



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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):
28 / 12 / 2016
ម៉ោង (Time/Heure) :
14:20
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier:
SANN RADA

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

Date: 28 December 2016
Original language(s): Khmer/English/French
Classification: PUBLIC

DECISION ON THE NUON CHEA INTERNAL RULE 87(4) REQUEST TO ADMIT DOCUMENTS RELATED TO ROBERT LEMKIN (2-TCW-877) AND ON TWO RELATED INTERNAL RULE 93 REQUESTS

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1. INTRODUCTION

1. On 22 June 2016, the NUON Chea Defence filed an Internal Rule 87(4) request¹ for admission into evidence of the following four categories of documents: (1) transcripts of interviews with four anonymous witnesses, conducted by Robert LEMKIN (2-TCW-877) and THET Sambath (2-TCW-885) for their film “Enemies of the People” (“Transcripts”);² (2) notes written by Robert LEMKIN (2-TCW-877) related to said interviews (“Notes”);³ (3) Robert LEMKIN (2-TCW-877)’s written record of interview before the Delegate Judges of the Supreme Court Chamber (“WRI”);⁴ and (4) an article published by the *Cambodia Daily Weekend* on 18 June 2016 (“Article”) (“NUON Chea’s Request”).⁵ The Co-Prosecutors and the Lead Co-Lawyers responded, respectively, on 28 June 2016 and 4 July 2016.⁶ In their response, the Co-Prosecutors included an Internal Rule 93 request to obtain additional material from Robert LEMKIN (2-TCW-877) (“OCP IR93 Request”).⁷ On 29 June 2016, the NUON Chea Defence sent an email to the Trial Chamber requesting leave to file a response to the Co-Prosecutors’ Response. On 30 June 2016, the Trial Chamber replied via email, granting the Defence leave to reply instead.⁸ The NUON Chea Defence filed a reply to the Co-Prosecutors’ Response on 5 July 2016.⁹

2. On 19 September 2016, the Trial Chamber issued an oral decision finding that the WRI was already admitted as E3/9620 and therefore the request in relation to this document was moot.¹⁰ The Chamber granted in part, with reasons to follow, the request to admit the

¹ NUON Chea’s Rule 87(4) Request for Admission into Evidence of Documents by Robert LEMKIN (2-TCW-877) and Another Related Document Prior to the Testimony of Witness TOAT Thoeun (2-TCW-829), E416, 22 June 2016 (“NUON Chea’s Request”).

² F2/4/3/3/6.2.

³ F2/4/3/3.1.

⁴ F2/4/3/1. The Chamber notes that the NUON Chea requested the admission of the Transcripts, Notes and WRI before the Supreme Court Chamber and the latter admitted only excerpts of the Transcripts through its decision F2/9.

⁵ E416/3.1.2.

⁶ Co-Prosecutors’: 1) Response to NUON Chea’s Rule 87(4) Request to Admit into Evidence Documents Provided by Robert LEMKIN (2-TCW-877) and a Cambodia Daily Article; and, 2) Related Investigatory Request Pursuant to Rule 93, E416/1, 28 June 2016 (“Co-Prosecutors’ Response”); Civil Party Lead Co-Lawyers’ Response to NUON Chea’s Rule 87(4) Request for Admission into Evidence Documents by Robert LEMKIN (2-TCW-877) and Another Related Document Prior to the Testimony of Witness TOAT Thoeun (2-TCW-829) (E416), E416/2, 4 July 2016 (“Lead Co-Lawyers’ Response”).

⁷ Co-Prosecutors’ Response, para. 15.

⁸ Email correspondence between the Trial Chamber and the NUON Chea Defence, E416/3.1.1.

⁹ NUON Chea’s Reply to Co-Prosecutors’ Response to NUON Chea’s Rule 87(4) Request for Admission into Evidence of Documents by Robert LEMKIN (2-TCW-877) and Another Related Document Prior to the Testimony of Witness TOAT Thoeun (2-TCW-829), E416/3, 5 July 2016 (“NUON Chea’s Reply”).

