

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

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**REQUEST TO HEAR DEFENCE WITNESSES AND TO
TAKE OTHER PROCEDURAL MEASURES IN ORDER
TO PROPERLY ASSESS HISTORICAL CONTEXT**

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I. INTRODUCTION

1. Pursuant to Rule 92, counsel for Nuon Chea (the ‘Defence’) hereby submits this request (the ‘Request’) that the Trial Chamber: (i) not yet close the historical background segment of the first mini-trial; and (ii) call Defence witnesses and experts¹ whose testimony is relevant for the proper assessment of this historical background. The Request outlines why it is legally imperative that the Trial Chamber consider the broader historical context in which the DK regime came to power, in line with the approach taken by international tribunals.

II. PROCEDURAL HISTORY

2. On 25 May 2011, the Defence filed its ‘Motion in support of “Ieng Sary’s motion to add new trial topics to the trial schedule” and request to add additional topics’ (the ‘Motion’).² In the Motion, the Defence asked the Trial Chamber to add the following topics (insofar as relevant) to the Trial Schedule: *Relevant Contextual Elements*: the historical, geo-political, socio-economic, demographic, military, and legal circumstances and/or institutions—including those of the CPK and those originating in or operating from *outside* Cambodian soil—which directly or indirectly impacted Cambodia *before, during and following* the DK regime.³
3. On 3 June 2011, the Trial Chamber rejected the Motion, stating that ‘[b]ackground contextual issues and events outside the temporal jurisdiction of the ECCC will be considered by the Chamber only when demonstrably relevant to matters within the ECCC’s jurisdiction and the scope of the trial as determined by the Chamber’.⁴ To

¹ In addition, the Trial Chamber should consider relevant *documents* for a proper assessment of historical background.

² Document No **E89**, ‘Motion in support of “Ieng Sary’s motion to add new trial topics to the trial schedule” and request to add additional topics’, 25 May 2011, ERN 00699769–00699773.

³ This category should include the following sub-categories: living conditions in Cambodia, especially at the time of the CPK’s rise to power in April 1975 and the period preceding this event; foreign presence/involvement in Cambodia, including activity of any intelligence agencies—in particular, on the part of Vietnam; positive goals of the CPK, also before its ascension to power; the aims and effects of the bombing of Cambodia by the USA in the late sixties and early seventies, in terms of human casualties, material damage (including impact on capacity for food production), and impact on the living conditions and mindset of Cambodians in affected areas. (*Footnote in original*)

⁴ See Document No **E93**, ‘Trial Chamber’s Directive in advance of Initial Hearing concerning proposed witnesses’, 3 June 2011, ERN 00702332–00702333.

date, this short consideration embodies the entirety of the reasons given for the Trial Chamber's refusal to consider the broader historical context during this trial.⁵

4. On 23 February 2011, the Defence provided the Trial Chamber with the summaries for its list of witnesses; the Defence listed 132 of these witnesses as relevant in order to properly establish the relevant historical context.⁶ On 25 October 2011, the Trial Chamber issued its partial list of witnesses, experts, and civil parties.⁷ Not a single witness as proposed by the Defence, relevant for establishing the broader historical context, is scheduled to be called by the Trial Chamber. So far, there is no evidence that the Trial Chamber intends to call any of these Defence witnesses. To date, the Trial Chamber has failed to provide any reasoning for its decision not to call witnesses suggested by the Defence.⁸
5. On 9 February 2012, as per an oral request by Judge Cartwright, the Defence filed its 'List of Additional Witnesses Regarding Historical Context'.⁹ All of these witnesses were previously listed in the original Defence request for witnesses as filed on 15 February 2011.¹⁰ The Trial Chamber decided that the Defence filing 'fail[ed] to demonstrate why any of these 47 witnesses should be heard immediately' and therefore declined to hear any of the proposed witnesses at this juncture.¹¹

⁵ This Request does not aim to re-litigate the issues as addressed in Document No **E89/1**; it merely seeks to demonstrate to the Trial Chamber that contextual evidence as discussed in the Motion *is* 'demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber' and thus merits discussion during trial as per the Trial Chambers determination in Document No **E93**.

⁶ Document No **E9/10**, 'Summaries of Proposed Witnesses, Experts, and Civil Parties', 23 February 2011, ERN 00646349-00646443; these witnesses were identified as being able to testify on 'Pre-1975 Conditions'.

⁷ Doc. No E131/1.1, ERN 00747479-00747481

⁸ Ostensibly, this lack of reasoning flows from the fact that these witnesses have not yet been 'refused' as such; however, the Defence has been informed informally by a representative of the Trial Chamber that these witnesses will not, in fact, be called.

⁹ Document No **E155/1.1**. List of Additional Witnesses Regarding Historical Context, 9 February 2012.

¹⁰ Document No **E9/4.4**. List of Proposed Witnesses, Experts and Civil Parties, 12 February 2011.

