

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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CIVIL PARTY LEAD CO-LAWYERS' RESPONSE TO "NUON CHEA'S SUBMISSIONS ON ROBERT LEMKIN'S TRANSCRIPTS AND THE SIGNIFICANCE OF THE 'RIFT' WITHIN THE CPK"

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Before:

Supreme Court Chamber

Judge KONG Srim, President
Judge A. KLONOWIECKA-MILART
Judge SOM Sereyvuth
Judge C.N. JAYASINGHE
Judge MONG Monichariya
Judge YA Narin
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I. INTRODUCTION

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) hereby respond to “Nuon Chea’s Submissions on Robert Lemkin’s Transcripts and the Significance of the ‘Rift’ within the CPK” (“Submission”)¹ at the request of the Supreme Court Chamber.²
2. The Lead Co-Lawyers respond to the Submission on behalf of the consolidated group of Civil Parties under their mandate to promote fair and effective conduct of proceedings³ upon the invitation of the Supreme Court Chamber.⁴

II. RESPONSE

A. Civil Party Standing

3. The Submission attempts to elaborate the discussion by further citing to Nuon Chea’s Sixth Additional Evidence Request⁵ and the Nuon Chea Appeal Brief⁶ thereby supplanting their arguments on appeal⁷ rather than addressing findings by the Trial Chamber that it must seek to be invalidated on appeal. It also contains a request to recall SCW-5.⁸
4. Nevertheless, the Nuon Chea Defence claims that the “rift” could invalidate the Trial Judgement, leading to an acquittal. If that were the case, the reparation projects endorsed by the Trial Chamber under Internal Rule 23 *quinqies* (b) could no longer be considered as “judicial” reparations. Therefore, the Lead Co-Lawyers have an interest in responding not only to the Submission but also to have their concerns known in respect of the additional evidence sought through that Submission.
5. The Lead Co-Lawyers add that the “[v]ictims” enjoy a right to legal certainty, a fundamental principle of the ECCC.⁹ It is submitted that this is becoming increasingly difficult as the Nuon Chea Defence ceaselessly seeks to obtain additional evidence on appeal for the consideration of the Supreme Court Chamber. It is further complicated by its attempt

¹ Nuon Chea’s Submissions on Robert Lemkin’s Transcripts and the Significance of the “Rift” within the CPK, F2/4/3/3/6/1, 8 October 2015.

² Decision Requesting Submissions, F2/4/3/3/6, 2 October 2015, p. 4.

³ Internal Rule 12ter (2).

⁴ Decision Requesting Submissions, F2/4/3/3/6, 2 October 2015, p. 5.

⁵ See Submission, paras 38-41.

⁶ Submission, paras 42-44, 61-65.

⁷ See also Submission, paras 50-60.

⁸ Submission, p. 29.

⁹ Internal Rule 21(1).

to mount additional challenges to findings of facts and law covertly and overtly through their submissions on appeal concerning additional evidence.

6. The Lead Co-Lawyers submit that the Civil Parties have been awaiting a final verdict for a little under a decade. While one or two days of further testimony and/or further consideration of additional evidence on appeal may not seem remarkable, it is a concern that should nevertheless be taken into account. This is considering that one of the fundamental principles guiding the ECCC is that the proceedings “shall be brought to a conclusion within a reasonable time”.¹⁰

7. Nevertheless, even at this late stage, as elaborated below, the Submission fails to clearly identify how the existence of the “rift” within the CPK relates to any of the findings of the Trial Judgement sought to be invalidated. The Lead Co-Lawyers urge that the Supreme Court Chamber take into account these cumulative concerns when considering the Submission and further requests for additional evidence.

B. The Submission Fails to Address the Supreme Court Chamber’s Directions

8. From the Submission, it is still unclear as to which specific crimes and modes of liability are challenged. Specifically, in the Submission, they refer to “the crimes charged during the evacuation of Phnom Penh”¹¹ and “crimes committed at Toul Po Chrey”¹² without indicating the exact crimes that are being challenged or how the “rift” relates to them and to Nuon Chea’s criminal responsibility. This leads to further confusion because the Nuon Chea Appeal Brief and the following requests for additional evidence seem to suggest that they challenge, *inter alia*, the crime of Extermination for Movement of Population (Phase One) in respect of former Khmer Republic officials¹³ whereas, Nuon Chea was not found to be guilty of commission through JCE

¹⁰ Internal Rule 21(4).

¹¹ Submission, paras 50-60.

¹² Submission, paras 61-65.

