

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

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**REQUEST FOR A PUBLIC ORAL HEARING REGARDING
THE CALLING OF DEFENCE WITNESSES**

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I. INTRODUCTION

1. Pursuant to Rule 92, counsel for Nuon Chea (the ‘Defence’) hereby submits this request (the ‘Request’) for a public oral hearing on the issue of whether the remaining Defence witnesses will be called. Such hearing should be held as soon as possible, so as to mitigate any further negative impact on the Defence case caused by the delay in determining the final witness list. The Request is supported by the ECCC Internal Rules (the ‘Rules’), the right to a public trial, the right to present a defence, and the right to equality of arms.

II. PROCEDURAL HISTORY

2. The Defence has previously requested that the Trial Chamber hold an oral hearing, conducted in open court, to allow the parties to present arguments for and against hearing certain witnesses proposed by the Defence.¹ To date, no such argument has been allowed by the Trial Chamber.

¹ See Document No E-1/4.1, ‘Transcript of Trial Proceedings’, 27 June 2011, ERN 00712135–0071252, pp 12:13–17:7 (‘MR. PESTMAN: Thank you very much. As my client explained, he’s not very happy. I would like to explain why he’s not very happy. This is not an Initial hearing [...]. We also asked for over 300 witnesses, witnesses we think should be heard in public. Witnesses about the whole historical context of this trial, of these proceedings, of the conflict, and also witnesses on the judicial investigation. We wonder why we bothered. This Trial Chamber, Your Honours, have set an agenda for a full-day hearing when none of our objections and none of our witnesses will be discussed although the rules of this Court state that these objections and all of our witnesses should be discussed in this very hearing [...] and [Nuon Chea] believes that they should be allowed -- by all of his witnesses, he should be allowed to explain why all of his witnesses should be heard at trial. And crucially, our client, Nuon Chea, he believes that all of this discussion should be done in public, should be made in public for the benefit of the Cambodian people [...]. We want a fundamental discussion on the judicial investigation, the foundations of a future trial, and a discussion on all of the witnesses to be heard at trial when it really matters [...]. He will leave and only come back when the Trial Chamber, this Trial Chamber, Your Honours, are willing to discuss his objections and all of his witnesses. If not this week, then at the next Initial Hearing. Our client does not longer want to honor these proceedings with his presence unless his objections and all of his witnesses; not just the ones in the envelope, but all of his witnesses are put on the agenda as the rules of this Court prescribe.’); see also Document No E-1/7.1, ‘Transcript of Trial Proceedings’, 30 June 2011, ERN 00713767–00713819, pp 17:24–18:13 (‘MR. KOPPE: Mr. President, do I have to understand the Trial Chamber’s decision that we are also not allowed to speak about the selection of the tentative list -- the selection of the witnesses? As I indicated, it was -- it’s only maximum 30 minutes that we are speaking about the very important issue of witnesses. Our client has waited four days for us to give this half hour -- MR. PRESIDENT: The Chamber has already made our decision that you are not allowed to make any observation beyond what has been allowed in the agenda and the Chamber would not wish to allow you to speak or take this opportunity to touch upon other issues that are not related to the potential [tentative] witness list [...].’); see also *ibid.*, p 37:2–14 (‘MR. KOPPE: Thank you, Mr. President. We have only one request for clarification, and it is something I feel should be discussed in public and we could do that after the break. But the request of clarification is about Rule 80(b), the rule on the Initial Hearing. We understand this provision to be as follows, it stipulates that the Trial Chamber shall, at the Initial Hearing, consider the list of potential witness. Now, we have understood this rule to imply that the Initial Hearing is the time to debate publicly the

III. RELEVANT LAW

A. The Requirement for a Hearing on Summoning of Witnesses

3. Under Internal Rule 80*bis*, this Chamber was required to deliberate over witness lists, among other matters, at the Initial Hearing. That Rule provides as follows: ‘Initial Hearing --- [...] *At this hearing*, the Chamber *shall consider* the lists of potential witnesses and experts submitted by the parties in accordance with these IRs. Where the Chamber considers that the hearing of a proposed witness or expert would not be conducive to the good administration of justice, it shall reject the request that such person be summoned.’ The Rules do not permit the consideration of witness lists via any venue other than the Initial Hearing.