¹¹ Document No E172, 'Trial Chamber Memorandum,' 17 February 2012, ERN 00780657. It must be noted that the Trial Chamber's reasoning is unconvincing. Counsel for the Defence was denied any meaningful opportunity to provide the reasons why these contextual witnesses should be heard; Counsel attempted (in vain) on several occasions during the court sessions of 15 and 16 February 2012 to do so but was time and again silenced by the President, with the President going as far as disconnecting Defence Counsel's microphone on several occasions. Therefore, the Trial Chamber's decision to not hear these witnesses on the grounds that the Defence has 'fail[ed] to demonstrate' the necessity of their testimony, fails to impress. (To the extent that Judge Cartwright requested the Defence to file *written* submissions on the reasons for hearing these witnesses, it must be noted that the less than 24-hour time limit as set by Judge Cartwright for doing so was blatantly insufficient; to properly argue why each and every of these 47 witnesses is relevant and important, much more time is needed. Further, the Defence position is that such arguments must be delivered in open court before the Cambodian public.)

6. Upon reaching the end of the trial segment dedicated to historical background, it seems clear that the Trial Chamber intends to limit itself to assessing the very limited topic of the historical background of the CPK,¹² foregoing a broader consideration of equally (and/or more) relevant topics. The instant submission argues that such an approach is untenable, as certain “[b]ackground contextual issues and events outside the temporal jurisdiction of the ECCC” which have not yet been considered by the Trial Chamber (and in all likelihood will not be) *are*, in fact, “demonstrably relevant to matters within the ECCC’s jurisdiction and the scope of the trial as determined by the Chamber.”¹³

III. RELEVANT LAW

A. The Importance of Context

7. International criminal tribunals have recognized the importance of assessing broader context of a conflict (and therefore assessing a broad range of contextual evidence). In the *Tadić* case at the International Criminal Tribunal for the Former Yugoslavia (the ‘ICTY’),¹⁴ the *Tadić* Trial Chamber’s Judgment devotes no less than twenty-five pages to the general context of the case, under the heading ‘*The Context of the Conflict*’.¹⁵ It provides a thorough and comprehensive analysis of the history of the region, and goes back centuries in time to do so. Throughout the judgment, the Trial Chamber links these historic events with the facts of the case.
8. Significantly, in order to establish this contextual and historic background, the Trial Chamber did *not* rely on written scholarly work. Instead, the *Tadić* Trial Chamber based its contextual findings *entirely* on live testimony by both prosecution and defence witnesses.¹⁶

¹² The Defence submits that even the consideration of this very limited topic has been conducted in too limited a fashion, by hearing (in addition to Nuon Chea himself) just two witnesses and two civil parties, which managed to provide only very limited insight into the history of the CPK.

¹³ Document No **E93**, ‘Trial Chamber’s Directive in advance of Initial Hearing concerning proposed witnesses’, 3 June 2011, ERN 00702332–00702333.

¹⁴ *Prosecutor v. Tadić*, Case No IT-94-1-T, ‘Opinion and Judgment’, 7 May 1997.

¹⁵ See *Tadić*, *supra* note 14, at § II.A., paras 53–126 (emphasis added). After providing the *general* background to the conflict, it then spends another five pages on the more specific situation in the region in which the alleged crimes took place.

¹⁶ See *Tadić*, *supra* note 14, at para 54. It should be further noted that the ICTY, like the ECCC, has a strict provision regarding its temporal jurisdiction. This did not stop the Trial Chamber from spending considerable time and resources on investigating events that *preceded* (in part: by *centuries*) this temporal jurisdiction. It seems clear that the ICTY chose to follow this comprehensive approach because *Tadić* was the first judgment the ICTY rendered; the Trial Chamber accordingly desired to provide a comprehensive description of the history of the conflict, in order to be able to draw on this history in the later cases before the ICTY. (The later ICTY judgments, indeed, do not contain such an extensive section on historical background; and none was needed, after the extensive discussion in *Tadić*.) The ECCC should adopt a

9. The International Criminal Tribunal for Rwanda (the ‘ICTR’) has similarly recognized the importance of assessing broader context in international criminal law. The Trial Chamber in *Akayesu*, the first case to be decided at the ICTR,¹⁷ underlined the importance of context and provided a history of Rwanda ‘from the pre-colonial period up to 1994’.¹⁸ The *Akayesu* Trial Chamber found that the lengthy historical analysis was ‘necessary in order to understand the events alleged in the Indictment’.¹⁹