¹³ See Nuon Chea Appeal Brief, Ground 208 where it alleges errors in law and fact to the extent that the Trial Judgement found that a pattern of killing Khmer Republic soldiers and officials existed on or after 17 April 1975 (paras 581-599). In the said portion of the brief, the Nuon Chea Defence also make reference to “deliberate, organized, large-scale” operation to kill Khmer Republic officials (*see ibid*, paras 588, 591, 592), a requirement that the Trial Judgement assessed in relation to the *mens rea* for Extermination (*see* Trial Judgement, para. 561).

of the crime of Extermination for Movement of Population (Phase One)¹⁴ but through planning, ordering, instigating, aiding and abetting.¹⁵

9. Therefore, for the purposes of the present response, the Lead Co-Lawyers assume that the Submission primarily meant to refer to factual and legal findings relevant to commission as a mode of liability for crimes of murder, political persecution and other inhumane acts of forced transfer and attacks against human dignity, and secondarily, to the other modes of liability.

10. First, the Trial Chamber was categorical on the nature of the common purpose i.e. to “implement rapid socialist revolution through a ‘great leap forward’ and defend the Party against internal and external enemies, by whatever means necessary”.¹⁶ The Trial Judgement did not find that such a purpose was inherently criminal – rather, the Trial Chamber found that its *implementation* led to and/or involved the commission of the crimes,¹⁷ a finding which must be viewed in the context of the “rapid” pace of the revolution intended in the common purpose and, *inter alia*, Nuon Chea’s role within the JCE vis-à-vis the criminal policies to implement that common purpose. The Submission does not elaborate as to how this finding is impacted by its contents and the additional evidence sought.

11. Second, with respect to Nuon Chea, the findings of *actus reus* for commission through JCE was attached to him based on (i) his role as Deputy Secretary of the Party who had ultimate decision-making power with Pol Pot; (ii) his involvement in the initial development of DK policies; (iii) his involvement in their continued implementation; and (iv) his knowledge, approval, contribution and promotion of the DK policy of targeting former Khmer Republic officials.¹⁸ The Submission does not elaborate how this finding must be overturned by its contents and the additional evidence sought.

12. Third, the Trial Chamber assessed Nuon Chea’s significant contribution based on his role in policy development and planning the common purpose,¹⁹ and his “role in the propaganda campaign and training of cadres both before and after April 1975”.²⁰ The Trial

¹⁴ Trial Judgement, para. 940 *cf.* para. 942.

¹⁵ Trial Judgement, para. 942.

¹⁶ Trial Judgement, para. 777.

¹⁷ Trial Judgement, para. 778.

¹⁸ Trial Judgement, para. 861.

¹⁹ Trial Judgement, paras 863-869.

²⁰ Trial Judgement, paras 870-874.

Chamber's assessment of his *de jure* and *de facto* authority to instruct lower-level Khmer Rouge cadres and soldiers to commit crimes was not the sole basis of the findings relating to *commission* or *significant contribution*. The Submission does not establish how it affects Nuon Chea's liability as a JCE member.

13. Insofar as the legal and factual findings so challenged *could* affect commission through JCE liability, it is through the Trial Chamber's finding that Nuon Chea's role in the said planning, ordering, instigation, aiding and abetting "*also demonstrate[d] a sufficient link between the direct perpetrators*" and himself.²¹ Considering that Nuon Chea was not convicted as a principal perpetrator for any of the crimes committed, the Trial Chamber needed only to demonstrate beyond reasonable doubt that the crimes committed in pursuance of the common purpose could be imputed to any of the JCE members.²²

14. In the case of crimes of murder and Extermination at Toul Po Chrey, this liability was attributed to Rhuos Nhim, a JCE member himself.²³ In case of Population Movement (Phase One), this liability was attributed to Pol Pot, Sao Phim, Koy Thuon, Ta Mok and Vorn Vet for crimes of murder, political persecution and other inhumane acts of forced transfer and attacks against human dignity.²⁴

15. The Nuon Chea Defence does not challenge Nuon Chea's or Rhuos Nhim's membership within the JCE but instead supposedly implies that they could not have shared the common purpose or the continued implementation of the criminal policies because such zone leaders "were very much willing to act outside the framework of Party policy".²⁵ The Submission also assumes that Nuon Chea's liability through the JCE was "filtered through the lens of its conclusion that 'zone leaders' (also known as members of the Standing and Central Committee) were incapable of substantial independent action outside the framework

²¹ Trial Judgement, paras. 862 (emphasis added).

²² *Brđanin* Appeal Judgement, para. 413: "Considering the discussion of post-World War II cases and of the Tribunal's jurisprudence above, the Appeals Chamber finds that, to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis."

