

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

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

Party Filing: Co-Prosecutors

Filed to: Trial Chamber

Original Language: English

Date of document: 20 June 2016



CLASSIFICATION

**Classification of the document
suggested by the filing party:** PUBLIC

Classification by Trial Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S SUBMISSIONS ON THE
SIGNIFICANCE OF ALLEGED FACTIONS AND REBELLIONS
DURING THE DK PERIOD**

Filed by:

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Distributed to:

Trial Chamber

Judge NIL Nonn, President
Judge Jean-Marc LAVERGNE
Judge YA Sokhan
Judge Claudia FENZ
Judge YOU Ottara

Civil Party Lead Co-Lawyers

PICH Ang
Marie GUIRAUD

Copied to:

Accused

NUON Chea
KHIEU Samphan

Lawyers for the Defence

SON Arun
Victor KOPPE
KONG Sam Onn
Anta GUISSÉ

Standby Counsel

TOUCH Voleak
Calvin SAUNDERS

I. Introduction

1. Nuon Chea recently filed submissions¹ (“Submissions”) in response to the Chamber’s request² that he explain the relevance of his requests to call 35 additional witnesses during the trial segments on S-21 and Internal Purges. Nuon Chea claimed in his Witness Requests that these witnesses are necessary to prove his claim that there were factions or rebellions within the CPK. He argues that evidence of the existence of factions or rebellions against the DK leadership will absolve him of liability for a number of crimes, including murder, extermination and imprisonment, and for all crimes charged via two modes of liability.³
2. Nuon Chea’s submissions regarding the charges that he is responsible for the imprisonment without due process of those detained at S-21 and the murders of these detainees and thousands of other cadre murdered in CPK purges are remarkable in their callousness towards the extreme brutality of these crimes. His submissions essentially rely on his contention that authoritarian regimes facing popular opposition to their rule should have free rein to imprison and murder all those suspected of disloyalty in order to maintain the leaders’ hold on power. This approach is quite extraordinary given its disregard of the basic foundations of international humanitarian law and its casual embrace of the destruction of individuals and communities whose existence a regime finds inconvenient or vaguely unsettling.

¹ **E395/2** Nuon Chea’s Submissions on the Relevance of Evidence of Treasonous Rebellion to his Individual Criminal Responsibility in Case 002/02, 10 June 2016 (“Submissions”).

² **E395/1** Trial Chamber Memorandum entitled “Request for briefing on significance of conflicting factions within the DK leadership”, 11 May 2016 (“Invitation”). The Chamber invited the Submissions to assist it in deciding a number of witness requests recently filed by Nuon Chea related to the S-21 Security Centre and Internal Purges trial segments. **E395/1** Invitation, paras 1, 3-4. See **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 March 2016 (“First Witness Request”); **E392** Nuon Chea’s Second Witness Request for the Case 002/02 Security Centres and “Internal Purges” Segment (Leadership), 1 April 2016 (“Second Witness Request”); **E395** Nuon Chea’s Third Witness Request for the Case 002/02 Security Centres and “Internal Purges” Segment (Evidence of Treasonous Rebellion), 8 April 2016 (“Third Witness Request”); **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 June 2016 (“Fourth Witness Request”). Nuon Chea has also indicated that he intends to file a fifth, and final, new witness request by the end of the summer recess. **E395/2** Submissions, para. 4. The witness requests together are referred to hereinafter as “Witness Requests”.

³ Specifically, Nuon Chea argues that this evidence will partially or completely absolve him of liability for the crimes against humanity of imprisonment, enslavement, persecution on racial grounds, persecution on political grounds, murder, torture, and extermination, as well as the grave breach of the Geneva Conventions of unlawful confinement of civilians. He also argues that this evidence will absolve him of liability for any crimes pursuant to the modes of liability of joint criminal enterprise and superior responsibility. **E395/2** Submissions, paras 18-38.

