**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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# LEAD CO-LAWYERS' RESPONSE TO NUON CHEA'S SUBMISSION ON THE RELEVANCE OF EVIDENCE OF TREASONOUS REBELLION TO HIS INDIVIDUAL CRIMINAL RESPONSIBILITY IN CASE 002/02

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**Before:**

**Trial Chamber**

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

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## I. INTRODUCTION

1. Following the instructions of the Trial Chamber,[1] the Lead Co-Lawyers for the Civil Parties ("Lead Co-Lawyers") hereby respond to the Nuon Chea Defence's submission on the relevance of evidence of treasonous rebellion to his individual criminal responsibility in Case 002/02.[2]

## II. APPLICABLE LAW

2. On 17 January 2011, when the Trial Chamber requested the parties to submit their materials under Internal Rule 80, it explained that the parties shall provide the following information:

> "i) A summary of the facts on which each proposed witness is expected to testify, or on which each Civil Party is to be heard concerning the facts or the impact of the alleged crimes. Subject to any protective measures that might have been ordered, or that are yet to be considered by the Trial Chamber, the summary should be sufficiently detailed to allow the Chamber and the other Parties to understand fully the nature and content of the proposed testimony;
> ii) A summary of the proposed expertise and qualification of each proposed expert. Subject to any protective measures that might have been ordered, the summary should be sufficiently detailed to allow the Chamber and the other Parties to understand fully the nature and content of the proposed expertise; and
> iii) The points of the Indictment to which each proposed witness, Civil Party or expert is expected to testify, including, where possible, the exact paragraph/s of the Closing Order and the specific count/s."[3]

3. Internal Rule 87(4) grants the Chamber the liberty to summon or hear any person as a witness, whose evidence it deems conducive to ascertaining the truth upon a reasoned request by a party to the proceedings. The same rule subjects such a request to the criteria set out in Rule 87(3) which mandates, *inter alia*, that such testimony not be "irrelevant or repetitious".[4] In addition, such party must also satisfy the Chamber that the requested testimony was not available before the opening of the trial.[5]

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[1] Request for briefing on significance of conflicting factions within the DK leadership, **E395/1**, 11 May 2016 ("Request for Clarification"), para. 5.
[2] Nuon Chea's Submissions on the Relevance of Evidence of Treasonous Rebellion to his Individual Criminal Responsibility in Case 002/02, **E395/2**, 10 June 2016 (Submission).
[3] Order to File Materials in Preparation for Trial, **E9**, 17 January 2011, para. 6. See further Annex I – List of Evidentiary Issues, **E9.1**, 17 January 2011.
[4] Internal Rule 87(3)(a). *See also* Final Decision on Witnesses, Experts and Civil Parties to be heard in case 002/01, **E312**, 7 August 2014 ("Final Decision on WECP in Case 002/01"), para. 124; Duch Trial Judgement, **E188**, 26 July 2010, para. 41.
[5] Internal Rule 87(4).

4. The Trial Chamber has previously refused to call individuals where it considered that the proposed testimony was (i) likely to duplicate the testimony of witnesses who had already testified;[6] (ii) would otherwise not shed light on the role of the Accused in relation to the concerned events;[7] (iii) is likely to be merely corroborative and thus, unnecessary to hear at trial;[8] or (iv) is repetitive of other evidence before the Chamber.[9]

5. Under Rule 85, the President must guarantee the free exercise of defence rights and may exclude any proceedings that unnecessarily delay the trial and are not conducive to ascertaining the truth.

## III. RESPONSE

6. The Lead Co-Lawyers note that the Submission lists and reiterates Nuon Chea Defence's previous submissions in which the theory concerning the factional nature of the CPK was discussed.[10] Notwithstanding the chronic self-referencing in the Submission, the Lead Co-Lawyers clarify for the purposes of the present response (and that of the First Request)[11] that the matter at issue for this Submission was not a lack of elaboration of the "Defence Case" to the parties but rather the non-fulfilment of the mandatory requirements of Internal Rules 87(4) and Internal Rule 93.

