

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

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**LEAD CO-LAWYERS' RESPONSE TO NUON CHEA'S FIRST RULE 87(4) AND
RULE 93 REQUEST RE CASE 002/02 TRIAL SEGMENT ON S-21 SECURITY
CENTRE AND INTERNAL PURGES**

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Before:

Trial Chamber

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

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I. INTRODUCTION

1. The Lead Co-Lawyers for the Civil Parties (“Lead Co-Lawyers”) hereby respond to Nuon Chea’s first Rule 87(4) request to call additional witnesses (“Additional Witness Request”) and Rule 93 request for additional investigations in relation to the Case 002/02 trial segment on S-21 Security Centre and “Internal Purges” (“Request for Additional Investigations”) filed together on 24 March 2016 (collectively referred to as “Request”).¹

II. APPLICABLE LAW

2. Internal Rule 87(4) grants the Chamber, the liberty to summon or hear any person as a witness, whose evidence it deems conducive to ascertaining the truth upon a reasoned request by a party to the proceedings. The same rule subjects such a request to the criteria set out in Rule 87(3) which mandates, *inter alia*, that such testimony not be “irrelevant or repetitious”.² In addition, such party must also satisfy the Chamber that the requested testimony was not available before the opening of the trial.³

3. The Trial Chamber has previously refused to call individuals where it considered that the proposed testimony was (i) likely to duplicate the testimony of witnesses who had already testified,⁴ (ii) would otherwise not shed light on the role of the Accused in relation to the concerned events;⁵ (iii) is likely to be merely corroborative and thus, unnecessary to hear at trial;⁶ or (iv) is repetitive of other evidence before the Chamber.⁷

4. Internal Rule 93(1) states, “[w]here the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations. Such order shall indicate which judge or judges shall conduct the new investigation.”⁸ Pursuant to this rule, the Trial Chamber has the discretion to initiate new investigation, which may include interviewing

¹ Nuon Chea’s First Rule 87(4) Request to Call Additional Witnesses and Rule 93 Request for Additional Investigations in Relation to the Case 002/02 Trial Segment on S-21 Security Centre and “Internal Purges”, **E391**, 24 March 2016.

² Internal Rule 87(3)(a). *See also* Final Decision on WECP in Case 002/01, para. 124; Duch Trial Judgement, **E188**, 26 July 2010, para. 41.

³ Internal Rule 87(4).

⁴ Final Decision on WECP in Case 002/01, para. 71.

⁵ *Ibid*, para. 75.

⁶ *Id.*

⁷ *Ibid*, paras 75, 78, 82, 133.

⁸ *See also* Article 339 of the Cambodian Code of Criminal Procedure authorizes the court of first instance to order additional investigations during the trial hearings.

witnesses or conducting searches, where it considers necessary; this necessity must be justified by the interests of justice.⁹ The Trial Chamber previously has held that this discretion must be understood “in the context of the ECCC Legal Framework which guarantees the Accused’s right to a fair and expeditious trial and grants the President the discretion to exclude any proceedings that unnecessarily delay the trial.”¹⁰

III. PROCEDURAL BACKGROUND

5. On 31 January 2014, the Nuon Chea Defence filed their response to the Trial Chamber’s request for submissions concerning the scope of Case 002/02.¹¹ Nuon Chea Defence argued that his “principal interest in regard to the scope of the Case 002/02 trial is that he has a full opportunity to adduce exculpatory evidence in support of his defence.”¹² It was added that:

“[i]n Case 002/02, the facts necessary to Nuon Chea’s defence include primarily the alliance between Northwest and East Zone forces against Pol Pot and Nuon Chea and the role of the Vietnamese government in supporting these factions throughout the Democratic Kampuchea regime. The most important allegations are those alleged to have taken place in the Northwest and East Zones: (i) the Trapeang Thma Dam worksite (paragraphs 323 through 350 of the Closing Order); (ii) either Wat Kirirum security center (paragraphs 551 through 571 of the Closing Order) or Wat Tlork Security Center (paragraphs 644 through 666 of the Closing Order); (iii) the alleged policy of internal purges (paragraphs 192-203 of the Closing Order); and (iv) the alleged third phase population movement (paragraph 283 through 301 of the Closing Order).”¹³

6. On 31 January 2014, the Lead Co-Lawyers filed their observations on the additional severance of Case 002 and advocated for the inclusion of “Forced Transfer Phase 3 and Related Purges of the East Zone”¹⁴ in addition to North Zone Security Centre¹⁵ and Koh Kyang Security Centre.¹⁶

7. On 11 February 2014, at the Trial Management Meeting, the Nuon Chea Defence took the position that:

⁹ Decision on Nuon Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN, **E294/1**, 24 July 2013, para. 11.

