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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

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សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

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

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

Date: 30 March 2017
Original language(s): Khmer/English/French
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**DECISION ON NUON CHEA DEFENCE REQUESTS TO HEAR ADDITIONAL WITNESSES
PURSUANT TO INTERNAL RULE 87(4) (E391, E392, E395, E412, AND E426) (FULL REASONS)**

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E443/10

1. INTRODUCTION

1. The Chamber is seised of five requests by the NUON Chea Defence, filed pursuant to Internal Rules 87(4) and 91(1), to hear a total of 45 additional witnesses and one additional Civil Party during the trial topic of Security Centres and Internal Purges. On 21 September 2016, the Trial Chamber issued a decision, with reasons to follow, on the five requests.¹ The Chamber hereby provides reasons for the Additional Witnesses Decision.

2. BACKGROUND

2. On 24 March 2016, the NUON Chea Defence filed its First Request, which includes an Internal Rule 93 request for additional investigations. On 4 April 2016, the Lead Co-Lawyers filed a response, requesting that the Chamber seek clarification as to how the proposed evidence relates to the Closing Order.² None of the other Parties filed a response.

3. On 1 and 8 April 2016, the NUON Chea Defence filed, respectively, its Second Request and Third Request. On 21 April 2016, the Lead Co-Lawyers filed a consolidated response to the two requests.³ None of the other Parties filed a response.

4. On 11 May 2016, noting that the NUON Chea Defence's three requests propose hearing testimonies related to conflicting factions within the Democratic Kampuchea (DK) leadership, the Chamber requested that the NUON Chea Defence file an Internal Rule 92 submission explaining how the Accused's criminal responsibility would be affected by further evidence

¹ 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 ("Additional Witnesses Decision") (confidential); 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 ("First Request") (confidential); NUON Chea's Second Witness Request for the Case 002/02 Security Centres and "Internal Purges" Segment (Leadership), E392, 1 April 2016 ("Second Request") (confidential); NUON Chea's Third Witness Request for the Case 002/02 Security Centres and "Internal Purges" Segment (Evidence of Treasonous Rebellion), E395, 8 April 2016 ("Third Request") (confidential); 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") (confidential); NUON Chea's Fifth Witness Request for the Case 002/02 Security Centres and "Internal Purges" Segment (Evidence of Treasonous Rebellion, Alleged Arbitrariness of Arrest and S-21 Security Centre), E426, 29 July 2016 ("Fifth Request") (confidential).

² 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, E391/1, 4 April 2016 ("Lead Co-Lawyers' Response to First Request"), para. 20.

³ Lead Co-Lawyers' Consolidated Response to NUON Chea's Second and Third Request Re Security Centres and Internal Purges, E392/1, 21 April 2016 ("Lead Co-Lawyers' Response to Second and Third Requests").

E443/10

tending to prove the existence of conflicting factions or rebellions within the scope of the Case 002 Closing Order, with the other Parties given the opportunity to respond.⁴

5. On 7 June 2016, the NUON Chea Defence filed its Fourth Request. On 20 June 2016, the Lead Co-Lawyers filed a response.⁵ None of the other Parties filed a response.

6. On 10 June 2016, in response to the Trial Chamber's request for briefing, the NUON Chea Defence filed an Internal Rule 92 submission on the relevance of treasonous rebellion to the Accused's individual criminal responsibility.⁶ On 20 June 2016, the Co-Prosecutors, the KHIEU Samphan Defence and the Lead Co-Lawyers filed their respective submissions in response to NUON Chea's Submissions.⁷

7. On 29 July 2016, the NUON Chea Defence filed its Fifth Request. None of the Parties filed a response.

3. SUBMISSIONS

3.1. NUON Chea's Requests

3.1.1. First Request

8. The NUON Chea Defence requests that the Chamber call six additional witnesses in relation to the trial topic of the S-21 Security Centre, specifically witnesses SUOY Sav (2-TCW-1029), THACH Siek (2-TCW-1030), SEM Am (2-TCW-1031), VUNG Vei (2-TCW-1032), KHOEM Samhuon (2-TCW-1033) and SAU Ren (2-TCW-1031).⁸ The Defence submits that these witnesses either knew about the existence of conflicting factions or were involved in an attempted *coup d'état* themselves and that their evidence is therefore relevant to internal purges.⁹ All six witnesses were part of Division 1 or Division 310, headed

⁴ Request for briefing on significance of conflicting factions within the DK leadership, E395/1, 11 May 2016.

