. "Not six. Just five. The court must secure the stability and the peace of the nation," he said. "The conflict and internal instability we don't want".'[41]

12. In reaction to this course of events, and given Judge You Bunleng's continued involvement in Case 002, the Defence filed a request for his disqualification,[42] and an additional request for investigation pursuant to Rule 35.[43] Both were dismissed by the PTC as factually unsubstantiated.[44]

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37 *See* Case File No 001/18-11-2008-ECCC/PTC, 'Annex I: Public Redacted Version – Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71', 18 August 2009, paras 28–37 and separate 'Opinion of Judges: Prak Kimsan, Ney Thol, and Huot Vuthy'.

38 OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, re 'Dossiers 003 et 004' (unofficial translation from the original French).

39 *Ibid* (unofficial translation from the original French). *See also* Douglas Gillison, 'Khmer Rouge Tribunal Judge Backs Out of New Inquiries', *The Cambodia Daily*, 10 June 2010, p 2.

40 Douglas Gillison, 'Khmer Rouge Tribunal Judge Backs Out of New Inquiries', *The Cambodia Daily*, 10 June 2010, p 2; *See also* Douglas Gillison, 'KR Judge Does Not Sign On To New Investigations', *The Cambodia Daily*, 9 June 2010, p 26.

41 Douglas Gillison, 'KRT Begins Investigation of Five New Regime Suspects', *The Cambodia Daily*, 8 June 2010, p 26.

42 *See* You Bunleng Disqualification Application.

43 *See* Case File 002/07-07-2010-ECCC-PTC(10), Document No 1, 'Second Request for Investigation', 7 July 2010, ERN 00553229–00553250.

44 *See* Document No **D-384/5/1**, 'Appeal Against the Order on Nuon Chea's Second Request for Investigation (Rule 35)', 1 September 2010, ERN 00598096–00598113; Document No **D-384/5/2**, 'Decision on Appeal Against the Order on Nuon Chea's Second Request for Investigation (Rule 35)', 2 November 2010, ERN 00608821–00608839; Case File 002/17-06-2010-ECCC-PTC(09), Document No 8, 'Decision on Application for Disqualification of Judge You Bunleng', 9 September 2010, ERN 00600686–00600706.

4. Further Independent Assessment & Government Reaction

13. In March 2010, the Open Society Justice Initiative ('OSJI') published a report regarding, among other things, Government meddling at the ECCC:

> In the past six months, improper interference has been manifest in the response of Cambodian government officials to the summonsing of high-level officials by the investigating judges in Case 002, and to the initiation of an investigation into charges against five additional accused in what is referred to as Cases 003 and 004. Influential government officials, including the prime minister, have made clear their position that the summonsed witnesses will not appear, and that Cases 003 and 004 will not proceed.[45]

Later in the year, UN Special Rapporteur on the Situation of Human Rights in Cambodia Surya Subedi strongly criticized rampant RGC interference in the work of the Cambodian judiciary, stating that 'both financial and political interference in the judiciary was undermining the faith that Cambodians had in their judicial institutions'.[46]

14. The publicly reported comments of one of the tribunal's Cambodian judges suggest that such RGC obstruction is simply a fact of life at the ECCC: 'How can we say that the court is a model of independent justice if the government does not let us do our job?'[47] In this regard, the last word belongs to Hun Sen, who—in possibly the most overt admission of interference in the work of the tribunal to date—told visiting UN Secretary-General Ban Ki-moon on 27 October 2010 that no further prosecutions beyond those already in progress would be 'allowed' by his Government.[48]

C. The OCIJ Investigation

1. General Approach

15. Despite the Co-Investigating Judges' mandate to conduct an impartial investigation,[49] the dossier, as forwarded to the Trial Chamber, can hardly be said to reflect the balanced achievement of a neutral arbiter of the truth. Rather, the Case File—inspired in both scope and substance by the extensive research conducted over the previous fifteen years by an organization devoted exclusively to establishing the occurrence of 'genocide' in

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[45] OSJI Report, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', March 2010 Update, p 6 available at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-20100324/cambodia-court-20100324.pdf.

[46] Mark Worley & Neou Vannarin, 'UN Envoy Says Judiciary "Compromised"', *The Cambodia Daily*, 18 June 2010, pp 1, 2.

[47] James Goldston, *The Wall Street Journal*, OP-ED, 'Cambodia's Court at a Crossroads', 1 March 2010.

[48] *See* AFP Report, 'Cambodian PM Says No Third Khmer Rouge Trial', 27 October 2010 ('Cambodian Prime Minister Hun Sen told visiting UN Secretary General Ban Ki-moon on Wednesday that a second Khmer Rouge war crimes trial due to start early next year would be the last. Hun Sen "clearly affirmed that case three is not allowed", Foreign Minister Hor Namhong told reporters after Ban met with the premier. "We have to think about peace in Cambodia," he said.')

[49] *See* Rule 55(5) ('In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.')

Cambodia, the Documentation Center of Cambodia ('DC-Cam')—suggests a magistrates' office predisposed to a predetermined historical outcome. While the RGC's approach to stage management has been rather brutally overt (perhaps given its experience with show trials), the OCIJ's fiction of justice has unfolded largely behind the curtain.

2. Lack of Transparency

16. Citing the needs for secrecy, the OCIJ has consistently refused to provide information as to how it conducted the investigation. No insight into: (i) the qualifications of investigators, analysts, or interpreters; (ii) working methods; or (iii) the application of such methodology to the targeting of witnesses and evidence was ever provided. Defence teams repeatedly attempted to lift this veil of secrecy, but such efforts were in vain.[50] This silence, among other circumstances, led the Defence to set out several specific concerns regarding the conduct of the investigation[51] and subsequently file a request to disqualify Judge Marcel Lemonde.[52]

3. Lack of Sufficient Agency

17. The OCIJ made it clear at the outset of the proceedings that the Defence would not be allowed to undertake any investigative actions of its own.[53] Additionally, the Defence was barred from attending *any* witness interviews conducted by the OCIJ or its delegated investigators. Instead, the CIJs referred the parties to their right to *request the OCIJ* to undertake certain investigative actions on their behalf—essentially confirming the judges' status as agents of the Defence.

18. Accepting this premise, the Defence filed a number of requests on behalf of Nuon Chea: in total, twenty-six so-called Requests for Investigative Action (the 'RIAs').[54] Yet, in almost every case, the OCIJ either dismissed or failed to adequately execute the requested action.[55] Notably, in those RIAs related exclusively to witnesses and witness interviews, the Defence requested the OCIJ to remedy a large number of significantly flawed witness interviews, the records of which had been placed on the Case File: '[T]he CIJs' approach

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50 *See, e.g.*, Document No **D-171**, 'Ieng Sary's Third Request for Investigative Action', 21 May 2009, ERN 00330819–00330834; Document No **D-171/2**, 'Notice of Joinder to Ieng Sary's Third Request for Investigative Action', 9 June 2009, ERN 00337488–00337489.