¹⁰ T. 19 September 2016, pp. 22-23 (Draft). The WRI was admitted pursuant to the Decision on KHIEU Samphan Rule 87(4) Request to Admit Documents in respect of witness THET Sambath, E335/5, 15 June 2015

Transcripts, admitting as E3/10665 the excerpt containing the interview of the witness identified as W2, who is believed to be TOAT Thoeun (2-TCW-829) according to the Supreme Court Chamber.¹¹ The remainder of NUON Chea's Request was denied.¹²

3. On 9 September 2016, the NUON Chea Defence filed an Internal Rule 93 request to take additional investigative actions in relation to CHAN Savuth (2-TCW-959), including by using part of the Transcripts ("Defence IR93 Request").¹³ None of the Parties filed a response.

4. The Chamber hereby provides reasons for its decision in relation to the Transcripts, Notes and Article. The Chamber also disposes of the OCP IR93 Request and the Defence IR93 Request.

2. SUBMISSIONS

2.1. NUON Chea's Request and the OCP IR93 Request

5. The NUON Chea Defence requests that the Trial Chamber admit into evidence the Transcripts, Notes, WRI and Article prior to the testimony of TOAT Thoeun (2-TCW-829) in order to confront him with this evidence.¹⁴ The Defence submits that all four documents relate "chiefly to rebellion events occurring in the Northwest Zone in 1975-1979 and, as a result, [are] relevant for the examination of witness Toat Thoeun (2-TCW-829)."¹⁵ The NUON Chea Defence submits that the documents were not available prior to the opening of the trial and that the request is timely since TOAT Thoeun (2-TCW-829) is scheduled to testify in the coming weeks.¹⁶ The Defence notes that it gained access to the documents on the following dates: 2 October 2015 for the Transcripts; 15 June 2015 for the Notes; and 18 May 2015 for the WRI. The Article was published on 18 June 2016.¹⁷

and was allocated an E3 number pursuant to the Allocation of E3 numbers to New Documents Admitted in Case 002/02, E373, 9 October 2015.

¹¹ T. 19 September 2016, pp. 22-23 (Draft); Decision on Pending Requests for Additional Evidence on Appeal and Related Matters – Disposition, F2/9, 21 October 2015, p. 7 ("SCC Disposition"), admitting F2/9.2. *See also* Appeal Judgement, 23 November 2016 ("Appeal Judgement"), para. 56.

¹² T. 19 September 2016, pp. 22-23 (Draft).

¹³ NUON Chea's Rule 92 Submissions and Rule 93 Request for Additional Investigation Concerning Witness CHAN Savuth (2-TCW-959), E438, 9 September 2016 ("Defence IR93 Request").

¹⁴ NUON Chea's Request, para. 1.

¹⁵ NUON Chea's Request, para. 12.

¹⁶ NUON Chea's Request, para. 32.

¹⁷ NUON Chea's Request, para. 31.

6. The NUON Chea Defence submits that the Transcripts contain key exculpatory evidence that is highly relevant and that they consist of the written account of Robert LEMKIN (2-TCW-877)'s interviews with four crucial witnesses.¹⁸ The Defence further submits that the person identified as W2 in the Transcripts is TOAT Thoeun (2-TCW-829) and that his interview should be admitted in accordance with the Trial Chamber's practice of admitting previous statements of an upcoming witness.¹⁹ As for the interviews with W1, W3 and W4, the Defence intends to use them to confront TOAT Thoeun (2-TCW-829).²⁰ Finally, the Defence submits that the Transcripts should be admitted in their entirety because they "corroborate and supplement existing evidence as to the existence of important divisions within the CPK and fomenting rebellion".²¹

7. The NUON Chea Defence also intends to use the Notes to confront TOAT Thoeun (2-TCW-829), and submits they should be admitted because they complement the Transcripts.²² In addition to summarising the interviews in the Transcripts, the Defence contends that the Notes add information "likely obtained from different sources".²³ As for the Article, the Defence submits it is relevant because it relates to internal factions plotting against the Communist Party of Kampuchea during the Democratic Kampuchea (DK) period and it contains an interview with Robert LEMKIN (2-TCW-877).²⁴

8. The Co-Prosecutors do not object to the admission of the proposed documents assuming that Robert LEMKIN (2-TCW-877) will be asked to testify, although they note the limited legal relevance in the trial proceedings of the issue of the resistance to DK authorities.²⁵ However, they disagree with several representations in NUON Chea's Request and submit that a number of factors diminish the probative value of the Transcripts, including: (a) the identities of three of the four witnesses interviewed in the Transcripts are unknown; (b) the identifying information available for the witnesses is often suspect; (c) the circumstances of the interviews and their translation and/or transcription into English remain unclear (d) the Transcripts do not comport with the interview process described by Robert LEMKIN (2-TCW-877) in his WRI; and (e) the Transcripts appear to be incomplete and/or redacted and/or

¹⁸ NUON Chea's Request, para. 13.

