

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO NUON CHEA'S "REQUEST TO HEAR DEFENCE WITNESSES AND TO TAKE OTHER PROCEDURAL MEASURES IN ORDER TO PROPERLY ASSESS HISTORICAL CONTEXT"

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distributed to:

Trial Chamber
Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Copied to:

Accused
NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

Lawyers for the Defence
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGÈS

I. INTRODUCTION

1. On 16 March 2012, the defence team for Nuon Chea (“Defence”) filed the instant *Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context* (“Request”).¹ In the Request, the Defence requests the Trial Chamber to “(i) not yet close the historical background segment of the first mini-trial; and (ii) call Defence witnesses and experts whose testimony is relevant for the proper assessment of this historical background.”² The Request purports to demonstrate how certain historical information and additional witnesses could be relevant to the trial.
2. In response, the Co-Prosecutors submit that the Request is premised on a misconception, namely that future witnesses cannot address matters relating to historical background. The Co-Prosecutors do not object in principle to the calling of a limited number of additional witnesses and experts on these issues, subject to: appropriate procedures to determine who those witnesses are; consideration of the Co-Prosecutors’ previous submissions regarding witnesses; and the Trial Chamber’s conclusions as to the utility and necessity of calling additional witnesses. In this case, however, the Co-Prosecutors believe that the number of additional witnesses proposed by the Defence is grossly excessive to any possible justification and an attempt to obstruct and delay this trial. The attempt by Nuon Chea and his counsel on 19 March 2012 to extort the Court, by refusing to answer questions unless the Chamber grants this Request, further demonstrates that the Defence is not acting in good faith in relation to this matter.
3. Moreover, the issues raised by the Request have been the subject of numerous prior filings by the Defence at each stage of these proceedings, and have already been thoroughly considered and ruled upon by the Office of Co-Investigating Judges (“OCIJ” or “CIJ”), Pre-Trial Chamber (“PTC”), and Trial Chamber. The Defence had the opportunity to present testimony from the Accused and documentary evidence on these issues in the initial Historical Background segment of the trial, and will have the opportunity to question all subsequent witnesses on these issues. Those witnesses will

¹ E182 Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context, 16 March 2011 (“Request”).

² E182 Request *supra* note 1 at para. 1.

include over 50 former CPK cadres, numerous civilians who resided in Phnom Penh prior to 17 April 1975, and experts familiar with the conditions in Cambodia during the pre-1975 period. For these reasons, the fair trial rights of the Defence have not been compromised, and the hearing of their additional witnesses is not necessary.

II. PROCEDURAL HISTORY

A. Proceedings before OCIJ and PTC

4. On 26 September 2008, the Defence filed a Request for Investigative Action concerning the actions of the government of the United States of America (along with other states) in Cambodia in the pre-1975 time period.³ The CIJs granted many of the Defence requests, indicating that they had sent rogatory letters to the United States and other countries they determined were most likely to have relevant information.⁴ As a result of the OCIJ investigation, a substantial number of documents were obtained from the files of the US and French governments covering the DK period and pre-1975 period.⁵
5. The Defence appealed the CIJs' order in relation to the investigative requests that had been denied.⁶ In a 7 June 2010 decision, the PTC dismissed that appeal, finding that the CIJs were entitled to refuse requests that were "insufficiently precise" and would require the investigation of an "exhaustive catalogue of evidence," and that the CIJs were "entitled to consider whether a request might cause an unreasonable delay when exercising its judicial discretion in light of the overall investigation."⁷ The PTC also concluded that the CIJs were not required to investigate the "numbers of deaths

³ **D105** Fifth Request for Investigative Action, 26 September 2008.

⁴ **D315** Order on Nuon Chea's Requests for Investigative Action Relating to Foreign States (D101, D102, D105, D126 & D128), 13 January 2010 at paras. 19-20, 25-27, 32-35; **D291** International Rogatory Letter, 8 August 2008; **D291/3** Letter from OCIJ to US Embassy, 28 July 2009 (including requests for documents relating to the "Economic and social situation in Cambodia" both "before and after April 1975").