51 *See* Document No **D-221**, Letter to OCIJ re 'Lack of Confidence in the Judicial Investigation', 15 October 2009, ERN 00388879-00388881.

52 *See* Case File No 002/29-10-2009-ECCC/PTC(04), Document No 1, 'Application for Disqualification of Judge Marcel Lemonde', 29 October 2009, ERN 00398693–00398704 (the 'Lemonde Disqualification Application').

53 *See* Document No **A-110/I**, Memorandum from OCIJ to Defence, 14 January 2008, ERN 00157729–00157730.

54 *See* the 26 RIAs previously filed by the Nuon Chea Defence team: Document Nos **D-80**, **100**, **101**, **102**, **105**, **113**, **122**, **126**, **128**, **136**, **158**, **173**, **179**, **194**, **130/11**, **253**, **265**, **273**, **318**, **319**, **320**, **336**, **338**, **339**, **340**, and **356** (see TOA for full citations).

55 *N.B.* In such cases, the follow-up investigations ordered by the PTC did not conform to the actual Defence request, failed to achieve the outcome sought, or were not undertaken at all.

to witness interviews has been marred by several flaws and omissions. In particular, OCIJ investigators have often neglected to identify the witnesses' source of knowledge and have consistently failed to address issues of transparency, veracity, and accuracy when producing the recorded witness statements.'[56] Yet, despite sufficient factual motivation, these RIAs were dismissed nearly in their entirety by the OCIJ; this approach was sanctioned by the PTC on appeal.[57] Only in very few instances where it seemed likely that further *inculpatory* evidence could be obtained by interviewing witnesses suggested by the Defence did the OCIJ order the re-hearing of witnesses.[58]

4. Bias in Favor of Inculpatory Evidence

19. Information from within the OCIJ revealed that Judge Lemonde had, in a meeting with key members of his staff, expressed a desire to find more inculpatory, rather than exculpatory, evidence.[59] In response, the Defence moved for Judge Lemonde's disqualification.[60] While the application was eventually dismissed by the PTC,[61] Judge Lemonde's stated preference was evident in the OCIJ's approach to the RIAs.[62] Additionally, Judge Lemonde permitted to be internally distributed within the OCIJ an unofficial document provided by Craig Etcheson of the Office of the Co-Prosecutors (the 'OCP') regarding potential avenues of investigative inquiry.[63]

D. Adoption and Application of the Rules

20. 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

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56 *See, e.g.*, Document No **D-318**, 'Nineteenth Request for Investigative Action', 13 January 2010, ERN 00417064–00417072, para 9.

57 *See* Document No **D-375**, OCIJ 'Order on NUON Chea's Requests for Interview of Witnesses (D318, D319, D320, D336, D339 & D340)' [RIAs 19-25], 9 April 2010 , ERN 00495898-00495911 (the 'OCIJ Order on Request for Interview of Witnesses'); *See further* Document No **D-375/1/4**, PTC 'Decision on Appeal Against Co-Investigating Judges' Order on NUON Chea's Request for Interview of Witnesses (D318, D319, D320, D336, D339 & D340)' [RIA nos 19-25], 16 June 2010, ERN 00531133-00531138.

58 *See*. OCIJ Order on Request for Interview of Witnesses.

59 *See* Lemonde Disqualification Application; *See inter alia* Document No **D-263.3**, 'First Wayne Bastin Statement', 8 October 2009, ERN 00387016-00387018.

60 *Ibid.*

61 *See* Case File No 002/29-10-2009-ECCC/PTC(04), Document No 4, 'Decision on Nuon Chea Application for Disqualification of Judge Marcel Lemonde', 23 March 2010, ERN 00485317–00485329.

62 *See* paras 56–59, *infra*.

63 *See* Case File 002/07-12-2009-ECCC/PTC(05), Document No 1, 'Ieng Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde', 7 December 2009, ERN 00411010–00411026, paras 11(e); *See also* Document No **D-263.4**, 'Second Wayne Bastin Statement', 2 December 2009, ERN00408614-00408625, p 3-4 at ERN 00408616-00408617.

the principles and modalities'[64] for conducting the current criminal proceedings '*within the existing court structure of Cambodia*'.[65] As required by its terms,[66] 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.[67] 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').[68]

21. 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').[69] 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.

22. 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*'.[70]

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64 ECCC Agreement, Article 1.

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

66 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.')

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

68 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.

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

70 Emphasis added.

23. 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').[71] 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');[72] nor have the Rules been endorsed by 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,[73] including important legislative developments,[74] 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.

24. 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.[75] 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].[76]
>
> Provisions of the [CCP] should only be applied where a question arises which is not addressed by the Internal Rules.[77]

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71 ECCC Internal Rules, preambular para 5.

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

73 *See* paragraph 22, *supra*.

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

75 *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.

76 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.

77 Annulment Decision, para 15.

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

25. 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.[78] This Chamber was officially seised of the Case File on 14 January 2011.[79]

III. RELEVANT LAW

A. Jurisdiction of the Tribunal

26. The Defence hereby incorporates by reference the various legal submissions contained in its previously filed 'Appeal Against the Closing Order'[80] and 'Reply to Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary, and Ieng Thirith's Appeals Against the Closing Order'.[81]

B. Termination of Prosecution

27. International jurisprudence and ECCC case law acknowledge that courts, in their role as guardians of the judicial process, have the discretionary power to stay proceedings—on a permanent or temporary basis—where alleged violations are of such an egregious nature that they 'would prove detrimental to the court's integrity'.[82] Indeed, relying on *Lubanga*

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78 *See* Closing Order Decision; Closing Order.

79 *See* Preparation Order, para 2.

80 *See* Document No **D-427/3/1**, 'Appeal Against the Closing Order', 18 October 2010, ERN 00614048–00614065, paras 5-22 ('Relevant Law').

81 *See* Document No **D-427/3/11**, 'Reply to Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary, and Ieng Thirith's Appeals Against the Closing Order', 6 December 2010, ERN 00629679–00629687, paras 4–5.

