

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

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**NUON CHEA'S SUBMISSIONS ON THE RELEVANCE OF EVIDENCE OF
TREASONOUS REBELLION TO HIS INDIVIDUAL CRIMINAL RESPONSIBILITY
IN CASE 002/02**

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I. INTRODUCTION

1. The current Security Centres and “Internal Purges” Case 002/02 trial segment relates more closely to the heart of Nuon Chea’s case than any other chapter in the nearly nine year-long proceedings against him. For this reason, Nuon Chea’s fundamental right to present a defence in Case 002/02 ultimately turns on whether he is given sufficient opportunity to explore the relevant issues in this segment.¹ This has led the Co-Lawyers for Nuon Chea (the “Defence”) to request several additional witnesses to testify during the segment² on issues critical to Nuon Chea’s case, in particular the existence of a treasonous rebellion within Democratic Kampuchea (“DK”), sponsored by Vietnam, against the Communist Party of Kampuchea (“CPK”) and the legitimate and widely-recognised DK government.³
2. On 11 May 2016, the Trial Chamber invited the Co-Lawyers for Nuon Chea (the “Defence”) to make written submissions on the relevance to the Chamber’s determination of Nuon Chea’s criminal responsibility in Case 002/02 of additional evidence the Defence has requested on treasonous rebellion within DK.⁴ In response, and pursuant to Internal Rule 92, the Defence makes the following submissions (the “Submissions”).
3. Part II of these Submissions provides relevant background. Part III is divided into three sections, addressing the impact of treasonous rebellion evidence on Nuon Chea’s individual criminal responsibility: (a) in respect of crimes charged in connection with the Security Centres and “Internal Purges” segment; (b) under the modes of liability of joint criminal enterprise and superior responsibility for all crimes charged; and (c) under various modes of liability for crimes charged in zones under the control of treasonous leaders of the rebellion. Finally, Part IV discusses the impact of issues addressed in the instant Submissions on Nuon Chea’s right to a fair trial.

II. BACKGROUND

A. The Witness Requests

4. On 24 March,⁵ 1 April,⁶ 8 April⁷ and 7 June⁸ 2016, the Defence submitted the first four

¹ See, *infra*, at paras. 43-50.

² See, *infra*, at para. 4.

³ See, *infra*, at paras. 5-6, 10.

⁴ E395/1, ‘Request for briefing on significance of conflicting factions within the DK leadership’, 11 May 2016 (“TC Briefing Request”); see, also, *infra*, at para. 14.

⁵ E391, ‘Nuon Chea’s First Rule 87(4) Request to Call Additional Witnesses and Rule 93 Request for Additional Investigations in Relation to the Case 002/02 Trial Segment on S-21 Security Centre and “Internal Purges”’, 24 Mar 2016 (“First Witness Request (Division 310)”).

instalments in a series of requests to the Trial Chamber for additional witnesses to testify during the Security Centres and “Internal Purges” segment, with a fifth and final request to be filed by the end of the summer recess (together, the “Requests”). At this stage, the Requests concern 35 witnesses (with some more to come in the fifth request). They include 16 witnesses who the Defence have already proposed and seek to expedite; 17 witnesses who the Defence had not previously proposed; and two witnesses who the Defence had proposed but who the Chamber rejected. Among the 35 witnesses, four are currently top-ranking leaders of the Royal Government of Cambodia, including two witnesses who the Defence has persistently requested to appear over the nine-year proceedings (but whose identities the Defence are absurdly prohibited from mentioning here⁹) as well as Prime Minister Hun Sen. A further three witnesses are currently top-ranking leaders of the Royal Cambodian Armed Forces. Another is the renowned *Enemies of the People* filmmaker Robert Lemkin¹⁰ and another, Ka Dev, the daughter of East Zone secretary and rebellion leader Sao Phim.

B. The Defence’s Case

5. The Defence explained in the Requests that the 35 witnesses’ testimony goes directly to the heart of the Defence’s case¹¹ (as will the testimony of the witnesses requested in the forthcoming fifth request). The Defence has extensively explained its case in numerous past submissions, beginning with Nuon Chea himself, who devoted his Case 002 opening statements on 22 November 2011 to this very subject. Nuon Chea said that:

In Vietnam, Vietnam secretly organized another party. It was called Kampuchea People’s Party, and members of these parties are those Khmers Viet Minh who were educated by Vietnam in Hanoi from 1954[.] [...] They lived in Vietnam for 16 years and they were influenced by the views, standpoints, political line, organizational line from the Vietnamese Communist Party and they were to disseminate and implement those in Cambodia. In addition, they even attacked the political line, organizational line, the strategy and the tactics of the Communist Party of Kampuchea continually since 1960.

⁶ E392, ‘Nuon Chea’s Second Witness Request for the Case 002/02 Security Centres and “Internal Purges” Segment (Leadership)’, 1 Apr 2016 (“Second Witness Request (Leadership)”).

⁷ E395, ‘Nuon Chea’s Third Witness Request for the Case 002/02 Security Centres and “Internal Purges” Segment (Evidence of Treasonous Rebellion)’, 8 Apr 2016 (“Third Witness Request (Rebellion Evidence)”).

⁸ E412, ‘Nuon Chea’s Fourth Witness Request for the Case 002/02 Security Centres and “Internal Purges” Segment (S-21 Operations and Documentary Evidence)’, 7 Jun 2016 (“Fourth Witness Request (S-21 Operations and Documentary Evidence)”).

⁹ E305/15, ‘New Pseudonyms for Witnesses, Civil Parties and Experts Proposed to be Heard in Case 002/02’, 24 Jul 2014, para. 2.

¹⁰ See, *infra*, at para. 45.

¹¹ E391, First Witness Request (Division 310), para. 23; E392, Second Witness Request (Leadership), paras. 18-35; and E395, Third Witness Request (Rebellion Evidence), paras. 21-40; E412, Fourth Witness Request (S-21 Operations and Documentary Evidence), para. 20.

During the period from 1960 to 1979, Vietnam employed every trick available to destroy the revolution of the Kampuchean people and the development in Cambodia and its democracy including the organization of their members in the party members from the upper echelon downward secretly in order to prepare themselves for the overt opposition against CPK at the present time and they also organized their secret neighbour in the Communist Party of Kampuchea for the future.

They also attacked on the Communist Party of Kampuchea. They instigated, break up, and persuaded Kampuchea and revolutionary army to cause conflicts to become the enemies of the party in order to cause confusion and chaos to break up solidarity and to destroy the political line and the developing of the country through the means of burn it to a crisp or leave it raw. Through their activities in the international stage including their reliance and close cooperation with the Soviet Union through their economic and military and diplomatic ties, they tried to liaise and persuade the U.S. to – not to interfere in the activities of Kampuchea. They tried to intimidate and persuade the neutrality of the Asian countries and non-alliance countries. They opposed China to an extent; however, they tried to persuade China as well.

They attacked Democratic Kampuchea with their big force of 250,000 people through the strategy of lightning attack, immediate victory, and long-term control. They implemented the policy of impoverishment and enticement people into a (inaudible) so that Kampuchea would not have enough strength to liberate the country.

What are the main factors for the Vietnamese to have such an evil ambition to control Kampuchea and Laos? There are certain factors as follow: Vietnam is of the idea of expansionism; that is, to have the doctrine, to be the boss to the smaller country, to the weaker country. Vietnam has the view of the doctrine of invasion, expansion, land grabbing and racial extermination. Vietnam was greedy of power for their own interest and economics or, in short, they were egoism.

They organised the Indo-Chinese Federation under its own control through their form of special friendship. They also wanted to be senior member in the Asian countries to fulfil its ambition. Therefore, the Vietnamese factor is the main factor that caused confusion in Democratic Kampuchea from 1975 through April 1979.¹²

6. The Defence has consistently elaborated on the factual and legal basis of this aspect of its case ever since. The Defence's 27 May 2013 appeal of the Chamber's second decision to sever Case 002 outlined its position across all of Case 002 in order to demonstrate how the only way to ensure a fair trial for Nuon Chea was through a "trial which captures all of the major themes and alleged policies of [DK]".¹³ Its 26 September 2013 Case 002/01 closing brief obviously outlined its case at length, submitting that "[t]he existence of outright conflict among zone-based forces in more than half of Cambodia for two-plus years is powerful evidence that the country was not under unified command".¹⁴ The Defence's closing oral submissions on 22 October 2013 detailed how:

¹² T. 22 Nov 2011 (Case 002 Opening Statements, E1/14.1), p. 78, ln. 25 – p. 81, ln. 7 (emphases added); *see, also*, T. 31 Oct 2013 (Nuon Chea Closing Submissions, E1/237.1), p. 7, ln. 24 – p. 10, ln. 14.

¹³ E284/4/1, 'Immediate Appeal Against Trial Chamber's Second Decision on Severance and Response to Co-Prosecutors' Second Severance Appeal', 27 May 2013 ("Second Severance Decision Appeal"), para. 32; *see, also*, paras. 12, 29, and generally.

¹⁴ E295/6/3, 'Nuon Chea's Closing Submissions in Case 002/01', 26 Sep 2013, para. 200; *see, also*, paras. 8, 20, 26, 200, 180-8, 435-7.