⁵ The Co-Prosecutors have identified over 250 documents in the Case File from the US State Department, US Embassies in Phnom Penh and Bangkok, National Security Council and White House. Some were produced directly by the US government in this case (those with "D291" at the start of their Case File number), while others had previously been declassified by US authorities and publicly released (e.g., documents included in the D313, D366 and D248 Case File document series). A total of 605 documents were obtained by OCIJ from the archives of the French Foreign Ministry. See **D199/3** OCIJ Cover Letter, 7 September 2009; **D199/26** Note by the Co-Investigating Judges, 8 January 2010 (stating that documents were being placed on the Case File relevant to investigative requests "regarding the relationships between Cambodia and other States filed by the Nuon Chea defense team").

⁶ **D315/1/1** Appeal Against OCIJ Order on Nuon Chea's Requests for Investigative Action Relating to Foreign States, 15 February 2010.

⁷ **D315/1/5** Decision on the Appeal Against Order on Nuon Chea's Requests for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for Investigative Actions Relating to Foreign States, in Respect of the Denial of the Request for Witness Interviews by Khieu Samphan, 7 June 2010 at paras.19-24.

caused by US Air Force bombing missions in Cambodia,” as it was the fact such bombings occurred (and not the exact number of deaths caused) that was relevant to the exculpatory theory presented by the Defence.⁸

6. On 3 June 2009, the Defence filed a Request for Investigative Action requesting information and material regarding food supplies and living conditions in Cambodia prior to and during the DK regime.⁹ The majority of this request was granted by the OCIJ, and only two parts rejected.¹⁰ Specifically, the OCIJ rejected the request to obtain information from the International Monetary Fund (IMF), finding that such action would be “unnecessarily duplicative” and provide no “additional value to the investigation,”¹¹ and the request to obtain information from the International Committee for the Red Cross (“ICRC”), based on the privilege customarily recognized for that entity.¹²
7. The CIJs’ order was again appealed by the Defence.¹³ On 15 June 2010, the PTC allowed the appeal in part, and ordered the OCIJ to reconsider the request relating to the ICRC and to provide examples of the other investigation that made the IMF request “unnecessarily duplicative.”¹⁴ On 21 June 2010, the OCIJ issued a further order in response to the PTC decision. In relation to the ICRC, the OCIJ noted that they had already contacted other agencies and received evidence providing the same information that the ICRC could provide, which had been placed on the Case File. With respect to the IMF, the OCIJ also confirmed that further investigation was not warranted, as the available information at the IMF concerned the time period after the

⁸ **D315/1/5** Decision on the Appeal Against Order on Nuon Chea’s Requests for Investigative Action Relating to Foreign States and on the Appeal Against the Order on the Requests for Investigative Actions Relating to Foreign States, in Respect of the Denial of the Request for Witness Interviews by Khieu Samphan, 7 June 2010 at paras. 45-47.

⁹ **D173** Twelfth Request for Investigative Action, 3 June 2009.

¹⁰ **D300** Order on Requests D153, D172, D173, D174, D178 & D284, 12 January 2010 at paras. 31-39.

¹¹ **D300** Order on Requests D153, D172, D173, D174, D178 & D284, 12 January 2010 at para. 34.

¹² **D300** Order on Requests D153, D172, D173, D174, D178 & D284, 12 January 2010 at para. 35.

¹³ **D300/1/1** Appeal Against OCIJ Order on Requests D153, D172, D173, D174, D178 and D284 (Nuon Chea’s Twelfth Request for Investigative Action), 11 February 2010.