82 *See* IT-95-5/18-AR73.4, *Prosecutor v Radovan Karadzic*, 'Decision on Karadzic Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement', 12 October 2009, para 45. With regard to the PTC's acceptance of the power to stay proceedings, *see* Document No **D-264/2/6**, 'Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1)', 10 August 2010, ERN 0054379–00543799 (the 'Ieng Thirith Stay Decision'), paras 22–28. *See further* ICTR-97-19-AR72, *Jean-Bosco Barayawiza v Prosecutor,* 'Decision', 3 November 1999, paras 74, 77. In this case, the ICTR Trial Chamber ruled that the only appropriate remedy to violations of the Accused's rights was to

and other authorities, the PTC has recently held that such course of action could be necessary in 'exceptional and very serious cases of violations of the rights of the [Accused] which cannot be rectified or contravene the court's sense of justice'.[83] In such circumstances, the PTC reasoned, it is up to the Court 'to strike the correct balance between the fundamental rights of the [Accused] and the interests of the international and national communities in the prosecution of persons charged with serious violations of international humanitarian law and national law'.[84]

28. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (the 'ICTY') has recently stated: 'in circumstances of witness intimidation [...], it is incumbent upon a Trial Chamber to do its utmost to ensure that a fair trial is possible'.[85] Countering such interference 'is especially pressing when outside forces seek to undermine the ability of a party to present its evidence at trial. For the Tribunal to function effectively, the Trial Chamber must counter witness intimidation by taking all measures that are reasonably open to them [...]'.[86]

29. With regard to prejudice, the views of the PTC's international judges are instructive: 'If an interference has occurred or is currently occurring and that interference impedes the judicial investigation, the charged persons may be prevented from obtaining possible advantage that may emerge from the testimony of the Six Officials.'[87]

C. Nullity of Procedural Acts

30. 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'.[88]

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halt the proceedings against Barayagwiza. This decision was overturned on review, but only because the initial remedy had been ordered based on cumulative failings by the Office of the Prosecutor and new facts were brought to light that diminished the role played by those failings rendering the initial remedy disproportionate, *see* ICTR-97-19-AR72, 'Decision' (Prosecutor's Request for Review or Reconsideration) 31 March 2000, para 71; *See further* ICC-01/04-01/06, *Prosecutor v Thomas Lubanga Dyilo*, 'Public Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending', 8 July 2010, para 31. In this case the stay of proceedings was granted due to *material non-compliance* by (i) the Prosecution's refusal to execute an order from Chambers and (ii) 'because of the Prosecutor's clearly evinced intention not to implement the Chamber's orders (...) if he considers that they conflict with his interpretation of the Prosecution's other obligations'.

83 Ieng Thirith Stay Decision, para 28.

84 Ieng Thirith Stay Decision, para 28.

85 IT-04-84-A, *Prosecutor v Haradinaj et al*, 'Judgment', 19 July 2010, para 35.

86 *Ibid.*

87 Dissenting Opinion, para 12.

88 Annulment Decision, para 36.

> 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.[89] [...] [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.[90]

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

D. Right to a Fair Trial

31. According to the Cambodian Constitution, the CCP, and the ECCC Agreement and Law, the Accused unquestionably has the right to a fair investigation and subsequent trial. These guarantees are adequately reflected in Rule 21, which provides (among other things) that: (i) the applicable law and procedure 'shall be interpreted so as to always safeguard the interests of [the] [...] Accused';[91] (ii) 'ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties';[92] and (iii) '[e]very person [...] prosecuted shall be presumed innocent as long as his/her guilt has not been established'.[93] At all times, the Trial Chamber 'is under an obligation to ensure that the integrity of the proceedings is preserved'.[94]

E. Lawmaking Authority in the Kingdom of Cambodia

32. The Constitution, which endorses the well-known democratic principle of separation of powers,[95] 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.'[96] All laws and government decisions 'shall have to be in strict conformity with the Constitution'.[97] A hierarchy of 'main legal norms' exists in Cambodia: (i) the Constitution; (ii) constitutional law (i.e. revisions or amendments to the Constitution; (iii) laws (*kram*); (iv) decrees (*kret*); (v) sub-decrees (*anukret*); (vi) regulations (*prakas*); and (vii) circulars (*sarachor*).[98]

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89 *Ibid*, para 40.
90 *Ibid*, para 42.
91 Rule 21(1)(chapeau).
92 Rule 21(1)(a).
93 Rule 21(1)(d).
94 Dissenting Opinion, para 10.
95 *See* Constitution, Article 51 ('The Legislative, Executive, and the Judicial powers shall be separate.')
96 Constitution, Article 90.
97 Constitution, Article 131.
98 *See* Council of Jurists of Cambodia website at http://www.bigpond.com.kh/council_of_jurists/z/Typolg.htm.

F. Applicable Procedure at the ECCC

33. The Constitution provides that the 'prosecution, arrest, or detention of any person shall not be done except *in accordance with the law*',[99] and any subsequent trial 'shall be conducted [...] *in accordance with the legal procedures and laws in force*'.[100] Echoing this Constitutional mandate and the relevant provisions of the International Covenant on Civil and Political Rights[101] (the 'ICCPR'), the Constituent Instruments provide an identical guarantee: The 'procedure' applied at the ECCC '*shall be in accordance with Cambodian law*';[102] and the prosecution, investigation, and trial of any individual shall follow '*existing procedures in force*'.[103] 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.[104]

34. 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 question regarding' a provision's 'consistency with international standards'.[105] In such cases—*and only in such cases*—'guidance' may be sought 'in procedural rules established at the international level'.[106] 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.

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99 Constitution, Article 38 (emphasis added).

100 Constitution, Article 110 (emphasis added).

101 *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*.

102 ECCC Agreement, Article 12(1) (emphasis added); *See also* Duch Judgment, para 35.

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

104 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). *N.B.* Göran Sluiter is a Defence consultant and member of Böhler Advocaten, the Amsteredam practice of Messrs Pestman and Koppe.

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

106 *Ibid.*

35. 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.[107] Unlike the analogous instruments of 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.[108] 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 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.

G. Equality Before the Law

36. According to the Constitution, every Cambodian citizen 'shall be equal before the law, enjoying the same rights [...] regardless of [...] status'.[109] The same guarantee is enshrined in the ICCPR: 'All persons shall be equal before the courts and tribunals.'[110]

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[107] *See* ECCC Law, Articles 20*new*, 23*new*, and 33*new*. *N.B.* Göran Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers', Journal of International Criminal Justice 4 (2006) ('Sluiter 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.')

[108] *See* O'Neill & Sluiter, n 104, *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* ICTY 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.')

[109] Constitution, Article 31.

[110] ICCPR, Article 14(1).

H. Additional Issues

37. Due to space constraints,[111] the Defence hereby incorporates by reference its previously submitted positions on the following points of law: (i) adequate time and facilities;[112] (ii) reliability and probative value of evidence;[113] (iii) obligation to seek exculpatory material;[114] (iv) verification of inculpatory material;[115] (v) sufficiency of evidence;[116] and (vi) independence and impartiality of the judiciary.[117] Additionally, as to the last point, it bears emphasizing that 'interference with the administration of justice may imply disregard for the independence of the judiciary'.[118]

IV. ARGUMENT

A. The Objections Are Admissible and the Defence Intends to Raise the Matters at the Initial Hearing

38. The Closing Order and Indictment became final on 14 January 2011. As the instant objections have (in their original format) been filed within thirty days of that date[119] and concern: (i) the jurisdiction of the Trial Chamber; (ii) an issue which requires the termination of prosecution, namely: the lack of a fair investigation; and (iii) the validity of procedural acts made after the Indictment was filed, they are therefore admissible in accordance with Rules 89(1)(a)–(c).