¹⁹ NUON Chea's Request, para. 14.

²⁰ NUON Chea's Request, para. 18.

²¹ NUON Chea's Request, para. 21.

²² NUON Chea's Request, para. 24.

²³ NUON Chea's Request, para. 24.

²⁴ NUON Chea's Request, paras 28-29.

²⁵ Co-Prosecutors' Response, para. 2.

altered by Robert LEMKIN (2-TCW-877).²⁶ The Co-Prosecutors also submit that the Transcripts are tainted by torture evidence because Robert LEMKIN (2-TCW-877) showed RUOS Nhim's S-21 confession to each interviewee and numerous references are made to what they read in said confession.²⁷

9. The Co-Prosecutors submit that the Notes are subject to the same concerns raised in relation to the Transcripts, including that they are torture-tainted because they cite part of VORN Vet's S-21 confession.²⁸ Furthermore, the Co-Prosecutors submit that the Notes are not a factual summary of the Transcripts but rather a piece of advocacy written by Robert LEMKIN (2-TCW-877).²⁹ As for the Article, the Co-Prosecutors do not object to its admission but submit that the opinions of Robert LEMKIN (2-TCW-877) recorded therein should be afforded no weight as he is not an expert.³⁰ Finally, the Co-Prosecutors make an Internal Rule 93 request, seeking to obtain from Robert LEMKIN (2-TCW-877) "any additional footage and/or transcripts of the interviews with Nuon Chea, Khieu Samphan, and any witnesses referred to in the Transcripts or Notes."³¹

10. While the Lead Co-Lawyers take no position on the admission of the documents, they submit that there is uncertainty as to the completeness of the Transcripts and the circumstances of their making, notably in relation to their translation and transcription.³² Additionally, the Lead Co-Lawyers are concerned by the use of RUOS Nhim's S-21 confession in the Transcripts, Notes, and Article, submitting that "there is a risk that the Defence is opening an alternative avenue to bring torture-tainted evidence into the court room."³³ Finally, they note that certain sources cited in the Article are not easily verifiable.³⁴

11. In NUON Chea's Reply, the Defence submits that Robert LEMKIN (2-TCW-877) confirmed the identity of W2 as TOAT Thoeun (2-TCW-829), and that W1 and W3 "are very likely" IN Thoeun (2-TCW-961) and CHAN Savuth (2-TCW-959), respectively.³⁵ In response to the reliability concerns raised by the Co-Prosecutors, the Defence contends that Robert LEMKIN (2-TCW-877)'s methodology is similar to that of expert Alexander

²⁶ Co-Prosecutors' Response, para. 4.

²⁷ Co-Prosecutors' Response, para. 4(i).

²⁸ Co-Prosecutors' Response, paras 5-6, 9.

²⁹ Co-Prosecutors' Response, para. 5.

³⁰ Co-Prosecutors' Response, paras 12-14.

³¹ Co-Prosecutors' Response, para. 15.

³² Lead Co-Lawyers' Response, para. 8.

³³ Lead Co-Lawyers' Response, paras 9-13.

³⁴ Lead Co-Lawyers' Response, para. 14.

³⁵ NUON Chea's Reply, para. 5.

HINTON (2-TCE-88).³⁶ With respect to the Co-Prosecutors' submission that the proffered evidence is torture-tainted, the Defence contends that it was reasonable for Robert LEMKIN (2-TCW-877) to show RUOS Nhim's confession to his interviewees and that the Co-Prosecutors never objected to the admission of other evidence which included the content of confessions.³⁷ Finally, the Defence does not object to the Co-Prosecutors' Internal Rule 93 request.³⁸