⁵ Lead Co-Lawyers' Response to NUON Chea's Fourth Request Re Security Centres and Internal Purges, E412/1, 20 June 2016 ("Lead Co-Lawyers' Response to Fourth Request").

⁶ NUON Chea's Submissions on the Relevance of Evidence of Treasonous Rebellion to his Individual Criminal Responsibility in Case 002/02, E395/2, 10 June 2016 ("NUON Chea's Submissions").

⁷ Co-Prosecutor's Response to NUON Chea's Submissions on the Significance of Alleged Factions and Rebellions During the DK Period, E395/3, 20 June 2016; *Réponse de la Défense de KHIEU Samphan aux conclusions de la Défense de NUON Chea sur la pertinence de l'existence de rébellions* (E395/2), E395/4, 20 June 2016; Lead Co-Lawyers' Response to NUON Chea's Submission on the Relevance of Evidence of Treasonous Rebellion to his Individual Criminal Responsibility in Case 002/02, E395/5, 20 June 2016.

⁸ First Request, paras 1, 36.

⁹ First Request, para. 23.

by Oeun.¹⁰ According to the Defence, the request is not untimely because “the need to hear the six witnesses only became absolute and concrete after the conclusion of the testimonies of KEO Loeur and SEM Hoeun”, when it transpired that the latter held “limited information” on the rebellion and attempted coup d’état.¹¹

9. The NUON Chea Defence also requests, pursuant to Internal Rule 93, that the Chamber order an additional investigation in connection with defectors who left Cambodia during the DK regime and could provide information on attempted coup d’états led by the opposition factions.¹² Specifically, the Defence requests that the Chamber identify and locate defectors mentioned in Ben Kiernan’s book *The Pol Pot Regime*, as well as any available interviews of these defectors.¹³ The NUON Chea Defence submits that this evidence is relevant to the trial topic of Internal Purges and particularly to the S-21 Security Centre.¹⁴ It submits moreover that the evidence is relevant to the contention that the DK leadership was divided into conflicting factions, some of which were secretly supported by Vietnam, which may, *inter alia*, affect the attribution of responsibility for alleged crimes.¹⁵

3.1.2. Second Request

10. The NUON Chea Defence requests, pursuant to Internal Rule 91(1), that the Chamber expedite the testimony of five witnesses previously proposed by the Defence, namely HENG Samrin (2-TCW-831), OUK Bunchhoeun (2-TCW-951), PEN Sovann (2-TCW-952), POL Saroeun (2-TCW-962) and MEAS Soeun (2-TCW-917).¹⁶ The Defence additionally requests that the Chamber reconsider its decision not to call witnesses HUN Sen (2-TCW-1001) and KA Dev (2-TCW-998).¹⁷ With respect to KA Dev (2-TCW-998), the Defence also requests, pursuant to Internal Rule 93, that the Chamber either interview her or permit the Defence to do so due to the limited information currently available.¹⁸ While the Defence acknowledges that requests for reconsideration must be justified by showing new evidence or new circumstances, it submits that the Trial Chamber should adopt a “broader test [...] commonly applied at the ICTY” which includes circumstances where the previous decision is found to be

¹⁰ First Request, paras 7, 12, 15, 17, 19, 22.

¹¹ First Request, para. 24.

¹² First Request, para. 26.

¹³ First Request, para. 36.

¹⁴ First Request, para. 34.

¹⁵ First Request, paras 23, 34.

¹⁶ Second Request, paras 2, 37.

¹⁷ Second Request, paras 2, 8, 37.

¹⁸ Second Request, para. 35.