39. According to Rule 89, preliminary objections need only be 'raised' within thirty days of the Closing Order becoming final. The instant objections, intended to comply with that requirement and this Chamber's recent directions, is by no means an exhaustive briefing of the issues presented herein. Rather, the Defence intends to make further oral submission on these matters at the Initial Hearing, at which point the Trial Chamber is required to 'consider' preliminary objections.[120]

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111 *See* n 1, *supra*.
112 *See* Document No **D130/**11, 'Fifteenth Request for Investigative Action', 1 September 2009, ERN 00372524-00372528, para 6.
113 *See* Document No **D318**, 'Nineteenth Request for Investigative Action', 13 January 2010, ERN 00417064-00417072, para 5.
114 *See* Document No **D-135/1/1**, 'Appeal Against OCIJ Order on Nuon Chea's Requests for Investigative Action Relating to Foreign States', 15 February 2010, ERN 00456083–00456100, paras 14–17.
115 *Ibid.*
116 *See* Nineteenth Request for Investigative Action, para 4.
117 *See* You Bunleng Disqualification Application, paras 12–13.
118 *See* You Bunleng Disqualification Application, para 9.
119 *N.B.* Additional time in which to file these consolidated objections has been granted by the Trial Chamber. *See* n 1, *supra*.
120 *See* Rule 80*bis*(3) ('The Chamber shall consider matters dealt with in Rule 89.')

40. Moreover, given the size and late filing of the PTC's reasoned 'Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order',[121] further written submissions on the jurisdictional issues addressed therein may be necessary in the interests of justice.

B. Extension of the 1956 Penal Code's Statute of Limitations Would Violate the Principle of Legality

41. As the applicable limitation period had already expired before its putative extension under Article 3*new* of the ECCC Law, this Chamber may not—consistent with the principle of legality—interpret said article as reinstating the right to prosecute crimes contained in the 1956 Penal Code. On this issue, the Chamber should adopt the previously expressed position of its international judges, which is the only approach consistent with Cambodia's strict principle of legality.[122]

C. Trying Nuon Chea for Alleged Violations of the International Crimes Referenced in the ECCC Law Would Violate the Principle of Legality

1. Because the ECCC is a Domestic Tribunal, Cambodian Law—Including the National Principle of Legality—is Strictly Applicable

42. The ECCC was 'established by Law as a judicial body *within the Cambodian court system*'.[123] Unlike the ICTY,[124] ICTR,[125] SCSL,[126] and ICC[127]—each of which possesses a 'separate international legal personality'[128]—the ECCC is fundamentally a domestic criminal tribunal. Despite the expressed ambivalence on this issue,[129] several factors make it abundantly clear that the ECCC is nothing if not Cambodian:

a. The ECCC was established by national (rather than international) law.[130]

b. It was 'established in the existing court structure' of Cambodia.[131]

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121 Document No **D-427/2/15**, 'Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order', 15 February 2011, ERN 00644462–00644571.

122 *See* Case 001/18-07-2007-ECCC/OCIJ, Document No **E-187**, 'Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes', 26 July 2010, paras 9–14, 27–35, 39–54.

123 Closing Order, para 1300 (emphasis added).

124 *See* ICTY Statute, preamble ('Having been established by the Security Council *acting under Chapter VII of the Charter of the United Nations* [...].') (emphasis added).

125 *See* ICTR Statute, preamble ('Having been established by the Security Council *acting under* Chapter VII of the Charter of the United Nations [...].') (emphasis added).

126 *See* Special Court Agreement, 2002 (Ratification) Act, 2002, Section 11(2) ('The Special Court shall not form part of the Judiciary of Sierra Leone.'); *ibid*, Section 13 ('Offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone.')

127 *See* Rome Statute, Article 4(1) ('The [ICC] shall have international legal personality.')

128 Goran Sluiter, *Legal Assistance to Internationalized Criminal Courts and Tribunals*, in CPR Romano, PA Nollkaemper & JK Kleffner, INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA (Oxford 2004), p 396 (noting that the SCSL has a 'separate international legal personality and is not part of the national court system in Sierra Leone').

129 *See, e.g.*, Document No **D-97/14/15**, 'Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise (JCE)', 20 May 2010, ERN 00486521–00486589 (the 'JCE Decision'), para 47.

130 *See* ECCC Law and ECCC Agreement.

131 ECCC Law, Article 2.

c. The RGC explicitly rejected the idea of establishing an international tribunal.[132]

d. All of the ECCC's judicial officers were appointed by the RGC, with the UN providing only a list of proposed international candidates.[133]

e. The Cambodian Constitutional Council highlighted the ECCC's position within the existing court structure as being protective of Cambodian sovereignty.[134]

f. In one of its earliest decisions, PTC—while ruling that the ECCC was 'distinct from other Cambodian Courts in a number of respects'—nevertheless found that it operated as 'an independent entity *within the Cambodian court structure*'.[135]

g. Although (in exceptional cases) recourse may be had to procedural rules established at the international level,[136] the starting point at the ECCC is always existing Cambodian law and procedure.[137]

43. Continued reference to the ECCC as an 'internationalized' institution[138] is merely a descriptive exercise without any legal effect. And the mere fact that its subject-matter jurisdiction extends to international law or that some of its judges are non-Cambodians does not transform the ECCC into an international court.[139] Indeed, the tribunal's name—the Extraordinary Chambers in the Courts of Cambodia—speaks for itself.[140]

44. Accordingly, it is *Cambodia's* principle of legality, as it existed in 1975–79, which must apply.[141] That principle is strictly enshrined in the 1956 Penal Code at Article 6, which contains no exception such as the one provided in Article 15(2) of the ICCPR. And the references in the former article to 'law' can only reasonably be interpreted to mean *law applicable in Cambodia at the relevant period.*

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132 *See* 'Report of the Secretary-General on Khmer Rouge Trials', paras 6–7, n 12 *supra.*

133 Constitution Council Decision No 040/002/2001, 12 February 2001, p 3.

134 *Ibid*, p 4.

135 Case No 001/18-07-2007-ECCC/OCIJ, Document No **C-5/45**, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', 3 December 2007, paras 17–19 (emphasis added).

136 *See* ECCC Agreement, Article 12(1); ECCC Law, Articles 20*new*, 23*new*, 33*new*.