2.2. The Defence IR93 Request

12. The NUON Chea Defence requests that the Chamber order the Witness and Expert Support Unit (WESU) to take additional investigative actions in relation to CHAN Savuth (2-TCW-959) and makes submissions pursuant to Internal Rule 93 stating that his testimony is "of the foremost importance" to the Defence case.³⁹ The NUON Chea Defence notes WESU's unsuccessful attempts to locate CHAN Savuth (2-TCW-959) and requests that the Trial Chamber order WESU "to take further measures than those already undertaken to locate the witness".⁴⁰ The Defence submits that the person identified by WESU as CHAN Samuth bears sufficient resemblance to CHAN Savuth (2-TCW-959) to justify meeting him in person and checking "whether his account fits with the transcripts of CHAN Savuth (2-TCW-959) provided by Robert LEMKIN (2-TCW-877)".⁴¹ Specifically, the NUON Chea Defence requests the following measures by WESU: (1) engage with OCIJ to verify whether CHAN Savuth (2-TCW-959) has been identified by the Court investigators; (2) ask Robert LEMKIN (2-TCW-877) to provide WESU with a film still of CHAN Savuth (2-TCW-959)'s face; and (3) order WESU to personally meet CHAN Samuth and ask him follow-up questions based on additional details offered in the Transcripts.⁴²

3. APPLICABLE LAW

13. According to Internal Rule 87(4), the Trial Chamber may admit, at any stage of the trial, any 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

³⁶ NUON Chea's Reply, paras 6-8, 12.

³⁷ NUON Chea's Reply, para. 11.

³⁸ NUON Chea's Reply, para. 15.

³⁹ Defence IR93 Request, paras 2-4, 9-14.

⁴⁰ Defence IR93 Request, paras 6-7, 9.

⁴¹ Defence IR93 Request, para. 13.

⁴² Defence IR93 Request, paras 11-14.

Internal 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 satisfy these criteria, including instances in which evidence relates closely to 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 should be evaluated to avoid a miscarriage of justice.⁴³

14. Pursuant to Internal Rule 93, the Trial Chamber has discretion to initiate a new investigation, which may include interviewing witnesses or conducting searches, where it considers it necessary.⁴⁴ This necessity must be justified by the interests of justice. Likewise, the Trial Chamber's 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.⁴⁵

15. Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") requires the exclusion of statements extracted through torture, except against a person accused of torture as evidence that the statement was made ("exclusionary rule").⁴⁶ The Supreme Court Chamber has held that subject to the exception provided, "information obtained as a result of torture is inadmissible as evidence, even if it is relevant to the subject of the proceedings and may have some probative value."⁴⁷ The Trial

⁴³ Decision on NUON Chea's Rule 87(4) Requests for Admission of 29 Documents Relevant to the Testimony of 2-TCE-95, E367/8, 5 May 2016, para. 11; *see also* Response to the Internal Rule 87(4) Requests of the Co-Prosecutors, NUON Chea, and KHIEU Samphan (E236/4/1, E265, E271, E276, E276/1), E276/2, 10 April 2013, para. 2.

⁴⁴ Decision on NUON Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN, E294/1, 24 July 2013 ("24 July 2013 Decision"), para. 11. *See also*, Cambodian Code of Criminal Procedure, Article 339.

⁴⁵ 24 July 2013 Decision, para. 11. *See also*, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia ("ECCC Law"), Article 33 new; Internal Rule 85.

⁴⁶ Article 15 of the CAT: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

⁴⁷ Decision on Objections to Document Lists Full Reasons, F26/12, 31 December 2015 ("SCC Objections Decision"), para. 47.

Chamber has held that the exclusionary rule applies to all Parties and to evidence purported to be exculpatory as well.⁴⁸

4. FINDINGS

16. For ease of analysis, the Chamber will address the requests in four parts: (1) the NUON Chea Defence's request to admit the Transcripts and Notes; (2) the NUON Chea Defence's request to admit the Article; (3) the Defence IR93 Request; and (4) the OCP IR93 Request.

4.1. Admissibility of the Transcripts and Notes

17. The Defence's submission that the request was filed prior to TOAT Thoeun (2-TCW-829)'s scheduled testimony does not alleviate the tardiness stemming from the fact that these two documents were available to the Parties since 11 April 2015, over a year before NUON Chea's Request was filed.⁴⁹ Nor does the Defence's claim that it "assumed" the Trial Chamber would request submissions on whether this material should be admitted⁵⁰ relieve it of its obligation "to exercise due diligence and to request admission of documents in a timely manner, notably as soon as practicable after becoming aware of the material sought for admission."⁵¹ The Chamber therefore finds that the NUON Chea Defence failed to exercise due diligence and the request to admit the Transcripts and Notes is untimely. The Chamber will now consider whether the documents should be admitted nonetheless in the interests of justice.