E443/10

erroneous or to have caused injustice.¹⁹ Finally, the NUON Chea Defence requests that the Chamber call a new witness, KUN Kim (2-TCW-1035), pursuant to Internal Rule 87(4), and either interview him pursuant to Internal Rule 93 or permit the Defence to do so.²⁰

11. The Defence submits that all eight witnesses are “either senior-surviving leaders of a treasonous rebellion led by defecting CPK cadres with Vietnamese support against the CPK and legitimate DK government, or they can testify as to the rebellion’s leaders.”²¹ The only new witness proposed, KUN Kim (2-TCW-1035), is the Deputy Commander-in-Chief of the Royal Cambodian Armed Forces and allegedly a former leader of the rebellion.²² The Defence submits its request is not untimely because it waited to confirm details about KUN Kim (2-TCW-1035) during the testimony of VAN Mat (2-TCW-893) on 9 March 2016.²³

3.1.3. Third Request

12. The NUON Chea Defence requests, pursuant to Internal Rule 91(1), that the Chamber expedite the testimony of four witnesses previously proposed by the Defence, namely Robert LEMKIN (2-TCW-877), CHAN Savuth (2-TCW-959), CHEAL Cheoun (CHIEL Chhoeun) (2-TCW-960) and IN Thoeun (2-TCW-961).²⁴ The Defence submits that Robert LEMKIN (2-TCW-877) is a key Defence witness and that his testimony is of heightened importance since THET Sambath (2-TCW-885) was unwilling to cooperate with the ECCC.²⁵ The Defence also submits that the testimony of CHAN Savuth (2-TCW-959), CHEAL Cheoun (CHIEL Chhoeun) (2-TCW-960) and IN Thoeun (2-TCW-961) is of heightened importance given THET Sambath (2-TCW-885)’s unwillingness to disclose the identities of the four people he and Robert LEMKIN (2-TCW-877) interviewed. Their evidence is said to focus on “preparation and attempts at treasonous rebellion in the Northwest Zone”.²⁶

13. The Defence also requests that the Chamber call seven new witnesses pursuant to Internal Rule 87(4), namely TOAT Thoeun (2-TCW-829), CHHORN Vorn (2-TCW-1036), HUON Choeun (2-TCW-1037), SAMEY Saveng (2-TCW-1038), CHHUOM Savoeun (2-

¹⁹ Second Request, paras 15-16.

²⁰ Second Request, paras 2, 37.

²¹ Second Request, para. 1.

²² Second Request, para. 29.

²³ Second Request, para. 31.

²⁴ Third Request, para. 2.

²⁵ Third Request, para. 23.

²⁶ Third Request, paras 24-25.

E443/10

TCW-1039), MEY Savoeun (2-TCCP-1040), and AN Sopheap (2-TCW-1041).²⁷ Regarding the first five witnesses, former Northwest Zone Cadres, the Defence refers to its submissions before the Supreme Court Chamber for the relevance of their testimony, noting that their Written Records of Interviews (WRIs) have already been admitted into evidence.²⁸ These witnesses are expected to provide evidence on “preparations and attempts at rebellion in the Northwest Zone; internal turmoil and the existence of factions within the CPK; and the structure and operations of the Northwest Zone”.²⁹ The NUON Chea Defence also seeks to hear MEY Savoeun (2-TCCP-1040), who is identified as a Civil Party in Case 004.³⁰ He worked on an agricultural worksite in Prey Veng and his WRI describes him joining an internal rebellion led by SAO Phim, the East Zone secretary, who gathered forces to oppose POL Pot. He also provides information on the CPK forces launching attacks by aircraft and tanks, the suppression of the rebellion, and SAO Phim’s suicide.³¹ Finally, the Defence requests to hear AN Sopheap (2-TCW-1041), a former Northeast Zone cadre and the wife of CHHAOM Se (2-TCW-840), who was scheduled to testify in Case 002/02 but passed away.³²

14. The Defence submits that all 11 witnesses offer evidence of “a treasonous rebellion led by defecting CPK cadres with Vietnamese support against the CPK and legitimate DK government” and that they are in a position to testify on events in the Northwest, East and Northeast Zones.³³ It requests that they appear before the court prior to the testimony of KAING Guek Eav alias DUCH (2-TCW-916).³⁴

15. The Defence contends that the request is timely because it was appropriate to wait until the close of the trial topic on Security Centres and Internal Purges before assessing whether it would seek to summons additional witnesses in relation to the rebellion and attempted coup.³⁵ The Defence additionally submits that it waited for the Supreme Court Chamber decision on whether three of the proposed witnesses –TOAT Thoeun (2-TCW-829) (as a recall witness),

²⁷ Third Request, para. 2.

²⁸ Third Request, para. 26.

²⁹ Third Request, para. 28.

³⁰ Third Request, para. 31.

³¹ Third Request, paras 32-34.

³² Third Request, paras 36, 39.

³³ Third Request, paras 1, 21-22.