B. The Accused’s Fundamental Right to a Public Hearing

4. The right to a public trial is guaranteed by the International Covenant on Civil and Political Rights (ICCPR),² the European Convention on Human Rights (ECHR),³ the Universal Declaration of Human Rights (UDHR),⁴ and all the international and internationalized courts and tribunals.⁵ Article 34 new of the ECCC Law similarly requires that ‘[t]rials shall be public and open to representatives of’ the national and international community. Rule 79(6) mandates a *public broadcast* of all ECCC trial hearings.⁶ The Chamber may decide to hold hearings *in camera*, but only where it determines by reasoned decision that such a hearing is necessary for the preservation of public order or to give effect to protective measures.⁷

requests for witnesses from the parties, and that prosecution can object to witnesses requested by the accused, and that we can object to witnesses of the prosecution.’)

² International Covenant on Civil and Political Rights, Art. 14(1) (‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’).

³ European Convention on Human Rights, Art. 6(1) (‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’).

⁴ Universal Declaration of Human Rights, Art. 11(1).

⁵ See Rome Statute, Art. 67(1); ICTY Statute, Art. 20(4); ICTR Statute, Art. 20(2); SCSL Statute, Art. 17(2); UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, Doc No. UNTAET/REG/2000/30 (25 September 2000), Art. 2.1.

⁶ Rule 79(6) (‘Hearings of the Chamber shall be conducted in public. (a) The Office of Administration shall ensure a public broadcast of the trial hearings, subject to any protective measures adopted under these IRs.’).

⁷ Rule 79(6)(b).

5. The right to a public hearing applies to the *80bis* hearing on witnesses. The (initial) hearing on witness lists is a hearing like any other before the Trial Chamber. Pursuant to Article 34 new and Rule 79(6), the (initial) hearing must be part of a fully public trial and broadcast to the public.
6. In *Prosecutor v Delalić*, the ICTY discussed the rationale behind requiring public hearings and the fundamental nature of the right, noting:

The principal advantage of permitting the public and the press access to a hearing is that their presence contributes to ensuring a fair trial. In *Pretto & Ors v Italy*, (Series A, No. 71 (1984) 6 EHRR 182) the ECHR stated that "[p]ublicity is seen as one guarantee of fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered". Thus, a public hearing is mainly for the benefit of the accused and not necessarily of the public.⁸

The *Delalić* decision underscores the paramount importance of guarantees against arbitrary decision-making and promotes the value of public scrutiny of trial proceedings. The right to a public trial requires the Court to engage in public discussion, argumentation, and decision-making to the fullest extent possible, so as to enforce conscientious, transparent, and logical decision-making on all issues coming before the Court.

C. The Defendant's Fundamental Right to Equality of Arms

7. The principle of equality of arms mandates the Trial Chamber to ensure that Nuon Chea be afforded "a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."⁹ The equality of arms, which is distinct from the right to present a defence, is guaranteed by the ECCC Law, the Internal Rules and the ICCPR.¹⁰ The Trial Chamber has previously observed that "the fundamental nature of this principle is

⁸ IT-96-21-T, *Prosecutor v Delalić*, 'Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" Through to "M"', 28 April 1997, para 34.

⁹ IT-94-1-A, *Prosecutor v Tadić*, 'Judgement', 15 July 1999, para. 48, citing *Dombo Beheer B.V. v. The Netherlands*, ECtHR (14448/88), 'Judgement', 27 October 1993, para. 40 (emphasis added).