It certainly is true that the zone leaders acted autonomously and with wide discretion, but that is not the most important fact about Ros Nhim and So Phim. The most important fact about Ros Nhim and So Phim is that they were leading and founding members of the CPK and yet actively opposed to Pol Pot and Nuon Chea, first secretly and later openly. The most important fact about Ros Nhim and So Phim is that the CPK was not, at its core, a unified entity. The internal disputes which ultimately destroyed the CPK were not the consequence of Pol Pot's paranoia; instead Pol Pot's supposed paranoia was a direct reaction to a real and ongoing struggle for control within the Party. Vietnamese hegemony, and ultimately the direct involvement of the Vietnamese Government was a critical component of that struggle.¹⁵

7. However, the Defence's view – as a report published by Stanford University echoed – is that the Case 002/01 Judgement (the “Judgement”) failed even to acknowledge its case in any meaningful way, instead offering a “poorly organized, ill-documented and meandering narrative *in lieu of clearly structured legal writing based upon a thorough and balanced analysis of the legal and factual issues in dispute*”.¹⁶ This situation prompted the Defence to not only seek to disqualify the Case 002/01 judges from sitting again in judgement on Case 002/02¹⁷ but to revisit its case in detail in its Case 002/01 appeal brief.¹⁸
8. Moreover, given that new, relevant evidence has continued to surface even now that supports this aspect of the Defence's case (particularly through the ongoing investigations in Cases 003 and 004), the Defence has had occasion to reiterate its case in numerous requests for the admission of new evidence, both on appeal and at trial. Notable appellate submissions included the Defence's sixth additional evidence request, which sets out the factual basis for its case in a 24-page section entitled “The Head and Tail of the Crocodile”.¹⁹ At the request of the Supreme Court Chamber, the Defence also filed submissions to that Chamber which, rather like these Submissions, expounded on the relevance of a “rift” within the Communist Party of Kampuchea (the “CPK”).²⁰ On appeal, the Defence also outlined its case in its request filed on 4 February 2016

¹⁵ T. 22 Oct 2013 (Closing Oral Submissions, E1/232.1), p. 25, lns. 11-23; *see, generally*, pp. 23-28.

¹⁶ F30/11.1.3, David Cohen, Melanie Hyde and Penelope Van Tuyl, *A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge (Case 002/01)*, 2015, available at: <https://handacenter.stanford.edu/report/well-reasoned-opinion-critical-analysis-first-case-against-alleged-senior-leaders-khmer-rouge>, pp. viii, 73 (emphasis added).

¹⁷ *See*, E314/6, ‘Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne and You Ottara’, 29 Sep 2014 (“Second Disqualification Motion”), paras. 63-64, arguing that the judges’ use of particular language in the Case 002/01 Judgement gave rise to an unacceptable bias vis-à-vis whether the CPK faced a real threat from internal and external enemies.

¹⁸ F16, ‘Nuon Chea’s Appeal of the Judgment in Case 002/01’, 29 Dec 2014 (“Appeal”), paras. 225, 230, 236-244.

¹⁹ F2/8, ‘Nuon Chea’s Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01’, 11 Sep 2015 (“Sixth Appeal Additional Evidence Request”), paras. 23-69.

²⁰ F2/4/3/3/6/1, ‘Nuon Chea’s Submissions on Robert Lemkin’s Transcripts and the Significance of the “Rift” Within the CPK’, 8 Oct 2015 (“Appeal Submissions on Significance of CPK “Rift””), paras. 16-66.

requesting the Supreme Court Chamber to reconsider its decision not to summons Defence witnesses Heng Samrin and Robert Lemkin and to admit Mr. Lemkin's notes and transcripts into evidence (the "Appeal Witness Reconsideration Request").²¹ In Case 002/02, meanwhile, relevant Defence submissions include evidence requests in late 2015 in connection with the East²² and Northwest Zones,²³ and of course, the Requests to which these Submissions relate.

9. Nevertheless, in spite of the Defence's submissions from the first day of the Case 002 trial, the Chamber's invitation for the Defence to make the instant Submissions suggests that the Chamber has yet to grasp the factual and legal consequences of the Defence's case, and likely, therefore, the Defence's case itself. Therefore, it seems to be necessary to revisit the Defence's case yet again here, before discussing its implications.
10. In a nutshell, and to echo Nuon Chea's abovementioned comments, the heart of the Defence case is that the CPK, far from being a disciplined, unified and "pyramidal" hierarchy, was engulfed in constant internal turmoil. Different and equally strong factions (including one led by East Zone secretary Sao Phim and Northwest Zone secretary Ruos Nhim) pursued competing agendas intending to seize overall control of the Party and the country. One of those factions sought to advance the interests of Vietnam, if not also the Soviet Union. That faction received significant support from Vietnam to foment rebellion and treason against the legitimate and widely-recognised²⁴ DK government, beginning right after the liberation of Phnom Penh on 17 April 1975.

C. The Threat of Vietnam

11. This aspect of the Defence's case pivots around one core truth: that Vietnam represented the single greatest threat to DK's national security, territorial integrity, and ultimately sovereignty. This is not bombast; it is historical fact. On 25 December 1978, Vietnam invaded Cambodia. Make no mistake; this was no coming of the saviour, no

²¹ **F2/10**, 'Nuon Chea's Request for Reconsideration of the Supreme Court Chamber's Decision Not to Summons Heng Samrin and Robert Lemkin and to Admit Evidence Produced by Robert Lemkin on Appeal', 4 Feb 2016 ("Appeal Witness Reconsideration Request").

²² **E370**, 'Nuon Chea's Urgent and Consolidated Request to Expedite Two Already-Requested Witnesses and Summons Four Additional Witnesses Regarding the Treatment of the Cham', 29 Sep 2015 ("East Zone Witnesses Request"), para. 25.

²³ **E319/30**, 'Nuon Chea's Rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02', 24 Aug 2015, paras. 23-32.

²⁴ On the recognition of the DK government, *see*, **F2/7**, 'Nuon Chea's Fifth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01', 25 Jun 2015, fn. 13; **F2/8**, Sixth Appeal Additional Evidence Request, para. 24 and fn. 61.

humanitarian intervention.²⁵ It was a blatantly illegal act of aggression in flagrant violation of the United Nation's most fundamental tenet: refraining from threatening the sovereignty of another State.²⁶ Furthermore, although it seems to have been forgotten by this Chamber, at the time, Vietnam's expansionist ambitions had been a cause for grave international concern, including by the United States and its allies,²⁷ China²⁸ and Vietnam's ASEAN neighbours including even Indonesia.²⁹ Moreover, Vietnam's ultimate invasion of Cambodia rightfully turned it into an international pariah for a decade until it finally withdrew its military forces following the collapse of the countries of the Warsaw Pact.³⁰

12. It is of direct significance to the Defence's case to recall that Vietnam's direct invasion of Cambodia was only its Plan B. Its Plan A was to sponsor, groom and puppeteer Cambodian proxies to seize the reins of the country internally through a rebellion and coup d'état, as well as through acts of sabotage such as deliberately creating harsh or starvation conditions. The leaders of the rebellion were traitors and collaborators, not freedom fighters, and they worked to advance and ultimately to fulfil the existential threat posed to the DK by a foreign country. They built on Vietnam's long-held ambitions,³¹ which Vietnam had already substantially advanced when it won control over the Kampuchea Krom territory. In the end, these efforts paid off. Following its 1978 invasion, Vietnam occupied Cambodia for a decade, installed a loyal puppet government that is still effectively in power today, and won control over Cambodian resources

²⁵ See, also, **F16**, Appeal, paras. 125, 723.

²⁶ United Nations, *Charter of the United Nations*, 1 UNTS XVI, entered into force 24 Oct 1945, Art. 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (emphasis added).

²⁷ See, e.g., **E3/2370**, 'Vietnam-Cambodia Conflict: Report Prepared at the Request of the Subcommittee on Asian and Pacific Affairs Committee on International Relations', 4 Oct 1978, ERN 00187392 (p. 13), in which US expert on Vietnam, Douglas Pike, reported to US Congress (and astutely predicted) that conflict between Vietnam and Cambodia could result in "the capture of Phnom Penh and establishment of a lackey regime under a kept Cambodian Communist Party".

²⁸ See, e.g., **E3/7325**, Geng Biao, 'Geng Biao's Report on the Situation of the Indochinese Peninsula', 1981, ERN 01001621 (p. 380), in which then-Chinese Communist Party politburo member, Vice-Premier and Minister of Defence Geng Biao said that "as early as before the liberation of South Vietnam, Vietnam had harboured malicious intentions. The small handful of its war maniacs, at the instigation of their social-imperialist behind-the-scenes boss, had wanted to encroach on Cambodia, drawing it into the so-called "Indochinese Alliance", and turning it into the springboard and base of social-imperialism in its attempt to realize its global strategic plan and expand into Southeast Asia".

²⁹ See, e.g., **D269/5.1**, Ben Kiernan, *Genocide and Resistance in Southeast Asia: Documentation, Denial & Justice in Cambodia & East Timor*, 2008, ERNs 00488244-00488245 (pp. 105-106), referring to a 5 July 1975 meeting between Indonesian President Suharto, US President Ford and US Secretary of State Kissinger at Camp David. See, also, 'Memorandum of Conversation', The White House, 5 Jul 1975 (**Attachment 1**) describing this meeting, and Diplomatic Cable from the US Ambassador to Jakarta to the Secretary of State entitled 'Ford-Suharto Meeting', 6 Dec 1975 (**Attachment 2**), describing a follow-up meeting in Jakarta.