137 *See* ECCC Agreement, Article 12(1).

138 *See* Document No **D-427/3/6**, 'Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary, and Ieng Thirith's Appeals Against the Closing Order', 19 November 2010, ERN 00626531–00626650 (the 'OCP Response'), para 138.

139 *N.B.* Domestic courts routinely apply international law (subject to the rigors of their national principles of legality). And it is not uncommon for municipal courts to be composed of foreign judges.

140 Albeit an 'extraordinary' one, the ECCC is—in the final analysis—a Cambodian court. And while it indeed occupies a unique position within the domestic legal order, it remains (along with ordinary Cambodian courts) an integral part of that order. The distinctions previously enumerated by the OCP (at paragraphs 137–142 of its Response) emphasize the tribunal's admittedly *sui generis* nature, yet they fall short of justifying the subordination of established domestic principles to less protective international ones.

141 *See* A Cassese (Ed), THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE (Oxford 2009), p 438 ('The principle of legality postulates that a person may only be held criminally liable and punished if, *at the moment when he performed a certain act, the act was regarded as a criminal offence by the relevant legal order.*') (emphasis added).

2. Domestic Criminal Law at the Time of the Alleged Events Did Not Provide for the Criminalization of Genocide, Crimes Against Humanity, or War Crimes

45. As noted previously, the domestic legal regime in force at the time of the events alleged in the Closing Order did not criminalize the offences set out in Articles 4–6 of the ECCC Law. Additionally, and irrespective of the state of customary international law in 1975–1979, Cambodia's dualist tradition prevented the direct application of any such international norms (which may or may not have existed) during the same period. Moreover, no implementing legislation was passed before, or at any time during, the Democratic Kampuchea era with respect to genocide, crimes against humanity, or war crimes. Accordingly, these international offences were not '*applicable in Cambodia at the relevant time*'.[142]

46. Therefore, arguments suggesting that 'the issue [of] whether international law is directly applicable in [Cambodia] has no bearing on ECCC jurisdiction'[143] are erroneous. Because domestic law does not provide the necessary criminalization of the conduct alleged in the Indictment, the only alternative basis would be the application of international criminal law; yet—for the reasons stated in the previous paragraph—such law did not apply in Cambodia in 1975–1979. International custom has never been a direct part of the Cambodian legal order.[144]

47. Likewise, suggestions that the criminality of genocide, crimes against humanity, and war crimes would have been sufficiently accessible to Nuon Chea because he was allegedly a member of Cambodia's governing authority[145] misses the point. Even if the sources of then-existing *international* law on genocide, crimes against humanity, and/or war crimes had been available to Nuon Chea, such 'law' would not have been binding on him within the *domestic* legal order of Cambodia.

48. Particularly instructive in this regard is a 2007 decision of Spain's *Tribunal Supremo* in the *Scilingo* case.[146] At trial, the *Audiencia Nacional* convicted the accused of crimes against humanity as codified in the Spanish Code of 2004. The alleged acts had taken place between 1976 and 1981, well in advance of domestic criminalization. On appeal, stressing

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[142] Closing Order, para 1302 ('[I]n order to be applied before the ECCC, where a crime was not included in the applicable national criminal legislation, it must be provided for in the ECCC Law, explicitly or implicitly, and it must have existed under international law *applicable in Cambodia at the relevant time.*') (emphasis added).

[143] Closing Order, para 1304.

[144] The OCP has confidently asserted that '[t]here can be no argument that participation in genocide, murder, rape, enslavement, extermination of civilians or the unlawful imprisonment, torture, and killing of prisoners of war were not criminal *in any of the major legal systems between 1975 and 1979*'. OCP Response, para 164 (emphasis added). This may or may not be the case. In any event,, it cannot be argued that genocide, crimes against humanity, and war crimes—as defined by the ECCC Law—were criminalized *in Cambodia* during the same period.

[145] *See* Closing Order, paras 1305–1307.

[146] *See Tribunal Supremo, Sala de lo Penal, Segunda Sentencia, Sentencia No* 798/2007, *Recurso Casacion (P) No* 10049/2006 P (the 'Scilingo Decision').

the dualist nature of the Spanish legal order,[147] and invoking Spain's national principle of legality,[148] the *Tribunal* held that Scilingo could not be convicted pursuant to the contemporary code as: (i) crimes against humanity had not yet been incorporated into Spanish law at the time of the commission of the alleged acts and (ii) customary international law was not directly applicable.[149] The court ultimately convicted the accused 'merely' for the domestic crimes of murder and illegal detention.[150] The analogy between Scilingo and the instant case is clear: Nuon Chea cannot be charged with international crimes that were not part of the Cambodian legal order at the time they were allegedly committed.[151]

3. The ECCC Law Does Not Provide for Criminalization of Genocide, Crimes Against Humanity, or War Crimes

49. The OCIJ has suggested that the ECCC Law itself has criminalized in Cambodia offences recognized under international law.[152] This is not the case. Rather, the ECCC Law vests the tribunal with jurisdiction over certain *persons* in regard to particular crimes listed in Articles 3*new*–6. This is made plain by the phrasing of those provisions, which simply authorizes the ECCC to 'bring to trial' individuals accused of national crimes, genocide, crimes against humanity, and war crimes. Drafted in the limiting language of jurisdiction to enforce,[153] these articles do not convey the substantive basis of criminalization, such as that found in 1956 Penal Code.

50. The principle of legality itself draws a sharp distinction between jurisdiction to enforce and the substantive basis of criminality.[154] While retroactive changes in conditions of a prosecution that are not material for the determination of criminality—for example, procedural provisions—are generally not subject to the principle of legality,[155] *ex post facto* changes to substantive laws clearly are.[156] Given this distinction, it would be illogical to infer criminality

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147 Scilingo Decision, *Sexto*, § 4, para 1.

148 Scilingo Decision, *Sexto*, § 4, para 1; § 6 para 1. The *Tribunal Supremo* also discussed the relevant provision in the European Convention of Human Rights (Article 7) and stressed that the convention allowed member states to apply more robust protections in proceedings before national courts. *Ibid*, para 2).

149 Scilingo Decision, *Sexto* § 1, para 1; § 4, para 5.

150 The court went on to recognize that the specific acts in question constituted crimes against humanity under international law, which it deemed relevant in order to assume jurisdiction over the facts. *See* Scilingo Decision, *Septimo, Octavo*. For a discussion of this case in English, see Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEORGETOWN LAW JOURNAL 119, 163–165.

151 *See also Mpambara*, Interlocutory Decision, Hague District Court, 24 July 2007, paras 36–44 (citing, *inter alia*, *Bouterse*, Appeal Judgment, Netherlands Supreme Court, 18 September 2001) (affirmed on appeal).