³⁴ Third Request, paras 3, 41.

³⁵ Third Request, para. 29.

E443/10

CHHORN Vorn (2-TCW-1036) and HUON Choeum (2-TCW-1037) – would be summoned on appeal, which was rendered on 21 October 2015 and denied the requests to hear them.³⁶

3.1.4. Fourth Request

16. The NUON Chea Defence requests, pursuant to Internal Rule 91(1), that the Chamber expedite the testimony of seven witnesses previously proposed by the Defence, namely MAM Nai (2-TCW-864), NIM Kimsreang (2-TCW-854), LY Hor (2-TCW-956), Walter HEYNOWSKI (2-TCW-946), CHHANG Youk (2-TCW-870), YIN Nean (2-TCW-963) and CHEY Sopheara (2-TCW-81).³⁷ The Defence additionally requests that the Chamber hear three witnesses pursuant to Internal Rule 87(4), namely HIN Sotheany (2-TCW-1042) and Hiroto FUJIWARA (2-TCW-1043) – both of whom worked for the Office of Co-Investigating Judges (OCIJ) and prepared the OCIJ list of S-21 prisoners – and NUON Maly (2-TCW-1044) – who provided a number of alleged S-21 photographs to DC-Cam.³⁸ The position of the NUON Chea Defence is that the vast majority of individuals allegedly registered at S-21 were not detained or executed there.³⁹ The Defence states that its review of the OCIJ list of S-21 prisoners, which is admitted into evidence in Case 002/02, raised “significant questions about the methodology used to compile the list” and about “the origin, the date and general accuracy” of the documents relied upon in preparing the list.⁴⁰ The NUON Chea Defence therefore submits that it is essential to hear HIN Sotheany (2-TCW-1042) and Hiroto FUJIWARA (2-TCW-1043), both of whom worked on the list for two years.⁴¹ Similarly, the Defence requests that NUON Maly (2-TCW-1044) be summoned to testify on the authenticity and chain of custody of the S-21 photographs listed in the index admitted in Case 002/02 as E3/9214. The Defence contends that this witness’ testimony is the only way to understand the context in which the photographs were obtained and transferred to DC-Cam.⁴² Finally, the Defence submits that the request is timely because the OCIJ list of S-21 prisoners was made available to the Parties on 5 April 2016 and the Co-Prosecutors filed a request to add photographs to the E3/9214 index on 11 April 2016.⁴³

³⁶ Third Request, paras 30, 35, 40.

³⁷ Fourth Request, paras 1-2, 37.

³⁸ Fourth Request, paras 3, 37.

³⁹ Fourth Request, para. 4.

⁴⁰ Fourth Request, paras 33-34.

⁴¹ Fourth Request, para. 34.

⁴² Fourth Request, para. 35.

⁴³ Fourth Request, paras 35-36.

E443/10

3.1.5. Fifth Request

17. The NUON Chea Defence requests that the Chamber hear 11 new witnesses pursuant to Internal Rule 87(4) and admit into evidence five DC-Cam statements related to five of the proposed witnesses.⁴⁴ The Defence requests that the Chamber summons W4 (2-TCW-1052) and LONG Vun (2-TCW-971) to testify on conflicting internal factions in the Northwest Zone in relation to the trial topic of Internal Purges. W4 is an anonymous witness interviewed by Robert LEMKIN (2-TCW-877) and THET Sambath (2-TCW-885) for their film *Enemies of the People*.⁴⁵ According to Robert LEMKIN (2-TCW-877), he was a military commander in the capture of Phnom Penh in April 1975 and was later part of the official Northwest Zone administration under the direct instruction of POL Pot. The Defence submits that he provides a unique account of the chaotic situation in the Northwest Zone where people were starving, forced to overwork and massively killed in contravention with the Party line.⁴⁶ Since W4 has requested strict confidentiality, the Defence also requests that WESU conduct a risk assessment pursuant to Internal Rule 29(3) in order to provide any protective measures deemed necessary.⁴⁷ The Defence submits LONG Vun (2-TCW-971) was sent to work in the Northwestern Zone and he can describe people's poor living conditions there.⁴⁸ It submits that he can provide unique insight regarding the consequences of the policies implemented by the former Northwest Zone cadres and the discrepancies between those policies and the Party line.⁴⁹