³⁰ **E3/2376**, Nayan Chanda, *Brother Enemy: The War after the War*, 1986, ERN 00192561 (p. 376); see, also, **F2/8**, Sixth Appeal Additional Evidence Request, para. 68.

³¹ See, **F2/8**, Sixth Appeal Additional Evidence Request, paras. 24-26 and, generally, paras. 23-69.

(which, as all Cambodians know, Vietnam also continues to enjoy to this day). Having already gained dominance over Laos, Vietnam's invasion therefore effectively allowed it to establish its long-coveted "Indochinese Federation".³² In sum, and to put it in modern-day perspective, Vietnam was to the DK a far more dangerous version of what Russia is now to Ukraine.

D. The Requested Witnesses' Expected Evidence

13. As detailed in the Requests,³³ the 35 witnesses can describe the existence and breadth of the internal rebellion. They can provide primarily eyewitness accounts detailing the leadership of the rebellion by defecting CPK cadres (some of the requested witnesses being those very leaders). They can describe preparations and attempts to effect the rebellion across multiple zones and regions of DK as well as within Phnom Penh, since many were involved in those efforts first-hand (in particular, members of military division 310, which is the exclusive subject of the Defence's first witness request).³⁴ Some can also provide detailed insight into Vietnam's role in the rebellion and invasion, while others can provide unique insight into operations at S-21 security centre (where most arrested defectors were sent) or testify as to the provenance, chain of custody, and authenticity of documents purporting to prove what happened at S-21.³⁵ Each witness's expected evidence, as the Defence outlined in the Requests, is not only relevant to ascertaining the truth but is also unique. In the Defence's view, the relevant issues in the Security Centres and "Internal Purges" segment – and in Nuon Chea's case overall – can only be sufficiently explored if all 35 witnesses (and the additional witnesses to be addressed in the forthcoming fifth request) appear before the Chamber. It is therefore in the interests of justice that they all be summonsed.

E. Status of the Requests, and Chamber's Request for a Briefing

14. On 8 April 2016, the Trial Chamber included two of the Defence's 35 requested witnesses (2-TCW-917 and 2-TCW-829, who were also requested by the Co-Prosecutors)³⁶ as witnesses to testify on the "Internal Purges" sub-topic. The Chamber has yet to render decisions on the 33 remaining witnesses. On 11 May 2016, the

³² See, e.g., the evidence summarised in, **F2/8**, Sixth Appeal Additional Evidence Request, paras. 24-31, 53-68; **E284/4/1**, Second Severance Decision Appeal, paras. 81-82.

³³ See, **E391**, First Witness Request (Division 310), paras. 7-25; **E392**, Second Witness Request (Leadership), paras. 18-35; and **E395**, Third Witness Request (Rebellion Evidence), paras. 21-40.

³⁴ See, **E391**, First Witness Request (Division 310).

³⁵ **E412**, Fourth Witness Request (S-21 Operations and Documentary Evidence), paras. 18-36.

³⁶ Email from Trial Chamber Senior Legal Officer to the Parties, 8 Apr 2016 (**Attachment 3**).

Chamber invited the Defence to provide it with a written briefing to assist in its consideration of the first three requests in the series (the “TC Briefing Request”).³⁷ The Chamber described that briefing, which was to be submitted by 10 June 2016, as “an opportunity to further explain how the existence of conflicting factions could provide a defence to the charges in the Closing Order or could be considered a mitigating circumstance”. It specifically requested the Defence to address the following question, with reference to relevant Closing Order paragraphs:

How would the assessment of NUON Chea’s criminal responsibility be affected by further evidence tending to prove the existence of conflicting factions or rebellions, whether supported by other countries or not?³⁸

III. SUBMISSIONS

15. The Defence notes at the outset that in effect, the Trial Chamber is asking the Defence to explain substantial aspects of its core case as a precondition for the possible admission of the Defence’s key witnesses. Imposing such a precondition over and above the information that the Defence has already provided in respect of the witnesses is a flagrant violation of Nuon Chea’s right to a fair trial, as detailed *infra*.³⁹ Nevertheless, the Defence assumes that the admission of its witnesses depends on these Submissions, and that this is true not only of the witnesses addressed in its three requests to which the TC Briefing Request relates, but also its recently-filed fourth request and the forthcoming fifth witness request, which will request witnesses for similar reasons. Given the importance of the witnesses to the Defence’s case, therefore, the Defence makes the following additional Submissions, albeit under protest.
16. The Defence further notes that given the Trial Chamber’s formulation of its question, which addresses evidence of treasonous rebellion in general terms, the Defence has accordingly focused within the limited confines of these Submissions on identifying connections between such evidence in general terms and the paragraphs of the Closing Order. It has not addressed in detail the connection between each witness’s evidence and the Closing Order, understanding that this is not required. However, should the Trial Chamber later require elaboration in this regard, the Defence will oblige.

³⁷ E395/1, TC Briefing Request.

³⁸ E395/1, TC Briefing Request, paras. 3-4.

³⁹ See, *infra*, at paras. 43-52.

A. Impact on Nuon Chea's Individual Criminal Responsibility in Respect of Crimes Charged in Connection with the Security Centres and "Internal Purges" Segment

17. Duch described the essence of S-21 Security Centre to the OCIJ in the following terms: "[t]he upper echelon had stated that the Vietnamese had sent agents into Cambodia, and this was the reason S-21 was appointed to search for those agents through the confessions".⁴⁰ In other words, and as he testified before the Chamber in the Case 002/01 trial, S-21 was "a unit to fulfil its anti-espionage task."⁴¹ With this context in mind, evidence of treasonous rebellion against the CPK and the DK government backed by Vietnam should be of straightforward relevance to the current Security Centres and "Internal Purges" segment of the Case 002/02 trial as it shows S-21 and other security centres as being regular state security apparatuses as opposed to "torture and execution centres".⁴² Such evidence casts many of the facts at issue in the segment in a fundamentally different light.⁴³ This would not only alter the Chamber's factual findings in respect of Security Centres and "Internal Purges", it would also absolve Nuon Chea in whole or part of criminal responsibility for several of the crimes charged in the Closing Order in relation to this segment.

(i) Crimes against Humanity of Imprisonment and Enslavement

18. The Closing Order alleges that thousands of people were unlawfully imprisoned and enslaved at S-21 Security Centre and the other security centres within the scope of Case 002/02 (Kraing Ta Chan, Au Kanseng and Phnom Kraol).⁴⁴ It further alleges that many of those imprisoned and enslaved entered the security centres as a result of so-called "internal purges" of the old and new North Zone and the East Zone.⁴⁵
19. As the Chamber is already aware, the Defence's position is that a substantial number of the arrests and detentions were lawful, not only at S-21 Security Centre but also at other security centres within the scope of Case 002/02 (Kraing Ta Chan, Au Kanseng and Phnom Kraol).⁴⁶ This directly challenges Nuon Chea's charge of the crime against humanity of imprisonment,⁴⁷ which requires there to be an *arbitrary* deprivation of

⁴⁰ E3/451, 'Written Record of Interview of Kaing Guek Eav *alias* Duch', 5 May 2009, ERN 00204341.

⁴¹ T. 9 Apr 2012 (Kaing Guek Eav *alias* Duch, E1/62.1), p. 107, lns. 2-3.

⁴² D427, 'Closing Order', 26 Sep 2010 ("Closing Order"), paras. 139, 455.

⁴³ See, also, E412, Fourth Witness Request (S-21 Operations and Documentary Evidence), para. 20.

⁴⁴ D427, Closing Order, paras. 1402-1404, 1391-1394.

⁴⁵ D427, Closing Order, paras. 192-203.

⁴⁶ See, T. 28 Apr 2016 (Prak Khan, Draft Transcript), p. 88; E409, 'Nuon Chea's Request to Recall Witness Prak Khan', 27 May 2016 ("Prak Khan Recall Request"), para. 14.

⁴⁷ D427, Closing Order, para. 1402.

liberty,⁴⁸ or in other words, a lack of legal basis for arrest.⁴⁹ Similarly, it challenges the charge of enslavement, since that charge hinges on exercising control over others without them being given a right to agree,⁵⁰ which is an irrelevant consideration when the person in question has been lawfully detained.

20. Treason and espionage have always been among the gravest crimes under domestic criminal law systems anywhere in the world. The DK was no different. Under Article 10 of the DK Constitution, “actions violating the laws of the people’s State” were defined as “dangerous activities in opposition to the people’s State”, which “must be condemned to the highest degree.”⁵¹ Likewise, under the 1956 Cambodian Penal Code which was the applicable criminal law within the DK at the time, treason and espionage-like acts were not merely criminalised but identified as among the category of most serious crimes for which the applicable punishment was the death penalty.⁵² Accordingly, evidence that treason and espionage were being pursued within the CPK or by RAK forces associated with the centre, multiple DK zones and autonomous sectors, would suggest the existence of a clear legal basis for the deprivation of liberty of those arrested. That legal basis is a

⁴⁸ *Prosecutor v. Krnojelac*, ‘Judgement’, Case No. IT-97-25-T, 15 Mar 2002 (“*Krnojelac* Trial Judgement”). This is referenced in the Closing Order at **D427**, Closing Order, paras. 1403-1404.