18. The Chamber first notes that the NUON Chea Defence seeks the admission of the Transcripts and Notes primarily in order to confront TOAT Thoeun (2-TCW-829) with this

⁴⁸ Decision on Evidence Obtained through Torture, E350/8, 5 February 2016 ("Decision on Torture Evidence"), para. 47. The Supreme Court Chamber also appears to reach the same conclusion: *See* SCC Objections Decision, para. 40 ("The parties' propositions that the prohibition is more limited and principally does not extend over information favourable for the defence cannot be defended on the language of the provision alone and would, therefore, have to be vetted against the object and purpose of the exclusionary rule."); *see also*, paras. 40-47.

⁴⁹ *See* Response to Trial Chamber's Memorandum of 9 March 2016 (E375/2), E375/2/1, 11 April 2016.

⁵⁰ NUON Chea's Request, para. 32.

⁵¹ Decision on International Co-Prosecutor's Requests to Admit Written Records of Interview Pursuant to Rules 87(3) and 87(4), E319/47/3, 29 June 2016, paras 18-19 ("WRI Decision"); Decision on NUON Chea's Rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02, E319/30/1, 15 September 2015, para. 3; Disclosure Decision, para. 29; Trial Chamber Memorandum Entitled "Decision on Civil Party Lead Co-Lawyers' Rule 87(4) Request Regarding Civil Party D22/2500 with Confidential Annex A", E344/1, 31 March 2015, para. 4.

evidence in court. As TOAT Thoeun (2-TCW-829) passed away on 21 July 2016,⁵² the Chamber considers that this basis for admission is no longer applicable.

19. Concerning the *prima facie* requirements of reliability, the Chamber notes that in the WRI Robert LEMKIN (2-TCW-877) explains that the witnesses were interviewed several times which does not appear to be reflected in the Transcripts.⁵³ The transcribed answers also appear to contain redactions.⁵⁴ Although the Transcripts are in English, in the WRI it states that THET Sambath (2-TCW-885) would ask the interview questions in Khmer and translate the answers for Robert LEMKIN (2-TCW-877), who may then ask supplementary questions again through THET Sambath (2-TCW-885).⁵⁵ The Chamber notes that it has no information as to the accuracy or completeness of the translation, or of the original material used in creating the English Transcripts. The Chamber also has no information as to how long each interview was and how the interview excerpts making up the Transcripts were selected and/or edited. The Chamber further notes that Robert LEMKIN (2-TCW-877) refuses to provide the ECCC with the original digitalized footage.⁵⁶ The Chamber considers the Notes to be subject to the same reliability concerns as the Transcripts since they consist of Robert LEMKIN (2-TCW-877)'s editorialised assessment of the information contained therein.

20. Additionally, the Trial Chamber considers that there is uncertainty regarding the identities of three of the four interviewees: W1, W3 and W4. Contrary to the Defence submission that the identities of W1 and W3 have been “confirmed by the Supreme Court Chamber”,⁵⁷ the latter found only a “substantial likelihood” that these two witnesses were named in the book *Behind the Killing Fields* and were among the witnesses the NUON Chea Defence proposed in Case 002/01.⁵⁸ Further, contrary to the Defence submission that W1 is “very likely” IN Thoeun (2-TCW-961),⁵⁹ Robert LEMKIN (2-TCW-877) indicated in a recent email to the WESU that: “I was careful to say that W1 in my earlier notes was [sic] person named as In Thoeun on page 104 [of *Behind the Killing Fields*]. That is not his real name and

⁵² See Email from the Trial Chamber to the Parties dated 26 July 2016.

⁵³ Written Record of Witness Interview – Robert T.F. LEMKIN, E3/9620, 18 May 2015, A18 and A20.

⁵⁴ See e.g. F2/4/3/3/6.2, ERN 01151695, ERN 01151739, 01151750-01151751, 01151785.

⁵⁵ E3/9620, A17.

⁵⁶ Response of Rob Lemkin to Trial Chamber Inquiry, E29/489/1, 27 September 2016 (“E29/489/1”), para. 2

⁵⁷ NUON Chea’s Reply, para. 5.