¹⁴ **D300/1/2** Decision on Nuon Chea’s Appeal Against OCIJ Order on Requests D153, D172, D173, D174, D178 and D284 (Nuon Chea’s Twelfth Request for Investigative Action), 15 June 2010.

events under investigation.¹⁵ The Defence also appealed the second order issued by OCIJ,¹⁶ which appeal was dismissed by the PTC on 14 July 2010.¹⁷

B. Proceedings before the Trial Chamber

8. On 17 January 2011, the Trial Chamber ordered the parties to provide information on all proposed witnesses, civil parties, and experts.¹⁸ The parties were required to provide for each witness, *inter alia*, “[t]he estimated length of time required to testify”, “[a] summary of the facts on which each proposed witness is expected to testify” that is “sufficiently detailed to allow the Chamber and the other Parties to understand fully the nature and content of the proposed testimony”, and “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 counts.”¹⁹
9. The Defence argued that the Trial Chamber’s request for the information was “without legal basis”²⁰ but nevertheless it partially complied with the Trial Chamber’s directive. On 15 February 2011, the Defence submitted a list proposing 527 witnesses, 6 civil parties, and 13 experts.²¹ Amongst the 527 witnesses proposed by the Defence, at least 134 were identified as being relevant to historical context. The entirety of the description provided for those individuals was “Pre-1975 Conditions”, “Post-1975 Conditions”, “US Involvement”, and/or “CIA Involvement”. The Defence list included 73 diplomats, 57 foreign government officials, 19 embassy staff, 59 international organization staff, 15 foreign political party members, 11 foreign delegates, 30 academics or historians, and 50 journalists, many of whom were proposed to testify solely regarding either the “pre-1975 conditions” in Cambodia or the conduct of the United States during that period.

¹⁵ **D300/3** Order on Direction to Reconsider Order on Requests D153, D172, D173, D174, D178 and D284 (Nuon Chea’s Twelfth Request for Investigative Action), 21 June 2010 at para. 8.

¹⁶ **D300/1/3** Notice of Intention to Proceed with Appeal Against OCIJ Order on Nuon Chea’s Twelfth Request for Investigative Action, 23 June 2010; **D300/1/4** Further Submissions in Appeal Against OCIJ Order on Nuon Chea’s Twelfth Request for Investigative Action, 28 June 2010.

¹⁷ **D300/1/6** Decision on Nuon Chea’s Appeal Against OCIJ Order on Direction to Reconsider Requests D153, D172, D173, D174, D178 and D284, 14 July 2010.

¹⁸ **E9** Order to File Material in Preparation for Trial, 17 January 2011.

¹⁹ **E9** Order to File Material in Preparation for Trial, 17 January 2011, paras. 2, 6.

²⁰ **E9/10** Summaries of Proposed Witnesses, Experts, and Civil Parties, 23 February 2011, para. 2.

²¹ **E9/4/4** List of Proposed Witnesses, Experts, and Civil Parties, 15 February 2011; **E9/10** Summaries of Proposed Witnesses, Experts, and Civil Parties, 23 February 2011; **E9/10.1** Annex D: Witness Summaries with Points of the Indictment – Nuon Chea Defence Team, 23 February 2011.

10. As the Co-Prosecutors observed in their response to the Defence's filing, the proposed witness list was deficient in three main ways: (1) the list was not definitive, but instead provided multiple witnesses in relation to what the Defence termed "recurring categories" and explicitly made a "deliberate omission" as to preferences among those witnesses; (2) the summaries, in most cases, did not provide sufficiently detailed information on the nature of the witnesses' proposed testimony to allow the Parties to understand how the testimony purportedly related to the issues at trial; and (3) the Defence did not provide time estimates for the testimony of their proposed witnesses.²² In addition, the contact information provided by the Defence for the proposed witnesses on pre-1975 conditions was over 30 years outdated or otherwise inadequate.²³ The Co-Prosecutors also submitted substantive objections to some of the witnesses on both specific and categorical bases.²⁴
11. In relation to the witnesses that the Defence claimed would testify regarding "pre-1975 conditions", the Co-Prosecutors noted that the summary of the proposed testimony typically stated that the witness would offer insight into pre-1975 conditions but did "*not specify those conditions or explain how such testimony relates to the Closing Order.*"²⁵ In relation to those witnesses that the Defence claimed would testify regarding US foreign policy and operations in Cambodia, the Co-Prosecutors similarly observed that "*Nuon Chea fails to specify the reasons why these witnesses are proposed or the specific points in the indictment on which they will testify.*"²⁶ The Defence's description of witnesses that it claimed would provide information on other contextual and historical matters were similarly flawed.²⁷
12. On 25 May 2011, the Defence requested that the Trial Chamber add additional topics to the broad categories the Trial Chamber had indicated would encompass the first