152 *See* Closing Order, paras 1305–1307.

153 *See* Jurisdiction Objection, n 52, on the distinction between jurisdiction to prescribe and jurisdiction to enforce.

154 *Ibid*.

155 *See, e.g.* IT-96-21-A, *Prosecutor v Delalic et al*, 'Judgment', 20 February 2001, paras 179–180; *cf* ECtHR Case Nos 34044/96 & 35532/97 & 44801/98, *Streletz, Kessler & Krenz v Germany*, 'Judgment', 22 March 2001, paras 79–81; Duch Judgment, para 34.

156 *See* RA Kok, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW (Asser 2001), pp 291–292.

from jurisdiction. Simply put, between the alleged commission of a crime and its subsequent prosecution, the scope of criminalization should not be expanded.[157] Moreover, the notion that the ECCC Law's jurisdictional provisions (could) *implicitly* criminalize genocide, crimes against humanity, and war crimes in Cambodia undermines the foreseeability and accessibility requirements of the principle of legality.

51. While 'the drafters of the ECCC Law [no doubt] intended to enable the ECCC to exercise jurisdiction over [...] specific international crimes',[158] allowing the tribunal to actually do so in the absence of clear domestic criminalization would contravene 'the overriding guarantees of fair trial'.[159]

4. The International Principle of Legality Does Not Provide for Domestic Criminality

52. Although it contemplates the domestic prosecution of international crimes in certain cases, the international principle of legality cannot, by its mere existence, inject substantive criminality into an established national legal order. As evidenced by the relevant state practice, international *nullum crimen* is complementary to the strictures of national sovereignty (including Cambodia's own principle of legality); its invocation (however well intentioned[160]) has no normative effect on the domestic plane in the absence of municipal criminalization. Accordingly, Article 33(2) of the ECCC Law—which refers to Article 15 of the ICCPR—does not itself secure criminalization of genocide, crimes against humanity, or war crimes in Cambodia because these international offences were not *applicable* in 1975–1979.

53. The 'reason to depart from [previous] decisions confirming the ECCC's jurisdiction over international law'[161] is a misplaced emphasis on the international principle of legality.

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157 *See* Fair Trial Objection, n 29; *See also* Belgium Constitutional Court 73/2005, *Erdal v Council of Ministers*, 'Decision', ILDC 9 (BE 2005) para B7 (holding that the principle of non-retroactivity of criminal law governed the extension of the scope *ratione loci* of pre-existing criminal law provisions: the laws extending the scope *ratione loci* of crimes already listed in the Penal Code (Belgium) ('Penal Code') were substantive laws in that they created a legal basis for prosecution in Belgium. Accordingly, they could not be applied retroactively).

158 OCP Response, para 135.

159 OCP Response, para 135. Contrary to the OCP's position, there is indeed a 'further pre-condition[...] on the application of those [international] laws'. OCP Response, para 135. As noted, domestic legislation specifically *criminalizing* the offence in question is a mandatory prerequisite for any application of international criminal principles within the national legal order.

160 *See* JCE Decision, para 47 (The status of the ECCC 'does not, in the view of the Pre-Trial Chamber, impact the Impugned Order's finding that [customary international law] is applicable before the ECCC. This is the case in light of the clear terms of Articles 1 and 2 of the ECCC Law whose purpose is to bring to trial senior leaders of [DK] and those who were most responsible for [...] serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized by Cambodia [...]. In this regard, the ECCC Law also makes clear that the Extraordinary Chambers shall be established within the existing court structure for this purpose.') *N.B.* For all of the reasons discussed in this brief, the mere desire or intention to 'bring to trial' alleged perpetrators of international crimes is an insufficient justification for the (attempted) establishment of domestic criminalization.

161 *See* OCP Response, para 136 (citing Document No **D-97/16/10**, PTC 'Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise', 20 May 2010, ERN 00486521–00486589, paras 45,

Repeated invocation of Article 15 of the ICCPR[162] has failed to take due account of another provision of the same covenant, one that 'preserves the sanctity of any laws that provide a higher level of protection for civil and political rights than those set out in the ICCPR'.[163] Article 5(2) of the ICCPR (applicable to these proceedings by virtue of the Cambodian Constitution[164]) prohibits this or any other domestic court from derogating from Cambodia's strict national principle of legality, which—unlike Article 15 of the ICCPR—suffers no exception. Accordingly, that the execution of the international regime envisaged by the ECCC Law would not violate Article 15 is immaterial.[165]

5. Retroactive Criminalization Violates the National Principle of Legality

54. Assuming, *arguendo,* this Chamber is convinced that the ECCC Law *has* criminalized the offences referred to in Articles 4–6, such retroactive legislation violates Cambodia's national principle of legality.[166] Criminalization of prior conduct in a subsequent legal order fails to satisfy the foreseeability requirement of national *nullum crimen.* While the exception to the international principle of legality (ICCPR, Article 15(2)) would arguably apply were the ECCC an international tribunal like the ICTY or SCSL, it strains reason to suggest that Nuon Chea could have foreseen internationally-based criminality in a Cambodian court. Put another way, it is difficult to understand how a person operating in a dualist, national system with strong *nullum crimen* protection could (or should) have appreciated that such protection would one day be stripped.

55. The previously stated position that the ECCC Law 'is not a law that has "retroactive effect"'[167] is misleading. As a practical matter, the execution of the tribunal's purported jurisdiction would undoubtedly entail *ex post facto* criminal consequences in violation of the clear provisions of Article 6 of the 1956 Penal Code. In short: Nuon Chea would face prosecution for international offences that attracted no sanction in this country before the

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47–48, 69, 87; Duch Judgment, para 30; and Document No **C-22/I/74**, 'Decision on Appeal Against Provisional Detention Order of Ieng Sary', 17 October 2008, ERN 00232976–00233004, paras 12–13).

162 *See* OCP Response, paras 145–146, 160–164.

163 Document No **D427/1/6**, 'Ieng Sary's Appeal Against the Closing Order', 25 October 2010, 00617486–00617631 (the 'Ieng Sary Appeal'), fn 210 (citing M Novak, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: ICCPR COMMENTARY, (2nd Edition), p 118 (NP Engel 2005)).

164 *See* Constitution, Article 31 (which states 'that Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights [...]').

165 *N.B.* This is true irrespective of Article 5(2). Article 15 does not (and could not) prescribe domestic criminalization; it merely sets out the *minimum* standards applicable to national legislation. At the same time, it leaves room for more robust protection such as that provided by Article 6 of the 1956 Penal Code. Given these factors, as well as the very definition of the principle of legality, Article 15 surely presumes an act of domestic criminalization.

166 *See* Jurisdiction Objection, n 52.

