



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

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DECISION ON NUON CHEA'S PRELIMINARY OBJECTION ALLEGING THE UNCONSTITUTIONAL CHARACTER OF THE ECCC INTERNAL RULES

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
NUON Chea

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

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SON Arun
Michiel PESTMAN
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1. INTRODUCTION

1. In his Consolidated Preliminary Objections of 25 February 2011, NUON Chea (“the Accused”) contends that the original adoption and subsequent amendments to the ECCC Internal Rules was “unconstitutional and *ultra vires*”.¹ He further contends that continued application of certain rules, as well as enforcement of the Trial Chamber’s Order to File Materials of 17 January 2011 (“Preparation Order”), infringes NUON Chea’s right to legal certainty and a fair trial.² The Accused further seeks oral argument on these issues at the Initial Hearing.³

2. The Civil Party Lead Co-Lawyers and Office of the Co-Prosecutors (“OCP”) responded to the preliminary objections of all Parties on 7 and 21 March 2011 respectively. They oppose this portion of the Accused’s Consolidated Preliminary Objections both on grounds of its admissibility and merits.⁴

2. SUBMISSIONS

3. The Accused contends that this portion of his Consolidated Preliminary Objections is admissible on the basis of Internal Rule 89(1)(c).⁵ Regarding its substance, the Accused argues that the ECCC is a Cambodian court, established pursuant to legal instruments adopted and enacted by the Cambodian legislature. The Constitution of Cambodia vests lawmaking authority in the national legislature and prohibits the transfer of such authority to other entities. Article 12(1) of the Agreement permits the ECCC to seek guidance from international standards “where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards.” However, the Internal Rules exceed these limits and are consequently *ultra vires*.⁶ The Accused further maintains that Article 12(1) authorizes the ECCC to refer to international standards on a case-by-case basis, but not to convene a Plenary

¹ Consolidated Preliminary Objections, E51/3, 25 February 2011 (“Consolidated Preliminary Objections”), para. 3.

² NUON Chea Objections, para. 3; Order to File Materials in Preparation for Trial, E9, 17 January 2011 (“Preparation Order”).

³ NUON Chea Objections, para. 39.

⁴ Civil Parties’ Joint Response to Defence Rule 89 Preliminary Objections, E/51/5/4, 7 March 2011 (“Civil Party Response”), para. 32; Co-Prosecutors’ Joint Response to Defence Rule 89 Objections, E51/5/3/1, 21 March 2011 (“OCP Response”), paras 80-90.

⁵ NUON Chea Objections, paras 3, 38.

⁶ NUON Chea Objections, paras 20-25, 33-34, 66-69.

Session for the purpose of creating a comprehensive system of rules.⁷ He further contends that continued application of the Internal Rules constitutes an infringement of his right to legal certainty.⁸ To the extent the Preparation Order relies on such rules, it is without legal authority and should be declared null and void.⁹

4. In response, the OCP and the Civil Party Group contend that this request falls outside the scope of Rule 89(1) and is therefore inadmissible.¹⁰ The OCP further submits that the underlying ECCC legal framework in its totality provides the lawful authority for procedural acts undertaken by the ECCC. In this regard, the Preparation Order merely instructed the parties to provide basic preparatory information prior to trial, and NUON Chea has already conceded that the Order is largely consistent with his obligations under Cambodian law.¹¹ The only express reference made to the Internal Rules in the Preparation Order concerned the requirement that the parties produce a list of any facts that are uncontested. As NUON Chea was under no compulsion to agree to any fact, no prejudice can result from this reference.¹²

3. FINDINGS

5. Rule 89(1)(c) contemplates preliminary objections concerning the “nullity of procedural acts made after the indictment is filed.” The indictment in the present case was filed on 15 September 2010. The adoption of the Internal Rules, which occurred in June 2007, was therefore not a “procedural act” within the meaning of Rule 89(1)(c). Any objection to the legality of the Rules as such is therefore inadmissible as a preliminary objection.

6. The substance of NUON Chea’s objections to the Internal Rules is in any event without merit. Nothing in Article 12(1) or elsewhere in the ECCC Agreement prohibits the adoption of procedural rules by a Plenary Session convened for that purpose.¹³

7. The purpose of the Internal Rules is to consolidate applicable Cambodian procedure, supplemented by international standards where necessary and appropriate. As the Pre-Trial Chamber has previously held, trials at the ECCC differ substantially from cases before

⁷ NUON Chea Objections, paras 35, 66-69.

⁸ NUON Chea Objections, para. 71.

⁹ NUON Chea Objections, para. 72.

¹⁰ Civil Party Response, para.32; OCP Response, para. 81.

¹¹ OCP Response, paras 88-89.

¹² OCP Response, para. 89.

¹³ Article 12(1) of the ECCC Agreement provides that “guidance may be sought” in procedures established at the international level.

ordinary Cambodian courts.¹⁴ Other international courts trying cases similar to those before the ECCC have also adopted Rules of Procedure and Evidence specifically adapted to the requirements of complex international criminal trials. As the Accused acknowledges, the Rules and Procedure Committee referred to those rules in the course of designing the ECCC Internal Rules.¹⁵ These rules represent prevailing international standards in relation to cases adjudicating international crimes and are consonant with the ECCC's obligation, enshrined in Article 33 new of the ECCC Law, to conduct proceedings in accordance with international standards of justice, fairness and due process of law as expressed in Articles 14 and 15 of the ICCPR.¹⁶ The Trial Chamber therefore agrees with the Pre-Trial Chamber when it noted that

[t]he Internal Rules ... form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Code of Criminal Procedure of the Kingdom of Cambodia ("CPC") but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialised system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.¹⁷

8. The Accused's request to nullify the Internal Rules in their entirety is therefore denied.
9. NUON Chea's request for annulment of the Preparation Order is also rejected. Pursuant to Rule 48, investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application. The Preparation Order required all parties to file, amongst other things, lists of proposed witnesses, experts and Civil Parties, supplementary information in relation to these lists, and lists of documents and exhibits. The Preparation Order is consistent with international practice dealing with cases of this magnitude and complexity. The sole portion of the Preparation Order specifically addressed by the Accused concerns the section requiring parties to produce a list of uncontested facts pursuant to Rule 80(3)(e).¹⁸ This rule, which does no more than require the parties to file a list of facts that are uncontested, is consistent with both prevailing practice before other tribunals and the Accused's fundamental fair trial rights.

¹⁴ Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment (public), D55/I/8, 26 August 2008, para. 14

¹⁵ NUON Chea Objections, para. 21.

¹⁶ The Agreement furthermore established other fundamental principles, including the right to fair and timely proceedings in accordance with international standards (*see, e.g.*, ECCC Agreement, Article 13(1)).

¹⁷ Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment (public), D55/I/8, 26 August 2008, para. 14.

¹⁸ NUON Chea Objections, Annex A, p. A-1.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DECLARES this portion of the Accused's Consolidated Preliminary Objections inadmissible;

FURTHER DECLARES the substance of this portion of the Accused's Consolidated Preliminary Objections to lack merit; and

REJECTS the Accused's request for nullification of the Preparation Order.

Phnom Penh, 8 August 2011
President of the Trial Chamber



[Handwritten signature]
Nil Nonn