¹⁰ *Ibid*, para. 11 *citing* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, Article 33 new; Internal Rule 85.

¹¹ Nuon Chea’s Response to Trial Chamber’s Request for Submissions Concerning the Scope of Case 002/02, **E301/5/4**, 31 January 2014 (“Nuon Chea’s Submission on Scope of Case 002/02”).

¹² *Ibid*, para. 3.

¹³ *Ibid*, para.7 (emphasis added).

¹⁴ Civil Parties’ Submission on the Scope of Case 002/02, **E301/5/3**, 31 January 2014 (“Civil Parties’ Submission on the Scope of Case 002/02”), paras 29-35.

¹⁵ *Ibid*, paras 21-24.

¹⁶ *Ibid*, paras 25-28.

“If the Chamber limits us to matters narrowly relevant to the crime sites in Case 002/02, as we feel it generally did in Case 002/01, we must insist that the trial include the allegations in the Closing Order most closely linked to Nuon Chea's defence. In general, these include allegations in respect of crime sites based in the Eastern Zone and the Northwest Zone. We note and support the civil parties' request to include Trapeang Thma Dam worksite, the alleged third phase population movement, and the alleged purge of East Zone cadres within the scope of the trial.”¹⁷

8. On 4 April 2014, the Trial Chamber ruling on the additional severance of Case 002 and the scope of Case 002/02, held that:

“Considering that the NUON Chea Defence team identifies the inclusion of these charges as ‘most important’ to the Accused’s interests and that granting this request would not unduly lengthen the estimated trial time, the Chamber also grants the request to include these charges within the scope of Case 002/02. As discussed further below, internal purges are closely related to allegations of forced movement of population and their inclusion is, consequently, reflective of broader themes of the Closing Order.”¹⁸ [...]

9. Annex to the Decision on Additional Severance seised the Trial Chamber in Case 002/02 of the factual findings of “Security Centres and Execution Sites (178-203) (including internal purges, implementation limited to relevant underlying offences)”.¹⁹ The term “internal purges” was qualified in footnote 9 stating that:

“[i]n addition to those sections included within the scope of Case 002/02, the Chamber notes that further facts relating to the North Zone purges are set out in the section of the Closing Order regarding the North Zone Security Centre (paras 572-587). Further facts relating to the East Zone purges are set out in the sections of the Closing Order regarding the Steung Tauch Execution Site (paras 715-738) and movement of population (phase three) (paras 283-300). Upon reasoned application, the Chamber may expand the scope of Case 002/02 to include additional facts relating to internal purges in the North and East Zones, subject to the right of the Accused to have adequate time and facilities for the preparation of a defence and the right of all parties to be provided with timely notice.”²⁰

10. The Annex does not seise the Trial Chamber of any underlying offences relating to Internal Purges.²¹ The Annex further does not seise the Trial Chamber of any other Security

¹⁷ Transcripts dated 11 February 2014, **E1/239.1**, pp. 43-44 EN ERN 00975409- 00975410.

¹⁸ Decision on Additional Severance of Case 002 and Scope of Case 002/02, **E301/9/1**, 4 April 2014 (“Decision on Additional Severance”), para. 35.

¹⁹ List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014 (“Annex to Decision on Additional Severance”), p. 2.

²⁰ *Ibid*, fn. 9 (emphasis added).