7. The Submission purports to respond to the invitation of the Trial Chamber to "further explain how the existence of conflicting factions could provide a defence to the charges in the Closing Order or could be considered to be a mitigating circumstance".[12] The Lead Co-Lawyers submit that the Submission fails to do both in form and principle. The Lead Co-Lawyers understand the purpose of the Trial Chamber's request for clarification and the underlying requests made by the Nuon Chea Defence to be strictly matters of procedural law and the fulfillment of the minimum threshold of admissibility of evidence. The Lead Co-Lawyers submit that the substantive arguments contained in the Submission do not address

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[6] Final Decision on WECP in Case 002/01, para. 71.
[7] *Ibid*, para. 75.
[8] *Id*.
[9] *Ibid*, paras 75, 78, 82, 133.
[10] Submission, paras 4-14.
[11] Lead Co-Lawyers' Response to Nuon Chea's First Rule 87(4) and Rule 93 Request re Case 002/02 Trial Segment on S-21 Security Centre and Internal Purges, **E391/1**, 4 April 2016.
[12] Request for Clarification, para. 3.

the procedural requirements of Internal Rule 87(4) on which the clarification was based. The Lead Co-Lawyers therefore, refrain from commenting on the interpretation of evidence, challenges to the legal requirements of substantive crimes charged, or the citations to Nuon Chea's own statements on the contents of the policy in question.

8. On principle, the Lead Co-Lawyers do not oppose requests for relevant evidence which would further the ascertainment of the truth provided the balance of rights of parties is respected and/or evidence which the defence claim to be exculpatory. The Civil Parties consider it in their interest to have the fair trial rights of the Co-Accused fully respected. For this purpose, the Lead Co-Lawyers as a matter of practice defer to the wisdom of the Trial Chamber on the final determination of the necessity to call the requested witnesses.[13] Therefore, for the adjudication of the First Request to which the Lead Co-Lawyers did not respond on merits and the remainder of the requests for additional evidence that may be filed, the Lead Co-Lawyers submit the following.

**(a) Response to the existence of a "Defence case"**

9. The Lead Co-Lawyers submit that the core of the Submission is premised on a fundamental misunderstanding of the ECCC legal framework and of the civil law system, generally.

10. The Lead Co-Lawyers note with concern the persistent use of the term "Defence case"[14] – a term that exists neither in the ECCC legal framework, Cambodian law, French law, and not in civil law generally.[15] Granted that the proceedings are initiated by the Introductory

[13] For certain requested witnesses and civil parties, the Lead Co-Lawyers have submitted specific responses. *See* Lead Co-Lawyers' Consolidated Response to Nuon Chea's Second and Third Request re Security Centres and Internal Purges, **E392/1**, 21 April 2016; Lead Co-Lawyers' Response to Nuon Chea's Fourth Request re Security Centres and Internal Purges, **E412/1**, 20 June 2016.

[14] Submission, paras 5-14.

[15] For ease of reference by the parties and the Trial Chamber, the Lead Co-Lawyers produce below provisions from other courts that operate[d] in the context of international crimes under different legal frameworks that use this terminology instead. The Lead Co-Lawyers invite the Nuon Chea Defence to compare these provisions with Internal Rule 80:
International Criminal Tribunal for the former Yugoslavia, Rule 65*ter*: "(G) After the close of the Prosecutor's case and before the commencement of the defence case, the pre-trial Judge shall order the defence to file the following: (i) a list of witnesses the defence intends to call […](ii) a list of exhibits the defence intends to offer in its case, stating where possible whether the Prosecutor has any objection as to authenticity. The defence shall serve on the Prosecutor copies of the exhibits so listed."

Submission at the behest of the prosecution, it is the Office of the Co-Investigating Judges that investigates the facts set out in an Introductory Submission or a Supplementary Submission impartially, "whether the evidence is inculpatory or exculpatory".[16] The dossier at the pre-trial stage is fed by the arguments and submissions by all parties. The Co-Accused had a right to challenge the charging,[17] the right to make investigative requests,[18] the right to

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International Criminal Tribunal for Rwanda has similar provisions, Rule 73ter " (A) The Trial Chamber may hold a Conference prior to the commencement by the defence of its case.(B) At that Conference, the Trial Chamber or a Judge, designated from among its members, may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following: [...](iv) A list of exhibits the defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity. The Trial Chamber or the Judge may order the Defence to provide the Trial Chamber with copies of the written statements of each witness whom the Defence intends to call to testify. [...] (E) After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

Special Court for Sierra Leone, Rule 73*ter*: "(A) The Trial Chamber or a Judge designated from among its members may hold a Conference prior to the commencement by the defence of its case. (B) Prior to that Conference, the Trial Chamber or a Judge designated from among its members may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following: [...](iii) A list of witnesses the defence intends to call with: [...] (iv) A list of exhibits the defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity. The Trial Chamber or the said Judge may order the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements of each witness whom the Defence intends to call to testify. (E) After the commencement of the defence case, the defence may, if it considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called."