⁴⁹ *Krnojelac* Trial Judgement, para. 115.

⁵⁰ **D427**, Closing Order, para. 1392.

⁵¹ **E3/259**, *The Cambodian Constitutions (1953-1993) Collected and Introduced by Raoul M. Jennar*, ERN 00184836.

⁵² **D288/6.91/6.11**, *1956 Code Pénal et Lois Pénales*, Arts. 220 and 21, ERNs 00366894-00366895 (pp. 116-117), 00366801 (p. 21). The Code is not available in English. The Defence’s internal translation of the relevant articles is as follows:

Art. 220: (Text resulting from Kram number 41-NS of 22 September 1955) Will be found guilty of treason and will be punished by the third degree criminal punishment all Cambodians or equivalent:

(a) Who will carry arms against Cambodia.

(b) Who will pass intelligence with a foreign power with the aim of engaging it to carry out hostilities against Cambodia or give it the means to do so, notably by facilitating in any way the entry of hostile forces onto the Kingdom’s territory, or by weakening in any way the loyalty of the Cambodian armed forces.

(c) Who will hand over to a foreign power, its agents or rebels, either Cambodian troops, or territories, cities, fortresses, structures, posts, shops, arsenal, material, ammunitions, vessels, river navigation ships, airfields belonging to Cambodia or put to the use of its armed forces.

(d) Who, in times of war, will cause Cambodians to fight for a foreign power, facilitate them doing so, or carry out unauthorised recruitment on the foreign power’s behalf on Cambodian territory.

(e) Who, in times of war, will pass intelligence with a foreign power in view of facilitating its undertakings against Cambodia or its allies.

(f) Who will hand over to a foreign power or its agents, or rebels, in any form and in any way, a secret, the possession of which could harm the national defence, or will make sure to possess such a secret with the aim of communicating it to a foreign power or its agents.

(g) Who will, by any means harm the territorial integrity of Cambodia. Notes – See Article 21 of the Penal Code, Article 155 of the Military Justice Code – intelligence or espionage in favour of rebels: see Article 222 Military Justice Code.

Art. 21: The criminal penalties are: 1° - Death; 2° - Forced labour for life (or life forced labour); 3° - Forced labour for a prescribed period.

The death penalty constitutes the criminal penalty of the third degree. Crimes punishable by the death penalty are qualified as third degree crimes.

The life forced labour penalty constitutes the criminal penalty of the second degree. The crimes punishable by life forced labour are qualified as second degree crimes.

The forced labour for a prescribed period penalty constitutes the criminal penalty of first degree. The crimes punishable by forced labour for a prescribed period are qualified as first degree crimes.

legitimate suspicion that the arrested people were involved in the crime of treason and related crimes.

21. To the extent that the evidence of treason indicates that defecting cadres were engaging in sabotage, this evidence can in particular support the Defence's position that S-21 served two important purposes: to investigate criminal acts committed by local cadres "in the countryside", and to prevent criminal attempts to overthrow the legitimate government. As he was reported to have stated in *Behind the Killing Fields*:

Nuon Chea doesn't apologize for S-21 [...] He often stated that the enemies responsible for killing people in the countryside had to be smashed. Others were conspiring to overthrow Pol Pot and had to be stopped.⁵³ [...]

"We knew there were many enemies hiding in our regime and planning to destroy our policies. So we were very busy trying to find the enemies." [...] "There were many spies in Cambodia. They had been hiding in Cambodia and destroying the internal party for a long time," Nuon Chea said, pointing his finger for emphasis.⁵⁴ [...]

[Yet] Nuon Chea said they also knew there were problems with S-21. He blamed Son Sen and his man, Duch, for killing too many people and killing some unnecessarily.⁵⁵

This evidence, again, would contradict the allegation that people were arbitrarily arrested and detained at S-21 or other security centres, and accordingly absolve Nuon Chea of criminal responsibility for the crime against humanity of imprisonment. The Defence also contests the second basis on which the crime against humanity of imprisonment may be established – i.e. a lack of due process – although it will not outline this position here since it does not relate to the instant Submissions.

22. Further specifics of treasonous rebellion would also undoubtedly confirm the existence of a clear correlation between dates and locations of uncovered preparations and attempts at treasonous rebellion on the one hand, and the arrest and detention of people in the relevant security centres on the other. The other principal source for such information at present is the substantive content of statements given at S-21 (i.e. "confessions"). However, a recent incomprehensible, deeply-biased decision issued by the Trial Chamber on 19 May 2016 now appears to act as a blanket prohibition on the use of the substantive content of all statements given at S-21, even when the Defence can unequivocally demonstrate, as in the case of leading CPK defector Koy Thuon, that the statements were

⁵³ E3/4202, Gina Chon and Sambath Thet, *Behind the Killing Fields: A Khmer Rouge Leader and One of His Victims* (2010) ("Behind the Killing Fields"), ERN 00757521 (p. 84) (emphasis added).

⁵⁴ E3/4202, Chon and Sambath, *Behind the Killing Fields*, ERN 00757521 (p. 84).

⁵⁵ E3/4202, Chon and Sambath, *Behind the Killing Fields*, ERN 00757538 (p. 119).

not tainted by torture.⁵⁶ Indeed, the Defence notes that the Trial Chamber's ruling effectively violates the Supreme Court Chamber's ruling which permits the party seeking to use the contents of confessions to offer proof that the information in question was not the result of torture.⁵⁷ Accordingly, the live evidence of the Defence's 35 requested witnesses has now taken on heightened importance in filling this newly-created evidentiary vacuum, as calling these witnesses is now the only way for evidence to be heard on this critical issue.

23. In the Closing Order, the criminal act underlying Nuon Chea's charge of the crime against humanity of imprisonment is not only the allegedly unlawful arrest and detention of people, but also the act of preventing them from challenging the lawfulness of that detention.⁵⁸ The Defence's position in this regard is that the CPK and DK government were under no obligation to provide such an opportunity due to the existential threat Vietnam posed to Cambodia's national security, territorial integrity and sovereignty during the relevant period, and the legitimate suspicions held over the involvement of the arrested persons in furthering that clear and actual threat. International human rights law contemplates that during a state of emergency threatening the life of a nation (which was obviously the case during the DK given the existential threat posed by Vietnam), States are to be afforded a "wide margin of appreciation"⁵⁹ to derogate from certain human rights protections to the extent that the exigencies of the emergency require. This has included derogating from the obligation to allow a detained person to challenge the lawfulness of that detention,⁶⁰ which the Defence further contests may not, in any event, have been required by international law at the relevant time.
24. Concerning the charge of enslavement, the Defence takes the further position that to the extent that detainees at S-21 and other security centres within the scope of Case 002/02 were even forced to perform labour, this may perhaps not even qualify as enslavement. Indeed, international human rights law recognises that "work or service [...] normally required of a person who is under detention in consequence of a lawful order" or "exacte

⁵⁶ **E399/4**, 'Decision on Nuon Chea's Rule 92 Motion to Use Certain S-21 Statements', 19 May 2016. For the relevant background, see, **E399**, 'Nuon Chea's Rule 92 Motion to Use Certain S-21 Statements', 20 Apr 2016 and **E399/3**, 'Nuon Chea's Combined Reply to Co-Prosecutors' and Civil Party Lead Co-Lawyers' Responses to Nuon Chea's Rule 92 Motion to Use Certain S-21 Statements', 12 May 2016.

⁵⁷ **F26/12**, 'Decision on Objections to Documents Lists, Full Reasons', 31 Dec 2015, para. 58.

⁵⁸ **D427**, Closing Order, para. 1404.

⁵⁹ See, e.g., *Aksoy v. Turkey*, ECtHR, App. No. 21987/93, Judgement, 18 Dec 1996, para. 68 (**Attachment 4**).

⁶⁰ See, e.g., *Lawless v. Ireland (No. 3)*, ECtHR, App. No. 332/57, Judgement, 1 Jul 1961, paras. 31-37 (**Attachment 5**).

in cases of emergency or calamity threatening the life of well-being of the community”, such as famines, are legitimate exceptions from the prohibition on forced or compulsory labour.⁶¹ In this regard, the Defence notes that the 1956 Penal Code applicable in the DK prescribed forced labour as a sentence for a wide range of offences.⁶² The United Nations and the plenary of the European Commission on Human Rights have also held at the relevant time that “normally prisoners have no legal right to remuneration”.⁶³ These exceptions, in the Defence’s view, would cover the kind of unpaid work performed by some of the detainees at S-21 and the other security centres within Case 002/02, such as routine prison maintenance and farming. Accordingly, Nuon Chea would also be absolved of criminal responsibility for enslavement for this reason.

