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ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):
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មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé
..... Sann Rada

E398/1

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

TRIAL CHAMBER

TO: All Parties, Case 002 **Date:** 8 June 2016

FROM: NIL Nonn, President of the Trial Chamber *Signature*

CC: All Trial Chamber Judges; Trial Chamber Senior Legal Officer

SUBJECT: Decision on NUON Chea Rule 87(4) Request and Request for the Production of a Document in relation to Witness NHEM En



1. The Trial Chamber is seized of a request pursuant to Internal Rules 87(4) and 93, circulated as a courtesy copy on 18 April 2016 and filed by the NUON Chea Defence on 19 April 2016, to admit into evidence eight documents in relation to the testimony of witness NHEM En (2-TCW-919), and to obtain from the same witness and admit into evidence a copy of his book, entitled “NHEM En, The Khmer Rouge’s Photographer at S-21” (“Request”) (E398 and annexes 1-8). On 19 April 2016, the Chamber heard oral submissions by the NUON Chea Defence as well as responses by the other Parties. On the same day, the Chamber granted the Request in part by admitting seven of the eight requested documents (T. 19 April 2016, p. 94). On 20 April 2016, the Chamber also admitted NHEM En’s book (T. 20 April 2016, p. 12 (DRAFT)). The Chamber hereby provides reasons for its decisions.

2. Document 1 is a Rogatory Letter Report from the Office of the Co-Investigating Judges (“OCIJ”) regarding a conversation between an OCIJ investigator and NHEM En (E398.1.1). Document 2 is a newspaper article from the Phnom Penh Post concerning the origin of the photos of S-21 prisoners found at the S-21 security centre and the ownership over these photos (E398.1.2). Document 3 is another newspaper article from the Phnom Penh Post relating to the attempt of NHEM En to establish a museum for his collection of Khmer Rouge memorabilia (E398.1.3). Document 4 is an article from the website of the University of Minnesota also on the origin of the photos found at the S-21 security centre (E398.1.4). Document 5 is a newspaper article from the Cambodian Daily about NHEM En being banned from selling his book at the Toul Sleng Museum compound (E398.1.5). Documents 6-8 are photographs: three photos of NHEM En when he was a Khmer Rouge Cadre (E398.1.6); a photo of three individuals alleged to be Khmer Rouge cadres at the S-21 security centre (E398.1.7) and a photograph of an alleged detainee at the same security centre (E398.1.8). The NUON Chea Defence submits that documents 1, 4 and 5

were available after 2011 and their request for admission of these documents is therefore timely. While annexes 2, 3, 6, 7 and 8 were available prior to the start of the trial, the NUON Chea Defence submits that they could not have anticipated using those documents since it was unaware that NHEM En would appear as a witness only until recently. The NUON Chea Defence further submits that all the requested documents are relevant to NHEM En's testimony and to his credibility, and are closely related to material already before the Chamber, namely NHEM En's previous OCIJ statements and other photographs of the S-21 security centre allegedly taken by him (E398, paras 17-19).

3. The NUON Chea Defence also request that the Chamber obtain NHEM En's book for the Parties to review its contents. It submits that this book is equivalent to a statement by this witness and that it relates to the trial topic he is expected to testify about (E398, para. 20).

4. The Co-Prosecutors do not object to any of the documents. However, they submit that document 4 is not particularly probative and that there are approximately another one thousand photos recovered by DC-Cam which are currently the subject of the Co-Prosecutors' request E394 that can provide further insight into the origin of photos taken at the S-21 security centre (T. 19 April 2016, p. 62-63). The Co-Prosecutors further note that it is unclear whether the individual in the photo in document 8 was detained at the S-21 security centre (T. 19 April 2016, p. 64). The Civil Party Lead Co-Lawyers do not object to the admission of the requested documents (T. 19 April 2016, p. 66; T. 20 April 2016, p 12 (DRAFT)). The KHIEU Samphan Defence has no objection to the requested documents.