Special Tribunal for Lebanon, Rule 112: "(A) At the end of the Prosecutor"s case, following a Defence election to present its case, within the time-limit prescribed by the Pre-Trial Judge or the Trial Chamber, but not less than one week prior to the commencement of the Defence case, the Defence shall: [...](ii) provide to the Prosecutor copies of statements if any, of all witnesses whom the Defence intends to call to testify at trial, and copies of all statements taken in accordance with Rules 93, 123, 125, 155, 156, 157 and 158, which the Defence intends to present at trial. Copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses. (C) Failure of the Defence to provide notice under this Rule shall not limit the right of the Defence to rely on the above defences. (D) The Trial Chamber shall consider defences available upon the evidence as a matter of law in the relevant factual circumstances, even if such a defence has not been advanced by the Defence."

[16] Internal Rule 55(5).

[17] Internal Rule 74(3): "3. The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges: a) confirming the jurisdiction of the ECCC; b) refusing requests for investigative action allowed under these IRs; c) refusing requests for the restitution of seised items; d) refusing requests for expert reports allowed under these IRs; e) refusing requests for additional expert investigation allowed under these IRs; f) relating to provisional detention or bail; g) refusing an application to seise the Chamber for annulment of investigative action; h) relating to protective measures; i) declaring a Civil Party application admissible; or j) reducing the scope of judicial investigation under Rule 66 *bis*."

[18] Internal Rule 55(10): "10. At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and

file a note(s) to dismissal before the closing of investigations,[19] right to appeal every single factual allegation in the Closing Order,[20] right to appeal the Closing Order on grounds of procedural defects,[21] right to make preliminary objections before the trial begins,[22] right to file a list of witnesses, experts, and civil parties requested to be called to testify during trial,[23] among others. The core questions of applicable law and principle of legality that paragraphs 23, 28-29 of the Submission raise were in fact heavily litigated at the pre-trial stage and

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shall be subject to appeal." *See further* Internal Rule 66(1): "Where the Co-Investigating Judges consider that an investigation has been concluded, they shall notify all the parties and their lawyers. This decision shall be made public. The parties shall have 15 (fifteen) days to request further investigative action. They may waive such period." *See further* Internal Rule 58(6): "At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. The request shall be made in writing with a statement of factual reasons for the request. If the Co-Investigating Judges do not grant the request, they shall issue a rejection order as soon as possible, and in any event, before the end of investigation. The rejection order shall state the factual reasons for rejection. The Charged Person shall immediately be notified of the rejection order. The Charged Person may appeal the rejection order to the Pre-Trial Chamber." *See also* Code of Criminal Procedure 2008, Article 133.

[19] Internal Rule 76(6): "A party whose interests have been affected by an invalid investigative action may waive the right to request annulment, and thus regularise the proceedings. The Co-Investigating Judges shall record such renunciation in the case file. Where the requesting party has a lawyer, the CoInvestigating Judges shall summon such lawyer at least 5 (five) days before the date of recording the renunciation, so that the lawyer may examine the case file." *See further*, Internal Rule 67(3)(c): "The Co-Investigating Judges shall issue a Dismissal Order in the following circumstances [...]There is not sufficient evidence against the Charged Person or persons of the charges." *See also* Code of Criminal Procedure 2008, Article 247.

[20] Internal Rule 66(3): "All the parties may, within 30 (thirty) days from notice of such order, file appeals to the PreTrial Chamber. The parties may, in the presence of their lawyer, or where the lawyer has been summoned in due form, waive their right to appeal."