¹⁰ Rule 21(1)(a) ('ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties'). See also ICCPR, Art. 14(1) ('(1) All persons shall be equal before the courts and tribunals. ... (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine, or have examined, the witnesses against him and obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.');

ECCC Law, Art. 35new.

acknowledged in the Internal Rules”.¹¹ According to the ICTY, the “equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts.”¹²

D. The Accused’s Fundamental Right to Present a Defence

8. As the Defence has previously submitted,¹³ the right to present a defence is widely recognized as a fundamental fair trial right in both domestic jurisdictions and international law. In exercising this right, a defendant is entitled to present witnesses, and other evidence and raise defences during the course of trial. The right to present a defence ensures that an Accused is permitted to develop his own theory of the case using his own evidence, including testimony from witnesses called on his behalf, in rebuttal to the Prosecution’s theory. This theory almost by definition involves perspectives and issues not considered in the Prosecution’s version of the case, including additional information and alternative explanations.
9. The right to present a defence is clearly protected in the Code of Criminal Procedure of the Kingdom of Cambodia. The Code 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.¹⁴ The ECCC Law recognizes the right of the Accused’s 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.¹⁵ Further, the Internal Rules recognize the right for the Accused to submit a list of witnesses they want to summon.¹⁶

¹¹ Case No 001/18-07-2007-ECCC/TC, Document No **E-90**, ‘Decision on IENG Sary’s Request to Make Submission in Response to the Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise’, 3 July 2009, ERN 00345178-00345180, para 4.

¹² IT-94-I-A, *Prosecutor v. Tadić*, ‘Judgement’, 15 July 1999, paras 51-52.

¹³ See Document No **E-182**, ‘Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context’, 16 March 2011, ERN 00790415-00790430, paras 10-13.

¹⁴ Code of Criminal Procedure of the Kingdom of Cambodia, Art. 298 (‘At his expenses, the accused and the civil party may summons witnesses who have not been summonsed by the Prosecutor.’). See also *Id.*, Art. 334 (‘Until the end of the trial hearing, the accused ... may make written statements and submit all documents and evidence that they think will be conducive to ascertain the truth.’).

¹⁵ ECCC Law, Art. 35 new.

¹⁶ 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’).

10. The right to present a defence has long been recognized in international law, starting at the Nuremberg trials.¹⁷ The ICCPR¹⁸, ECHR¹⁹ and the Rome Statute all state that the 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.²⁰ Manifestations of the right to present a defence are found in domestic jurisdictions around the world.²¹
11. The rationale behind this basic due process right is simple: if the defendant is not able to present his own witnesses and evidence and to effectively challenge the Prosecution's theory of the case with his own, the Court will achieve only a partial or speculative understanding of the facts. Unless the Court fully meets its truth-seeking duties, justice cannot be served.²²

E. The President Must Guarantee the Free Exercise of Defence Rights

¹⁷ London Charter of the International Military Tribunal, Art. 16 ('In order to ensure fair trial for the Defendants, the following procedure shall be followed: [...] (e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence...').

¹⁸ ICCPR, Art. 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.').

¹⁹ ECHR, Art. 6(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*, ECtHR (12351/86), 22 April 1992, paras 34-35 (finding that a defendant's fair trial rights under Art. 6 of the ECHR were violated where the court below declined, without reason, to call witnesses requested by the defendant).

²⁰ Rome Statute, Art. 67(1)(e). See also ICC-01/04-01/06, *Prosecutor v. Lubanga Dyilo*, Transcript, 20 March 2006 at 4 (court informing defendant of his right to conduct a defence, request and examine witnesses, raise defences, and present other evidence during trial), available at <http://www.icc-cpi.int/iccdocs/doc/doc248955.pdf>

²¹ Article 281 of the French Code de procédure pénale not only provides the defendant with a right to present a list of witnesses in its defence, but moreover places an 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 U.S. 400, 423-424 (1988) (discussing the paramount importance of the right to present a defence in the US criminal justice system); New Zealand Bill of Rights Act, Art. 25(f) ('the right [...] to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution'); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Cal. L. Rev. 1163, 1201 (2011), available at <http://www.californialawreview.org/assets/pdfs/99-5/01-LawVersteeg.pdf> (discussing a survey of 188 constitutions, wherein 72% contained the constitutional right to present a defence).