B. The Fundamental Right to Present a Defence

10. The right to present a defence is widely recognized as a fundamental fair trial right in both domestic jurisdictions and international law. This right stipulates that a defendant has the right to request witnesses on his behalf, present other evidence to substantiate his legal claims, and raise defences during the course of a trial.
11. The Code of Criminal Procedure of the Kingdom of Cambodia strongly endorses this right where it recognizes the defendant’s unqualified right to call witnesses to give evidence on his behalf, and to submit to the Court all evidence which he deems conducive to ascertaining the truth.²⁰ The ECCC Law recognizes the right to present a defence in guaranteeing the Accused’s right to ‘obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them’ in accordance with the minimum fair trial standards guaranteed under the ICCPR,²¹ and the Internal Rules recognize the right for the Accused to submit a list of witnesses they want to summon.²²

similar approach. For reasons set out in this submission, a discussion of *just* the history of the CPK (as the OCIJ has done in the Closing Order and the Trial Chamber apparently intends to do) is insufficient in order to establish the broader contextual picture. (Unlike Case 001, Case 002 is the first case in which the historical context is truly important to properly understand the facts of the case.)

¹⁷ Significant for the reasons set out in footnote 16.

¹⁸ *Prosecutor v Akayesu*, Case No ICTR-96-4-T, ‘Judgment’, 2 September 1998, paras 78, 79–111.

¹⁹ See *Akayesu*, *supra* note 18, para 78. It should be noted that the temporal jurisdiction of the ICTR is limited to the year 1994; clearly, this formal provision did not prevent the *Akayesu* Trial Chamber from considering the broader context of the conflict, and therefore facts that well preceded 1994.

²⁰ Code of Criminal Procedure of the Kingdom of Cambodia, Article 298: ‘Summons of Witness by Accused Person and Civil Party - At his expenses, the accused and the civil party may summons witnesses who have not been summonsed by the Prosecutor.’ See also Article 334: ‘Until the end of the trial hearing, the accused [...] may make written statements and submit all documents or evidence that they think will be conducive to ascertain the truth.’

²¹ ECCC Law, Article 35 *new*.

²² 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 [...]’

12. A defendant's right to present a defence has been recognized in international law since the Nuremberg trials.²³ The ICCPR²⁴ contains language almost identical to that of the European Convention on Human Rights²⁵ and the Rome Statute, all of which state that an accused has the right to obtain the attendance and examination of witnesses on his behalf. The Rome Statute indicates furthermore that this right includes the entitlement to raise defences and present other evidence.²⁶ Manifestations of the right to present a defence are found in domestic jurisdictions the world round.²⁷
13. The rationale behind this fundamental right is simple: if the defendant is not afforded the right to present his own witnesses and evidence and to effectively challenge the Prosecution's case, the Court will achieve only a partial or speculative presentation of the facts. Justice can only be served through a trial during which the truth-seeking function of the Court is fully met.²⁸

²³ London Charter of the International Military Tribunal, Article 16: 'In order to ensure fair trial for the Defendants, the following procedure shall be followed: [...] A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence [...].'

²⁴ ICCPR, Article 14(3): 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...] (e) [...] to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

²⁵ ECHR, Article 6: Right to a fair trial: '3. Everyone charged with a criminal offence has the following minimum rights: [...] (d) [...] to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.' See also *Vidal v Belgium*, European Court of Human Rights (22 April 1992), finding that a defendant's fair trial rights under Article 6 of the ECHR were violated where the court below declined, without reason, to call witnesses requested by the defendant.

²⁶ Rome Statute, Article 67(1)(e): 'In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...] (e) [...] to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.' In fact, Judge Jorda at the ICC specifically informed a defendant of his right to conduct a defence, noting that he had the right to request and examine witnesses, to raise defences, and to present other evidence during trial, in accordance with the Rome Statute. *Prosecutor v Lubanga Dyilo*, Case No ICC-01/04-01/06, Transcript of First Appearance, 20 March 2006, p 4.

²⁷ A manifestation is found in Article 281 of the French Code de procédure pénale, which not only provides the defendant with a right to present a list of witnesses in its defence, but moreover places on obligation on the prosecutor to summons these defence witnesses (albeit with a limit of five). 'Le ministère public et la partie civile signifient à l'accusé, l'accusé signifie au ministère public et, s'il y a lieu, à la partie civile, dès que possible et vingt-quatre heures au moins avant l'ouverture des débats, la liste des personnes qu'ils désirent faire entendre en qualité de témoins. [...] [L]e ministère public est tenu de citer à sa requête les témoins, dont la liste lui a été communiquée par les parties [...]; cette liste ne peut comporter plus de cinq noms.' See also *Taylor v Illinois*, 484 US 400, 423–424 (1988), discussing the paramount importance of the right to present a defence in the US criminal justice system. See also New Zealand Bill of Rights Act, § 25(f), in relation to the defendant's right to call and examine witnesses: 'Everyone who is charged with an offence has, in relation to the determination of the charge, the right [...] to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution.' See also David S Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Cal L Rev 1163, 1201 (2011) (discussing a survey of 188 constitutions, wherein 72% contained the constitutional right to present a defence).