18. The NUON Chea Defence further requests that the Chamber hear five witnesses in relation to treasonous rebellion by East Zone cadres. MOV Song (2-TCW-1053) was a medical staff in Division 703 and he provided information as to the rebellion between the Southwest Zone and the East Zone, relating it to "the fight for the country".⁵⁰ BUT Rom (2-TCW-1054) was a soldier in the Artillery Unit of Division 703 and he provides evidence on internal factions competing as of April 1976, in particular by being ordered to protect people against a potential imminent attack led by SAO Phim during the Victory Day

⁴⁴ Fifth Request, paras 1, 41. The documents are the DC-Cam interviews with the following five proposed witnesses: MOV Song (2-TCW-1053); BUT Rom (2-TCW-1054); KHAN Pot (2-TCW-1055); TUY Peng Chhorn (2-TCW-1056); and TOB Launh (2-TCW-1059).

⁴⁵ Fifth Request, para. 13.

⁴⁶ Fifth Request, para. 13.

⁴⁷ Fifth Request, paras 15, 41.

⁴⁸ Fifth Request, para. 16.

⁴⁹ Fifth Request, para. 17.

⁵⁰ Fifth Request, para. 18.

E443/10

Anniversary in 1976.⁵¹ KHAN Pot (2-TCW-1055) was also a soldier in Division 703 who provides information on the Vietnamese incursions into Cambodian territory as of 1976 and attempts to crack down the rebellion forces that joined with the Vietnamese.⁵² TUY Peng Chhorn (2-TCW-1056) was a chief of the child unit of Division 703 and may be able to provide evidence on CHAN Chakrei's betrayal and consecutive arrest, as well as on Choeung Ek generally.⁵³ Finally, SAR Kheng (2-TCW-1057) was a battalion leader of the East Zone rebels who attended a meeting with HENG Samrin (2-TCW-831), HUN Sen (2-TCW-1001) and CHEA Sim on 10 June 1977 that allegedly focused on smashing East Zone combatants and fleeing to Vietnam.⁵⁴ The Defence therefore submits that he could likely provide evidence on the rebellion and subsequent imprisonment of East Zone cadres, including at S-21.⁵⁵

19. The NUON Chea Defence requests to hear CHHUM Phuot (2-TCW-1058) in relation to conflicting internal factions at the Thai Border, notably the rebellion in the Northwest Zone.⁵⁶ The witness was a soldier during the DK regime and was posted at the Thai-DK border. He states that in 1977 his squad leader YOEUN Yong, who led a rebel group against the Khmer Rouge, permitted people to escape to Thailand.⁵⁷ Additionally, the Defence requests to hear TOB Launh (2-TCW-1059), who can provide evidence on the Special Regiment assigned to monitor workers to identify potential traitors. According to the Defence, the monitoring process this witness describes substantiates its position that most arrests conducted during the DK regime were not arbitrary.⁵⁸

20. The final two witnesses requested by the NUON Chea Defence, TES Oi (2-TCW-1060) and SRENG Thi (2-TCW-1061), would testify on the release of prisoners from S-21 Security Centre. TES Oi (2-TCW-1060) was a medic in Division 310 under the command of Oeun. He states that he was arrested and sent to S-21 for two days before being released.⁵⁹ SRENG Thi (2-TCW-1061) was a soldier in Division 502 who was also sent to S-21, where he was

⁵¹ Fifth Request, para. 19.

⁵² Fifth Request, para. 21.

⁵³ Fifth Request, paras 22-23.

⁵⁴ Fifth Request, para. 24.

⁵⁵ Fifth Request, para. 25.

⁵⁶ Fifth Request, paras 27-28.

⁵⁷ Fifth Request, para. 27.

⁵⁸ Fifth Request, paras 29-30.

⁵⁹ Fifth Request, para. 32.