²² E9/14/1/1 Co-Prosecutors' Objection to the Witnesses and Experts Proposed by the Other Parties With 11 Confidential Annexes, 7 March 2011, paras. 13-17.

²³ E9/4/4.4 Annex A: Proposed Witness List, 15 February 2011. For example, the only contact information provided by the Defence for witnesses who worked for UNICEF in the early 1970's in Phnom Penh was the UNICEF office in New York. For witnesses who worked for foreign governments in Phnom Penh during that same time period, the Defense simply listed the Ministry of Foreign Affairs for their country.

²⁴ E9/14/1/1 Co-Prosecutors' Objection to the Witnesses and Experts Proposed by the Other Parties With 11 Confidential Annexes, 7 March 2011 (and related annexes); E9/14/1/1/1 Co-Prosecutors' Further Objections and Observation to the Witnesses and Experts Proposed by the Other Parties, 11 March 2011.

²⁵ E9/14/1/1 Co-Prosecutors' Objection to the Witnesses and Experts Proposed by the Other Parties With 11 Confidential Annexes, 7 March 2011, para. 22.

²⁶ E9/14/1/1 Co-Prosecutors' Objection to the Witnesses and Experts Proposed by the Other Parties With 11 Confidential Annexes, 7 March 2011, para. 24.

²⁷ E9/14/1/1 Co-Prosecutors' Objection to the Witnesses and Experts Proposed by the Other Parties With 11 Confidential Annexes, 7 March 2011, paras. 27-29.

four trial segments of Case 002/01.²⁸ These requested additional topics included historical aspects “which directly or indirectly impacted Cambodia *before, during, and following* the DK regime.”²⁹

13. On 3 June 2011, the Trial Chamber declined to grant the request “at this stage”, but stated 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.”³⁰

14. On 9 September 2011, the Trial Chamber ruled on an 18 May 2011 request by the Nuon Chea Defence for additional investigations pursuant to Internal Rule 93.³¹ The Defence request repeated their prior arguments that the judicial investigation was flawed and that the CIJs’ rejection of some of their twenty-six requests for investigation demonstrated a failure to investigate exculpatory evidence.³² In response, the Co-Prosecutors noted that the Defence had failed to demonstrate that the Case File contained inadequate information regarding food supplies, living conditions and other such background or contextual issues.³³ The Trial Chamber held that “[t]he Accused has had ample opportunity, during a judicial investigation spanning almost two and one half years, to request of the CIJs all investigative actions considered by the Accused to be relevant, and to challenge any refusals of such requests by the CIJs to the Pre-Trial Chamber when considered necessary. ... The Accused has not demonstrated why the Trial Chamber must now accede to any of the specified RIAs in order to ensure the fairness of the trial.”³⁴

²⁸ **E89/1** 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.

²⁹ **E89/1** 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 at paras. 3, 7, 8.

³⁰ **E93** Directive in Advance of Initial Hearing Concerning Proposed Witnesses, 3 June 2011 at p. 2.

³¹ **E88** First Consolidated Request for Additional Investigations, 18 May 2011; **E116** Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011.

³² **E116** Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011 at para. 5.

³³ **E88/2** Co-Prosecutors’ Response to Nuon Chea First Consolidated Request for Additional Investigations, 3 June 2011 at para. 20.

³⁴ **E116** Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 September 2011 at para. 19.