²⁸ *Taylor v Illinois*, 484 US 400, 423–424 (1988) (internal citations omitted): "[F]ew rights are more fundamental than that of an accused to present witnesses in his own defense." The exclusion of criminal defense evidence undermines the central truthseeking aim of our criminal justice system [...]. Surely the

IV. ARGUMENT

A. Introduction

14. The DK regime did not exist and operate in a vacuum. The events that occurred in Cambodia in the period 1975-1979 were reactions to (and results of) events that preceded them. The Trial Chamber cannot possibly assess the actions (and inactions) of the DK leaders without explicitly assessing the broader historical, sociological and political circumstances that prevailed at the time the DK regime came to power. The hunger, the destruction, the poverty, the deaths, the corruption, the disease, the chaos and the anger that permeated Cambodia right before the start of the DK regime are factual circumstances that are relevant for *legal* reasons, and must be considered in full.²⁹
15. The Defence submits that the following historical topics, which are inextricably linked with (acts and inactions of) the DK regime, must be discussed in open court, and witnesses must be heard on them: (1) the extent and effects of USA bombing of Cambodia from 1965 until 1973, including an assessment of civilian casualties (also in terms of maimed workers and resultant decreased productivity) and of material damage done to Cambodia's infrastructure (roads, lines of communication, production facilities, etc.); (2) the starvation and hunger in large parts of Cambodia, including Phnom Penh, in the period leading up to April 1975, including an assessment of the number of refugees in Cambodia, their living conditions, and the causes of their displacement; (3) the availability of food, and specifically rice, in Phnom Penh and Cambodia just before April 1975, as well as a proper assessment of short-term and long-term agricultural capabilities in Cambodia around that time; (4) the state of Cambodia's health care system in April 1975; (5) an assessment of the availability of foreign humanitarian aid (or dearth thereof) in the 1970-1975 period, including (but not limited to) aid (or dearth thereof) offered by the USA.

B. Broader Consideration of Context is Required For Purely Legal Reasons

16. A proper assessment of the broader historical context of the DK regime is necessary for a number of legal reasons, discussed below. In short, a proper appreciation of the

paramount value our criminal justice system places on acquitting the innocent demands close scrutiny of any law preventing the jury from hearing evidence favorable to the defendant.'

²⁹ This holds *a fortiori* true considering the topics of the first mini-trial: the evacuation of Phnom Penh and the first phases of the population movements, which took place *at the beginning* of the DK regime. By force of logic, the circumstances prevailing in Cambodia in early 1975 had a direct impact on these events in numerous ways, and are inextricably linked with them.

broader context is indispensable in order to adequately assess certain defences that Nuon Chea has raised (or will want to raise) during his trial, as well as to adequately assess the motives and intent behind Nuon Chea's actions.

1. The State of the Country upon Power Transition is Prima Facie Relevant

17. At the most basic level, it must be noted that when leaders take over a country, it simply matters whether they take over a well-functioning and prosperous country, or rather a country that is on the brink of starvation, with a completely shattered infrastructure. In order to assess the later actions and inactions of such leaders, one needs to obtain an accurate picture of the state of the country at the moment of the transition of power. A broader assessment of the historical context can (and the Defence submits, will) thus be a mitigating factor in and of itself; it therefore deserves to be fully explored as part of this trial.

2. Broader Discussion of Context is Required to Properly Assess the Existence of 'Grounds Permitted under International Law' for Population Movements

18. The OCIJ, as part of its discussion of the population transfers in the first and second phase, rightfully considered whether the population movements took place 'without grounds permitted under international law'.³⁰ The Closing Order states that counsel for the accused persons 'submitted justifications' for the movement of the population out of Phnom Penh related to the broader situation in Cambodia at the time. The Closing Order then discusses (and dismisses) in cursory fashion several of those justifications: the security of the population, military necessity, food shortage, and (the lack of) medical care.³¹ In short, the OCIJ dismisses these justifications by finding that the accused persons' claims are not substantiated by adequate factual evidence. In other words, the OCIJ asserts that it has considered the justifications as put forward by the accused persons, and then rejects these justifications based on the (lack of) evidence it has found during its investigation.

³⁰ Closing Order, para 1449. The question of whether or not the OCIJ applied the correct *legal* test while considering this issue is an important one, and one that the Defence answers in the negative. The Defence submits that the OCP bears the burden of proof that no conceivable grounds permitted under international law existed or were applicable. However, this issue will not be briefed in the current Request, as it is irrelevant for the argument made; after all, no matter which understanding of the concept of 'grounds permitted under international law' prevails, it is clear that a *factual* assessment of the underlying (and therefore pre-existing) situation is required.

³¹ Closing Order, paras 1453–1462.