E443/10

detained for about 2 months and a half before being sent to Kampong Chhang Airfield. He states he was released with some 50 other persons.⁶⁰

21. The NUON Chea Defence submits that the request is timely because the relevant DC-Cam interviews were placed on the Case File on 2 June 2016. In any event, it submits the evidence relates to material already before the Chamber and comprises exculpatory content which will therefore be conducive to ascertaining the truth.⁶¹

3.2. Lead Co-Lawyers' Responses to NUON Chea's Requests

22. The Lead Co-Lawyers respond that the First Request does not reason how the additional evidence sought relates to any of the factual allegations within the scope of Case 002/02 for Security Centres or Internal Purges.⁶² Accordingly, the Lead Co-Lawyers limit their response to the untimeliness of the request, emphasising that the statements of the six proposed witnesses were available to the Parties prior to the beginning of Case 002/02 and that the Defence had previously used some of these statements to examine witnesses in court.⁶³ As for the requested Internal Rule 93 investigation, the Lead Co-Lawyers note that the NUON Chea Defence does not explain whether it sought such investigations at the pre-trial stage or why the request emerged more than half-way through the trial proceedings. Furthermore, it is submitted that the First Request does elaborate on how the investigation would result in potentially exculpatory evidence.⁶⁴ The Lead Co-Lawyers request that the Chamber either seek clarifications from the Defence or summarily dismiss the First Request.⁶⁵

23. In a consolidated response to the Second and Third Requests, the Lead Co-Lawyers submit that, in Case 002/02, the scope of factual allegations relevant to Internal Purges is limited to the policy issues in "the Old and New North Zones, and the East Zone".⁶⁶ Accordingly, the crimes or policy of internal purges in the Northwest and Northeast Zones are excluded, unless they are related to a security centre falling within the scope of Case 002/02.⁶⁷ Specifically, the Lead Co-Lawyers submit that the Third Request does not identify how the proposed additional witnesses are relevant to the three security centres within the scope of

⁶⁰ Fifth Request, paras 34-35.

⁶¹ Fifth Request, paras 39-40.

⁶² Lead Co-Lawyers' Response to First Request, paras 14, 17.

⁶³ Lead Co-Lawyers' Response to First Request, paras 15, 17.

⁶⁴ Lead Co-Lawyers' Response to First Request, para. 18.

⁶⁵ Lead Co-Lawyers' Response to First Request, para. 20.

⁶⁶ Lead Co-Lawyers' Response to Second and Third Requests, paras 8, 15.

⁶⁷ Lead Co-Lawyers' Response to Second and Third Requests, para. 8.

E443/10

Case 002/02 or to the policy of internal purges in the North and East Zone.⁶⁸ They also note that MEY Savoeun (2-TCCP-1040) is a Civil Party in Case 002/02 and should therefore testify as such should the Chamber decide to call him.⁶⁹

24. Specifically in regard to the Second Request, the Lead Co-Lawyers submit that the request for the Defence to interview KUN Kim (2-TCW-1035) and KA Dev (2-TCW-998) is unfounded in the Internal Rules, the procedural framework of the ECCC and/or Cambodian criminal procedure. They therefore submit that this request should be dismissed.⁷⁰ The Lead Co-Lawyers defer to the Chamber's wisdom as to whether it should interview these two witnesses itself, while maintaining their submissions as to the limited scope of Internal Purges for Case 002/02.⁷¹

25. In response to the Fourth Request, the Lead Co-Lawyers submit that LY Hor (2-TCW-956) is deceased and the request to expedite his testimony is therefore moot.⁷² In relation to the OCIJ list of S-21 prisoners, the Lead Co-Lawyers submit that it is the work product of an investigative team and not intended to be used as evidence *per se*, but rather as a reference for the underlying documents, which are also admitted in Case 002/02.⁷³ The Lead Co-Lawyers request that the Chamber take their submissions into consideration with respect to calling HIN Sotheany (2-TCW-1042) and Hiroto FUJIWARA.⁷⁴

4. APPLICABLE LAW

26. Pursuant to Internal Rule 91(1), the Chamber shall hear Civil Parties, witnesses and experts in the order it considers useful.⁷⁵

27. According to Internal Rule 87(4), the Trial Chamber may at any stage of the trial summons or hear any person as a witness or admit any new 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 Internal Rule 87(3). The Chamber

⁶⁸ Lead Co-Lawyers' Response to Second and Third Requests, para. 17.

⁶⁹ Lead Co-Lawyers' Response to Second and Third Requests, paras 18-19.

⁷⁰ Lead Co-Lawyers' Response to Second and Third Requests, paras 20-21.

⁷¹ Lead Co-Lawyers' Response to Second and Third Requests, para. 22.

⁷² Lead Co-Lawyers' Response to Fourth Request, paras 10, 22.

