

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

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**LEAD CO-LAWYERS' RESPONSE TO NUON CHEA'S FOURTH REQUEST RE
SECURITY CENTRES AND INTERNAL PURGES**

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Before:

Trial Chamber

Judge NIL Nonn, President
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara
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I. INTRODUCTION

1. The Lead Co-Lawyers for the Civil Parties (“Lead Co-Lawyers”) hereby respond to Nuon Chea Defence’s fourth witness request for the Case 002/02 trial segment on Security Centres and Internal Purges’.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 Rules 21(1)(a) and 21(4) read together provides that the ECCC proceedings shall preserve a balance of rights between the parties and shall be brought to a conclusion within a reasonable time.

5. Under Rule 85, the President must guarantee the free exercise of defence rights and may exclude any proceedings that unnecessarily delay the trial and are not conducive to ascertaining the truth.

¹ Nuon Chea’s Fourth Witness Request for the Case 002/02 Security Centres and “Internal Purges” Segment (S-21 Operations and Documentary Evidence), E412, 7 June 2016 (“Fourth Request”).

² Internal Rule 87(3)(a). *See also* Final Decision on Witnesses, Experts and Civil Parties to be heard in case 002/01, E312, 7 August 2014 (“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.

III. RESPONSE

(a) Response to the request to expedite the calling of LY Hor (2-TCW-956)

6. The Request argues for LY Hor's testimony to be expedited for the ongoing segment on Security Centres and Internal Purges so that he may be able to provide evidence, *inter alia*, on the conduct of interrogators and the transfer of prisoners from S-21 to Prey Sar.⁸ The Request notes that "LY Hor (2-TCW-956) testified before the Chamber in Case 001 as a civil party. However, the Chamber finally dismissed his civil party application" relying on the Case 001 Trial Judgment.⁹

7. LY Hor testified as a civil party in Case 001¹⁰ and was rejected as a direct victim of S-21 by the Trial Chamber.¹¹ However, the Request omits that, upon submission of additional evidence, the Supreme Court Chamber in Case 001 was satisfied that LY Hor was a detainee at S-21; and had reversed the Trial Chamber's decision. In admitting his civil party application,¹² the Supreme Court Chamber reasoned that:

"It was not necessary for the Trial Chamber to have been certain that "LY Hor was also known by the name EAR Hor during the DK period."1166 What matters is whether the Appellant, presently using the name LY Hor, is the same person that was detained at S-21 under the name of EAR Hor. At the Appeal Hearing, the Civil Party Appellant submitted additional evidence showing that the names of his parents match the parents' names of EAR Hor,1167 and submitted his thumbprint that matches the thumbprint of EAR Hor taken at S-21.1168 The Supreme Court Chamber is therefore satisfied that the Appellant was a detainee at S-21, and decides to reverse the Trial Chamber's decision and to admit this Civil Party's application."¹³

8. In Case 002, Ly Hor submitted his civil party application on 30 August 2008.¹⁴ On 13 September 2010, he was admitted by the Co-Investigating Judges as a civil party for having suffered harm as an immediate victim at S-21.¹⁵ On 21 June 2011, the Nuon Chea Defence included LY Hor in their primary list of "witness" summaries to testify as to his experiences as a former S-21 detainee and to offer insight, *inter alia*, into the reliability of

⁸ Request, para. 25.

⁹ Request, para. 26.

¹⁰ Case 001, Transcripts of Trial Proceedings dated 6 July 2009, **E3/7454**; *see also* Summons-Civil Party, **D288/6.83**, 25 June 2009.

¹¹ Case 001, Trial Judgement, **E188**, 30 March 2009, para.647.

¹² Case 001, Appeal Judgement, **F28**, 3 February 2012, paras 539-540.

¹³ Case 001, Appeal Judgement, **F28**, 3 February 2012, para. 540.

¹⁴ D22/2052.

¹⁵ Order on the Admissibility of Civil Party Applicants from Current Residents of Banteay Meanchey Province, **D416**, 13 September 2010, pp. 9, 11.