[21] Internal Rule 76(2): "Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seise the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs. *"See also* Internal Rule 74(3): "3. The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges: a) confirming the jurisdiction of the ECCC; b) refusing requests for investigative action allowed under these IRs; c) refusing requests for the restitution of seised items; d) refusing requests for expert reports allowed under these IRs; e) refusing requests for additional expert investigation allowed under these IRs; f) relating to provisional detention or bail; g) refusing an application to seise the Chamber for annulment of investigative action; h) relating to protective measures; i) declaring a Civil Party application admissible; or j) reducing the scope of judicial investigation under Rule 66 *bis*." *See also* Code of Criminal Procedure 2008, Article 253.

[22] Internal Rule 89: "A preliminary objection concerning: a) the jurisdiction of the Chamber, b) any issue which requires the termination of prosecution; c) nullity of procedural acts made after the indictment is filed shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible."

[23] Internal Rule 80(2): "Where the Accused and/or the consolidated group of Civil Parties wishes to summon any witnesses who are not on the list provided by the Co-Prosecutors, they shall submit an additional list, including a statement of any relationship referred to in Rule 24(2) to the Greffier of the Chamber within 15 (fifteen) days from notification of the list. The Greffier shall place such list on the case file and, subject to any protective measures, forward a copy of the list to the other parties."

definition and charging of substantive crimes as it appears in the Closing Order was a result of such a debate.

11. The Nuon Chea Defence did exercise some of those rights[24] but not in respect of the witnesses mentioned in the First Request. The Lead Co-Lawyers add that the existence of those witnesses was known to Nuon Chea Defence as early as the Introductory Submissions.[25] For example, Witness 2-TCW-1033's DC-Cam statement was cited in the Introductory Submission[26] and Co-Prosecutors' supplementary submission regarding the North Zone Security Centre.[27] His DC Cam statement was also cited in Co-Prosecutor's request for investigative action regarding the Kampon Chhnang airport construction site.[28] The witness was interviewed by the Co-Investigating Judges[29] and was cited in the Site Identification Report for Kampong Chhnang Airfield.[30] This witness' evidence was also cited in the Closing Order.[31] However, Nuon Chea Defence did not exercise any of the rights available to them in respect of this witness – neither at the pre-trial stage nor at the trial stage until now. The same applies for the witnesses: 2-TCW-1029, 2-TCW-1030, 2-TCW-1031, 2-TCW-1032.

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[24] *See e.g.* Twenty-First Request for Investigative Action, **D320**, 15 January 2010, para. 17 requesting the Co-Investigating Judges, *inter alia*, to re-interview witness LONG Norin and asking the specific questions annexed to thereto. *See further*, Twenty-First Request for Investigative Action, D320.1, 15 January 2010 which is an annex to D320 listing the questions that the Nuon Chea Defence requested the OCIJ to re-interview **LONG Norin**. This request was granted by the Co-Investigating Judges, *see* Order on Nuon Chea's Requests for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340), D375, 9 April 2010, paras 23-24: OCIJ granted the request outlined in D320. Dispositive on p. 14. *See* Consolidated Preliminary Objections, **E51/3**, 25 February 2011 whereby the Co-Accused requested a number of investigative actions that had been fully or partly refused by the Co-Investigating Judges; *see also* Preliminary Submissions Concerning the Applicable Law, **E163/5/11**, 18 January 2013. *See further*, Notice of Joinder to IENG Sary's Request E234, **E234/2**2, November 2012.

[25] 2-TCW-1032 (IS 19.219) noting that he was requested by the Civil Party lawyers to be interviewed. *See* Co-Lawyers of Civil Parties' Investigative Request Concerning the Crimes of Enforced Disappearances, D180, 30 June 2009.See further, 2-TCW-1031 (IS 19.175), 2-TCW-1030 (IS 19.201), 2-TCW-1029 (IS 19.193).

[26] *See* IS 19.73.

[27] Co-Prosecutors' Supplementary Submission regarding the North Zone Security Center, **D83**, 26 March 2008, para. 20.

[28] Co-Prosecutors' Request for Investigative Actions Regarding the Kampong Chhnang Airport Construction Site, **D245**, 19 November 2009.

[29] Written Record of Interview of Khoem Samhuon, D166/117, 6 March 2009.

[30] Site Identification Report, **D232/100**, 2 January 2010.