⁵⁸ Third Interim Decision on the Additional Investigation, F2/4/3/3/5, 20 August 2015, p.4 (“SCC Third Interim Decision”). The Chamber notes that in his email response to the Chamber, Robert LEMKIN (2-TCW-877) stated that both In Thoeun and Chiel Chhoeun were incorrectly named on pages 104 and 106 of the book *Behind the Killing Fields*. See E29/489/1. See also T. 17 October 2016, pp.43-46 (Draft).

⁵⁹ NUON Chea’s Reply, para. 5.

I am not free to divulge his real name.”⁶⁰ Robert LEMKIN (2-TCW-877) has similarly refused to identify W4, for confidentiality reasons, and the Defence makes no submissions as to who W4 may be.⁶¹ As for W3, the Chamber notes that although Robert LEMKIN (2-TCW-877) has not denied that this was CHAN Savuth (2-TCW-959), he also neither explicitly confirmed his identity nor did he provide helpful contact information when WESU requested contacting details relating to W3.⁶² As a result, the Chamber cannot establish with certainty the identities of the interviewees identified as W1, W3 and W4 in the Transcripts and Notes. In light of this lack of information on the interviewees’ identities, in combination with the reliability concerns noted above, the Chamber finds that the interviews with W1, W3 and W4 from the Transcripts lack the *prima facie* reliability required for their admission pursuant to Internal Rule 87(4). As a secondary source, the Notes suffer the same reliability deficiencies.

21. As for the interview with W2 from the Transcripts, the Chamber notes that it was the only interview admitted by the Supreme Court Chamber, on the basis that it is “the transcripts of TOAT Thoeun’s interviews”.⁶³ Robert LEMKIN (2-TCW-877) observed that W2 gave evidence before the Supreme Court Chamber. Although TOAT Thoeun (2-TCW-829) appeared as a Defence witness before that Chamber on 6 July 2015,⁶⁴ the Supreme Court Chamber obtained the Transcripts only after TOAT Thoeun (2-TCW-829)’s testimony on 6 July 2015, and he was therefore never asked to confirm whether he was W2.⁶⁵ Nonetheless, the Trial Chamber notes that the Supreme Court Chamber admitted into evidence the part of the Transcripts where W2 is being interviewed as “the transcripts of TOAT Thoeun’s interviews”.⁶⁶ This constitutes an indication of *prima facie* reliability when it comes to the identification of this witness. The Trial Chamber adopts the same conclusion and admits into evidence this excerpt of the Transcripts, assigning it document number E3/10665. Issues regarding challenges to the identity of W2, concerns as to E3/10665 being edited and/or selected portions of lengthier interviews, and uncertainties as to the translation and/or transcription methods used will be considered by the Chamber when assessing the document’s probative value.⁶⁷

⁶⁰ E29/489/1.

⁶¹ See NUON Chea’s Request, para. 23.

⁶² See WESU Report concerning witness CHAN Savuth (F2/4/3/3/6.2), E29/490, 12 August 2016 (“E29/490”).

⁶³ SCC Disposition, p.7. See also Appeal Judgement, para. 56.

⁶⁴ See SCC Third Interim Decision, fn.15; F1/3.1 (T. 6 July 2015).

⁶⁵ See Appeal Judgement, para. 56.

⁶⁶ SCC Disposition, p.7. See also Appeal Judgement, para. 56.

⁶⁷ See e.g. E3/10665, ERN 01156815 at 01:15:57:21, ERN 01156818 at 01:29:24:12; E3/9620, see A17, A20.

22. The Chamber reminds the Parties that evidence admitted into the Case file cannot be used in order to circumvent the prohibition against invoking the contents of torture-tainted confessions to establish their truth.⁶⁸ Having admitted E3/10665, the Chamber notes that it contains extracts derived from the torture-tainted confessions of RUOS Nhim or other S-21 prisoners. As a confession from S-21, there is a real risk that RUOS Nhim's confession was obtained through torture. Consequently, W2's responses to questions premised upon RUOS Nhim's confession are torture-derived evidence. In this context, the Chamber considers that the reference to RUOS Nhim's evidence is an attempt to circumvent the prohibition against torture-tainted evidence to establish the truth of the confession.⁶⁹ As such, the party requesting to use the evidence derived from torture bears the burden of rebutting the presumption that RUOS Nhim's statement was torture-tainted or to show that it falls within the exception permitted by Article 15 of the CAT.⁷⁰ The NUON Chea Defence made no submissions in this regard.⁷¹ The Chamber finds that any portion of E3/10665 referring to S-21 confessions, notably RUOS Nhim's confession, may not be used in the proceedings of Case 002/02.⁷²