²³ See Trial Judgement, paras 727, 729, 733, 735, 741, 749, 766, 772, 773, 777.

²⁴ Trial Judgement, para. 807.

²⁵ Submission, para. 38.

of Party policy.”²⁶ It adds that the findings in the Trial Judgement assumed that “power in the DK was exercised within a strongly hierarchical structure, with Pol Pot and Nuon Chea as its most senior leaders exercising absolute authority over all lower-ranking cadres, including ‘zone leaders’ Rhuos Nhim and Sao Phim, who strictly followed and implemented orders transmitted to them through a rigid, top-down chain of command.”²⁷ A reference to the paragraph(s) in the Trial Judgement containing the concerned mode of liability is not provided.

16. Contrary to these assertions by the Nuon Chea Defence, the Trial Judgement held:

“The Chamber is therefore satisfied that, at the latest, by June 1974 until December 1977, there was a plurality of persons who shared a common purpose to “implement rapid socialist revolution through a ‘great leap forward’ and defend the Party against internal and external enemies, by whatever means necessary”. Members of the Standing and Central Committees, government ministers, and Zone and Autonomous Sector secretaries, including NUON Chea, KHIEU Samphan, POL Pot, IENG Sary, SON Sen, VORN Vet, Ta Mok, SAO Phim, ROS Nhim, KOY Thuon, KE Pauk, CHANN Sam, CHOU Chet, BOU Phat, YONG Yem, BORN Nan, IENG Thirith and MEY Prang, were part of this group with the specified common purpose. The evidence establishes that this common purpose to rapidly build and defend the country through a socialist revolution, based on the principles of secrecy, independence-sovereignty, democratic centralism, self-reliance and collectivisation, was firmly established by June 1974 and continued at least until December 1977.”²⁸

17. The Lead Co-Lawyers submit that the arguments concerning the “rift” within the CPK ignore the path taken by the Trial Chamber to assess the membership of the JCE. The Trial Judgement noted that the most significant participants joined the common purpose before 17 April 1975.²⁹ The Trial Judgement’s conclusion as to the legal findings on the membership to the JCE during the temporal jurisdiction – 17 April 1975 to December 1977 – was based, *inter alia*, on consideration of evidence and factual findings relating to the presence of the participants in the First Party Congress in September 1960,³⁰ Second Party Congress in February 1963,³¹ meeting in January 1968³² and October 1970,³³ Third Party

²⁶ Submission, para. 24.

²⁷ Submission, para. 31.

²⁸ Trial Judgement, para. 777 (emphasis added).

²⁹ Trial Judgement, para. 725.

³⁰ Trial Judgement, para. 726: “At the First Party Congress in September 1960, TOU Samuth (Secretary), NUON Chea (Deputy Secretary), POL Pot, SON Sen, IENG Sary, VORN Vet, SAO Phim and others adopted a three point programme fighting imperialism, ‘liberating’ the country and people, and conducting a successful revolution.”

³¹ Trial Judgement, para. 727: “At the Second Party Congress in February 1963, POL Pot (now Party Secretary), NUON Chea (Deputy Secretary), IENG Sary, VORN Vet, ROS Nhim, Ta Mok, SAO Phim, likely

Congress in 1971,³⁴ planning June 1974,³⁵ meetings between April-December 1975,³⁶ nature of membership and the composition of the Standing Committee,³⁷ meeting in September 1975,³⁸ membership to the People's Representative Assembly,³⁹ regular meetings in Phnom Penh,⁴⁰ meetings in zones and communications through telegrams.⁴¹ Furthermore, the Trial

SON Sen and others affirmed the line adopted at the First Party Congress, including political and armed revolution.” (internal citations omitted)

³² Trial Judgement, para. 729: “In January 1968, NUON Chea convened a meeting in Phnom Penh with several Zone leaders, including SAO Phim, ROS Nhim and Ta Mok. Together, they discussed the need to begin armed struggle against those in power, namely the LON Nol faction which was then in charge of the government, in regions where they considered the latter were intensifying their ‘acts of suppression.’” (internal citations omitted)

³³ Trial Judgement, para. 732: “In October 1970, the Central Committee, including POL Pot, NUON Chea, IENG Sary, Ta Mok, SAO Phim, KOY Thuon and other Zone secretaries, discussed a plan to liberate Cambodia from the American imperialists and Khmer Republic and confirmed the Party's policy of self-reliance and independence.” (internal citations omitted)