[31] *See e.g.* Closing Order, fns 429 (para. 141) 450 (para. 148) , 695 (para. 201) 712 (para. 209) , 798 (para. 224), 865 (para. 235), 1663 (para. 384) , 1670 (para.386) , 1685 (para. 388), 1686, 1686, 1687, 1689, (para. 389) 1697 (para. 389), 1700, (para. 380) 1702 (para. 390) , 1705, 1710, 11715, 1716 (para.392), 1719, 1720 (para. 393) , 1722, 1725 (para. 395), 1730 (para. 396), 1739, 1740, 1741, (para.398) 4212, (para. 1017) 4732 (para.1152) , 4781 (para. 1169)..

12. Nuon Chea Defence did not appeal the Closing Order on the procedural defects; they did not appeal on the grounds that there was insufficient evidence against Nuon Chea.[32] The Lead Co-Lawyers reiterate that the parties may choose not to appeal the Closing Order on procedural defects but they are then precluded from raising these matters during trial; the procedural defects if any (challenged or not) are considered as having been cured, barred from being raised during the trial stage.[33]

13. The Lead Co-Lawyers further add that the rights granted to the defence at the pre-trial stage mean that the Closing Order and the factual allegations themselves are already a product of an adversarial debate between the parties.

14. The applicable legal framework at the ECCC allows for *one* case contained in the Closing Order, factual allegations of which must be proved by the prosecution based on the evidence contained in the case file *and* put before the Chamber.

15. Upon forwarding of the Closing Order to trial, the Trial Chamber is seised (*saisine*) of those factual allegations *in rem*[34] and is bound to examine them by subjecting them to a second layer of an adversarial debate. Notwithstanding that the burden of proof of such factual allegations rests with the Prosecution, such *saisine* is independent of the "Prosecution case" or the "Defence case".

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[32] Appeal Against Closing Order, **D427/3/1**, 18 October 2010, para. 38: "For the reasons stated above, the Defence submits that the OCIJ erred in law by confirming the ECCC's jurisdiction over genocide, crimes against humanity, war crimes, and any modes ofliability not recognized under the Cambodian legal order in 1975-1979. Accordingly, the Defence requests the PTC to quash and/or amend the Closing Order to the extent that Nuon Chea's alleged liability is expressed with *exclusive* reference to the substantive crimes and modes of liability recognized in the 1956 Penal Code. In the interests of justice and transparency, a public, oral hearing is requested."

[33] Internal Rule 76(7): "Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber." See further Decision on Defence Preliminary Objection Regarding Jurisdiction over the Crime Against Humanity of Deportation, E306/5, 29 September 2014, para. 9: "KHIEU Samphan had the opportunity to detect the alleged irregularity here at issue. Had the scope of the judicial investigation been a matter of controversy, this should have been raised before the opening of the trial. The Chamber is seized of the Closing Order which, according to Internal Rule 76(7), shall cure any procedural defects in the judicial investigation."

[34] For definition of the term *saisine in rem*, see Case 003, Decision on [REDACTED] Appeal Against Co-Investigating Judge Harmon's Decision on [REDACTED] Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, D134/1/10, 23 December 2015, Opinion of the International Judges on the Application of Annulment Concerning [REDACTED], paras 7-9.

16. The judges of the Trial Chamber determining those factual allegations have access to such evidence and to the entire case file[35] as soon as the Office of the Co-Investigating Judge seises the Trial Chamber[36] and on an ongoing basis when parties add documents to such case file.[37]

17. The Lead Co-Lawyers assert that, unlike common-law procedure, the trial is not hinged on the evidence added by the parties and the pleading of their respective *cases*, much less that of the defence (or civil parties).[38]This is not to say that the accused under these legal frameworks are precluded from presenting *a* defence. What it implies is that criminal trials in such frameworks are not a dialectic contests between *cases*, but rather a process to allow the ascertainment of the truth concerning the facts relevant to the guilt or innocence of the accused contained in the Closing Order.[39]

18. At paragraphs 15, the Submission states that "[i]mposing 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".[40] The Lead Co-Lawyers submit that the allegation of the violation of fair trial rights of the accused have to be assessed in the context of the legal framework within which the criminal trial is operating. A repeated misunderstanding of the applicable framework and/or assertion of a parallel framework that does not form part of Cambodian law nor the ECCC legal framework cannot be pleaded as a basis of violation of fair trial rights.