15. On 25 October 2011, the Trial Chamber released a “Partial List of Witnesses, Experts and Civil Parties For First Trial in Case 002”.³⁵ The Trial Chamber explained that the witnesses included in this list concerned the first four topics to be considered at trial. The Trial Chamber also stated that “[w]itnesses, experts and Civil Parties relevant instead to the factual portions of the first trial in Case 002 (concerning population movement phases one and two) will be communicated to the parties at a later date.”³⁶
16. On 8 February 2012, in response to a request by the Defence, the Trial Chamber invited the Defence to submit a list of additional witnesses it considered relevant to the ongoing trial segment on Historical Background.³⁷ The following day, the Defence submitted a list of 47 witnesses regarding historical context, all of whom were part of the Defence’s initial list of witnesses. Despite being given this opportunity and despite being put on notice of the deficiencies in its previous witness filings, the Defence’s additional witness list *again* failed to comply with the Trial Chamber’s Order regarding proposed witnesses, in that it did not provide any additional information regarding how the proposed witnesses’ testimony related to the issues at trial.³⁸ On 17 February 2012, the Trial Chamber rejected the Defence request: “These witnesses were considered by the Trial Chamber in formulating its provisional witness list ... and the Nuon Chea Defence filing ... fails to demonstrate why any of these 47 witnesses should be heard immediately.”³⁹ The Trial Chamber also noted, however, that all proposed witnesses remain under consideration by the Chamber until they are called or rejected, and that it would shortly be issuing its first list of rejected witnesses, experts, and/or Civil Parties.⁴⁰
17. On 16 March 2012, the Defence filed the instant Request seeking additional witnesses to be called to testify as to matters of historical background. On 19 March 2012, Nuon Chea read a statement summarizing that filing, and announced that he would refuse to continue answering questions unless the Chamber granted all of his requests.⁴¹

III. ARGUMENT

³⁵ **E131/1.1** Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial In Case 002, 25 October 2011.

³⁶ **E131/1.1** Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial In Case 002, 25 October 2011.

³⁷ **E1/40.1** Transcript, 8 February 2012 at pp. 32 ln. 32-35 & 33 ln. 1-9.

³⁸ **E155/1.1** List of Additional Witnesses Relevant to Historical Background, 9 February 2012.

³⁹ **E172** Trial Chamber Memorandum, 17 February 2012 at p. 4.

⁴⁰ **E172** Trial Chamber Memorandum, 17 February 2012 at p. 4.

⁴¹ **E1/50.1** Transcript, 19 March 2012 at pp. 5-10, 17-19, 23.

A. The Defence erroneously believes evidence of historical background will no longer be permitted

18. The Defence asks that the Trial Chamber “not yet close the historical background segment of the first mini-trial.”⁴² This request is based on an erroneous assertion that matters of historical background may no longer be addressed in this trial. While the Chamber has divided the questioning of the Accused into specific segments, starting with Historical Background, it has also directed that witnesses are to be examined on all issues relevant to the paragraphs of the Closing Order included in Case 002/01.⁴³ The Office of the Co-Prosecutors has explained its understanding of this issue in Court,⁴⁴ and International Defense Counsel for Nuon Chea seemed to share this position when he stated on 8 February 2012: “we assume that we will be allowed to ask some witnesses who will be heard later in this case, especially the experts, about the historical context, so that we’ll be allowed to go back and revisit this particular topic when hearing other witnesses, even if those witnesses are not called or asked to testify about this first trial segment.”⁴⁵
19. Indeed, the Chamber has found all facts concerning the first trial to be appropriate for questioning of witnesses, no matter when the witness is called to testify, with the condition that questioning should generally follow the sequence of the Closing Order for the sake of clarity.⁴⁶ When a member of the Defence sought clarification as to the scope of questioning, the President reiterated this basic position.⁴⁷ In several

⁴² E182 Request *supra* note 1 at paras. 1, 39.