3. Nuon Chea's arguments regarding the relevance of the evidence he seeks to certain of the other crimes and modes of liability are more nuanced, but unpersuasive for the reasons explained below. Nuon Chea's proposed additional witness evidence is irrelevant on most of the grounds he has suggested, though there are certain kinds of evidence that may be relevant to certain crimes and modes of liability. The Co-Prosecutors will address each of Nuon Chea's arguments in turn below.

II. Submissions

A. *The Crime against Humanity of Unlawful Imprisonment*

4. Nuon Chea's argues that because (he claims) rebellions and espionage "were being pursued" at various locations in Cambodia at the relevant time, there was legitimate suspicion justifying the arrest and detention of tens of thousands of people imprisoned in S-21 or other detention centres and that this evidence would absolve him of the crime of imprisonment.⁴ He argues that the evidence he hopes will establish the existence of resistance movements and espionage in various parts of Cambodia created a legitimate suspicion justifying the imprisonment and execution of the many thousands of men, women and children detained at S-21 or executed in purges elsewhere.⁵ According to Nuon Chea, this means that the arrests and the subsequent imprisonment of these victims were not "arbitrary".
5. Nuon Chea's argument misconstrues the elements of the crime against humanity of imprisonment. The crime of imprisonment is "the arbitrary deprivation of an individual's liberty without due process of law."⁶ Nuon Chea attempts to conflate the existence of suspicion with due process. He argues that if he can show that the DK's leaders had some suspicion that "treason and espionage were being pursued," there was "a clear legal basis for the deprivation of liberty of those arrested", namely, "a legitimate suspicion that the

⁴ E395/2 Submissions, para. 20.

⁵ E395/2 Submissions, para. 20. (Nuon Chea says that evidence of treason and espionage would create legitimate suspicion regarding "the arrested people", with no further limitation.)

⁶ Case 001-E188 Judgment, 26 July 2010 ("Duch Trial Judgment"), para. 347; *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002 ("*Krnojelac* Trial Judgment"), paras 113 & 115; *Prosecutor v. Simić et al*, IT-95-9-T, Trial Judgment, 17 October 2003 ("*Simić* Trial Judgment"), paras 64-65.

arrested people were involved in the crime of treason and related crimes.”⁷ This is simply a misunderstanding of the law.

6. In fact, the existence of due process is assessed with reference to the circumstances surrounding a deprivation of liberty. For example, in assessing whether a deprivation of liberty is arbitrary, a chamber may consider, *inter alia*, whether the detention was “based on a valid warrant of arrest, whether the detainees were informed of the reasons for their detention, whether the detainees were ever formally charged, and whether they were informed of any procedural rights.”⁸ Even if Nuon Chea’s witnesses’ testimony were to demonstrate the existence of groups planning to overthrow the barbarous rule of the Pol Pot regime, it could not cure a lack of due process or exonerate Nuon Chea of his imprisonment charges for those detained with no charges, no counsel, no trial, no right to challenge evidence and indeed, no evidence at all, and destined for execution from the moment of their arrest.⁹

B. *The Crime against Humanity of Enslavement*

7. Nuon Chea’s argument regarding enslavement is that because people under lawful detention may be required to work in some circumstances, any forced labour required of prisoners at S-21 and other DK detention centres was lawful given his argument that the regime had the

⁷ E395/2 Submissions, para. 20.

⁸ *Prosecutor v. Ntagerura et al*, ICTR-99-46-T, Trial Judgment, 25 February 2004 (“*Ntagerura* Trial Judgment”), para. 702. Although the factors discussed in this paragraph relate to the lawfulness of the initial arrest, a detention can become arbitrary—and therefore constitute the crime of imprisonment—even following a lawful initial arrest. If the legal basis for the initial deprivation of liberty ceases to apply, even an initially valid deprivation of liberty may become arbitrary. *Krnjelac* Trial Judgment, para. 114.