²² *Taylor v. Illinois*, 484 U.S. 400, 423-424 (1988) ('[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 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.') (internal citations omitted).

12. Pursuant to Rule 85, “[t]he President of the Chamber [...] shall guarantee the free exercise of defence rights.” Rule 85 establishes the President’s obligation to see that the defendant enjoys *all* of his rights freely, including the rights discussed above, without impediment or undue limitation.

IV. ARGUMENT

13. The Defence submits that the Trial Chamber must hold a public hearing, pursuant to Rule 80*bis*, at which the Parties may argue for and against witnesses proposed by the Defence.²³ This hearing is required by both the Rules and Nuon Chea’s fundamental fair trial rights. The Defence submits that this hearing should be conducted via oral argument, in an open, public hearing, and that this hearing must be held as soon as possible, so as to mitigate any further negative impact on the Defence case caused by delay in determining the final witness list.

A. The Trial Chamber Must Hold a Hearing Pursuant to Rule 80*bis* and Nuon Chea’s Fair Trial Rights to Consider the Calling of Witnesses Proposed by the Defence

14. The Trial Chamber is obligated by Rule 80*bis* to hold a hearing to determine whether or not to call the witnesses on Nuon Chea’s list. However, the Trial Chamber declined in its first sessions to invite oral argument on witnesses not included in its initial list. The Chamber only stated that parties were still able to make written submissions on additional potential witnesses, and noted that if further hearings and oral argument were necessary, it would so decide at an unspecified time.²⁴ The plain language of Rule 80*bis* requires that the consideration of witness lists should be held at a *hearing*, which must involve substantive argumentation about the witnesses proposed by the parties.²⁵ This hearing has not yet been held and the Trial Chamber is in breach of its obligations under the Rules until that hearing is convened. The requirement for a Rule 80*bis*

²³ Document No. E-9/4/4.4, ‘Order to File Materials in Preparation for Trial Proceedings: Annex A: Proposed Witness List (where no protective measures are sought) – NUON Chea Defence Team’, 22 February 2011, ERN 00645893-00646073 (‘Nuon Chea Witness List’).

²⁴ Document No E-1/7.1, ‘Transcript of Trial Proceedings’, 30 June 2011, ERN 00713767-00713819, pp. 18, 48.

²⁵ The first sentence of Rule 80*bis* states that the Chamber shall ‘consider’ witnesses proposed by the parties at the Initial Hearing. The second sentence describes the circumstances under which the Chamber may ‘consider’ that a witness should not be called. The only reasonable interpretation of Rule 80*bis* is that (i) the word ‘consider’ carries the same meaning in both sentences (i.e. involving a substantive determination as to whether particular witnesses should be called) and (ii) the determination in the second sentence is an aspect of the greater procedure described in Rule 80*bis* (i.e. the Initial Hearing).

hearing was clearly understood by the Parties, as the Defence request for the initial hearing on proposed witnesses was supported by both the Prosecution and the Civil Parties.²⁶

B. When the Trial Chamber Holds the 80bis Hearing, the Hearing Must Involve Public Oral Argument by the Parties in Open Court

15. The 80bis hearing necessitates oral argument. Again, plain language prevails: a *hearing* is, necessarily, comprised of an oral presentation by the parties in court.²⁷ Written submissions and deliberation behind closed doors for an indefinite duration do not constitute a hearing. Therefore, under the Rules, the Trial Chamber must invite the Parties' *oral* arguments for and against the calling of witnesses during a hearing in open court.
16. Nuon Chea's right to a public trial also supports an oral, public hearing. Nuon Chea's trial *must* be held in public if it is to meet his basic rights under the ICCPR and UDHR and accord with ECCC procedure, including Article 34 new of the ECCC Law and Rule 79(6).²⁸ The importance of public hearings in criminal proceedings cannot be