³⁴ Trial Judgement, para. 733: “At the Third Party Congress in 1971, NUON Chea, POL Pot, KHIEU Samphan (now a candidate member of the Central Committee), IENG Sary, KOY Thuon, KE Pauk, Doeun, SAO Phim, VORN Vet, Ta Mok, ROS Nhim and others decided to change the name of the Party to the CPK, created the Special Zone around Phnom Penh and reaffirmed the Party line from the First and Second Congresses, including commitment to the class struggle.” (internal citations omitted)

³⁵ Trial Judgement, para. 735: “In June 1974, the Central Committee, including members and candidate members POL Pot, NUON Chea, KHIEU Samphan, SAO Phim, KOY Thuon, Ta Mok, VORN Vet, ROS Nhim and SON Sen, pursuant to the principle of democratic centralism, planned the final offensive to liberate the country and evacuate the population of the cities to rural areas.” (internal citations omitted)

³⁶ Trial Judgement, para. 741: “Between April 1975 and December 1977, they included ROS Nhim (Northwest), SAO Phim (East), Ta Mok (Southwest), CHOU Chet (West), KOY Thuon (Central (old North) Zone, until 1975), KE Pauk (Central (old North) Zone, from 1975), CHANN Sam (North Zone, from its establishment around 1977), MEN San (Northeast), BOU Phat (Sector 103, until its incorporation into the North Zone around 1977), YONG Yem (Sector 505, until 1976), and BORN Nan (Sector 505, from 1976).” (internal citations omitted)

³⁷ Trial Judgement, para. 745: “Beginning around August 1975, the Standing Committee, consisting of full-rights members NUON Chea, POL Pot, IENG Sary, SAO Phim, Ta Mok VORN Vet (either a full-rights or candidate member) and SON Sen (a candidate or alternate member only), would meet about once a week, and more frequently in times of emergency.” (internal citations omitted)

³⁸ Trial Judgement, para. 749: “IENG Sary confirmed that he was present at a September 1975 meeting of Party leaders, including KHIEU Samphan, POL Pot, NUON Chea, SAO Phim, SON Sen, Ta Mok, VORN Vet, ROS Nhim, KOY Thuon and a number of military commanders, at which defence, agriculture, “the water problem” and industry were discussed.” (internal citations omitted)

³⁹ Trial Judgement, para. 766: “The PRA then formally appointed the new government: KHIEU Samphan became president and SAO Phim and ROS Nhim were appointed vice-presidents in the State Presidium. KHIEU Samphan later explained that he accepted the presidency due to a sense of patriotic duty: he did not want to weaken the movement. POL Pot was appointed prime minister; NUON Chea, Chairman of the PRA Standing Committee; IENG Sary, Deputy Prime Minister of Foreign Affairs; SON Sen, Deputy Prime Minister of National Defence; VORN Vet, Deputy Prime Minister of Economics; HU Nim, Minister of Information and Propaganda; THIOUNN Thioun, Minister of Health; IENG Thirith, Minister of Social Action; TOCH Phoeun, Minister of Public Works; and YUN Yat, Minister of Culture, Training and Education.” (internal citations omitted)

⁴⁰ Trial Judgement, para. 772: “In addition to attending meetings of the Centre, Zone and Autonomous Sector secretaries and officials, such as ROS Nhim, also came to Phnom Penh on a regular basis to meet with Party leaders, including NUON Chea. Party leaders, including POL Pot, KHIEU Samphan and NUON Chea, led

Judgment acknowledged, “the Chamber is unable to conclude that unanimity was required in decision-making [within the Standing Committee], and therefore leaves open the possibility that individual members may have disagreed with particular decisions from time to time”.⁴²

18. Although, the Trial Judgement did find the accused criminally responsible for planning,⁴³ ordering,⁴⁴ instigating,⁴⁵ and aiding and abetting,⁴⁶ these did not result in a conviction except for Extermination (Population Movement, Phase One), Extermination (Population Movement, Phase Two), Enforced Disappearances (Population Movement, Phase Two), and Political Persecution (Toul Po Chrey).⁴⁷

19. In relation to superior responsibility,⁴⁸ the Trial Judgement limited its conclusive findings to the assessment of his complete role during the DK and to the consideration in sentencing and not towards conviction.⁴⁹ It follows from an understanding of the modes of liability that one cannot be convicted of planning/ordering/instigating/aiding and abetting/ or

education sessions in Phnom Penh, beginning soon after 17 April 1975 and continuing throughout the DK era. They lectured Zone, Sector and District officials, as well as ordinary cadres, about the identification and elimination of enemies, continuation of the armed struggle establishment of cooperatives, building of dikes and canals, and completion of work and production quotas.” (internal citations omitted)

⁴¹ Trial Judgement, para. 773: “Party leaders, including POL Pot, NUON Chea, KHIEU Samphan and IENG Thirith, also traveled to the Zones to observe the conduct of the socialist revolution and meet with Zone leaders and officials. According to Witness SAUT Toeung, NUON Chea would travel to Battambang to meet with ROS Nhim every three to four months. Further, several surviving telegrams from 1977-78 demonstrate that Zone secretaries and officials, such as ROS Nhim and SAO Phim, reported to Angkar or the leadership, copying POL Pot, SON Sen, VORN Vet, NUON Chea and/or Office 870, on former Khmer Republic officials and other enemy situations, and fighting on the border with Vietnam. They also asked for instructions.” (internal citations omitted)

⁴² Trial Judgement, para. 228.