19. This particular finding of fact (being the lack of sufficient evidence to substantiate—among others—Nuon Chea’s claims) is, of course, no more than a *preliminary* assessment by the OCIJ of the evidence. *At the trial stage*, where the definitive legal determination of these facts will take place, Nuon Chea must be afforded an effective opportunity to challenge that *preliminary* assessment by the OCIJ.
20. The only way that Nuon Chea *can* effectively challenge these findings by the OCIJ is if the Trial Chamber actually sets aside specific time during trial for the discussion of *these particular topics*, which (correctly) have been deemed relevant by the OCIJ in light of the discussion of ‘grounds permitted under international law’.³² As part of these discussions, Nuon Chea must be allowed to challenge the evidence as relied on by the OCIJ,³³ and he himself must be allowed to present evidence to buttress his own claims.³⁴
21. With regard to the latter point: Fair trial considerations (more specifically, the right to present a defence) as well as common sense dictate that Nuon Chea must be provided with an effective opportunity to *substantiate* his factual claims relating to possible ‘grounds as permitted under international law’; he must be given room to present his own evidence *à décharge*. This means that Nuon Chea must be afforded an opportunity to present in court the witnesses and experts whom he timely proposed and whom (he submits) will buttress his claims. In other words, in order for the Trial Chamber to be in a position to properly assess relevant questions relating to possible grounds for population transfers ‘as permitted under international law,’ a broader discussion of the historical context in which the DK regime came to power is required; in order to do so, certain witnesses and experts must be heard.

3. Basic Notions of Criminal Law Require Broader Discussion of Context

22. The broader context of the case is furthermore relevant from a basic criminal law viewpoint. In *any* criminal case it is important to consider the *reasons* a suspect engaged in certain conduct, and under what circumstances. This consideration is important in order to properly assess: (1) possible intent or lack of intent; (2)

³² These topics include the security of the population, military necessity, food shortages, and (the lack of) medical care. *See supra* para. 18.

³³ Which evidence is, in Nuon Chea’s view, unconvincing and/or unreliable.

³⁴ It is not just this (by definition) ‘preliminary character’ of the OCIJ’s findings on the factual foundations of ‘grounds permitted under international law’ that must lead to Nuon Chea being afforded an opportunity to present his own defense; another ground is the fact that the investigation by the OCIJ has been substantively *inadequate*. *See paras 30-39*.

knowledge or awareness of certain facts; (3) possible motives or the disapproval of alleged motives; (4) potential justifications for certain conduct; and (5) potential mitigating circumstances.

4. Assessment of Crimes Against Humanity Calls for Broad Discussion of Context

23. While these observations hold true in any criminal case, they are particularly apposite for a trial in which the Accused is charged with crimes against humanity, as well as with genocide and war crimes. These are all types of crimes that are inextricably linked to historical, political and sociological realities: one simply cannot properly assess an accused person's intent and motives for these crimes without simultaneously examining the historical context of certain actions and decisions (such as the evacuation of certain cities by the DK leaders upon taking power.) Simply put, one cannot assess the motives and intent of Nuon Chea by only considering his actions; these actions need to be embedded in a historical narrative in order to be properly understood.
24. Moreover, it is relevant in the ECCC context to note that crimes against humanity must have been committed on 'national, political, ethnical, racial or religious grounds'.³⁵ According to the indictment, *political* grounds were by far the most important underlying grounds for committing the alleged crimes against humanity.³⁶ In order to properly assess these (putative) political grounds, it is simply crucial to establish a comprehensive picture of the broader political and socio-historical context in which the actions and inactions of the relevant actors took place.

5. Assessment of Political Persecution Calls for Broad Assessment of Context

25. Similarly, when assessing the crime of 'political persecution,' with which Nuon Chea has been charged,³⁷ one cannot avoid comprehensively considering highly political, historical and sociological circumstances. This is especially true when considering persecution allegedly committed on putative political grounds.³⁸ Accordingly, for a proper assessment

³⁵ ECCC Law, Article 5.

³⁶ Closing Order, paras 1366, 1368 (which form part of the first mini-trial).

³⁷ Closing Order, paras 1415–1418, 1423–1425 (which form part of the first mini-trial); Of course, also when considering a charge of genocide and its requirement of special intent, it is crucial to obtain a comprehensive historical account of the wider context of the actions and inactions of the relevant actors, and the proper socio-historical setting. We will not develop this point further in this submission, as the charges of genocide do not form part of the first mini-trial.