⁹ The cases Nuon Chea cites in an attempt to justify his position do not support him. *Aksoy v. Turkey* found a human rights violation when a suspect was detained for 14 days without judicial intervention, despite a state of emergency. The Court explicitly noted that prompt judicial review of detention is important not just in its own right but also because it can lead to early detection of serious mistreatment and torture. *Aksoy v. Turkey*, Application No. 21987/93, Judgment, 18 December 1996, paras 76 & 78. *Lawless v. Ireland* found a justified derogation from the European Convention on Human Rights in a situation in which (i) the Irish Parliament could rescind the Irish Government’s declaration of emergency at any time, thus providing democratic oversight; (ii) any person detained could have his case reviewed by a “Detention Commission” composed of two judges and a military officer, the opinion of which was binding on the Government; (iii) ordinary courts had the power to compel the Detention Commission to carry out its functions; and (iv) the Government was required to immediately release any detained person who gave a written undertaking to obey the constitution and laws of Ireland. In addition, under the terms of the challenged legislation, detainees were immediately provided with the warrant justifying their detention and information regarding their right to have their detention reviewed by the Detention Commission. *Lawless v. Ireland (No. 3)*, Application No. 332/57, Judgment, 1 July 1961, paras 12 & 37.

right to detain without charges or legal process all those it suspected of disloyalty.¹⁰ This argument is based on two flawed premises. First, it depends on his earlier argument that detainees were lawfully imprisoned despite the absence of any due process. As set out above, that premise is false.

8. Second, the argument is premised on a misunderstanding of the elements of enslavement. Enslavement is defined as “the exercise over a person of any or all powers attaching to the right of ownership.”¹¹ A number of factors are relevant to the analysis of whether an individual is exercising such powers; these include the following:

control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.¹²

9. Nuon Chea’s argument, which only concerns the legality of imposing forced labour on those lawfully detained, fails to address the indicia of slavery. Nuon Chea’s proposed evidence regarding factions within the CPK and resistance to its rule is therefore irrelevant to his liability for the crime against humanity of enslavement, because evidence of factions and resistance, no matter how persuasive, would tell the Chamber nothing about whether the victims at S-21 and elsewhere were subjected to the powers of ownership exercised by another person.

C. The Unlawful Confinement of Civilians as a Grave Breach of the Geneva Conventions

10. Nuon Chea seems to suggest that his claim that there were groups within DK opposing the Khmer Rouge central leadership and “seeking to advance Vietnam’s existential threat to Cambodia” provides a legal basis to detain Vietnamese civilians at S-21 and elsewhere simply on the basis of their nationality.¹³
11. However, Article 42 of the Fourth Geneva Convention provides that civilians may be interned only if “the security of the Detaining Power makes it absolutely necessary.”¹⁴ Article 43 of the Fourth Geneva Convention requires that detained civilians have the right

¹⁰ E395/2 Submissions, para. 24.

¹¹ Case 001-F28 Appeal Judgment, 3 February 2012 (“Duch Appeal Judgment”), para. 153.

¹² Case 001-E188 Duch Trial Judgment, para. 342, *affirmed by* Case 001-F28 Duch Appeal Judgment, para. 154.

¹³ E395/2 Submissions, para. 25.

¹⁴ Geneva Convention (IV), art. 42.

to challenge their detention and additionally would have required (in this case) that the DK authorities promptly notify Vietnam of the identities of any Vietnamese national civilians it detained. The Co-Prosecutors recognize that any evidence that an individual detained at S-21 was not a civilian but rather a combatant or engaged in espionage could be exonerating on the charge of unlawful confinement of civilians and should be heard. However, the mere fact of an armed conflict between the DK and Vietnam would not justify the unlawful confinement or execution of civilians simply based on their being of Vietnamese nationality or ethnicity. Such racist targeting of individual groups finds no support in international law.