²⁶Document No E-1/7.1, 'Transcript of Trial Proceedings', 30 June 2011, ERN 00713805-00723806, pp. 37-38 ("MR. KOPPE: Thank you, Mr. President. We have only one request for clarification, and it is something I feel should be discussed in public and we could do that after the break. But the request of clarification is about Rule 80(b), the rule on the Initial Hearing. We understand this provision to be as follows, it stipulates that the Trial Chamber shall, at the Initial Hearing, consider the list of potential witness. Now, we have understood this rule to imply that the Initial Hearing is the time to debate publicly the requests for witnesses from the parties, and that prosecution can object to witnesses requested by the accused, and that we can object to witnesses of the prosecution. So, I mean, I'm speaking about the witnesses not included in the tentative list. And we would like to have guidance on the word, "consider" as laid down in Rule 80(b). Is there going to be another Initial Hearing where we can argue why our witnesses who are not on the tentative list should be, at one point or another, on the final witness list. We just need clarification on that specific issue. -- MR. PRESIDENT: Lead co-lawyer Fort, you may now proceed. -- MS. SIMONNEAU-FORT: Yes, Mr. President. We also believe that another Initial Hearing will be necessary in order to discuss the lists, among other things, and also legal points, and we would like to receive extra clarification regarding another initial hearing, and we would like to know when this Initial Hearing may be scheduled. -- MR. SMITH: Thank you, Your Honour. Perhaps just briefly; the prosecution certainly supports as much of a public hearing on these issues as possible, and we are aware that a number of matters haven't been dealt with today, and we're aware of your Order stating that you would advise us shortly as to how they'll be dealt with. But certainly we would like to support the defence and the civil parties that as much of this hearing should be as public as possible. And certainly because of the size of this trial, the number of accused and civil parties, there's certainly quite a number of issues that need to be resolved before the beginning of the case. And so any more Initial Hearings, trial management meetings, and meetings of that sort in the courtroom, we think would be invaluable to ensure that once the trial starts it will run smoothly.")

²⁷Bryan A. Garner ed., *Black's Law Dictionary*, 9th ed. (Thomson Reuters, 2009) ("Hearing -- A judicial session, usu. open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying.")

²⁸See *supra*, § III.B.

overstated.²⁹ The publicity of proceedings is fundamental to a fair trial and guards against arbitrary and unjustified decision making by the Court.³⁰ All issues of fundamental importance to the parties *must* therefore be resolved through public proceedings. The hearing of witnesses is one such fundamentally important issue. In order to allow the Cambodian people to bear witness the administration of justice,³¹ and for the press to report on and serve as a watchdog to the proceedings, the Court is obligated to conduct Nuon Chea's entire trial publicly, to the fullest extent possible.

17. Finally, oral argument is a far more efficient method of identifying witnesses for trial than the lengthy process of drafting and exchanging formal written submissions. The relevance of any particular witness depends in part on the totality of the other evidence to be presented and cannot be fully assessed on an individual basis without knowledge of the Chamber's decisions on other similarly placed witnesses. The resources of the parties, the Chamber and Court-sponsored translation services are better respected by an interactive oral procedure than by a succession of cumbersome, individualized written submissions.

C. The Trial Chamber Must Hold the 80bis Hearing as Soon as Possible in Order to Avoid Further Infringement of Nuon Chea's Fair Trial Rights

18. The Trial Chamber has held that it will, at some undetermined point in time, decide whether or not to call Nuon Chea's proposed witnesses. However, the Trial Chamber's delay in holding the 80bis hearing violates Nuon Chea's right to equality of arms and to present a defence.

²⁹ See *supra*, § III.B. See also *Werner v Austria*, ECtHR (138/1996/757/956), 'Judgement', 24 November 1997, para 45 (the public character of proceedings 'protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.').

³⁰ See *supra*, para. 6.