**(b) Response on the fulfilment of the Trial Chamber directive**

19. The Lead Co-Lawyers submit that the parties are at liberty to add evidence to the case file to shed light on the various aspects of the truth during trial and the possible interpretation of

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[35] *See* Internal Rule 69(2)(a): "If an Indictment is issued, the Greffier of the Co-Investigating Judges shall forward the case file to the Greffier of the Trial Chamber to allow a date for trial to be set;"
[36] Internal Rule 79 (1).
[37] Internal Rules 80, 87(4).
[38] Compare Rule 65*ter* of the ICTY where the parties are expected to submit an evidence list *after* the presentation of the Prosecution case. The presentation of evidence before the Trial Chamber is dependent on the admission of those documents *through* witnesses.
[39] The Trial Chamber is seised with the factual allegations and their potential legal characterization contained in the Closing Order. It is not adjudicating upon an indictment prepared by the prosecution, which forms the basis of the "Prosecution Case" in common-law jurisdictions.
[40] *See also* Submission, paras 43-46.

such evidence in their final pleadings. However, all such evidence during trial must relate to the factual allegations contained in the Closing Order.[41]

20. The obligation to make such a connection between the evidence and the factual allegations is equally applicable to *all* parties.[42] It is applicable during *all* stages of the concerned trial proceedings. The absence of such a requirement when requesting "new" evidence under Internal Rule 87(4), the parameters of which are stricter, would amount to obviating the requirements of Internal Rule 80(3), thus defeating its very purpose.

21. The failure to demonstrate such a connection by a party does not translate to a failure of the Chamber to "grasp [...] the Defence's case".[43] The insinuation in the Submission 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"[44] is therefore, unwarranted.

22. The Lead Co-Lawyers acknowledge that the Submission itself clarifies that it will be limited to "identifying connections between such evidence in general terms and the paragraphs of the Closing Order [and] not address[...] in detail the connection between each witness's evidence and the Closing Order, understanding that this is not required."[45] However, noting that the Request for Clarification resulted from a Nuon Chea Defence application under Internal Rule 87(4) to admit additional evidence and Internal Rule 93 to seek further investigation,[46] the linking of such additional evidence to the factual allegations in the Closing Order was fundamental. The reiteration of their "Defence case" was not.

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[41] Internal Rule 80.

[42] Internal Rule 80(3)(a): "In addition to the list of witnesses referred to in Rule 80 of the Rules: (i) A summary of the facts on which each witness is expected to testify. Subject to any protective measures that might have been ordered, the summary should be sufficiently detailed to allow the Chamber and the other parties to understand fully the nature and content of the proposed testimony; (ii) The points of the Indictment to which each witness is expected to testify, including the exact paragraph/s and the specific count/s".

[43] Submission, para. 9.

[44] Submission, para. 9.

[45] Submission, para. 16.

[46] Request for Clarification, para. 1 *referring to* 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", **E391**, 24 March 2016; Nuon Chea's Second Witness Request for the Case 002/02 Security Centres and "Internal Purges" Segment (Leadership), **E392**, 1 April 2016; Nuon Chea's Third Witness Request for the Case 002/02 Security Centres and "Internal Purges" Segment (Evidence of the Treasonous Rebellion), **E395**, 11 April 2016.

23. The Lead Co-Lawyers submit that the terminology of "original sin" citing to their own submission during the proceedings on severance do little to further the case, however erroneous. The Lead Co-Lawyers draw attention to the interoffice memo filed by the Office of the Co-Investigating Judges where it responded to Nuon Chea Defence's concerning the conduct of judicial investigation:

> "Again, it appears necessary to distinguish this legal system from that of other international and common law systems. Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorises the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems. Of course, the parties have the right, under Rules 55(10) and 58(6), to request the Co-Investigating Judges to undertake investigative action; if the Co-Investigating Judges do not accept the request, they must hand down an order rejecting the request, before the end of the investigation at the latest, which is open to appeal. The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action."[47]

24. Whilst it could be part of the Nuon Chea Defence's strategy to challenge the very system that they operate in i.e. Cambodian civil law procedure, the Lead Co-Lawyers cannot comment on the choice of the legal system that the ECCC operates in. However, they submit that such a strategy does not bind the parties and the Trial Chamber. Therefore, for requests that affect the rights of other parties, it is not onerous to require that the minimum requirements within the applicable system are fulfilled so as to further a meaningful debate.