³⁸ This is illustrated, for example, where the Closing Order speaks about 'junior officials of the former regime, some were arrested immediately after the CPK took power, because of their allegiance to the previous government.' This comment begs the question: what, exactly, was this "former regime" and why would an

of Nuon Chea's intent in relation to the persecution charges, a *broad* assessment of the historical, political and sociological context of his putative actions is required.³⁹

6. Assessment of Joint Criminal Enterprise Requires Broad Discussion of Context

26. The Closing Order states, in the part dedicated to the factual findings on the alleged Joint Criminal Enterprise ('JCE'), that '[t]he common purpose [of the JCE] came into existence *on or before 17 April 1975* and continued until at least 6 January 1979. The five policies designed to achieve this common purpose were implemented *within or before* these dates.'⁴⁰ According to the OCIJ, the common purpose of the JCE was 'to implement rapid socialist revolution in Cambodia through a "great leap forward" and defend the Party against internal and external enemies, by whatever means necessary'.⁴¹ The OCIJ thus explicitly considers that the 'roots' for the common purpose of the alleged JCE⁴² lie in the period before April 1975. The OCIJ further asserts that the roots for the five *policies* designed to achieve this common purpose equally lie in the period before April 1975.
27. It almost goes without saying that if, as the OCIJ claims, the common purpose 'to implement rapid socialist revolution in Cambodia' and to 'defend the Party against internal and external enemies' came into existence *before* April 1975, this Court must assess the social and historical circumstances *before* April 1975 in which this putative common purpose came to fruition.⁴³ Likewise, if certain policies to achieve said common purpose were (allegedly) already implemented before April 1975, it is clear that this Court must look at the period before April 1975 in order to establish the rationale for the implementation of said (putative) policies. In other words, a proper

allegiance to this government provide a (putative) reason for arrest? In other words, more political context is needed to properly understand and assess these charges.

³⁹ To quote the Closing Order on this issue: 'As regards the *mens rea*, in this instance, the intent to discriminate on political, racial or religious grounds is reflected in the context of the attack and the circumstances surrounding the commission of the acts.' Closing Order, para 1523. The Defence submits that 'the context' and the 'circumstances surrounding the commission of the acts' are, indeed, relevant, but are by force of logic not limited to the 1975–1979 period.

⁴⁰ Closing Order, para 158 (emphasis added).

⁴¹ Closing Order, para 156.

⁴² Nuon Chea challenges the existence of a JCE; in the context of this submission, the Defence will not brief this issue further.

⁴³ This holds true not just because the Closing Order itself claims that pre-1975 events lie at the root of the common purpose, but also because this alleged common purpose itself is so *inherently* linked to social considerations: if, for the sake of argument, one assumes that one of the common purposes of the CPK was to implement rapid socialist revolution in Cambodia, one simply cannot avoid considering the question the prevailing social circumstances which led the DK leaders to desire such a socialist revolution.

assessment of any aspect of JCE requires a broad consideration of the wider historical context in which the DK regime came to power.

7. Need for Broader Assessment of Context Stems Directly from Certain Charges

28. The pre-1975 situation furthermore deserves the Court's full attention because the indictment contains certain charges that are logically linked to the pre-1975 period, such as the charge that Nuon Chea 'depriv[ed] the civilian population of adequate food, shelter, medical assistance, and minimum sanitary conditions,' during the evacuation of Phnom Penh ('Phase 1').⁴⁴ To properly assess this accusation, it is necessary to establish an accurate picture of the food quantity in the country in general, and in Phnom Penh specifically, just before April 1975, as well as the general state of medical services and sanitary conditions in Cambodia and Phnom Penh.⁴⁵ In other words, the broader context in which the DK regime came to power must be examined to properly assess this allegation.

8. Broader Assessment of Context is Needed to Adequately Assess Claim of Necessity

29. Nuon Chea and other DK leaders have argued that the evacuation of Phnom Penh was necessary to save the population from starvation, and to protect them from American bombings which they feared would strike the city. Other population movements, they have claimed, were necessary to feed the population and/or increase food production. In legal terms, these claims amount to a claim of 'necessity'.⁴⁶ Whether or not the Trial Chamber considers the claim to be plausible at this time, it suffices to observe that this submission is part of Nuon Chea's explanation of his motives for his actions. The only proper way to assess whether Nuon Chea can, indeed, rely on a defence of necessity is by comprehensively considering the state of the country, and more specifically Phnom Penh, in the period directly preceding April 1975. In other words, again, the broader context in which the DK regime came to power must be considered.⁴⁷

⁴⁴ Closing Order, para 1435 (which forms part of the first mini-trial).

⁴⁵ Simply put, if there is no food in a country or a city, one cannot be held criminally responsible for not providing it.

⁴⁶ The defence of necessity is a well-established defence in international criminal law, and is moreover recognized in domestic Cambodian law. *See* 1956 Cambodian Penal Code, Article 97(2). This defence therefore must be comprehensively assessed by the Trial Chamber when raised by a defendant.

⁴⁷ Where this submission argues in paragraphs 16-29 that broader context must be considered, this also means that Nuon Chea must be afforded an opportunity to substantiate *his* claims with regard to this broader context. *See* more specifically paras 19-21.