³¹ As only 1.3 out of every 100 Cambodian people have internet access, written submissions are effectively non-public submissions because they are only accessible online through the Court's website. Oral submissions make their way onto radio, into the news, and into the public dialogue. See 'Cambodia', *Data*, WORLD BANK (last accessed on 23 March 2012), available at <http://data.worldbank.org/country/cambodia>. In Cambodia, written submissions, particularly on such crucial, complex, and lengthy issues, simply do not allow adequate scrutiny by the public. The Supreme Court Chamber has reiterated the importance of public awareness and debate on ECCC findings. See Case No 001/18-07-2007-ECCC/SC, Document No F-28, 'Appeal Judgement', 3 February 2012, 00797698-00798047, para 708.

19. Although the Defence proposed 527 witnesses to testify in Nuon Chea's favor, the Trial Chamber's initial list selects only *two* witnesses to provide exclusively exculpatory testimony.³² Nuon Chea's right to present a defence³³ demands that he be able to present his own theory of the case including the use of testimony and other evidence. The current list of witnesses violates that right as it does not provide the Defence with an opportunity to positively establish its own theory of the case. The defensive act of cross-examination does not allow the Defence to elicit Nuon Chea's side of the story or to explore a version of events outside of the framework of the Prosecution's narrative.
20. The failure to give effect to Nuon Chea's right to present his case through affirmative witnesses was built into the trial preparation process from the outset. The Order to File Materials issued by the Chamber in advance of the trial management meeting instructed parties to indicate the paragraphs of the Closing Order to which the testimony of each of their witnesses related.³⁴ All testimony was therefore presumed to either prove or disprove a series of facts formulated by the investigating authorities and delivered to the parties in the hardened form of the Closing Order. But evidence of Nuon Chea's affirmative case does not fit within the pre-packaged narrative presented by the investigative judges.
21. The inability of the Defence to affirmatively present its case is also a violation of Nuon Chea's right to the equality of arms. The initial witness list issued by the Trial Chamber overwhelmingly favors inculpatory evidence.³⁵ It therefore fails to "ensure that a basic proportionality [exists] between the time and number of witnesses allocated

³² Although certain witnesses on the Trial Chamber's list were included on Nuon Chea's list of proposed witnesses, with the exception of TCW-425 and TCW-482, each of these was also proposed by the Prosecution or the Civil Party Lead Co-Lawyers. Only TCW-425 and TCW-482 were selected to advance the affirmative case of the Defence. (Document No. E-131/1.1, 'Confidential Annex A: Partial List of Witnesses, Experts, and Civil Parties for First Trial in Case 002', 18 October 2011, ERN 00747687-00747694). Nuon Chea proposed hundreds of witnesses not included on the OCP list. (Compare Document No. E-9/4.1, 'Annex 1: Proposed Order of Witness Appearance at Trial', 28 January 2011, ERN 00640745-00640778 (proposing 295 total witnesses, including 279 fact witnesses), with Nuon Chea Witness List (proposing 527 fact witnesses)).

³³ See *supra*, § III.D.

³⁴ Document No. E-9, 'Order to File Materials', 17 January 2011, ERN 00635754-00635759, para. 6(iii).

³⁵ Of 65 witnesses on the Trial Chamber List, 28 were proposed exclusively by the Prosecution or the Civil Party Lead Co-Lawyers. By contrast, a total of 6 witnesses from all four defence teams combined were chosen without a parallel endorsement from the Prosecution or the civil parties. See Document No. E-131/1.1, 'Confidential Annex A: Partial List of Witnesses, Experts, and Civil Parties for First Trial in Case 002', 18 October 2011, ERN 00747687-00747694.

to all sides”³⁶ and places Nuon Chea at a clear “disadvantage vis-à-vis [the Prosecution].”³⁷