D. The Crime against Humanity of Persecution on Racial and Political Grounds

12. Nuon Chea makes two analogous arguments regarding the crime of persecution on racial grounds (against Vietnamese victims) and the crime of persecution on political grounds.¹⁵ In essence, he contends that if the evidence shows that victims were imprisoned, tortured, murdered, etc. because they were believed to have attempted rebellion rather than because of their perceived membership in a racially defined group (as Vietnamese) or politically defined group (as enemies of the regime), then the *mens rea* requirement for persecution would not be satisfied.
13. Nuon Chea has correctly stated the specific intent element of persecutions. Any evidence that individuals were not targeted because of their race or political beliefs but rather because of genuinely held suspicions that they were actively preparing to form resistance movements aimed at overthrowing the Khmer Rouge regime would be relevant and exonerating on the *mens rea* element of persecution. However, evidence that the regime targeted individuals merely because of their membership in a national, ethnic, religious or political group (e.g., Vietnamese, “New People”, Cham) satisfies the *mens rea* of persecution and would be incriminatory rather than exonerating. The fact that the persecution was motivated by the CPK central leadership’s fear of losing power would not exonerate the Accused of the persecution charges if he targeted individuals merely because of their membership in the group.

E. The Crimes against Humanity of Murder and Extermination

¹⁵ E395/2 Submissions, paras 25-27.

14. Nuon Chea's submissions regarding murder and extermination are both chilling and farcical. They are chilling because Nuon Chea again expresses no regrets for S-21 and the massive purges but instead coldly asserts that extrajudicial killing was perfectly acceptable under international law during the DK period. They are farcical because they are entirely unsupported by law or by any serious effort to justify them based on law.
15. Nuon Chea claims that "it may be questionable" whether customary international law "prohibited the imposition of capital punishment (including without affording full due process guarantees)" during the period from 1975 to 1979.¹⁶ But the charges in this case do not concern the legality of capital punishment, but rather extrajudicial killings. Executions with no legal process or due process guarantees are not "capital punishment"—such extrajudicial killings are simply murder.
16. Nuon Chea is unable to cite any authority that supports his outlandish contention that a regime is free to execute its perceived enemies without any legal process. The sole legal authority he cites, a United States Department of Justice White Paper,¹⁷ unambiguously refutes rather than supports Nuon Chea's position. By its terms, the White Paper applies *solely* to situations in which "capture [of a suspected enemy] is infeasible,"¹⁸ and it is careful to emphasize that "to kill ... an enemy after he has laid down his arms, and especially when he is confined in prison, is murder".¹⁹ Even if Nuon Chea's factual premises that there were ongoing armed rebellions at all relevant times and places and that *all* of the many thousands of men, women and children imprisoned at S-21 and other security centres posed grave threats to the DK regime were correct, the killings that Nuon Chea seeks to justify would still be nothing less than murder, and given the scale of killings, would constitute the crime of extermination.
17. For these reasons, Nuon Chea's proposed evidence of resistance to the DK regime is irrelevant to his criminal liability for murder and extermination. No evidence of efforts to revolt against the Khmer Rouge tyranny would justify the murder and extermination of unarmed, helpless prisoners in the complete absence of judicial process.

¹⁶ E395/2 Submission, para. 28.

¹⁷ E284/4/1.1.1 Department of Justice White Paper "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa-ida or An Associated Force" ("DOJ White Paper").

¹⁸ E284/4/1.1.1 DOJ White Paper, p. 1.

¹⁹ E284/4/1.1.1 DOJ White Paper, p. 14 (internal citations and quotation marks omitted).

F. The Crime against Humanity of Torture

18. Nuon Chea argues that “it may be questionable whether [during the DK period], customary international law in fact prohibited ... certain acts which may today constitute torture”²⁰ and that evidence of attempts to rebel against the CPK constituted a threat of such magnitude that it absolves Nuon Chea of criminal responsibility for torture at S-21 and other security centres.²¹ This rather remarkable submission is surprising given the resolute and completely contrary position taken by Nuon Chea earlier in this trial.