Duch's testimony.¹⁶ On 8 May 2014, the Nuon Chea Defence included him on the list of "witnesses" in their updated list of witnesses, experts, and civil parties requested for Case 002/02.¹⁷

9. The Lead Co-Lawyers submit that entry no. 14,224 on the OCIJ S-21 prisoners list corresponds to the name EAR Hor (LY Hor's alias); this entry is based on a list of confession of Toul Sleng prisoners.¹⁸ The information contained therein matches the biographical information contained in LY Hor's confession on the casefile.¹⁹

10. However, the Lead Co-Lawyers were informed by the Civil Party Lawyer that civil party LY Hor is deceased. The Lead Co-Lawyers requested further information from the Victims Support Section ("VSS") about his death certificate and a possible successor claim.²⁰ VSS provided the Lead Co-Lawyers a compilation of documents concerning the successor claim.²¹ The Lead Co-Lawyers contacted the Civil Party's spouse and received the same information. On the basis of information received from VSS, the Civil Party Lawyer, and the Civil Party's spouse, the Lead Co-Lawyers submit that the Civil Party is deceased and therefore, the request to expedite or to summons the civil party to testify is not fruitful.

(b) Response to the request to call the authors of the OCIJ Prisoner List

11. The Request argues for the calling of Witness 1 and Witness 2, the "authors of the OCIJ Prisoner List" to provide "detailed explanations on, inter alia, the methodology applied, the nature of the original documentation they relied upon, and the selection of this

¹⁶ Materials in Preparation for Trial Proceedings, Primary List: Witness Summaries – Nuon Chea Defence Team, **E93/4.3**, entry no. 267, p. 79.

¹⁷ Updated Witness Summaries, **E305/4.2**, entry no. 17, p. 9. The Trial Chamber deferred the testimony of certain individuals sought by the parties for examination in "future trials". See Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01, **E312**, 7 August 2014, para. 127.

¹⁸ **E3/10510** KH ERN 00161117, p. 46, entry no. 40.

¹⁹ **E3/9216**, EN ERN 00361722, KH ERN 00279916, p. 1.

²⁰ See Annex I (confidential). For the benefit of the parties, the Lead Co-Lawyers clarify that successor claims are filed to the Trial Chamber by the Civil Parties through the VSS. The Lead Co-Lawyers do not have automatic access to such information or control over the process.

²¹ See Annex II (confidential and *ex parte*) which contains the documents that were obtained as a result of the request made by the Lead Co-Lawyers in Annex I. This annex contains a copy of the documents concerning the successor claim pending filing before the Trial Chamber by the VSS. The Lead Co-Lawyers were informed by VSS that these documents had been filed to the Trial Chamber but that such filing was rejected because the name of the individual was spelt differently in the death certificate. The Lead Co-Lawyers invite the Trial Chamber to compare the biographical information contained in the Civil Party's S-21 confession and the death certificate in order to reconsider further action on the successor claim.

documentation” as these clarifications from the investigators are “even more important since the OCIJ List constitutes key evidence the Parties may rely on during the ongoing trial segment, the authenticity and reliability of which is essential for the ascertainment of the truth”.²²

12. The Lead Co-Lawyers submit that the list of S-21 prisoners prepared by the International Co-Investigating Judge (“OCIJ S-21 Prisoner List”), admitted pursuant to E393 is a work product of an investigation team.²³ The underlying documents, which form the basis of this list, have been admitted as evidence before the Trial Chamber.²⁴ These documents are “Khmer Rouge (‘KR’) contemporaneous documents, which were collected from Tuol Sleng and Documentation Centre Cambodia”.²⁵

13. The Lead Co-Lawyers submit that this particular request is premised on whether or not the Trial Chamber and the parties intend to use the “OCIJ List”, a work product of the investigators as evidence itself.

14. Absent an indication from the Trial Chamber, the Lead Co-Lawyers have understood the purpose of the OCIJ S-21 Prisoner List to be to assist the Trial Chamber and the parties to benefit from the work already conducted by OCIJ by providing easy access to the names and information relevant to the prisoners and the underlying documents.

15. The Lead Co-Lawyers supported the request to admit the documents underlying the OCIJ S-21 Prisoners List on account of the fact that it would allow the parties and the Trial Chamber full access to the source of each entry in the OCIJ S-21 Prisoners List, thereby allowing the parties and the Trial Chamber to verify the contents of each entry with the actual contemporaneous document and use the same in court.

16. The Lead Co-Lawyers further submit that this has permitted the parties and the Trial Chamber to rely on contemporaneous documents rather than on the OCIJ S-21 Prisoner List

²² Request, para. 34.