25. As elaborated earlier, a connection between the evidence and the factual allegations was and always has been a precondition to admission of evidence into the case file. The Lead Co-Lawyers submit that absent such connection, even at this stage, they are limited in the manner in which they can respond to the scope of the evidence sought. However, the Lead Co-Lawyers respond below to the merits of the links that the Submission does make.

**(c) Observations on the remainder of the Submission**

26. Paragraph 17 attempts to establish a link between Duch's evidence to the "evidence of treasonous rebellion against the CPK and the DK government backed by Vietnam" to show

[47] Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, **A110/I**, 10 January 2008, para. 3. *See also*, Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigations (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), **E251**, 7 December 2012, p. 19 whereby the Trial Chamber affirmed that the defence "are prohibited from conducting investigations and that any breach of this provision may result in the application of sanctions against them".

that S-21 and other security centres were regular state security apparatuses "as opposed to 'torture and execution centres'".[48] The Submission adds that such evidence will cast "many of the facts at issue in the segment in a fundamentally different light".[49] The Lead Co-Lawyers are unable to respond because of a possible misstatement in the references to the Closing Order.[50] The term "torture and execution centres" quoted in the Submission as being derived from the Closing Order does not appear, not only in the paragraphs cited in the Submission but anywhere in the Closing Order.

27. Paragraph 18 contains a generalisation 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." The Lead Co-Lawyers submit that such a generalisation of the factual allegations renders a reading that risks inaccurate representation The Lead Co-Lawyers clarify that the security centres corresponding to the North Zone and the East Zone are not in the scope of Case 002/02. Kraing Ta Chan Security Centre concerns the Southwest Zone.[51] Au Kanseng Security Centre concerns the Northeast Zone.[52] Phnom Kraol Security Centre was within the Northeast Zone and subsequently under an autonomous zone, and therefore, under the direct control of the centre.[53] While it may be true that individuals from the North Zone and the East Zone entered S-21,[54] it is inexact to represent that the Closing Order states that many of those imprisoned at the Security Centres mentioned above were there for reasons of being targets of the policy of Internal Purges within the North Zone and East Zone.

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[48] Submission, para. 17.
[49] *Id.*
[50] Submission, fn 42 *citing* Closing Order, paras 139, 455. Compare with the factual allegations contained in the Closing Order, para. 139: "Messengers were also frequently used to transport messages. Individual divisions had messenger units to provide these services"; para. 455 "[t]he primary function of S-21 was to extract confessions from detainees that would help uncover other networks of potential traitors. Duch states that '*the content of the confession [was] the most important work of S-21*'. Most often, these confessions were in the form of a political biography written by the detainees who, under duress, ended up confessing to treason and implicating other traitors working for the secret services of foreign powers considered to be enemies of the Cambodian revolution. The 'truth' that these confessions were supposed to reveal was, in many respects, defined beforehand, since the interrogators, who had been instructed by Duch to establish the existence of links with the CIA, the KGB and/or the Vietnamese, forced detainees to provide pre-determined answers." (internal citations omitted)
[51] Closing Order, para. 489.
[52] Closing Order, para. 589.
[53] Closing Order, para. 625.
[54] Closing Order, paras 196, 199.

28. Paragraph 22 of the Submission submits that two categories of proof support their theory of treasonous rebellion, namely (i) the substantive content of S-21 confessions; and (ii) the live evidence of the 35 requested witnesses. It argues that the Trial Chamber has appeared to impose "a blanket prohibition" in its "incomprehensible, deeply-biased decision" that "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". First, the Lead Co-Lawyers submit that Nuon Chea Defence unfairly characterised the decision of the Trial Chamber.[55] The decision in question allowed the use of the statements "except within the limited circumstances authorized by the Chamber in its Decision on Evidence Obtained Through Torture".[56] To this effect, the standard is not different from that established by the Supreme Court Chamber.[57] Second, the Lead Co-Lawyers recall that the Nuon Chea Defence did in fact avail itself of the proper procedural avenue to present circumstances negating the real risk of torture for the Trial Chamber's consideration.[58] Third, the Lead Co-Lawyers note that there is no "evidentiary vacuum" which the requested 35 witnesses would fill as a means "to 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