19. On 25 May 2015, Nuon Chea’s counsel told the Chamber:

We never have nor will we ever make the argument that, under certain circumstances, torture at S-21 or Krang Ta Chan was ever justified; we’re not making that argument, we will never make that argument. There is an absolute prohibition on torture; there’s no doubt about that. Saying that under certain circumstance is is justified, I would argue with an American (*sic*) argument, an argument recently made by the Minister of Defence, Cheney (*sic*), when it comes to certain prisons, we're not making that argument.²²

20. No legal or ethical rules prevent defence counsel from abandoning a failing strategy and reversing their legal submissions. Given the overwhelming evidence that has been presented to the court of torture practices throughout DK security centres, it is understandable that Nuon Chea would abandon attempts to deny such torture practices and now try to justify them. However, unlike his current position, the statement of Nuon Chea’s counsel just last year that “there is an absolute prohibition of torture; there’s no doubt about that” is fully supported by international law and jurisprudence. His current claim that torture at S-21 was permissible is both abhorrent and spurious.

21. Nuon Chea does not cite any authority in support of his current position, for good reason—no such authority exists.

G. The Mode of Liability of Joint Criminal Enterprise

22. Nuon Chea asserts in conclusory fashion that evidence of treason would make it impossible, and indeed, “illogical and absurd” to find that Nuon Chea was part of a joint criminal

²⁰ E395/2 Submissions, para. 28.

²¹ E395/2 Submissions, para. 30.

²² E1/304.1 Transcript, 25 May 2015 at ENG 01123135-36.

enterprise with the people he says were conspiring against him.²³ But in fact, there is nothing impossible, and indeed nothing unusual, about members of a criminal organization sharing a common criminal purpose while simultaneously disliking, mistrusting, and even plotting against each other. As the Co-Prosecutors said in a previous filing on this subject:

Nor does a lack of trust or an emerging conflict between individuals necessarily mean that they are not working together toward a common criminal plan. For example, if two drug smugglers work together to bring a shipment of drugs into their target market while each, at the same time, is plotting to kill the other and take all the profits, those plots would in no way absolve either of criminal responsibility for his participation in a joint criminal enterprise to smuggle the drugs. Similarly, even if Nuon Chea's assertions of secret plots within the party were true, it would not absolve the Centre leaders of crimes implemented by Zone leaders that were part of the joint criminal enterprise.²⁴

23. Obviously, then, the mere existence of a disagreement or conflict between two JCE members is not, in itself, exculpatory. The evidence would only be exonerating if it were to show that the crimes committed were outside of the criminal plan to which the Accused agreed. If the evidence which Nuon Chea seeks to elicit would show that S-21 was being operated by regime opponents as part of a plot against the CPK, that would clearly be relevant evidence. Similarly, if the evidence were to show that the purges of the East Zone, North Zone, and Northwest Zone cadre were part of a plot against Nuon Chea and Khieu Samphan, that would clearly be exonerating evidence. However, the Co-Prosecutors have not read in any of the summaries of proposed witnesses proffered by Nuon Chea anything that would indicate that witnesses are likely to provide such evidence and the evidence to date is unambiguous that the purges and S-21 were directed by the Centre leadership and carried out by its most devoted cadre, including Ta Mok and Ke Pauk, whom Nuon Chea has never accused of disloyalty.

H. The Mode of Liability of Superior Responsibility

24. Nuon Chea also argues that evidence of "acts of conspiracy, preparation for and attempts at rebellion" would make it impossible to find that Nuon Chea exercised effective control over zone leaders and their subordinates, thereby precluding liability under a theory of superior

²³ E395/2 Submissions, paras 36-37.

²⁴ F2/4/3/3/6/1/1 Co-Prosecutors' Response to Nuon Chea's Submissions on the Significance of the Alleged "Rift" Within the CPK, 16 October 2015, para. 22.

responsibility.²⁵ He does so without engaging at all with the relevant law or addressing in a meaningful way important distinctions in various kinds of evidence he proposes or how this impacts on the current segments regarding S-21 and internal purges.