²¹ The underlying offences of Crimes against Humanity of murder, extermination, enslavement, imprisonment, persecution on political grounds, and other inhuman acts through “Attacks against human dignity” are limited to S-21, Phnom Kraol and Au Kanseng Security Centre. The Annex also provides for allegations of persecution on racial grounds at S-21 and Au Kanseng Security Centre; Other Inhumane Acts through Enforced Disappearances at Phnom Kraol Security Centre; and torture at S-21 and Phnom Kraol Security Centre. In respect of the Grave Breaches of Geneva Conventions, the Annex further seises the Trial Chamber of the underlying offences committed at S-21 an Au Kanseng Security Centre.

Centres save S-21, Kraing Ta Chan, Phnom Kraol, and Au Kanseng.²² Neither the Lead Co-Lawyers nor the Nuon Chea Defence made any reasoned application to include additional facts relating to internal purges in the North and East Zones in Case 002/02.

11. On 12 September 2014, the Trial Chamber allotted a full segment to “Security Centres and Internal Purges” with the crime sites limited to Au Kanseng, Phnom Kraol, S-21.²³

12. On 24 March 2016, the Nuon Chea Defence filed their Additional Witness Request in respect of: (i) Witness A, who may testify as to the involvement of Chakrei and Vietnam in the attempted coup; (ii) Witness B, who may testify as to the involvement of Koy Thuon, Sao Phim, Hou Him and Hou Yuon in the attempted coup and their connections; (iii) Witness C, who may testify as to secret documents that revealed the coup plot and the involvement of Sokh and Sao Phim therein; (iv) Witness D, who may testify as to the role of Koy Thuon played in the rebellion; (v) Witness E, who may testify as to a secret meeting held by his regiment commander and the connection between Oeun and Hun Sen; and (vi) Witness F, who may testify to the conflict between the RAK troops and the White Khmer resistance movement.²⁴

III. DISCUSSION

13. The Lead Co-Lawyers have, on principle, not opposed requests for additional exculpatory evidence presented by the defence teams. However, the Request summarises the evidence and makes general conclusions as to what the proposed witness would provide evidence on. The Lead Co-Lawyers being unable to comprehend the exact import and connections to the factual allegations consider it premature to respond on the merits of the Request.

14. The Request does not show how the evidence is linked to the factual allegations against the Co-Accused at S-21 except making a general claim that the anticipated evidence “is relevant not only to ‘internal purges’ in general but also to S-21 in particular because, *inter alia*, evidence on the record suggests that Oeun, Chakrei, Koy Thuon and Hou Nim – who according to these six witnesses were involved in the attempted coup d’état – were all

²² Annex to Decision on Additional Severance, p. 2.

²³ Decision on Sequencing of Trial Proceedings in Case 002/02, E315, 12 September 2014, para. 14, p. 6.

²⁴ Request, para. 25.

questioned at S-21.”²⁵ It does not reason how the additional evidence sought to be proffered and obtained relates to any of the factual allegations within the scope of Case 002/02 for Security Centres²⁶ and the policy of Internal Purges.²⁷ From the reading of the Request, it could equally relate to the hierarchical structure of the CPK, the role of the Co-Accused, and the composition of the Joint Criminal Enterprise. One is left to guess and attempt to make the links that the Nuon Chea Defence should have explicitly reasoned in the Request.

15. At present, the Lead Co-Lawyers can only respond on the timeliness of the Request. The Lead Co-Lawyers submit that statements of witnesses were available to the parties prior to the beginning of Case 002/02 and therefore, the Request is untimely.

16. The Request reasons that “it is impractical to call all the witnesses whose written statements are available to the parties, the Defence tried to elicit from KEO Loeur and SEM Hoeun evidence that may shed light on the unknown details about the information which was only revealed in a minimal way in the six witnesses’ DC-Cam interviews.”²⁸ However, witness Keo Loeur (2-TCW-932) was requested to be heard in Case 002, *inter alia*, by the Nuon Chea Defence.²⁹ However, he was not included in their list of Witnesses, Experts, and Civil Parties filed in Case 002/02. Similarly, witness Sem Hoeun (2-TCW-943) was not included in any of the lists of Witnesses, Experts, and Civil Parties in Case 002 filed by Nuon Chea Defence and was proposed instead by the Co-Prosecutors for the Segment on Worksites.³⁰ There was no request by the Nuon Chea Defence to summons either KEO Loeur