[55] Decision on Evidence Obtained through Torture, **E350/8**, 5 February 2016, para. 36: "[a]fter the Chamber has made a preliminary determination that there is a real risk that torture was used to obtain a statement, any party seeking to rely upon such evidence may rebut this preliminary determination in particular upon a showing of specific circumstances negating this risk." (emphasis added) The dispositive states that "statements from security centres that the Co-Investigating Judges determined used torture fall within the scope of Article 15 of the CAT and may not therefore be invoked in these proceedings unless it is established, on a case-by-case basis, that an individual statement was not obtained through torture or that it is adduced pursuant to the exception contained in Article 15". *See further* Trial Chamber Memorandum entitled Decision on NUON Chea's Rule 92 Motion to Use certain S-21 Statements, **E399/4**, 19 May 2016, para. 2: "The Trial Chamber hereby: a. Rejects the request to allow the use of S-21 Statements of KOY Thuon, YIM Sambath and CHEA Non except within the limited circumstances authorised by the Chamber in its Decision on Evidence Obtained Through Torture (E350/8)".

[56] Trial Chamber Memorandum entitled Decision on NUON Chea's Rule 92 Motion to Use certain S-21 Statements, **E399/4**, 19 May 2016, para. 2.

[57] Decision on Objections to Document Lists Full Reasons, **F26/12**, 31 December 2015, para. 58: "any party that seeks to rely on a statement taken at S-21 should be allowed to rebut the presumption by offering proof that the information in question was not the result of torture. For that reason, when deciding on this issue, the Chambers need to take into account, in addition to the submissions of the parties, any relevant information of which they are aware; eventually, a statement taken at S-21 may only be admitted into evidence if it has been established, on balance of probabilities, that it was *not* the result of torture." The Lead Co-Lawyers note that the standard set by the Supreme Court Chamber is more restrictive inasmuch as it does not permit even the admission into evidence of documents that have been established to be a result of torture.

[58] Nuon Chea's Rule 92 Motion to Use Certain S-21 Statements, **E399**, 20 April 2016.

centres on the other." The Nuon Chea Defence is not precluded from using objective information contained in S-21 statements in order to elicit this type information as explained by the Trial Chamber its Decision on Evidence Obtained through Torture.[59]

29. Paragraph 25 links the Nuon Chea Defence's position on the detention of "Vietnamese persons" at "S-21 and Au Kanseng security centres" to the charged substantive crime of unlawful confinement of civilians as a grave breach of the Geneva Conventions. Insofar as the contents of this paragraph relate to expressing a position as to one or more elements of a substantive crime, the Lead Co-Lawyers submit that this does not further the parties' ability to respond to the scope of the new evidence sought to be admitted. Further, the Lead Co-Lawyers clarify that Nuon Chea is not charged with the underlying crime of unlawful confinement of a civilian constituting Grave Breaches of the Geneva Conventions for Au Kanseng security centre.[60]

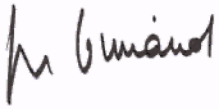
30. In response to paragraphs 31-38, the Lead Co-Lawyers do not contest the non-import of criminal responsibility from Case 002/01 on to Case 002/02. However, notwithstanding the conflation in the Submission between the CPK structure with the Joint Criminal Enterprise,[61] the Lead Co-Lawyers note that the trial segment on "Role of Accused/JCE" is due to be heard in the future,[62] where such evidence is due to be considered and examined by all parties.

## IV. REQUEST

31. The Lead Co-Lawyers respectfully request that the Trial Chamber to take into consideration the observations in the current response when adjudicating on the requests for additional witnesses and/or investigative actions for the trial segment on Security Centres and Internal Purges.

[59] Decision on Evidence Obtained Through Torture, E350/8, 5 February 2016, para. 49.
[60] Closing Order, paras 1518-1520.
[61] Submission, para. 34: "CPK structure and thus the JCE".
[62] Decision on Sequencing of Trial Proceedings in Case 002/02, **E315**, 12 September 2014.

Respectfully submitted,

| Date | Name | Place | Signature |
|---|---|---|---|
| 20 June 2016 | PICH ANG<br>Lead Co-Lawyer | Phnom Penh |  |
| | Marie GUIRAUD<br>Lead Co-Lawyer | Phnom Penh |  |