25. “Effective control” is defined as the material ability to prevent or punish the commission of crimes by a subordinate.²⁶ Factors tending to demonstrate the existence of effective control include the accused’s position within a military or political structure; his capacity to issue orders and whether such orders were followed; and the authority to invoke disciplinary measures.²⁷
26. Nuon Chea’s proposed evidence would only undermine a finding of effective control if it weakened evidence of Nuon Chea’s material ability to prevent or punish the crimes of his subordinates. In other words, to be relevant, the evidence must tend to show that planned or actual rebellions eliminated the power of Nuon Chea and the Party Centre to impose their will throughout the country.
27. Nuon Chea’s overall submission seems to be that the people were purged and sent to S-21 because they were rebelling against the CPK. But the issue with superior responsibility is not Nuon Chea’s effective control over these victims of the purges and S-21, but rather over the perpetrators of these crimes. None of the summaries provided gives any indication that witnesses will claim that the *perpetrators* of the purges or those operating S-21, such as Duch, were in rebellion. Moreover, the fact that the Party Centre was able to remove those it suspected of disloyalty from their positions, take them to S-21 and execute them, is itself powerful evidence of the Centre’s effective control over those it eventually choose to purge.

i. Evidence of Thoughts or Discussions of Resistance

28. Nuon Chea implicitly argues that evidence of CPK cadres’ subjective dissatisfaction with the Party Centre undermines evidence of the existence of a strong hierarchy in the DK regime. On the contrary, the more authoritarian and ruthless a regime, the more likely decision-making is hierarchical. This is true even though it is also more likely it will be unpopular and even its own cadres may wish for a change of leadership. While there is no

²⁵ E395/2 Submissions, para. 36 & 38.

²⁶ Case 001-E188 Duch Trial Judgment, para. 540.

²⁷ Case 001-E188 Duch Trial Judgment, para. 541.

doubt that the CPK regime that destroyed religion and impoverished, enslaved, and terrorized so many of its own people earned widespread hatred, the evidence also shows that the regime ruled with merciless intolerance of any dissent and exercised full control over the actions of its own cadre.

29. There is simply nothing improbable about people following instructions from superiors they fear, mistrust, or dislike. It happens all the time in ordinary life, and is obviously far more likely to occur in highly coercive circumstances like those that existed in the DK.

ii. Evidence of Preparation for Rebellion

30. Evidence that steps taken in preparation for possible rebellion were immediately discovered and that the incipient rebellion was quickly and brutally put down would tend to *support* rather than to undermine the conclusion that a strong hierarchy existed throughout the DK. Evidence that shows that any concrete act of dissent triggered an instant and overwhelming violent response from the Centre simply shows that the Party Centre retained its ability to impose its will throughout the territory of Cambodia.
31. Much of the evidence that Nuon Chea proposes appears to fall into just this category. For example, five of the six witnesses proposed by the First Witness Request say that the planned rebellion was “exposed” or “compromised” or that those involved were arrested before any action that could be characterised as an armed rebellion was taken.²⁸ None gives any indication that the Party Centre’s power was diminished—even for a moment—by this abortive attempt at resistance to the regime. If these witnesses were called and gave testimony consistent with Nuon Chea’s description, it would simply indicate that the Party Centre’s power to impose its will throughout the territory of Cambodia was undiminished by these failed attempts. Similarly, the Third Witness Request finds the relevance of the proposed witnesses on evidence about “preparation and attempts at treasonous rebellion in the Northwest Zone”²⁹ rather than any assertion of a successful rebellion or an ongoing armed conflict that could actually have diminished the power of the Party Centre. This is presumably because there simply is no evidence available that the Party Centre’s power in the Northwest Zone was ever seriously compromised.

²⁸ E391 First Witness Request, paras 7, 9, 12, 13, 15, 17 & 20.

²⁹ E395 Third Witness Request, paras 24 & 28.