4.2. Admissibility of the Article

23. The Chamber notes that the Article was published on 18 June 2016 and was therefore not available prior to the opening of trial. The Defence exercised due diligence in requesting admission of the Article a few days after it became available, and the Chamber therefore finds that the request is timely. With respect to its relevance and reliability, the Trial Chamber notes that the Article essentially consists of the following three categories: (1) citations of documents that are already on the Case File;⁷³ (2) references to the NUON Chea Defence's strategy before the ECCC, including to his Appeal Brief; and (3) the personal opinions of three individuals, including Robert LEMKIN (2-TCW-877). In relation to the first two categories, the Chamber considers that any factual elements contained therein are repetitious of evidence already on the Case File. The Chamber further considers that the third category does not contain factual evidence but rather personal opinions of individuals who are not

⁶⁸ See Decision on Torture Evidence, para. 70

⁶⁹ See Decision on Torture Evidence, para. 70.

⁷⁰ SCC Objections Decision, para. 69, *see also* fn. 48; Torture Evidence Decision, paras 36-38.

⁷¹ Cf. NUON Chea's Rule 92 Motion to Use Certain S-21 Statements, E399, 20 April 2016; Decision on NUON Chea's Rule 92 Motion to Use Certain S-21 Statements, E399/4, 19 May 2016.

⁷² See e.g. E3/10665, ERN 01156805 at 01:41:59:13 *et seq.*, ERN 01156807 at 01:48:05:24 *et seq.*, ERN 01156817 at 01:26:34:16 *et seq.*

⁷³ The Chamber notes that two of the documents cited in the Article are already admitted as E3/4202 and E3/89. The third document cited is proposed document E434.1.6, *see* NUON Chea's Rule 87(4) Request to Admit nineteen Documents (on SAO Phim, Vietnamese Aggression vis-à-vis Cambodia, Internal Rebellion, and Various Other Issues), E434, 30 August 2016, para. 12.

scheduled to appear before the ECCC in Case 002/02⁷⁴ and are therefore, in any event, of limited probative value. The Chamber therefore denies the request to admit the Article pursuant to Internal Rule 87(3)(a).

4.3. The OCP IR93 Request

24. In accordance with the Co-Prosecutors' Rule 93 request, the Chamber directed WESU to contact Robert LEMKIN (2-TCW-877) in relation to obtaining, *inter alia*, all footage of NUON Chea in his possession and an inventory of his digitalized footage related to the Democratic Kampuchea era.⁷⁵ Robert LEMKIN (2-TCW-877) responded that he could not accede to the Chamber's request "[f]or reasons given many times to the court".⁷⁶ The Chamber notes that Robert LEMKIN (2-TCW-877) has demonstrated a lack of cooperation with the ECCC since the pre-trial phase of proceedings in Case 002/01, including by refusing to hand over relevant material.⁷⁷ Accordingly, the Chamber finds that it is not necessary or appropriate to order additional investigations at this late stage of the proceedings, particularly given that it appears the material in question is not easily or readily available. The Chamber considers that there is not a sufficient basis to reopen lines of inquiry that have been exhaustively pursued in the past and it finds that ordering a formal investigation pursuant to Internal Rule 93 would be contrary to the expeditious conduct of proceedings.

4.4. The Defence IR93 Request

25. As noted at paragraph 12 of this decision, the NUON Chea Defence requests three investigative measures pursuant to Internal Rule 93 in relation to identifying CHAN Savuth (2-TCW-959). With respect to the first measure sought, the Chamber notes that it contacted the OCIJ with a request for any additional information regarding CHAN Savuth (2-TCW-959). The International Co-Investigating Judge responded that the OCIJ has neither spoken to nor contacted this witness and has no additional information to provide.⁷⁸ In relation to the second measure requested, the Chamber recalls its previous instruction that WESU communicate with Robert LEMKIN (2-TCW-877) in order to obtain from him any

⁷⁴ See Decision on NUON Chea Defence Requests to hear Additional Witnesses pursuant to Internal Rule 87(4) (E391, E392, E395, E412, and E426), E443, 21 September 2016.