(ii) Grave Breach of the Geneva Conventions for the Unlawful Confinement of Civilians, and Crime against Humanity of Persecution on Racial Grounds

25. Similarly – and as the Defence already argued before the Supreme Court Chamber in 2013 concerning the severance of Case 002⁶⁴ – to the extent that Vietnamese persons were detained at S-21 and Au Kanseng security centres,⁶⁵ the Defence’s position is that they were legitimately arrested and detained in connection with their participation in espionage and treason seeking to advance Vietnam’s existential threat to Cambodia. This directly challenges two charges against Nuon Chea. The first is the unlawful confinement of civilians as a grave breach of the Geneva Conventions, which the Closing Order alleges was without legal basis.⁶⁶ The second is the crime against humanity of persecution on racial grounds, since the Closing Order alleges that Vietnamese people were held at these security centres because “the CPK considered the Vietnamese to be racially distinct from Cambodian people [... and as such, they] were deliberately and systematically targeted *due to their perceived race*.”⁶⁷

⁶¹ *International Covenant on Civil and Political Rights*, 999 UNTS 171, entered into force on 23 Mar 1976 (“ICCPR”), Art. 8(c)(i); *see, also, European Convention on the Protection of Human Rights and Fundamental Freedoms*, ETS 5, entered into force on 3 Sep 1953 (“ECHR”), Art. 4(3); *Convention Concerning Forced or Compulsory Labour*, 39 UNTS 55, entered into force on 1 May 1932, Art. 2(2).

⁶² **D288/6.91/6.11**, 1956 *Code Pénal et Lois Pénales*, Art. 21, 00366801 (p. 21); *see, supra*, at fn. 52.

⁶³ *Twenty-One Detained Persons v. Germany*, ECtHR, App. Nos. 3134/67, 3172/67, 3188/67, 3189/67, 3190/67, 3191/67, 3192/67, 3193/67, 3194/67, 3195/67, 3196/67, 3197/67, 3198/67, 2199/67, 3200/67, 3201/67, 3202/67, 3203/67, 3204/67, 3205/67, 3206/67, Decision, 6 Apr 1968 (**Attachment 6**).

⁶⁴ **E284/4/1**, Second Severance Decision Appeal, para. 81.

⁶⁵ *See the relevant allegations at D427*, Closing Order, paras. 433 (S-21), 617-623 (Au Kanseng).

⁶⁶ **D427**, Closing Order, paras. 1518-1519.

⁶⁷ **D427**, Closing Order, para. 1422 (emphasis added).

(iii) *Crime against Humanity of Persecution on Political Grounds*

26. More broadly, the Closing Order alleges that “enemies” of the CPK were persecuted “based on their *real or perceived political beliefs* or political opposition to those wielding power within the CPK”; that the “categories of so-called “enemies” continued to expand over time”; and that “the identification of people as targets for persecution [was] on the basis that anyone who disagreed with the CPK ideology was excluded”.⁶⁸ It accordingly charges Nuon Chea with the crime against humanity of persecution on political grounds in connection not only with S-21 and the three other security centres in Case 002/02, but also its three included worksites (the 1st January Dam, Kampong Chhnang Airport and Trapeang Thma Dam) and the Tram Kok Cooperatives.
27. The Defence will not elaborate on its position that no such “enemies” policy existed since it is not directly relevant to the Trial Chamber’s question to which these Submissions have been requested to respond. Instead, focusing solely on evidence of preparation and attempts to foment treasonous rebellion against the CPK and the DK government, it is the Defence’s position that such evidence would at least partially absolve Nuon Chea of responsibility for this charge. This is because it would demonstrate that a substantial number of people were not at all persecuted on the basis of real or perceived political beliefs, but instead, because of legitimate suspicions of their involvement in the grave crime of treason, including through preparatory acts, attempts at rebellion, and acts of sabotage.⁶⁹ Indeed, international human rights law permits States to limit the freedom of thought, conscience and belief provided that such limitations are “prescribed by law and [...] necessary to protect public safety, order”,⁷⁰ etc. The European Court of Human Rights has ruled that not every act motivated or inspired by a belief will be protected;⁷¹ that criminal acts will not be;⁷² and that the prevention of crime is a legitimate aim pursuant to which limitations may be imposed.⁷³

(iv) *Crimes against Humanity of Murder, Torture, and Extermination*

28. Taking into account State practice between 1975 and 1979, it is the Defence’s position that it may be questionable whether at that time, customary international law in fact

⁶⁸ **D427**, Closing Order, para. 1417 (emphasis added).

⁶⁹ On sabotage, *see, supra*, at para. 21.

⁷⁰ ICCPR, Art. 18(3). *See, also*, ECHR, Art. 9(2).

⁷¹ *Kalaç v. Turkey*, ECtHR, App. No. 20704/92, Judgment, 1 Jul 1997, para. 27 (**Attachment 7**).

⁷² *Gündüz v. Turkey*, ECtHR, App. No. 59745/00, Décision sur la recevabilité, 13 Nov 2003 (“*Gündüz Admissibility Decision*”), pp. 4-6 (**Attachment 8**).

⁷³ *Gündüz Admissibility Decision*, pp. 4-6.

prohibited the imposition of the capital punishment (including without affording full due process guarantees) or certain acts which may today constitute torture. If it did not impose such prohibitions, then the question of Nuon Chea's responsibility for the crime against humanity of extermination may be partially moot, and entirely moot for the crimes against humanity of murder and torture.

29. Customary international law contemplates the use of violence and imposition of capital punishment against individuals actively involved in planning a serious security threat to the State. Even today, the United States government causes large-scale civilian casualties on an ongoing and regular basis and has purported to justify that practice under customary international law⁷⁴ – to say nothing of the practices it and many other countries used in the relevant period between 1975 and 1979. On this basis, the United States has seen fit, for example, to execute al-Qaeda leader Osama bin Laden and his whole family in 2011⁷⁵ and Taliban leader Mansur last month,⁷⁶ and to recently implement an expanded “liquidation program” in respect of ISIL and al-Qaeda.⁷⁷
30. Evidence of preparation and attempts to foment treasonous rebellion against the CPK and the DK government would constitute a security threat of far greater magnitude than those the United States currently faces. Accordingly, the existence of a threat of such magnitude absolves Nuon Chea of criminal responsibility for the charges of the crimes against humanity of murder, torture and extermination (insofar as the latter charge relates to deaths by execution) at the various security centres within the scope of Case 002/02, According to the Closing Order, this would again impact not only on S-21 Security Centre but also the other security centres within the scope of Case 002/02, as well as the included worksites and the treatment of the Cham and Vietnamese.⁷⁸

⁷⁴ **E284/4/1.1.1**, ‘Lawfulness of Lethal Operations Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force’ (United States Department of Justice White Paper, 2012). *See, also, E284/4/1*, Second Severance Decision Appeal, para. 82.

⁷⁵ *See, e.g.,* Owen Bowcott, ‘Osama bin Laden: US responds to questions about killing’s legality’, *The Guardian*, 3 May 2011, available at <http://www.theguardian.com/world/2011/may/03/osama-bin-laden-killing-legality> (**Attachment 9**).

⁷⁶ *See, e.g.,* ‘Statement by the President on the Death of Taliban Leader Mansur’, The White House, 23 May 2016, available at <https://www.whitehouse.gov/the-press-office/2016/05/23/statement-president-death-taliban-leader-mansur> (**Attachment 10**).

⁷⁷ *See, e.g.,* Michael S. Schmidt and Mark Mazzetti, ‘A Top ISIS Leader is Killed in an Airstrike, the Pentagon Says’, *The New York Times*, 25 Mar 2016, available at http://www.nytimes.com/2016/03/26/world/middleeast/abdalrahmanmustafaalqaduliisisreportedkilledinsyria.html?_r=0 (**Attachment 11**).

⁷⁸ **D427**, Closing Order, paras. 1373-1380 (murder, re: S-21, Kraing Ta Chan, Au Kanseng, Phnom Kraol, Trapeang Thma Dam, Kampong Chhnang Airport, 1st January Dam, treatment of Cham and Vietnamese) and 1408-1414 (torture, re: S-21, Kraing Ta Chan, Phnom Kraol, treatment of Cham).

B. Impact on Nuon Chea's Individual Criminal Responsibility under the Modes of Liability of Joint Criminal Enterprise and Superior Responsibility For All Crimes Charged

31. Although evidence of treasonous rebellion against the CPK and DK government is most closely related to the facts at issue in the current Security Centres and “Internal Purges” segment, its impact on Nuon Chea's criminal responsibility is by no means confined to the charges associated with that segment alone. Instead, such evidence is also of straightforward relevance to all modes of liability through which the Trial Chamber seeks to establish Nuon Chea's responsibility in Case 002/02 generally. It therefore impacts directly on all charges levelled at Nuon Chea in Case 002/02. Evidence of treasonous rebellion would cast a completely different light on the facts at issue in connection with all modes of liability applicable to Nuon Chea in Case 002/02. This would not only alter the relevant factual findings but would invalidate proof of all modes of liability under which Nuon Chea has been charged in the Closing Order.⁷⁹ This evidence would thereby absolve Nuon Chea of criminal responsibility for all charges in Case 002/02.