⁴³ E141 Trial Chamber Memorandum, 17 November 2011 at p. 3 (“In order to avoid asking witnesses or experts to return during Case 002/01, they should be examined on all topics included in Case 002/1 that are within their knowledge, using the same topic sequence (as set out in Annex E124/7.1) to guide the questioning”).

⁴⁴ E1/50.1 Transcript, 19 March 2012 at pp. 20 ln. 25 & 21 ln. 1-9 (“The only observation I wish to add to this is that there are -- the way this trial will proceed is that there are many, many witnesses yet to be heard. Unlike the accused where we are structuring their testimony on particular segments, when witnesses appear they will be able to address historical background issues. So to the extent the accused is suggesting that no future witnesses can address advance part -- pre-April 1975, that is incorrect, and I just want to make sure that’s clear on the record.”)

⁴⁵ E1/40.1 Transcript, 8 February 2012 at p. 4 ln. 2-7.

⁴⁶ E1/33.1 Transcript, 25 January 2012, p. 82 (“When putting questions to witness, parties are allowed to confine themselves to the facts -- the facts that have been already indicated in Document E124/7.2 and parties are advised to prepare their questions that are relevant to the alleged paragraphs in accordance with their ordering starting from small number to bigger numbers.”); see also, *id.*, p. 83 (“And the questions must be relevant to the facts concerning the knowledge of the witness and that they must be relevant to the facts that have been severed and classified in Case File 002/1. The first segment of the trial must be in line with this guideline. It is about the historical background of the Democratic Kampuchea. Then parties can process to another subsequential -- or subsequent fact, as laid down in Document E124/7.2. ... To be more understandable, these questions -- lines of questions should begin with the sequence of these facts.”).

⁴⁷ E1/34.1 Transcript, 26 January 2012 at p. 15.

instructions the Trial Chamber has been clear that the acceptable parameters of questioning generally extend to all issues related to Case 002/01.⁴⁸ The examination of Kaing Guek Eav, the first witness in the second trial segment, has confirmed this practice, as the witness was examined on Historical Background issues.⁴⁹

20. The Chamber therefore has already recognized that witness, expert and Civil Party testimony falling outside the current trial segment may continue to be presented throughout the trial, as long as it relates to facts falling within the scope of Case 002/01. Thus, because this portion of the Request is based on a misunderstanding of the Trial Chamber's instructions, it should be denied.

B. The Defence fail, once again, to substantiate why their proposed witnesses are necessary in relation to historical context

21. The Defence asserts that the Trial Chamber “refus[es] to consider the broader historical context during this trial.”⁵⁰ Yet, in the immediately prior sentence of the same paragraph, the Defence acknowledge that the Trial Chamber has agreed that “[b]ackground contextual issues and events outside the temporal jurisdiction of the ECCC will be considered by the Chamber” when “demonstrably relevant to matters within the ECCC’s jurisdiction and the scope of the trial.”⁵¹
22. The assertion by the Defence that the Trial Chamber has refused to consider issues relating to a “broader historical context,” such as the effects of the United States bombing, food shortages and starvation in Phnom Penh and Cambodia in the period leading up to April 1975, is patently false. To the contrary, the Chamber has so far heard testimony on such issues from both Nuon Chea⁵² and Prak Yut.⁵³

⁴⁸ E1/35.1 Transcript, 30 January 2012, p. 78 (“You may proceed with your questions but only if they are related to this case, not to other cases. Restrict your questions to the first trial in Case 002 which you have been well aware of and your questions should also be related to the facts to be known by this witness before us.”). See also E1/34.1 Transcript, 26 January 2012 at p. 15.

⁴⁹ See, e.g., E1/50.1 Transcript, 19 March 2012 at pp. 40-41, 43-45 (questioning witness Kaing Guek Eav regarding events in 1970-71); E1/51.1 Transcript, 20 March 2012 at pp. 7-9 (questioning witness Kaing Guek Eav regarding events in 1967-1974).

⁵⁰ E182 Request *supra* note 1 at para. 3.