⁷⁵ Request to contact Mr. Robert Lemkin (2-TCW-877) regarding additional documentary evidence and information, E29/489, 8 August 2016, para. 4.

⁷⁶ E29/489/1.

⁷⁷ 24 July 2013 Decision, fn. 31.

⁷⁸ Attachment 1: Email from OCIJ.

information that may help to locate CHAN Savuth (2-TCW-959).⁷⁹ In response to WESU's request, Robert LEMKIN (2-TCW-877) provided only the name of CHAN Savuth (2-TCW-959)'s village.⁸⁰ The Chamber further notes Robert LEMKIN (2-TCW-877)'s most recent refusal to provide WESU with information identifying another witness and footage from the film "Enemies of the People" that is in his possession.⁸¹ Considering Robert LEMKIN (2-TCW-877)'s reluctance to provide any contact information for CHAN Savuth (2-TCW-959) in response to WESU's first request, his continued unwillingness to cooperate with the ECCC and the late stage in the proceedings, the Chamber finds that the NUON Chea Defence has not provided a sufficient basis to reopen lines of inquiry that have been exhaustively pursued in the past.

26. As for the third measure requested, the Chamber recalls that WESU was specifically instructed to establish whether CHAN Samuth and CHAN Savuth (2-TCW-959) are the same person. WESU conducted its investigation by using as a reference the information in relation to CHAN Savuth (2-TCW-959) that is contained in the book *Behind the Killing Fields*.⁸² The NUON Chea Defence submits that WESU should also ask CHAN Samuth questions based on the Transcript.⁸³ While cognizant of the lack of *prima facie* reliability of the Transcript, the Chamber in an attempt to exploit every possible avenue for identification of the witness nevertheless instructed WESU to contact CHAN Samuth and ask follow-up questions based on the Transcript to determine if they are the same person.⁸⁴ From CHAN Samuth's answers to the follow-up questions, WESU determined that he is not the witness sought by the NUON Chea Defence.⁸⁵ The Chamber finds it unnecessary to order WESU to meet CHAN Samuth in person as the telephone conversations were sufficient for WESU to reach a final assessment as to his identity in relation to CHAN Savuth (2-TCW-959).⁸⁶

27. The Chamber considers that the substance of the Defence's Internal Rule 93 request has been granted in relation to first and third measures, and it considers the second request to be unfounded. Consequently, the Chamber finds that ordering a further formal investigation pursuant to Internal Rule 93 would be contrary to the expeditious conduct of proceedings.

⁷⁹ See E29/490.

⁸⁰ E29/490.

⁸¹ E29/489/1.

⁸² E29/490.

⁸³ Defence IR93 Request, para. 13.

⁸⁴ Second report in response to Trial Chamber's request to make sure witness CHAN Samuth is the right witness interviewed in the transcript (F2/4/3/3/6.2), E29/490/1, 17 November 2016 ("E29/490/1").

⁸⁵ E29/490/1.

⁸⁶ E29/490/1.

FOR THE FOREGOING REASONS, THE CHAMBER:

FINDS that the request to admit the WRI (E3/9620) is moot.

GRANTS in part the request to admit the Transcripts and admits the excerpt containing the document number F2/9.2 as E3/10665;

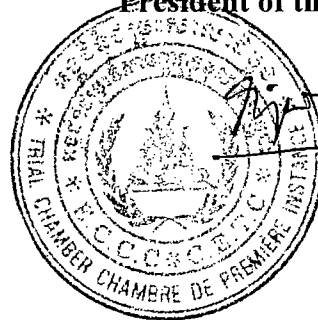
DENIES the remainder of NUON Chea's Request;

DENIES the Co-Prosecutors' request to initiate an investigation pursuant to Internal Rule 93; and

Concerning the Defence request to initiate an investigation pursuant to Internal Rule 93:

- **CONSIDERS** that the substance of the request has been granted in relation to first and third measures requested, and that any further formal investigation pursuant to Internal Rule 93 would be contrary to the expeditious conduct of proceedings;
- **DENIES** the second requested measure.

Phnom Penh, 28 December 2016
President of the Trial Chamber



Nil Nonn