(i) Relevant Context: Case 002 Severance

32. The Trial Chamber has repeatedly characterised Case 002/01 as a “foundation” for future Case 002 trials,⁸⁰ in large part because witnesses “relevant to the totality of Case 002 were heard in Case 002/01”,⁸¹ in particular witnesses who testified on CPK structure. The testimony of these witnesses formed the backbone of the Chamber's extensive findings on CPK structure in the Case 002/01 judgement (the “Judgement”).⁸² They also fed into the Chamber's findings on Nuon Chea's criminal responsibility under all modes of liability, namely joint criminal enterprise, planning, instigating, ordering, aiding and abetting, and in the alternative, superior responsibility.⁸³

33. However, the Supreme Court Chamber has since held unequivocally that there was no commonality among findings in each sub-case severed from Case 002, and that “common factual elements in all cases resulting from Case 002 *must be established anew*.”⁸⁴ The

⁷⁹ See, **D427**, Closing Order, paras. 1532-1533 (joint criminal enterprise), 1545 (planning), 1548 (instigating), 1551 (aiding and abetting), 1554 (ordering), 1559 (in the alternative, superior responsibility).

⁸⁰ **E131**, ‘Scheduling Order for Opening Statements and Hearing on the Substance in Case 002’, 18 Oct 2011, p. 2.

⁸¹ **E301/9/1**, ‘Decision on Additional Severance of Case 002 and Scope of Case 002/02’, 4 Apr 2014, para. 23.

⁸² See, **E313**, ‘Case 002/01 Judgement’, 7 Aug 2014 (“Judgement”), paras. 199-304 (on CPK administrative and communication structure), and 305-348 (on Nuon Chea's role in the CPK).

⁸³ See, **E313**, Judgement, paras. 722-942.

⁸⁴ **E301/9/1/1/3**, ‘Decision on KHIEU Samphân's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02’, 29 Jul 2014, para. 85 (emphasis added).

Defence considers this to be of acute importance to the facts underlying proof of CPK structure and most modes of liability, given that the Defence vehemently contested the Trial Chamber's findings in these regards in its appeal against the Judgement.⁸⁵ Indeed, the Defence recalls that its concern that Trial Chamber judges who sat in Case 002/01 would be unable to adjudicate these issues with an open mind in Case 002/02 was another reason it requested their disqualification from Case 002/02.⁸⁶ The Trial Chamber's evident hesitation to summons the Defence's 33 remaining witnesses gives the Defence obvious cause to renew the concerns it expressed in its disqualification motion.

(ii) Mode of Liability of Joint Criminal Enterprise

34. According to the Closing Order, membership of the joint criminal enterprise ("JCE") in which Nuon Chea was allegedly a key conspirator encompassed "zone and autonomous sector secretaries, and the heads of the Party Centre military divisions".⁸⁷ In describing CPK structure and thus the JCE, the Closing Order vests ultimate decision-making power with the Standing Committee, where it says that "effective power was exercised".⁸⁸ Below this level, allegedly, were a series of "*hierarchical* administrative entities, all reporting up in a *vertical chain-of-command*, culminating at the Centre."⁸⁹ These sub-structures included zone and autonomous sectors⁹⁰ whose secretaries were tasked with "*implementation of decisions of the Central and Standing Committees*".⁹¹ Similarly, the Closing Order alleges that regular divisions, Centre divisions and zone armies of the Revolutionary Army of Kampuchea (the "RAK") were all "under the command of the Central Committee and its Military Committee".⁹²
35. The Defence's position – as it has already outlined extensively in prior submissions⁹³ – is that evidence of treasonous rebellion against the CPK and the DK government reveals a very different reality within the CPK, the DK government and RAK. In particular, the Closing Order itself acknowledges that many of the zone leaders were also members of

⁸⁵ See, F16, Appeal, paras. 225-249 (on the structure of the CPK), 250-267 (on Nuon Chea's role), 484-626 (on joint criminal enterprise), 627-680 (on planning, ordering, instigating, and aiding and abetting), and 681-706 (on superior responsibility).

⁸⁶ See, E314/6, Second Disqualification Motion, paras. 93-114; the Defence also requested the disqualification of judges who sat in judgement on Case 001 for analogous reasons: see paras. 115-121.

⁸⁷ D427, Closing Order, paras. 159, 1529.

⁸⁸ D427, Closing Order, para. 41.

⁸⁹ D427, Closing Order, para. 61 (emphases added).

⁹⁰ D427, Closing Order, paras. 64-66.

⁹¹ D427, Closing Order, para. 68 (emphasis added).

⁹² D427, Closing Order, para. 126; see, also, paras. 127-128, 133.

⁹³ Cf., in particular, F2/4/3/3/6/1, Appeal Submissions on Significance of CPK "Rift", paras. 32-44 (undertaking a comparable analysis of the Case 002/01 judgement).

the Standing and Central Committees – and indeed, the Closing Order itself identifies East Zone secretary Sao Phim, Northwest Zone secretary Ruos Nhim, Northeast Zone secretary Ney Sarann alias Ya, and Special Zone secretary Vorn Vet as Nuon Chea’s fellow Standing Committee members.⁹⁴ The Closing Order further identifies (Old) North Zone secretary Koy Thuon and Northeast Zone secretary Ney Sarann *alias* Ya as members of the Central Committee.⁹⁵ Thus, by the Closing Order’s own definition, most zone secretaries were at the same time participants in the making of executive decisions. This alone already undermines the Closing Order’s simplistic portrayal of CPK hierarchy, while the evidence of treasonous rebellion eviscerates that portrayal entirely. That evidence demonstrates that not only were the abovementioned “zone leaders” functionally independent – as were the areas under their control – but that they, their allies and subordinates had been actively conspiring to overthrow the CPK and legitimate DK government from right after the liberation of Phnom Penh in April 1975.

36. Indeed, there is concrete evidence – on which some of the requested witnesses can testify – that by as early as May 1975, Sao Phim, Ruos Nhim and many others had already met clandestinely in Phnom Penh to firm up their plans for a coup d’état,⁹⁶ after which they began to implement the plans.⁹⁷ There is also substantial evidence providing specifics which confirm that acts of conspiracy, preparation for and attempts at rebellion did occur, including in collusion with Vietnam. This evidence can assist the Trial Chamber in ascertaining the start date and extent of the relevant leaders’ functional independence.
37. In light of the evidence of treason, the Defence’s position is that it would be not only legally impossible but illogical and absurd in the extreme for the Chamber to find that Nuon Chea shared a common purpose and apparently colluded in the JCE with the very individuals who, beginning right after the liberation of Phnom Penh, *sought to foment treasonous rebellion against the CPK and DK government*.

(iii) Alternate Mode of Liability of Superior Responsibility

38. Neither would it be possible to find that Nuon Chea exercised “effective control” over those leaders or their subordinates, the first precondition for the alternate mode of liability of superior responsibility. Thus, it would be impossible to hold Nuon Chea

⁹⁴ D427, Closing Order, para. 43.

⁹⁵ D427, Closing Order, para. 38.

⁹⁶ See, F2/8, Sixth Appeal Additional Evidence Request, paras. 31-32.

⁹⁷ See, F2/8, Sixth Appeal Additional Evidence Request, paras. 37-46.

criminally responsible for the crimes charged in Case 002/02 through either of these modes of liability.⁹⁸

C. Impact on Nuon Chea's Individual Criminal Responsibility Under Various Modes of Liability For Crimes Charged in Zones Under the Control of Treasonous Leaders of the Rebellion

(i) Responsibility of the Treasonous Leaders

39. However, evidence of treasonous rebellion does not simply redefine CPK structure and thus undermine proof of Nuon Chea's liability under the main mode of liability of JCE and the alternate mode of superior responsibility. It also impacts on the modes of liability under which Nuon Chea is charged in a second, very different sense. Such evidence – for instance, of preparation and attempts at rebellion and sabotage activities – supports the Defence's case that it was leaders of the treasonous rebellion who were responsible for deaths and other criminal acts in areas under their control.⁹⁹ As Nuon Chea previously remarked:

In my time, the policy was good; but our comrades (officers) are bad. We did not have good bridge to take our good policy to the people. Therefore we fail to reach our goal.¹⁰⁰
[...]

The Party's Standing Committee and the – even the commune district level educated the people not to discriminate the New People because we are all Khmer [...] Of course, there were bad elements who incited the hatred between the base and – the Base People and the New People. The situation was complicated.¹⁰¹

40. That is, it is the Defence's position that crimes committed in zones under the control of the leaders of the rebellion deviated from the CPK policies and were committed without prior knowledge of or subsequent approval by some top leaders such as Pol Pot and Nuon Chea. For instance, Ieng Thirith remarked in an interview with Elizabeth Becker about a number of peculiarities in the Northwest Zone, the stronghold of key leader of the rebellion Ruos Nhim:

IT: Yes, I was travelling in order to see the conditions of the people and at the time when I came back in Phnom Penh I reported to our leaders that there was something queer in some provinces, for example in Battambang, I saw something very clear, that they make people, all people going to the rice fields, very far from the village and they have no home; and I saw they have no home and they are all ill. I reported to my leaders that. .. [...]

⁹⁸ Cf., F2/8, Sixth Appeal Additional Evidence Request, paras. 10-13 (undertaking a comparable analysis of the Judgement).

⁹⁹ See, *supra*, at para. 21.

¹⁰⁰ E3/108, 'Note Takings (Khieu Samphan and Nuon Chea)', ERN 00000932; see, also, F2/4/3/3/6/1, Appeal Submissions on Significance of CPK "Rift", para. 19 *et seq.*

¹⁰¹ T. 31 Jan 2012 (Nuon Chea, E1/36.1), pp. 25-26; see, also, F2/4/3/3/6/1, Appeal Submissions on Significance of CPK "Rift", para. 19 *et seq.*

EB: Who were your leaders? Who did you report to?