**C. Failure of OCIJ and OCP to Investigate Now
Precludes Defence from Substantiating Its Claims**

30. The ECCC's legal structure has so far effectively denied the Defence an opportunity to affirmatively *substantiate* the submissions by Nuon Chea regarding the state of Cambodia at the moment of the power transition in April 1975 and the underlying reasons for his actions. Such substantiations by the Defence have been precluded because, to date, no adequate investigation has been undertaken by either the OCIJ or the OCP into the broader historical context in which the DK regime took over power,⁴⁸ while the Defence was enjoined from doing so itself.⁴⁹

1. OCIJ has failed to adequately investigate certain pivotal issues

31. The OCIJ's investigation has focused solely on the alleged crimes that were committed by the accused; it has failed to adequately investigate relevant broader contextual elements, most importantly the state of Cambodia and Phnom Penh pre-April 1975. This flawed approach is neatly illustrated by considering its treatment in the Closing Order of two pivotal and interrelated, topics: the state of Phnom Penh in April 1975, and the American bombings of Cambodia in the years 1965-1973.

a. OCIJ's Description of Phnom Penh in April 1975

32. The OCIJ's inadequate appreciation of the importance of the broader context is embodied in the Closing Order's discussion of the horrific conditions in Phnom Penh just before April 1975. The state of Phnom Penh is described in no more than three short paragraphs; astonishingly, these paragraphs paint a rather mitigated, almost positive, picture of the conditions in the city just before April 1975.⁵⁰
33. A review of the situation in Phnom Penh in only three short paragraphs (as part of a Closing Order containing 398 substantive pages) does not do justice to the demonstrable importance of this topic. More importantly, these short paragraphs are *substantively* flawed, as they simply do not accurately reflect the appalling state of the city in April 1975.⁵¹ There are ample indications that life in Phnom Penh was

⁴⁸ This context includes, but is not limited to, the dire state of Phnom Penh, and Cambodia as a whole, at that time.

⁴⁹ See Document No A110/1, Letter by the OCIJ to the Nuon Chea Defence Team, 10 January 2008, ERN 00157730.

⁵⁰ Closing Order, paras 221–223.

⁵¹ There is ample reason (upon which Nuon Chea wishes to elaborate through the hearing of witnesses) to assume that life in Phnom Penh was appalling at the time when the DK leaders took control of the city, and that grave problems existed with regard to both food and health services. Still, the OCIJ chose to turn to the use of euphemistic terms such as 'decreased capacity' of health service personnel and hospitals of 'varying

appalling at the time when the DK leaders took control of the city, and that grave problems existed with regard to both food and health services. Still, the OCIJ chose to turn to the use of euphemistic terms such as ‘decreased capacity’ of health service personnel and hospitals of ‘varying quality,’ and qualifies hunger and malnutrition as ‘matters of concern,’ rather than as humanitarian emergencies. Nuon Chea must be provided an opportunity to challenge the rather mitigated view of the OCIJ, and to properly substantiate his claims with regard to the appalling circumstances within the city in April 1975, and thus challenge the rather mitigated view of the OCIJ.

b. OCIJ’s Failure to Discuss the American Bombings

34. Another illustration of the OCIJ’s failure to investigate relevant contextual elements is found in the observation that the Closing Order wholly fails to address the bombing campaign of Cambodia by the United States in the ‘60s and early ‘70s. This is almost inconceivable. Not a word is dedicated to the origins of this campaign, its stated and actual purpose, its effects in terms of direct civilian casualties, its effects in terms of material damage to the infrastructure, its short and long term effects on food (rice) stocks and production, the maiming of innumerable members of the productive workforce, its ‘production’ of more than a million refugees, the devastating psychological effects on survivors of bombardments, or the wider political impact of this campaign.
35. From a legal perspective, for the reasons provided earlier, these are all relevant topics that must properly be assessed.⁵² Yet, the Closing Order does not even mention the US bombings, or their effects. Considering the arguably massive damage that was inflicted by the bombings (and their long-term catastrophic effects on Cambodian society as a whole) and the demonstrable relevance of this damage for issues that are the topic of Case 002, this omission is unpardonable. By way of illustration, a color map of the American bombings, based on American sources, is annexed to underline the scope of these bombings; it illuminates the *prima facie* relevance of this campaign for certain issues that form an integral part of Case 002 (such as the devastation of food production capacity and general infrastructure).⁵³ For the reasons provided

quality,’ and qualifies hunger and malnutrition as ‘matters of concern’ rather than as humanitarian emergencies. Closing Order, paras 222–223. Nuon Chea must be provided an opportunity to properly address and substantiate the circumstances within the city in April 1975.

⁵² Whatever way one looks at it, one cannot artificially separate the DK period and the American bombings; they are historically intertwined. It would be wholly unsatisfactory to discuss the ‘historical background’ of the DK regime without even mentioning the American bombings.

⁵³ Annex I.

earlier, Nuon Chea must be allowed to substantiate the immediate and long-term effects of the US bombings as part of his Defence.