⁵¹ E182 Request *supra* note 1 at para. 3, quoting E93 Trial Chamber’s Directive in advance of Initial Hearing concerning proposed witnesses, 3 June 2011 at p. 2.

⁵² See, e.g., E1/21.1 Transcript, 13 December 2011 at p. 29 ln. 9-14 (Nuon Chea: “The situation regarding the Phnom Penh was in dire consequence. People were starving since 1972. There was no more food storage or food reserved. There were incidents, riots, as many people were unemployed, there were many beggars. Soldiers did not receive their salary, and Lon Nol could not control the situation.”); E1/17.1 Transcript, 6 December 2011 at p. 83 ln. 15-18 (Nuon Chea: “Bombs were dropped, we could not stay in the villages, we had to take refuge in the jungle for the period of two years when bombs were constantly dropped on our location.”).

⁵³ See, e.g., E1/34.1 Transcript, 26 January 2012 at p. 82 ln. 4-8 (Prak Yut: “When I was in Kampot, it was rare that there was any food shortages because people had enough food to eat. And this is what I witnessed

23. Moreover, the Defence has once again failed to provide any specific information on the nature of the testimony of its proposed witnesses relating to historical context issues or to otherwise demonstrate why it is necessary to hear those witnesses. As such, the numerous witnesses proposed by the Defence can be properly rejected under Rule 87(3) as repetitious, impossible to obtain within a reasonable time and intended to unduly prolong the proceedings.
24. The Chamber has stated that it will shortly be providing explanations for some rejected witnesses, and that all other witnesses remain in consideration until called or rejected.⁵⁴ Thus, the Defence's lament that "the Trial Chamber has failed to provide any reasoning for its decision not to call witnesses suggested by the Defence"⁵⁵ is premature. Although the Defence acknowledges that decisions on these witnesses are still forthcoming, it claims that "the Defence has been informed informally by a representative of the Trial Chamber that these witnesses will not, in fact, be called."⁵⁶ The Co-Prosecutors were not privy to the Defence's alleged *ex parte* communications, and therefore cannot grant them any credence.

C. This is a belated attempt by the Defence to re-litigate previous deficient filings

25. The Defence claims that this Request is not an attempt to re-litigate previous rulings of the Court, but rather "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 trials as determined by the Chamber.'⁵⁷ However, on the very next page the Defence reiterates its claim that the Trial Chamber got it wrong the first time: "background contextual issues ... *are*, in fact, 'demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber.'⁵⁸ The Co-Prosecutors submit that this is the very definition of re-litigation. Indeed, the entirety of footnote 11 is an attempt by the Defence to re-litigate the Trial Chamber's previous decisions, asserting that "the Trial Chamber's reasoning is unconvincing" and that "the Trial Chamber's decision to not hear these witnesses ... fails to impress."⁵⁹

working there. So I can say that people had food to eat, although, in some places, people may lack some food, but it's not really big shortages. And people can share the food.")

⁵⁴ E172 Trial Chamber Memorandum, 17 February 2012 at p. 4.

⁵⁵ E182 Request *supra* note 1 at para. 4.

⁵⁶ E182 Request *supra* note 1 at para. 4 note 8.

⁵⁷ E182 Request *supra* note 1 at para. 3 note 5 (emphasis in original).

⁵⁸ E182 Request *supra* note 1 at para. 6 (emphasis in original).

⁵⁹ E182 Request *supra* note 1 at para. 5 note 11.

26. As set forth in the Procedural History section above, the arguments of the Defence have been previously considered and rejected by the OCIJ, Pre-Trial Chamber and Trial Chamber, and the Defence has failed to present any legitimate basis for reconsideration of the Court's prior rulings on these matters.