²³ See The OCIJ S-21 Prisoner List and explanation of the applied methodology, **E393.1**, 30 March 2016, paras 2, 4-6.

²⁴ Admission of documents underlying S21 prisoner list produced by the Office of the Co-Investigating Judges, **E393/1**, 11 May 2016, para. 1.

²⁵ See The OCIJ S-21 Prisoner List and explanation of the applied methodology, **E393.1**, 30 March 2016, para. 3.

itself as *evidence*. Based on this understanding, whilst the Lead Co-Lawyers have referenced the relevant entry in the OCIJ S-21 Prisoner List during their examination, they have always used the underlying contemporaneous documents to use in court. The Lead Co-Lawyers believe that the parties and the Trial Chamber share this understanding.

17. The Lead Co-Lawyers defer to the wisdom of the Trial Chamber in the calling of the authors of the OCIJ S-21 Prisoner List. However, the Lead Co-Lawyers submit that the grant of this request is only necessary should the Trial Chamber consider the OCIJ S-21 Prisoner List to constitute evidence on its own account rather than a tool to assist the parties. If the Trial Chamber maintains the practice of exclusively using the underlying contemporaneous documents in court, the Lead Co-Lawyers submit that the request to call the authors of the OCIJ S-21 Prisoner List will not contribute to the ascertainment of truth.

18. The Request reasons that there are “significant questions about the methodology used to compile the list – in particular regarding the use of the documentation and the organization of data”.²⁶ It cites as examples, *inter alia*, “406 individuals listed who have neither a date of entry, date of arrest nor date of execution”.²⁷ Notwithstanding the Lead Co-Lawyers’ observations on the nature of the OCIJ S-21 Prisoner List, it is submitted that all the entries listed in the Request,²⁸ save one,²⁹ emerge from S-21 Confession’s List prepared by Tuol Sleng staff and typed by DC-Cam;³⁰ the corresponding DC-Cam number of the S-21 confession for each entry has been listed in the OCIJ S-21 Prisoner List itself.³¹ The Lead Co-Lawyers note that the Request raises the allegation of anomalies in these entries in the OCIJ S-21 Prisoner List without seeking the admission of the actual S-21 confessions that form its ultimate basis.

²⁶ Request, para. 33.

²⁷ *Id.*

²⁸ Request, fn. 95.

²⁹ Request, fn. 95 also mentions entry no. 14,938 which is based on an S-21 confession (TSL1146). The confession itself does not state the date of entry but mentions that the individual also has a second confession dated 18 August 1975 (KH ERN 01219672).

³⁰ See **E3/10510** KH ERN 00161072-00161348. The OCIJ S-21 Prisoner List contains 705 entries that emerge from this document.

³¹ See e.g., entry no. 14,099 (S-21 Confession no. A21); entry no. 14,160 (S-21 Confession no. C200); entry no. 14,238 (S-21 Confession no. H41); entry no. 14,374 (S-21 Confession no. M17); entry no. 14,502 (S-21 Confession no. P322); entry no. 14,583 (S-21 Confession no. S392); entry no. 14,677 (S-21 Confession no. Y6); entry no. 14,689 (S-21 Confession no. Y91); entry no. 14,690 (S-21 Confession no. Y93).

19. The Lead Co-Lawyers respectfully submit that the Trial Chamber should consider whether it would be a better use of resources to admit the underlying S-21 confessions in question upon request of either party so that an independent assessment can be made, if required. The Lead Co-Lawyers submit that even if the Trial Chamber decides to call both or either of these two witnesses, the examination on this aspect raised by Nuon Chea Defence would be incomplete without the admission of such S-21 confessions.

20. The Lead Co-Lawyers further suggest the Trial Chamber to consider seeking a written clarification from the International Co-Investigating Judge on the known origins of the “new” underlying contemporaneous documents before making a determination on the request to call Witness 1 and Witness 2.

(c) Response to the request to call the remaining witnesses


21. For the remainder of the requested witnesses, the Lead Co-Lawyers defer to the Trial Chamber’s wisdom.

IV. REQUEST

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

- (i) **DECIDE** that the request to call LY Hor is moot; and
- (ii) **CONSIDER** the observations outlined in the present submission with respect to the calling of Witness 1 and Witness 2.

Respectfully submitted,

Date	Name	Place	Signature
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