⁴³ Trial Judgement, paras 878-883 (Population Movement Phase One) ; paras 899-904 (Population Movement Phase Two) ; paras 918-922 (Toul Po Chrey).

⁴⁴ Trial Judgement, paras 884-885 (Population Movement Phase One), paras 905-907 (Population Movement Phase Two), paras 923-925 (Toul Po Chrey).

⁴⁵ Trial Judgement, paras 887-888 (Population Movement Phase One) ; paras 908-909 (Population Movement Phase Two) ; paras 926-927 (Toul Po Chrey).

⁴⁶ Trial Judgement, paras 889-891 (Population Movement Phase One) ; paras 910-912 (Population Movement Phase Two) ; paras 928-931 (Toul Po Chrey).

⁴⁷ Trial Judgement, para. 942.

⁴⁸ Trial Judgement, paras 892-898 (Population Movement Phase One) ; paras 913-917 (Population Movement Phase Two) ; paras 932-939 (Toul Po Chrey).

⁴⁹ Trial Judgement, para. 939: “the Chamber is satisfied that NUON Chea is responsible as a superior for the crimes against humanity of murder, extermination and political persecution committed by Khmer Rouge soldiers and officials of the Northwest Zone at Tuol Po Chrey.” *Cf* Trial Judgement, para. 941: “the Chamber has found that NUON Chea is both directly responsible and responsible as a superior for all crimes committed in the course of movement of population (phases one and two) and at Tuol Po Chrey. Having found that the Accused was directly responsible for these crimes through his participation in the JCE, the Chamber declines to enter a conviction under the doctrine of superior responsibility.”

being responsible as a superior for the very act that he commits.⁵⁰ The Submission does not explain how the findings relating to planning, ordering, instigating, aiding and abetting or superior responsibility are linked to the Trial Chamber’s assessment of Nuon Chea’s guilt as a JCE member. Therefore, apart from conflating the modes of liabilities that Nuon Chea has been convicted of in the first instance, the Nuon Chea Defence fails to show how the Trial Judgement should have limited Nuon Chea’s and/or the role and participation of any of the zone leaders as JCE members.

20. In conclusion, the Lead Co-Lawyers submit that the Submission has failed to comply with the directions of the Supreme Court Chamber. Ultimately, the Lead Co-Lawyers defer to the wisdom of the Chamber in assessing the merits of the Request and the consideration of the Submission.

V. RELIEF REQUESTED

WHEREFORE, the Civil Party Lead Co-Lawyers respectfully request that the Supreme Court Chamber:

- (1) **CONSIDER** the concerns outlined in the present response when considering the Submission and the merits of the Request.

Respectfully submitted,

Date	Name	Place	Signature
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⁵⁰ See further, *Stakić* Trial Judgement, para. 445: “[t]he Trial Chamber considers, however, that an additional conviction for ordering a particular crime is not appropriate where the accused is found to have committed the same crime.” See also, *ibid.*, para. 466: “[f]or these reasons, it is in general not necessary in the interests of justice and of providing an exhaustive description of individual responsibility to make findings under Article 7(3) if the Chamber is already satisfied beyond reasonable doubt of both responsibility under 7(1) and the superior positions held by the accused. The superior positions of the accused, without diminishing their importance, would then only constitute an aggravating factor, the seriousness of which would depend on the concrete superior status of the accused over his subordinates. The superior positions of the accused must be established in detail and related to the concrete conduct established under Article 7(1). This approach in relation to Article 7(3) responsibility does not diverge from that taken in relation to e.g. ordering or planning when “committing” has already been established. Obiter: it would be a waste of judicial resources to enter into a debate on Article 7(3) knowing that Article 7(1) responsibility subsumes Article 7(3) responsibility.” This was undisturbed on appeal. Further, the Appeals Chamber reapplied the factual findings of co-perpetratorship to the requirements of Joint Criminal Enterprise. See *Stakić* Appeal Judgement, paras 66-85.

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