2. OCP Has Likewise Failed to Investigate

36. The *OCP* has likewise ignored the crucial issue of the broader context. This can be deduced simply by looking at the Introductory Submission. The Introductory Submission fails to mention the terrible state of the country and Phnom Penh pre-1975 altogether. Similarly, the American bombing campaign is not mentioned, even in passing.

3. The Defence Was Not Allowed to Investigate; OCIJ Did Not Do so on Its Behalf

37. The *Defence*, on the other hand, was not *allowed* to undertake any independent investigations, pursuant to clear instructions from the OCIJ.⁵⁴ For that reason, the Defence explicitly requested the OCIJ numerous times to conduct investigations into broader contextual issues on its behalf.⁵⁵ Importantly, the OCIJ failed to undertake the requested investigatory action. The OCIJ both bluntly refused certain reasonable requests by the Defence, and purported to be executing Defence requests while in fact failing to do so.⁵⁶ Paragraphs 38-60 of the Nuon Chea Appeal against the OCIJ's Order on the Defence's 12th Request are particularly illustrative of this flawed approach by the OCIJ, and are annexed to this submission for ease of reference.⁵⁷

4. Conclusion: The Defence is Left Empty-Handed

38. As a consequence of this failure by the OCIJ (and earlier: OCP) to undertake much needed and reasonable investigative actions into relevant broader contextual circumstances, the Defence is left empty-handed at this juncture. Neither the witnesses as proposed by the Defence have been heard, nor has relevant and adequate documentary evidence been searched or discovered. Because of the consistent failure by the OCP and

⁵⁴ See Document No A110/1, Letter by the OCIJ to the Nuon Chea Defence team, 10 January 2008, ERN 00157730.

⁵⁵ See, *inter alia*, Nuon Chea's 12th and 5th Requests for Investigative Action. For example, in its 12th Request, the Defence wrote: 'Given the obvious need to determine what proportion, if any, of the alleged crimes in Cambodia between April 1975 and January 1979—in particular those said to be the result of starvation and forced evacuation—are attributable to putative DK policies (as opposed to other factors), the Defence requests the OCIJ to investigate: [...],' after which follows a list of *prima facie* relevant topics.

⁵⁶ For example, when considering the Defence's 12th Request for Investigative Action, the OCIJ simply refused to approach the International Committee of the Red Cross and the IMF for relevant information relating to the pre-1975 situation. Possibly more damaging, the OCIJ *purported* to grant parts of the same Request in approaching the US government for certain information, but did not in fact ask for the broader contextual information as requested by the Defence; it rather requested the provision of further *inculpatory* information. (The US did not, in any case, provide the requested information.)

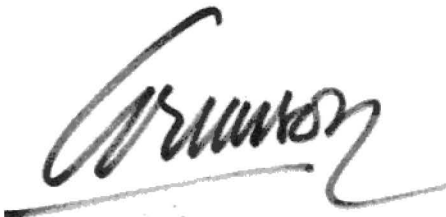
⁵⁷ Annex II. (The PTC did not address these submissions in its Decision on Appeal, for unknown reasons)

the OCIJ to properly investigate the broader context of the DK regime, even when specifically and timely requested to do so by the Defence, the Defence now finds itself precluded from properly substantiating Nuon Chea's legal and factual claims. This *de facto*, court-sanctioned, impossibility for Nuon Chea to effectively present his defence amounts to a violation of his right to a fair trial. At this stage, it falls to the Trial Chamber to provide an effective remedy to address said violation. Part of this remedy must consist of hearing the witnesses that the Defence has proposed, who, the Defence submits, will buttress the claims and defences made by Nuon Chea.⁵⁸

V. CONCLUSION

39. The Trial Chamber should, for the reasons provided in this submission:
- (a) not yet close the historical background segment of the first mini-trial;
 - (b) hear the witnesses and experts as proposed by the Defence in Document Number E155.1.1 on the topics listed in paragraph 15;
 - (c) take further procedural measures to enable the Trial Chamber to properly assess the historical context in which the DK regime operated, including (but not limited to) the admission of documentary evidence relevant to this issue, as well as affording all parties an opportunity to comment on such documents;
 - (d) hear the Accused Persons on the topics mentioned in paragraph 15; and
 - (e) allow the parties to make oral submissions on the topics as mentioned in this paragraph.
40. Oral argument during an open hearing regarding this Request—in advance of any determination—is appropriate, also considering the fundamental fair-trial rights that are at stake, and is hereby requested.

CO-LAWYERS FOR NUON CHEA



SON Arun



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⁵⁸ Alternatively (or additionally), the Trial Chamber could decide to order additional investigations into the topics as covered by this submission pursuant to Rule 93; however, considering that such investigations might be relatively time-consuming, reasons of procedural economy seem to militate against this approach; this leaves open the option of the hearing of witnesses in person.