22. As trial progresses, this state of affairs constitutes a continuing and growing violation of Nuon Chea’s right to a fair trial. Even if some of these witnesses are ultimately called by the Chamber, without any advance knowledge of those decisions the Defence is left to speculate and adopt a piece-meal approach to its trial strategy. The Defence is forced to prepare for trial with far less foresight than the Prosecution. This inhibits the ability of the Defence to present its case and places it at a disadvantage vis-a-vis its opponent. Both the right to present a defence and the right to equality of arms are violated.
23. Moreover, the Defence cannot mention the name of any proposed witnesses or discuss related identifying information in court prior to the *80bis* hearing.³⁸ Nuon Chea cannot properly present a Defence if his counsel is barred from discussing key people who affected events in Cambodia during the DK period. The Trial Chamber’s delay in holding an *80bis* hearing operates effectively as a gag order on Defence discussion of crucial names and topics during current proceedings. The Defence is again unable to present a full defence.
24. In order to mitigate further harm to Nuon Chea’s rights to present a defence and to the equality of arms, the Trial Chamber must not delay any longer in holding the *80bis* hearing to determine which Defence witnesses will be called to testify.

D. The Trial Chamber is Obligated to Allow the Defence to Address These Issues in Light of Nuon Chea’s Fair Trial Rights

25. Finally, the President is required by the Rules³⁹ to allow for the free exercise of defence rights. He therefore has an obligation to see that the Defence may exercise all of its rights in this case, including the rights to present a defence, to equality of arms, and to a public hearing. The Trial Chamber, under the direction of the President, must therefore

³⁶ IT-04-74-AR73.4, *Prosecutor v. Prlić et al.*, ‘Decision on Prosecution Appeal following Trial Chamber’s decision on remand and further certification’, 11 May 2000, para. 38.

³⁷ IT-94-1-A, *Prosecutor v. Tadić*, ‘Judgement’, 15 July 1999, para. 48, citing *Dombo Beheer B.V. v. The Netherlands*, ECtHR (14448/88), ‘Judgement’, 27 October 1993, para. 40.

³⁸ Document No E-1/4.1, ‘Transcript of Trial Proceedings’, 27 June 2011, ERN 00712135-00712252, pp. 40-41; Document No E-1/7.1, ‘Transcript of Trial Proceedings’, 30 June 2011, ERN 00713767-00713819, pp. 13-17.

³⁹ Rule 85(1).

honor Nuon Chea's rights, and resolve and settle the issue of which witnesses speaking on Nuon Chea's behalf will be allowed to testify by holding the *80bis* witness hearing.

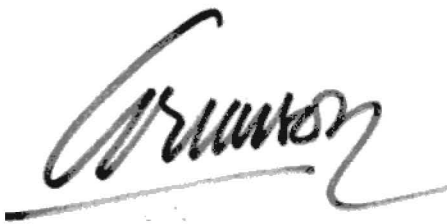
E. The Defence Request for an *80bis* Hearing is Timely

26. The Trial Chamber declined in the first public hearings in June 2011 to invite oral argument on witnesses not included in its initial list. The Chamber noted that if further hearings and oral argument proved necessary, it would so decide in due time.⁴⁰ The Trial Chamber has not held subsequent hearings or invited argument on this topic. In February 2012, the Trial Chamber stated in a memorandum that it would render its first list of rejected witnesses, experts, and/or Civil Parties shortly.⁴¹ More than four months later, the Trial Chamber has not yet issued that list. To date, the Defence does not know whether its proposed witnesses will be heard. Now that the Trial Chamber has had ample time to release its 'shortly' due rejection list, and given the Trial Chamber's lack of decisive action in determining a final witness list, this Request is timely.

F. CONCLUSION AND RELIEF SOUGHT

27. The Trial Chamber should, for these reasons, hold a hearing pursuant to Rule *80bis* and invite the parties to make oral submissions in order to determine which witnesses and experts on Nuon Chea's proposed witness lists will be called to testify at trial.

CO-LAWYERS FOR NUON CHEA



SON Arun



Michiel PESTMAN & Victor KOPPE

⁴⁰ Document No E-1/7.1, 'Transcript of Trial Proceedings', 30 June 2011, ERN 00713767-00713819, pp. 18, 48.

⁴¹ Document No E-172, Trial Chamber Memorandum, 17 February 2012, p. 4.