IT: To the Prime Minister. That's quite queer. It is not normal. There is something wrong in this. In fact, when they made inquiry, they saw that So Phim was an agent of the Vietnamese because he was an ancient member of Indochina Communist Party, you see and at that time they joined in a new party but when the Vietnamese ... (interrupted by somebody attending the interview) ... Ruos Nhim, Ruos Nhim, Ruos Nhim in Battambang (So Phim was in the East). He was in the Northwestern Region.

EB: So this is 1976. Then there was a purge in 1977. [...]

IT: At the time I told my leader there is something wrong in that province because I know the directives of the Prime Minister: not young, not old people, not pregnant women, not women feeding babies and not small children, but I saw everybody there in the rice fields in open air, nothing and with the sun, very hot sun. I saw many people ill of diarrhea and malaria so I reported it to him.

EB: And what happened?

IT: They made an inquiry and in the end, in 1978 we ...

EB: Executed? [...]

IT: ... no, we arrest him [Ruos Nhim]. We know that Ruos Nhim was in big collusion with So Phim in order to carry out the orders of XXX (Yun?) [*in original*] in order to sabotage our policy and to massacre our people. So in this way they can make people rise against us because they don't know. People know only Pol Pot and they don't know this, they don't know. They know that this is an order of Pol Pot. They don't know that Pol Pot don't order all of them to go to the rice fields. It's to cause dissatisfaction among people.¹⁰²

41. Such evidence would further corroborate the Defence's contention that many of the crimes for which Nuon Chea has been charged may have been the result of decisions taken by particularly brutal lower-level leaders. for instance Ta Val vis-à-vis the workers at the Trapeang Thma Dam and requested witness Hun Sen and other former East Zone cadres vis-à-vis the treatment of Cham in the East Zone. It may also suggest that the crimes were the result of deliberate attempts to sabotage the CPK and DK government, as Nuon Chea has long suggested.¹⁰³ More broadly, such evidence would render it doubtful that Nuon Chea could be held criminally responsible for planning, ordering, instigating or aiding and abetting such crimes, or committing such crimes through (the first form of) JCE. It would also jeopardise a conviction of Nuon Chea under the alternate mode of liability of superior responsibility, since the Defence's position is that these crimes were committed without Nuon Chea's knowledge and that when he did learn about them, for instance in the Northwest Zone, he initiated an investigation in order to determine who was responsible for their commission and ultimately arrested the alleged perpetrators.¹⁰⁴

¹⁰² E3/659, 'Transcription of IENG Thirith's 1980 Audio Interview by Elizabeth Becker', ERN 00182322.

¹⁰³ T. 31 Oct 2013 (Nuon Chea Closing Submissions, E1/237.1), p. 9, ln. 20 – p. 10, ln. 8.

¹⁰⁴ See, *supra*, at para.38.

(ii) Affected Crime Sites, Crimes and Locations

42. For the record, the affected crime sites, thematic crimes, and geographic locations are the Trapeang Thma Dam Worksite in the Northwest Zone; the 1st January Dam in the (Old) North (and later Central) Zone; the Kampong Chhnang Airport Construction Site in the West Zone; the Au Kanseng and Phnom Kraol security centres in the Northeast Zone, and later in autonomous sectors; the treatment of Cham and Vietnamese in the East Zone; and the regulation of marriage in areas including (but potentially not limited to)¹⁰⁵ the East, Northwest, (Old) North, Northeast and West Zones.¹⁰⁶ The affected charges are genocide; the crimes against humanity of murder, extermination, enslavement, deportation, imprisonment, torture, persecution (on political, religious, racial grounds), rape, and other inhumane acts (attacks against human dignity, forced marriage, enforced disappearances); and the grave breaches of the Geneva Conventions of wilful killing and wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial.¹⁰⁷ Evidence of treasonous rebellion would jeopardise convictions against Nuon Chea for all of these crimes in all of these locations.

IV. IMPACT ON NUON CHEA'S RIGHT TO A FAIR TRIAL**A. Violation of Nuon Chea's Right to a Fair Trial by Requesting These Submissions**

43. As the Defence has already noted, requiring the Defence to make these Submissions as a precondition to the possible summoning of the 33 remaining witnesses is a flagrant violation of Nuon Chea's right to a fair trial.¹⁰⁸ Current international law,¹⁰⁹ regional

¹⁰⁵ The evidence may reveal further information about additional areas under treasonous leaders' control.

¹⁰⁶ **D427**, Closing Order, paras. 323-349 (Trapeang Thma Dam); 351-381 (1st January Dam); 383-398 (Kampong Chhnang Airport); 589-623 (Au Kanseng) and 625-642 (Phnom Kraol); 745-770, 776-789 (treatment of Cham, limited to the East Zone), and 791-831 (treatment of Vietnamese, limited to Cambodian territory); and 842-860 (regulation of marriage, limited to areas under control of treasonous rebellion leaders).

¹⁰⁷ **D427**, Closing Order, paras. 1335-1349 (genocide re: Chams and Vietnamese); 1373-1380 (crime against humanity ("CaH") of murder re: 1st January Dam, Trapeang Thma Dam, Kampong Chhnang Airport, Au Kanseng, Phnom Kraol, treatment of Cham and Vietnamese); 1381-1390 (CaH of extermination re: 1st January Dam, Trapeang Thma Dam, Kampong Chhnang Airport, Au Kanseng, Phnom Kraol, treatment of Cham and Vietnamese); 1391-1396 (CaH of enslavement re: 1st January Dam, Trapeang Thma Dam, Kampong Chhnang Airport, Au Kanseng, Phnom Kraol); 1397-1401 (CaH of deportation re: treatment of Vietnamese); 1402-1407 (CaH of imprisonment re: Au Kanseng, Phnom Kraol, treatment of Cham); 1408-1414 (CaH of torture re: Phnom Kraol and treatment of Cham); 1415-1418, 1423-1425 (CaH of political persecution re: 1st January Dam, Trapeang Thma Dam, Kampong Chhnang Airport, Au Kanseng, Phnom Kraol); 1419-1421, 1423-1425 (CaH of religious persecution re: 1st January Dam, treatment of Cham); 1422-1425 (CaH of racial persecution re: treatment of Vietnamese); 1426-1433 (CaH of rape re: regulation of marriage); 1434-1441 (CaH of other inhumane acts through "attacks against human dignity" re: 1st January Dam, Trapeang Thma Dam, Kampong Chhnang Airport, Au Kanseng, Phnom Kraol); 1442-1447 (CaH of other inhumane acts through forced marriage re: 1st January Dam, Trapeang Thma Dam specifically and regulation of marriage generally); 1470-1478 (CaH of other inhumane acts through enforced disappearances re: 1st January Dam, Trapeang Thma Dam, Kampong Chhnang Airport, Phnom Kraol, treatment of Vietnamese); 1494-1495 (grave breach of the Geneva Conventions ("GB") of wilful killing re: Au Kanseng); and 1511-1514 (GB of wilfully depriving a prisoner of war or a civilian the rights of fair and regular trial re: Au Kanseng).

¹⁰⁸ See, *supra*, at para. 15.

norms,¹¹⁰ ECCC law,¹¹¹ and Cambodian domestic law¹¹² all agree that Nuon Chea enjoys the fundamental right to a fair trial – a right of Nuon Chea’s which, as the Defence has already chronicled in past submissions, has been routinely violated in Case 002/02.¹¹³

44. Constituent guarantees of the right to a fair trial that are relevant for the present submissions include the right to summons witnesses for him under the same conditions as those against him,¹¹⁴ and the right to present an effective defence.¹¹⁵ The Trial Chamber has already violated Nuon Chea’s guarantee to be able to summons witnesses for him under the same conditions as those against him by the very act of asking the Defence to make these Submissions. Doing so subjects the Defence to a far higher standard than parties generally in order to secure the appearance of its witnesses. The witness lists that the parties submitted to the Trial Chamber at the outset of Case 002/02 included only a sentence or two on the relevance of each witness, plus indications of the Closing Order paragraphs to which they relate.¹¹⁶ Since then, the Chamber has evidently decided concerning the vast majority of witnesses who have appeared in Case 002/02 based only on the paucity of information in those lists.
45. Concerning the first three witness requests to which the TC Briefing Request relates – namely, requests for witnesses whose evidence goes to the heart of the Defence’s case and is relevant to ascertaining the truth and unique – the Defence has not only had to provide the initial information in respect of the already-requested witnesses and provided additional information in the Requests concerning all witnesses. It has also been asked to

¹⁰⁹ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), Arts. 10-11; ICCPR, Arts. 14-15. Cambodia ratified the ICCPR on 26 Aug 1992.

¹¹⁰ *ASEAN Human Rights Declaration* (2012), Art. 20.

¹¹¹ *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, with amendments as promulgated on 27 Oct 2004 (NS/RKM/1004/006) (“ECCC Establishment Law”), Arts. 33 *new* and 35 *new*.

¹¹² Constitution of the Kingdom of Cambodia, Art. 31. *See, also*, specific fair trial guarantees under Art. 38.