32. Evidence of these kinds of trivial preparations (and what Nuon Chea characterizes as “attempts”) cannot undermine the evidence of Nuon Chea’s effective control.

I. Contentions that Crimes Were Committed at the Initiative of Zone Leaders

33. Nuon Chea also argues that evidence of “treasonous rebellion” “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” and that this would relieve him of liability for these crimes.³⁰
34. Nuon Chea does not indicate which of the crimes he is charged with would be affected by this evidence or who the “brutal lower-level leaders” are to whom he refers other than to name one cadre, Ta Val,³¹ about whom the Chamber has already heard extensive evidence. Moreover, evidence shows that when Ta Val was purged, he was replaced by someone equally brutal.³² Nuon Chea’s assertion that he was the one who “ultimately arrested” Ta Val and the other Northwest Zone cadres³³ shows that he acknowledges and accepts that he always retained effective control over the area.
35. In any event, the Co-Prosecutors acknowledge that any evidence that a cadre was purged *because of* committing the crimes with which Nuon Chea is charged would clearly be relevant as it could demonstrate that such crimes were not Nuon Chea’s intent and were

³⁰ E395/2 Submissions, paras. 39 & 41.

³¹ E395/2 Submissions, para. 41.

³² E3/7805 Written Record of Interview, at ENG 00277817 (“Ta Yun came from the Southwest to supervise the Trapeang Thma Dam. He arrested and killed many people.”) Numerous other witnesses give evidence that conditions actually worsened after Ta Val’s departure, undermining any contention that the purpose of the purge was to punish cadres for committing crimes. *See, e.g.,* E3/9076 DC-Cam Statement, at ENG 00731187 [(Question): During [Ta] Val's period and Ta Hoeng's comparing to [Yeay] Chaem's, which one was ... ? (Answer): It was all the same. The arrest occurred during [Ta] Val's control and it seemed like there were less killed. The killing did occur when the southwest zone came in. (Question): It was vigorous by the southwest zone? (Answer): Yes. It was vigorous. But [Ta] Val's was not. There were spies and later on [Ta] Val was killed as well. At the time we were to work only and there was no criticism of each other. When the southwest zone came in it was vigorous and they went on a killing spree with no reason but linkages of this and that. I was in fear of any linkage with this and that. When the southwest zone came in they chased people for networking and killed all within the supposed network. (Question): All within the network were killed? (Answer): It was a killing spree.”]; E319/19.3.33 Written Record of Interview, at A.10 [“I would like to add that life under the Southwest Zone people’s authority was extremely hard because we received an insufficient food supply despite hard work and because they killed a lot of people.”]; E319/21.3.5 Written Record of Interview at A.27 [“Actually, before the Southwest cadres arrived arrests and killings were not frequent, but after the Southwest cadres arrived the arrests and killing of people became more frequent.”]; E319/21.3.3 Written Record of Interview, at A.94 [“(Question): After the Southwest group took charge, what was the situation with disappearances and arrests? (Answer): Yes, more and more people disappeared or were arrested.”]

³³ E395/2 Submissions, para. 41.

outside of the criminal plan. The Co-Prosecutors encourage the Chamber to hear any such evidence should Nuon Chea make a showing that there is a reasonable basis to believe a witness could provide such evidence.

J. Nuon Chea's Claim that His Fair Trial Rights Have Been Violated

36. Nuon Chea repeatedly argues in his Submissions that his fair trial rights have been violated by the Chamber.³⁴ He argues that the Chamber's request that he file the Submissions violates his right to summon witnesses and subjects him to a "far higher standard than parties generally" with regard to the calling of witnesses.³⁵ This argument is completely baseless. In a civil law system, it is the Chamber that decides on which witnesses to hear, after considering the views of the parties. What the Chamber requested of Nuon Chea was to explain the *relevance* of his proposed additional evidence. It is the Chamber's duty to ensure that the trial is not unduly prolonged by hearing evidence of no relevance to the charges. Relevance is a condition to the admission of all evidence, for all parties, in all cases, in all courts.
37. While the Co-Prosecutors recognize the importance that his trial is conducted in a way that ensures the fair trial rights of each of the Accused, they cannot fail to note the irony that