5. According to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, all evidence that it deems conducive to ascertaining the truth, where that evidence also satisfies the *prima facie* standards of relevance, reliability and authenticity required under Rule 87(3). The Chamber determines the merit of a request to admit new evidence in accordance with the criteria in Rule 87(3). Rule 87(4) also requires that any party seeking the admission of new evidence shall do so by a reasoned submission. The requesting party must satisfy the Trial Chamber that the proposed evidence was either unavailable prior to the opening of the trial or could not have been discovered with the exercise of reasonable diligence. However, in certain cases, the Chamber has admitted evidence which does not strictly speaking satisfy this criterion, including in instances where evidence relates closely to the material already before the Chamber and where the interests of justice require the sources to be evaluated together, and where the proposed documents are exculpatory and require evaluation to avoid a miscarriage of justice (E276/2, para. 2 referring to E190 and E172/24/5/1; E260, para.5)

6. Although documents 1, 4, and 5 were not available prior to the start of trial in 2011, the Chamber considers that the request to admit these documents is untimely. These documents were published between May 2014 and March 2015. All Parties are expected to exercise due diligence and to request the admission of documents in a timely manner, notably as soon as practicable after becoming aware of the material sought for admission (E344/1, para.4; E323/1, para. 4). The Chamber is not persuaded that the delay in requesting admission of these documents may be linked to the selection of this witness in March 2016 (E398, para 17). The witness was proposed by the NUON Chea Defence in Case 002/02 in 2014 (E305/4.2, p 27-28). Similarly, the admission of NHEM En's book,

published in 2014, could have been requested earlier. The Chamber notes that the book was discussed in Document 5, which was published in March 2015, also alerting the Parties to its availability. The Chamber therefore, considers the Request to be untimely with respect to these documents.

7. The Chambers notes that the Request in respect of the other documents is also untimely. Documents 2 and 3 are dated August 2002 and June 2010 respectively. NHEM En's photos in document 6 were available on the Case File since 2008. These photos were filed during the investigation phase in Case 002 and at juncture assigned document reference number D108/3/15.1, which is still visible on the photos. Although document 7 is not dated, the NUON Chea Defence acknowledges the photograph was available before the start of the trial. Document 8, part of the Case File in Case 001, was made public in September 2012. As noted above, the Chamber is not satisfied that the Defence could have not anticipated using these documents because they were unaware that NHEM En would appear as a witness until very recently (E398, para 17).

8. Despite the untimeliness of the Request, the Chamber considers that it is in the interests of justice to admit documents 1, 2, 3, 4, 6, 7 and 8. These documents are relevant and reliable and closely relate to other material already on the Case File, including NHEM En's written records of interview with OCIJ (E3/68, E3/9532). The Chambers considers that documents 1 and 3 relate to NHEM En's motives for testifying and his credibility. Accordingly, it is conducive to ascertaining the truth to use both documents to confront the witness. As for documents 2 and 4, the Chamber considers that they provide relevant evidence on the origin of the photographs taken at S-21. The photographs in document 6 belong to NHEM En, thus the Chamber considers that it is relevant for the Parties to use these photos when questioning this witness. The photographs in document 7 and 8 appear to be taken during the Democratic Kampuchea period. These photos are closely related to other photographs found at S-21 already admitted into evidence in Case 002. The Co-Prosecutors' observations are relevant to the probative value of the photos, rather than their admissibility. In light of the above, these documents may be conducive to ascertaining the truth and therefore are admitted.

9. As to NHEM En's book, the Chamber notes that during the proceedings on 20 April 2016, the witness provided copies of the book to all the Parties. The request to obtain a copy of the book is therefore moot. The book describes the experience of NHEM En during the Democratic Kampuchea regime, including while he worked at S-21, in 1976. The Chamber considers that this book is relevant to Case 002/02, particularly the trial topic on the S-21 security centre, it relates closely to material already before the Chamber with regards to this witness and that it may be conducive to ascertaining the truth. Therefore, the Chamber admits this book into evidence.

10. The Chamber rejects the request to admit document 5. The Chamber considers that this article is not directly relevant to the trial topic about which NHEM En is expected to testify. Furthermore, insofar as the NUON Chea Defence considers this document to be relevant to NHEM En's credibility, this witness could be questioned on his credibility during his testimony.

11. In light of the above, the Request is granted in respect of documents 1, 2, 3, 4, 6, 7, 8 and the book entitled "NHEM En, the Khmer Rouge's Photographer at S-21." The

Chamber assigns E3 numbers to these documents, as specified in the attached annex. The Chamber rejects the request to admit document 5.

12. This constitutes the Chamber's official response to E398.