167 OCP Response, para 166.

enactment of the ECCC Law. While such result may promote the substantive-justice aims of international criminal law,[168] it is manifestly at odds with a strict principle of legality.

56. If the principle of legality truly is, 'first and foremost, a "principle of justice",'[169] it should not be employed to retroactively dilute individual rights at the municipal level. Any tension created by the divergence of the international and national approaches to *nullum crimen* must be alleviated in favor of the Accused pursuant to the principle of *in dubio pro reo.* Apart from violating Nuon Chea's constitutional right to prosecution 'in accordance with the law', allowing the international principle of legality to trump its more protective domestic counterpart would undermine the sovereignty of the Kingdom of Cambodia.[170]

D. The Judicial Investigation of Case 002 Was Fundamentally Flawed and Manifestly Unfair

1. Impermissible Government Interference Has Prevented the Collection of Key Evidence

57. As described previously, the RGC has interfered with the activities of the ECCC on numerous occasions. The Defence has attempted to counter such meddling by all available means. Yet the result of its concerted effort has been nil: Defence attempts have been rejected with unpersuasive and strained reasoning. Throughout the proceedings, Cambodian judges and prosecutors have behaved in perfect conformity with the RGC's stated position and have effectively blocked each and every Defence attempt to remedy this serious problem. Despite considerable factual support, no investigation has ever been undertaken; no person or entity has ever been sanctioned; and not a single warning has been issued. The facts, however, are clear: political interference is blatant and—as the Defence must assume—ongoing.[171] In no way a speculative matter (as were the corrosive effects of corruption), Nuon Chea *has been* 'prevented from obtaining possible advantage that may

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168 *See* Cassese, n 141 *supra*, at pp 438–439.

169 IT-99-37-AR72, *Prosecutor v Milutinovic et al*,'Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*', 21 May 2003, para 37 (quoting the International Military Tribunal at Nuremberg).

170 *N.B.* The 12 February 2001 decision of the Constitutional Council (Decision No 040/002/2001) is irrelevant, as it was limited to the constitutionality of the ECCC Law's extension of the statute of limitation for domestic crimes and other matters unrelated to the domestic application of internationally recognized crimes. The Council has not explicitly considered the effect of Cambodia's principle of legality on the international-criminal-law provisions contained in Articles 4–6 of the ECCC Law. Perhaps, in its wisdom, the Council has already correctly appreciated that the jurisdictional provisions of the ECCC Law cannot secure *post facto* criminalization in Cambodia's judicial chambers—however extraordinary they might be.

171 *N.B.* The Defence can only complain about instances of government interference *of which it is aware.* Needless to say, most unlawful interference would take place away from public view. It is not known why particular witnesses were singled out for interviews, whether there was any possibility of Government interference in the selection process, and whether the RGC had a chance to influence the substantive statements in advance. Considering that it has not shied away from openly meddling in the affairs of the tribunal, there is no reason to believe that the Government is not equally willing and motivated to influence the court in more covert ways.

emerge from [sought-after] testimony of the Six [RGC] Officials'[172] who refused to attend. Such interference has undoubtedly 'imped[ed] the judicial investigation'.[173]

2. A Biased and Otherwise Flawed Judicial Investigation Resulted in Significant Substantive and Procedural Violations

58. Serious flaws marred the judicial investigation from its inception. Most troubling, perhaps, was the particularly biased fashion in which it was carried out. This trend was overtly exemplified by the OCIJ's consistent denial of Defence Requests for Investigative Action (the 'RIAs'), nearly every one of which—although reasonably grounded and designed to shape the investigation to Nuon Chea's advantage—was summarily rejected, often with questionable legal reasoning. And when the PTC ordered the Co-Investigating Judges (the 'CIJs') to reconsider its denials, the outcome of such reconsideration was a *continued* refusal to assist the Defence. Indeed, the OCIJ routinely dismissed RIAs by perversely invoking Nuon Chea's right to a trial within a reasonable time in the rush to close the investigation before 19 September 2009 only to secure Nuon Chea's ongoing provisional detention. Despite its putative role as investigative agent on behalf of all parties, it became quite clear that the CIJs were uninterested in conducting an investigation that took into account relevant contextual circumstances or valued the vigorous pursuit of exculpatory theories. To the contrary, the OCIJ tasked itself solely with the search for material in support of the allegations contained in the OCP's Introductory Submission. Indeed, Judge Lemonde himself went so far as to articulate this position to his senior staff.[174]

59. Exacerbating the OCIJ's biased impulse was the lack of transparency that permeated the entire investigation. At no time were the parties informed of the underlying reasons for conducting (or not, as was very often the case) specific investigatory acts. In this regard, the CIJs repeatedly invoked the need for professional secrecy. Yet this over-anxious approach to confidentiality—clearly necessary vis-à-vis *the public*—worked a great (and unnecessary) disservice to *the parties*, who should have been permitted to verify and challenge both the manner and substance of the OCIJ's work throughout the process. Such secrecy—problematic in criminal-justice systems with robust procedural safeguards—becomes even more troubling in light of Cambodian contextual realities. The Defence simply has no way of knowing whether important exculpatory avenues of investigation were not pursued due to RGC interference. Moreover, as noted previously, Defence

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[172] PTC Witness Decision; Dissenting Opinion, para 12.
[173] *Ibid.*
[174] *See* para 19, *supra.*

attempts to verify witness statements, the provenance of documents, and their chain-of-custody since 1979 were thwarted in the name of investigative secrecy.

60. Given this lack of transparency with regard to the CIJs' methodology, the Defence was required to challenge the quality of the OCIJ's most tangible work product—the witness statements. As noted in a series of Defence RIAs, these records suffered from serious qualitative flaws. In particular, OCIJ investigators: routinely failed to adequately verify their sources of knowledge; lacked awareness of the threat of 'statement pollution' by information witnesses may have been exposed to in the years after 1979; and often failed to follow-up on *prima facie* exculpatory leads or inconsistencies in inculpatory narratives. While Defence presence at the interviews could have nuanced or undermined inculpatory statements, or resulted in more balanced exculpatory ones, the parties were shut out of the process. Moreover, as noted, Defence efforts to ameliorate the poor quality of these interviews after the fact—by filing numerous RIAs with the goal of re-questioning certain witnesses, corroborating and/or disproving their statements, and uncovering additional witnesses and leads—were rejected almost in their entirety.

61. Given the OCIJ's overall approach, Nuon Chea has been 'prevented from obtaining possible advantage that may emerge' from the pursuit of evidence on his behalf.[175] The CIJs' demonstrable bias, lack of transparency, and questionable methodology have undoubtedly 'imped[ed] the judicial investigation'[176] to the detriment of the Accused.