D. The Defence's fair trial rights have not been compromised

27. All Parties have been given equal opportunities in these proceedings to put forward documents and propose witnesses. Many of the Co-Prosecutors' proposed witnesses have also not been accepted by the Trial Chamber.⁶⁰ It is also worth noting that one witness that the Defence claims was excluded is actually on the Trial Chamber's witness list for the present trial segment,⁶¹ and eight of the witnesses proposed by the Defence were included on the initial segment list.⁶²

28. Fair trial rights do not serve to shield parties from the consequences of their own actions, inactions, or failure to comply with the Court's orders and rules. As explained above, the Defence have failed to follow the Trial Chamber's orders and submitted woefully inadequate filings in regards to proposed witnesses. When it was their turn to question Nuon Chea on historical issues, the Defence requested only a short period of time for their questions, and chose to use that time to explore marginally relevant issues, such as Nuon Chea's childhood and trips to the border with Heng Samrin. No questions whatsoever were asked by the Defence on the historical issues they now claim are crucial to this case.⁶³ Additionally, when the Defence had the opportunity to present documents on historical background issues, they listed only six documents, four of which were subject to pending objections, and chose not to present the two other documents when given the opportunity to do so by the Chamber.⁶⁴

29. Indeed, the Defence's grievance that is the thrust of their Request is a problem of their own creation. As just one example, the Defence argues that in regards to their 9 February 2012 filing in response to the Trial Chamber granting them permission to submit additional witnesses with written reasons for hearing them, the imposition of a

⁶⁰ For example, TCE-10 and TCE-33. *Compare* E9/10.1 Annex D: Witness Summaries with Points of the Indictment – Nuon Chea Defence Team, 23 February 2011, *with*, E9/4.2 Annex 2: OCP Expert List, 28 January 2011.

⁶¹ E172 Next Group of Witnesses, Civil Parties and Experts to be Heard in Case 002/01, 17 February 2012 (TCE 65).

⁶² E131/1.1 Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial In Case 002, 25 October 2011.

⁶³ See E1/36.1 Transcript, 31 January 2012; E1/41.1 Transcript, 9 February 2012.

⁶⁴ See E1/50.1 Transcript, 19 March 2012 at p. 10-11.

24-hour deadline was “blatantly insufficient” and that “much more time is needed”.⁶⁵ Yet by the Defence’s own admission, “[a]ll of these witnesses were previously listed in the original Defence request for witnesses as filed on 15 February 2011”, a filing that required, *inter alia*, “[a] summary of the facts on which each proposed witness is expected to testify” that is “sufficiently detailed to allow the Chamber and the other Parties to understand fully the nature and content of the proposed testimony”, and “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 counts.”⁶⁶ Therefore, over one year after the Defence should have provided written justifications for hearing these witnesses, they still had not produced the requisite justifications, and yet they seek to claim that they have been treated unfairly.

30. While the Defence may see it as in their short- or long-term interests to cast themselves as victims who are “left empty-handed”⁶⁷, the reality is that their failure to adequately justify to the Trial Chamber their need for specific witnesses, or to capitalize on the opportunities to provide and justify the historical background that have been allowed, can be laid at the feet of no-one but themselves. None of the argument regarding the purported relevance of historical background to the Defence’s case that is included in the instant filing is material that was previously unavailable to the Defence.

31. Should the Defence be concerned about its “Fundamental Right to Present a Defence”⁶⁸, it would do well to avail itself more fully of the opportunities it is provided to present a rigorous defence, rather than attempt to remedy their errors after the fact. What the Defence is requesting is not fairness, it is to be treated exceptionally and excused from complying with the orders and rules of this Court.

⁶⁵ E182 Request *supra* note 1 at para. 5 note 11.

⁶⁶ E9 Order to File Material in Preparation for Trial, 17 January 2011 at paras. 2, 6.


⁶⁷ E182 Request *supra* note 1 at para. 38.

⁶⁸ E182 Request *supra* note 1 at p. 14.

IV. RELIEF REQUESTED

32. For the reasons set forth above, the Co-Prosecutors respectfully request the Chamber to deny the Defence Request.

Respectfully submitted,

Date	Name	Place	Signature
29 March 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		