²⁵ Request, para. 23. *See e.g.* Closing Order, para. 431: “The CPK cadres and the members of the RAK who were arrested came from all zones and autonomous sectors of Cambodia. The numbers increased with the waves of purges, as arrests increasingly targeted higher-level cadres and military commanders. Thus, the number of prisoners coming from the former Central (Old North) Zone rose to 360 prisoners for the whole period, with more than 80 arrests in February 1977 (the month after Koy Thuon’s arrest). Sector 106 accounted for 75 arrests with a peak in March 1977. Some of those arrested were mentioned by Koy Thuon in his confession in which he listed his ‘traitorous network’. Finally, for the East Zone, the number rose to 1,165 arrests with close to 500 arrests in the month of June 1978, which corresponds to the suicide of Sao Phim.” (internal citations omitted)

²⁶ Closing Order, paras 178-191.

²⁷ *Ibid*, paras 192-203.

²⁸ Request, para. 24.

²⁹ Annex A: Proposed Witnesses, Experts, and Civil Parties, **E9/4/4.4**, 15 February 2011, entry 198 on p. 75. *See also* Annex D: Witness Summaries with Points of the Indictment – Nuon Chea Defence Team Witnesses, **E9/10.1**, 23 February 2011, entry 198 on p. 23.

³⁰ *See* Annex III – OCP Updated Witness, Civil Party and Expert Summaries, **E305/6.4**, 9 May 2014, entry 95, at p. 35.

or SEM Hoeun at the beginning of Case 002/02, let alone the six witnesses mentioned in the Request.

17. The Nuon Chea Defence has previously used the statements of some of the proposed additional witnesses in their examination of certain witnesses, for example, E3/7535 for witness 2-TCW-901³¹ and 2-TCW-938;³² E3/7540 for witness 2-TCW-901;³³ and E3/7583 for 2-TCW-938.³⁴ However, the Request has only been filed approximately a week before the trial segment on S-21 is due to begin. In the absence of clear reasons on why such a request is warranted and how it relates to the facts of the policy of Internal Purges, S-21, or hierarchy within the CPK except in general terms, the Lead Co-Lawyers find themselves unable to respond to the Additional Witness Request.

18. The Nuon Chea Defence adopt almost a verbatim reasoning for the Request for Additional Investigations after having summarised the events described in Ben Kiernan's book. Additionally, the Request does not explain whether the Nuon Chea Defence made attempts to seek such investigations at the pre-trial stage; and if not, why such a request has only emerged more than half-way during the trial proceedings. The Request does not provide how the additional investigation at this stage would not be contrary to the balance of the rights of all parties and the need for a fair and expeditious trial.³⁵ The Request does not elaborate on how the investigation sought would result in evidence that could be exculpatory. It further does not demonstrate how the grant of the Request would "avoid[...] a miscarriage of justice".³⁶

19. In light of the arguments advanced above, the Lead Co-Lawyers urge the Trial Chamber to seek clarification from the Nuon Chea Defence on how the Request relates to the Closing Order and/or evidence already before the Trial Chamber and, in the alternative, summarily dismiss the Request for lack of reasoning.

³¹ Transcripts dated 24 June 2015, **E1/321.1**, p. 7.

³² Transcripts dated 21 January 2016, **E1/380.1**, p. 28.

³³ Transcripts dated 24 June 2015, **E1/321.1**, p. 17.

³⁴ Transcripts dated 21 January 2016, **E1/380.1**, p. 37.

³⁵ *Ibid.* See further, Internal Rules 21(1)(a) and 21(4), which when read together provide that the ECCC proceedings shall preserve a balance between the rights of the parties and shall be brought to a conclusion within a reasonable time.


³⁶ Request, para. 35.

IV. REQUEST

20. The Lead Co-Lawyers respectfully request that the Trial Chamber:

- (i) **SEEK** clarification from the Nuon Chea Defence on how the Request relates to the Closing Order and/or evidence already before the Trial Chamber; and in the alternative
- (ii) **SUMMMARILY DISMISS** the Request, absent such further clarification

Respectfully submitted,

Date	Name	Place	Signature
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