E. Such Objective Shortcomings, Individually and *A Fortiori* Considered in Combination, Have Resulted in Irreparable Harm to Nuon Chea's Rights under Cambodian and Applicable International Law

62. As the case against Nuon Chea finally enters the trial phase, it is only now possible to take stock of what has (and has not) transpired over the course of the investigation. In light of the various shortcomings outlined previously, the only conclusion to be drawn is that the Accused is not in a position to receive a fair trial before this Chamber. While it is conceivable *in theory* that certain fair-trial violations could be remedied by a trial court practically and politically equipped to do so, rehabilitating *this Case File* to an acceptable standard of 'fairness' would prove impossible. The violations have been too grave and too pervasive. And it is inconceivable that the Trial Chamber could 'cure' them without ordering an entirely new investigation—an outcome as improbable as it would be unfair, given the age and physical/mental condition of the Accused. Tainted by political

[175] Dissenting Opinion, para 12.
[176] *Ibid.*

interference, bias, and a litany of methodological shortcomings, the harm suffered to date is simply irreparable in any practical sense.

63. Due to the flawed investigation, the Defence has not been able to adequately prepare for the trial and will not be able to put all relevant arguments before the Chamber or otherwise effectively influence the outcome of the proceedings. Blocked by the OCIJ at every turn (and forbidden from conducting its own investigation), the Defence is now in a position to present the Chamber with a witness list that amounts to little more than previously rejected investigative leads. In order to summon even a fraction of these individuals on behalf of the Defence, the Trial Chamber would be required to expend time and physical resources far beyond its current capacity.[177]

64. Although it may be the case that the overall fairness of criminal proceedings is properly assessed at the close of trial, the instant case presents certain unique complications in this regard. First of all, it is a foregone conclusion that this Chamber will not be in a position to undertake all (or even a significant portion of) the necessary remedial investigative action. Moreover, extra-judicial pressure from donors and the perceived demands of Cambodian society will undoubtedly affect this Chamber's assessment of Defence requests to call and cross-examine witnesses and to present and challenge documentary evidence. (In this regard, the Chamber need only look to the Special Court for Sierra Leone, where external pressure on the judges to complete the trial of Charles Taylor has been enormous.) *Conservative* estimates—which exclude from their calculus the need for significant curative measures, as argued herein—suggest a trial of, at the very least, two years. Yet given the number of witnesses proposed by the parties, such approximations seem overly optimistic, if not fanciful. Unlike a routine domestic civil-law investigation, where the trial court stands a reasonable chance of remedying initial fair-trial violations, this Chamber faces—quite literally—an insurmountable task.

65. Accordingly, because the 'exceptional and very serious cases of violations of the rights of the [Accused] [...] cannot be rectified'[178] and because they equally 'contravene the court's sense of justice',[179] termination of the prosecution is the only possible—that is to say, fair—remedy in the instant case. In striking 'the correct balance between the fundamental rights of the

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[177] *N.B.* Such lack of judicial resources is not the fault of the Defence and—according to the relevant case law—is an unacceptable justification for the violation of Nuon Chea's right to a fair, competent, and comprehensive investigation. As the ECtHR, has held: 'States are under the obligation to organize their legal systems so as to ensure compliance with [fair-trial] requirements', *see* ECtHR App No 32271/04, *Poppe v The Netherlands*, 'Judgment', 24 March 2009, para 23.

[178] *See* para 27, *supra.*

[179] *Ibid.*

[Accused] and the interests of the international and national communities in the [current] prosecution',[180] this Chamber could, as an alternative, consider a temporary stay of the proceedings. But only insofar as the Chamber is ready, willing, and materially able to practically rectify the violations set out previously. Any other course of action 'would prove detrimental to the court's integrity'[181] and fatal to Nuon Chea's fundamental rights.

F. Adoption and Amendment of the Rules at ECCC 'Plenary' Sessions is Unconstitutional and *Ultra Vires*

66. The Rules purport to have the force of law with respect to proceedings before this Tribunal, 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, the Rules—to the extent their drafters have attempted to fashion a new consolidated procedural code—are unconstitutional and without binding legal effect.

67. 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'.[182]

68. 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

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[180] *Ibid.*
[181] *Ibid.*
[182] Annulment Decision, para 14.

of extra-judicial conclaves in order to adopt procedures that 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 in the hierarchy of provisions'.[183] 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.[184]

69. Unless and until a particular Rule either restates an existing procedure in force or has been justified by *specific* reference to one of the ECCC Agreement's statutory exceptions,[185] 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.[186]

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

70. 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 previously is problematic. While the Rules profess merely to 'consolidate applicable Cambodian procedure for proceedings before the ECCC',[187] 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.[188]

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183 *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.

184 *Ibid*, para 37.

185 *N.B.* The ECCC judges may depart from the CCP on an *ad hoc* basis but they cannot legislate generally.

186 Sluiter 2006, 314–326, 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.')

187 Rules, Preamble.

188 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*.

71. 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 takes particular 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*.[189]

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

72. This particular objection 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 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.[190]

VI. CONCLUSION

73. For these reasons, the Defence requests the Trial Chamber to admit these preliminary objections and order the following relief with respect to each separately motivated objection contained herein:

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[189] *N.B.* 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. It 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.

[190] *N.B.* 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 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 troubling. Accordingly, the Defence will explore other avenues within the Cambodian legal system in order to bring the matter before a truly impartial adjudicator.

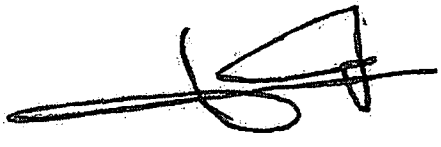
a. pursuant to Rule 89(1)(a): immediately release Nuon Chea from the custody of the tribunal, as there is no legal basis for his trial before this Chamber;[191]

b. pursuant to Rule 89(1)(b): order the termination of the prosecution or, in the alternative, a stay of the proceedings against Nuon Chea;[192] and/or

c. pursuant to Rule 89(1)(c): declare the Rules null and void for the purposes of the trial and subsequent proceedings; in the alternative, indicate (with precision and specific reference to Article 12(1) of the ECCC Agreement) the grounds upon which each and every departure from existing Cambodian procedure is justified; and declare the Preparation Order null and void and suspend its effect until a decision has been taken on this particular objection.[193]

As noted above,[194] the Defence reserves its right to make further submissions at the Initial Hearing and to file any necessary additional written submission in advance thereof in the interests of justice.

CO-LAWYERS FOR NUON CHEA



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Michiel PESTMAN & Victor KOPPE

[191] *See* paras 41–56, *supra*; *See also* Jurisdiction Objection.
[192] *See* paras 57–65, *supra*; *See also* Fair Trial Objection.
[193] *See* paras 66–73, *supra*; *See also* Rules Objection.
[194] *See* paras 39–40, *supra*.