³⁴ Nuon Chea argues that the Case 002/01 judgment "failed even to acknowledge [his] case in any meaningful way" and that his own criticism of the Case 002/01 judgment was "echoed" by an analysis of the judgment published by the Handa Center. **E395/2** Submissions, para. 7 & fn 16 and **F30/11.1.3** "A Well-Reasoned Opinion? Critical Analysis of the First Case against the Alleged Senior Leaders of the Khmer Rouge (Case 002/01), 2015" ("Handa Center Report"). While it is certainly true that the Handa Center Report repeated many of Nuon Chea's complaints about the trial, it is important for those unfamiliar with the extensive record of this case to understand that this report is replete with errors and critical omissions about what happened in the trial, what was stated in the judgment and the applicable law. To take just two of many examples, the report accuses the Chamber of misleading the Defence by promising not to consider victim impact testimony on issues of guilt or sentence and denying the defence the right to confront such evidence. **F30/11.1.3** Handa Center Report, p. 22. However, as detailed in the Co-Prosecutors response to the defence appeals, this is exactly the opposite of what actually occurred at trial: with the agreement of all parties, including Nuon Chea, the Chamber ruled that such evidence would be considered and provided all parties the opportunity to examine victim impact witnesses on issues of guilt, and Nuon Chea did so. **F17/1** Co-Prosecutors' Response to Case 002/01 Appeals, 24 April 2015, paras 99-103. Secondly, the report criticized the Chamber's finding that Khieu Samphan "regularly" attended Standing Committee meetings, saying no reason was given for the finding and suggesting that his attendance could have been better described as "sporadic." **F30/11.1.3** Handa Center Report, p. 55. The report failed to inform the readers that the Judgment made clear that the finding that Khieu Samphan regularly attending these meetings was based on minutes of nineteen meetings which showed Khieu Samphan in attendance at all but three, an 84% attendance rate that no objective observer could characterize as "sporadic." **E313** Case 002/01 Judgment, 7 August 2014, para. 386. *See also* "East-West Center's 'A Well-Reasoned Opinion?' Professor Michael A. Newton Offers Expert Analysis," Michael Newton, Vanderbilt University Law School, 18 February 2016, available at: <http://www.cambodiatribunal.org/2016/02/18/professor-michael-a-newton-offers-his-expert-analysis-of-the-east-west-centers-well-reasoned-opinion/>. (Authority 1).


³⁵ **E395/2** Submissions, para. 44.

Nuon Chea makes his assertion that his fair trial rights would be violated by not hearing all of the additional 35 witnesses he seeks, in the same document in which he argues that a procedure in which individuals were arrested without warrant, detained in filth without adequate food, tortured, never informed of charges or evidence against them, never given access to a lawyer, never brought before any court or given any trial and eventually clubbed to death and thrown into unmarked graves was justified under international law.

III. Conclusion

38. The Co-Prosecutors fully support Nuon Chea's right to have witnesses capable of giving relevant, probative evidence in his defence summoned to testify, but note that his Submissions on the relevance of his claims of rebellion against the CPK to his criminal responsibility in this trial largely rely on desperate and absurd interpretations of international law. His brazen submission that the massive torture and extra-judicial executions at S-21 and elsewhere in the DK were justified is legally specious and reveals the desperation of his case in light of the overwhelming evidence of his responsibility. Based on Nuon Chea's summaries of their expected testimony, none of the witnesses he seeks could possibly exonerate him and many are likely to add further evidence of his guilt. The Co-Prosecutors defer to the Chamber's discretion to select from Nuon Chea's proposed witnesses any who are likely to provide relevant testimony.

Respectfully submitted,

Date	Name	Place	Signature
20 June 2016	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		