¹¹³ *See, e.g.*, **E319/16**, ‘Nuon Chea’s Motion in Relation to Disclosures From Cases 003 and 004 and Response to the International Co-Prosecutor’s Filing Providing Information In This Regard’, 5 Mar 2015, paras. 17-18; T. 27 Aug 2015 (Document Hearing, **E1/338.1**), p. 9, ln. 24 – p. 12, ln. 11; **E366/2**, ‘Nuon Chea’s Response to the International Co-Prosecutor’s Request to Call Additional Witnesses on Treatment of the Cham’, 25 Sep 2015, paras. 21-23.

¹¹⁴ *See*, ICCPR Art. 14(3)(c), ECCC Establishment Law Art. 35 *new* (e).

¹¹⁵ This is considered a corollary of the right to adequate time and facilities for a defence: *see, e.g.*, UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007), para. 33: “Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence”.

¹¹⁶ *See*, **E305/4**, ‘Updated Lists and Summaries of Proposed Witnesses, Civil Parties and Experts’, 8 May 2014; **E305/5**, ‘Témoins et experts proposés par la Défense de M. KHIEU Samphan pour le procès 002/02’, 9 May 2014; **E305/6**, ‘Co-Prosecutors’ Proposed Witness, Civil Party and Expert List and Summaries for the Trial In Case File 002/02 (With 5 Confidential Annexes I, II, IIA, III and IIIA)’, 9 May 2014; **E305/7**, ‘Civil Party Lead Co-Lawyers’ Rule 80 Witness, Expert and Civil Party Lists for Case 002/02 With Confidential Annexes’, 9 May 2014.

make these additional Submissions, and do so in the midst of its preparation for the appearance of Kaing Guek Eav *alias* Duch. Moreover, it has already made extensive submissions in relation to two of the requested witnesses in repeated requests to summons them over the nine-year proceedings;¹¹⁷ in relation renowned filmmaker Robert Lemkin, in recent filings in Cases 002/01 (at trial and on appeal) and in 002/02;¹¹⁸ and in relation to Hun Sen in Case 002/02.¹¹⁹ It has also made additional submissions in relation to the importance of several others among the 35 witnesses in various other submissions cross-referenced in the Requests.

46. At the other end of the spectrum, the Defence notes that the Co-Prosecutors have, for example, recently been successful in requesting a witness on the tenuous basis that the person might be a neighbour vaguely referenced in the DC-Cam statement of another witness. Upon the witness's appearance, it transpired that she was not, in fact, the neighbour.¹²⁰ At that point, the Chamber nevertheless permitted the parties to continue question the witness as to her possible relevance to Case 002/02 despite the Chamber having ruled that the basis on which the neighbour was called was in fact erroneous.¹²¹

B. Need for “Further Evidence”

47. Finally, the Defence notes that the Trial Chamber's question queries the need for “*further evidence* tending to prove the existence of conflicting factions or rebellions” (emphasis added). One possible interpretation of this question is that the Trial Chamber may consider the evidence already before it to be sufficient and that further such evidence is thus unnecessary. In this vein, the Chamber has previously held that “ascertaining the truth need not require the testimony of an unlimited number of witnesses”.¹²²
48. The Defence agrees with this concept generally. However, it refers the Trial Chamber to the submissions it made in its Requests and reiterated above concerning the singular importance of the 35 witnesses to the Defence's case,¹²³ the relevance of their evidence to ascertaining the truth, and the unique (non-cumulative) nature of their evidence.

¹¹⁷ See, e.g., E370, East Zone Witnesses Request, paras. 18-25.

¹¹⁸ See, e.g., F2/10, Appeal Witness Reconsideration Request, paras. 46-56.

¹¹⁹ See, e.g., E370, East Zone Witnesses Request, paras. 26-30.

¹²⁰ See, T. 3 Feb 2016 (In Yoeung, E1/387.1), p. 66, ln. 16 – p. 80, ln. 25.

¹²¹ See, T. 3 Feb 2016 (In Yoeung, E1/387.1), p. 81, lns. 2-4.

¹²² E370/4, ‘Decision on Nuon Chea Request to Expedite Two Previously Proposed Witnesses and Summons Four Additional Witnesses During the Case 002/02 Trial Topic on the Treatment of the Cham and on National Co-Prosecutor's Request to Admit Written Testimony in Lieu of In-Court Appearance’, 25 Mar 2016, para. 15.

¹²³ In this regard, see, *supra*, at paras. 5, 13.

Moreover, and as abovementioned,¹²⁴ evidence on treasonous rebellion against the CPK and DK government would provide unique insights into matters which could be determinative, in whole or part, of Nuon Chea's criminal responsibility in Case 002/02.

49. The Defence has argued in numerous past submissions that the “original sin” overshadowing all of Case 002 is the Co-Investigating Judges’ decision, subsequently confirmed by the Trial Chamber, to totally prohibit the Defence both from carrying out its own investigation and simultaneously from being involved in the pre-trial investigation.¹²⁵ This decision not only triggered a flood of procedural errors but has also had a ripple effect throughout all stages of the proceedings that continues to be felt today. Concerning the instant Submissions, the relevant impact of the decision is that, as the Defence highlighted in its oral submissions on the (re-)severance of Case 002, it has transformed “[t]his trial [into] Nuon Chea’s *only opportunity* to present his defence to the allegations in the Closing Order”.¹²⁶ Accordingly, requests for the admission of additional witnesses assume a heightened significance for the Defence as they are one of the only tools available to it to develop an evidentiary foundation for its case.¹²⁷
50. On a related note, while the Defence has sought to identify relevant evidence with as much specificity as possible, the Chamber should not reject any of the Defence’s requested witnesses on the basis that their evidence appears to be general in nature. The proper approach should be the one adopted by the International Military Tribunal at Nuremberg, which admitted evidence it considered “strictly irrelevant and [which] might well be regarded as the red herring drawn across the trial” on the ground that “the Tribunal’s policy throughout this trial has been to admit everything which might conceivably elucidate the reasoning of the Defence”.¹²⁸ The requested evidence in the present case is clearly admissibility under this approach, since, far from being “strictly irrelevant”, it is, in the Defence’s view, highly relevant to the determination of Nuon Chea’s individual criminal responsibility. Rejecting the Defence’s witnesses because of the perceived generality of their evidence would violate Nuon Chea’s right to a fair trial, including his right to obtain witnesses for him on the same basis as those against him, and

¹²⁴ See, *supra*, at paras. 17-42.

¹²⁵ See, e.g., **F2/10**, Appeal Witness Reconsideration Request, para. 21; and, generally, paras. 22-26.

¹²⁶ T. 20 Feb 2013 (Severance Hearing, **E1/172.1**), p. 3, Ins. 24-25 (emphasis added); see, also, **E284/1/1**, Second Severance Decision Appeal, para. 33.

¹²⁷ On this, see, generally, **F2/10**, Appeal Witness Reconsideration Request, paras. 21-26.

¹²⁸ **F16.1.28**, Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, 2011, p. 140; see, also, **F16**, Appeal, para. 148.

to present a defence.¹²⁹ Given that Case 002/02 is in the evidentiary stage of proceedings and that the Defence was not permitted to interview witnesses at earlier stages, it is inevitable and acceptable for the Defence's evidence to be more broadly targeted.

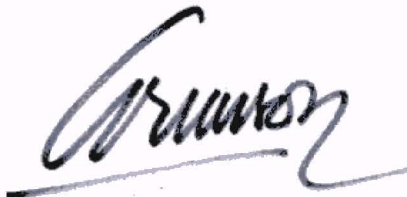
V. CONCLUSION

51. The violation of Nuon Chea's right to a fair trial will be far worsened – indeed, if that is even possible¹³⁰ – if the Trial Chamber ultimately decides not to call the remaining 33 witnesses requested by the Defence. It will be even worse if, in deciding not to call the witnesses, the Trial Chamber to consider this tribunal's well-known budgetary limitations. As the Supreme Court Chamber ruled in connection with the Trial Chamber's second decision to sever case 002:

The Supreme Court Chamber considers the Trial Chamber's reliance on the ECCC's financial malaise to be irrelevant and inappropriate in the present decision-making process. While Judges are at all times certainly obligated to be mindful of the efficiency of proceedings, they must always act within the *sacrum* sphere of the law, the tenets of which cannot be overridden by the *profanum* of budgetary savings. [...] If there is insufficient funding to guarantee a trial driven by law, all ECCC proceedings must be terminated and the court must close down. Barring this, proceedings must go on without individual decisions on matters of law and fact being unduly influenced by financial considerations.¹³¹

52. For all of the abovementioned reasons, the Defence submits that the evidence of the 33 remaining witnesses cannot simply be cast aside. Deciding not to summons the requested witnesses will effectively and finally prevent Nuon Chea from presenting his defence altogether. This will constitute a straightforward violation of the second aforementioned constituent guarantee of Nuon Chea's right to a fair trial. It will also render Nuon Chea's ongoing participation in Case 002/02 entirely meaningless.

CO-LAWYERS FOR NUON CHEA



SON Arun



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¹²⁹ See, *infra*, at paras. 43-52.

¹³⁰ See, e.g., T. 26 Aug 2015 (Documents Hearing, **E1/337.1**) in which the Defence described proceedings in Case 002/02 as a "farce".

¹³¹ **E284/4/8**, 'Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002', 25 Nov 2013, para. 73; see, also, **E409**, Prak Khan Recall Request, para. 25.