⁷³ Lead Co-Lawyers' Response to Fourth Request, paras 11-18. *See also* Decision admitting new OCIJ Prisoner List, E393, 5 April 2016; Admission of documents underlying S21 prisoners list produced by the Office of the Co-Investigating Judges (OCIJ), E393/1, 12 May 2016.

⁷⁴ Lead Co-Lawyers' Response to Fourth Request, para. 22.

⁷⁵ Internal Rule 91(1).

E443/10

determines the merit of a request to admit new evidence in accordance with the criteria in Internal Rule 87(3). Internal 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.⁷⁶

28. Reconsideration does not form part of the ECCC legal framework.⁷⁷ The Chamber will only consider a request anew where a “fresh application justified by new evidence or new circumstances is made”.⁷⁸

29. 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.⁷⁹ 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

⁷⁶ 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.

⁷⁷ Decision on NUON Chea Request to Reconsider Admitting one Extract and to Admit two Additional Extracts from the Human Rights Watch Report ‘30 Years of HUN Sen, E347/4, 2 June 2016, para. 7 (“Reconsideration Decision”); Decision on NUON Chea Request to Recall Witness PRAK Khan (2-TCW-931), E409/3, 11 July 2016, para. 6.

⁷⁸ Reconsideration Decision, para. 7; Decision on NUON Chea Request to Recall Witness PRAK Khan (2-TCW-931), E409/3, 11 July 2016, para. 6; Trial Chamber memorandum entitled “Decision on KHIEU Samphan’s urgent request for reconsideration of scheduling order of the substance of case 002/02”, E314/5/3, 16 October 2014, para. 2; *See also* Trial Chamber memorandum entitled “Decision on the Co-Prosecutor’s Request for Reconsideration of the decision regarding Admission of Newly Available United States Diplomatic cables (E282/2/1) and KHIEU Samphan’s Response (E282/2/1/1), E282/2/1/2, 1 August 2013, para. 3; Trial Chamber memorandum entitled “Decision on KHIEU Samphan’s Urgent Request for Clarification of the Trial Chamber Decision of 15 August 2013 relating to the Admissibility of Statements and Transcripts (E299/1), E299/2, 10 September 2013, para. 5; Trial Chamber “Decision on IENG Sary’s request for Reconsideration of the Trial Chamber decision on the Accused’s Fitness to Stand Trial and Supplemental Request, E238/11/1, 19 December 2012, paras 7-8; and Trial Chamber memorandum entitled “Decision on NUON Chea’s Request that the Chamber not provide prior statements to Tuol Po Chrey witnesses before testifying (E292/2), E292/2/1, 28 June 2013, para. 4.

⁷⁹ 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.

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.⁸⁰

5. FINDINGS

30. In the Additional Witnesses Decision,⁸¹ the Chamber granted the requests to hear nine witnesses and one Civil Party, specifically: SEM Am (2-TCW-1031) and SUOY Sav (2-TCW-1029) from the First Request; MEAS Soeun (2-TCW-917) from the Second Request; CHEAL Cheoun (2-TCW-960), HUON Choeun (2-TCW-1037), CHHORN Vorn (2-TCW-1036) and MEY Savoeun (2-TCCP-1040) from the Third Request; NIM Kimsreang (2-TCW-854) from the Fourth Request; and LONG Vun (2-TCW-971) and TES Ol (2-TCW-1060) from the Fifth Request. The Chamber reserved its ruling on HENG Samrin (2-TCW-831), OUK Bunchhoeun (2-TCW-951) and POL Saroeun (2-TCW-962) from the Second Request, as well as on HIN Sotheany (2-TCW-1042)⁸² from the Fourth Request.⁸³

31. The Chamber recalled that four proposed witnesses could not be summoned because they are deceased, namely: TOAT Thoeun (2-TCW-829) and AN Sopheap (2-TCW-1041) from the Third Request; and MAM Nai (2-TCW-864) and LY Hor (2-TCW-956) from the Fourth Request. This renders the request in respect to these witnesses moot. The Chamber rejected the remainder of the requests, while noting that it had sought information from Walter HEYNOWSKI (2-TCW-946) in lieu of hearing his testimony.⁸⁴

32. As a preliminary matter, the Chamber notes that the Second, Third and Fourth Requests include motions to expedite the testimony of a total of 11 witnesses previously proposed by the Defence in earlier filings. The reasoning in relation to 8 of these witnesses will be addressed in the Chamber's Final Witness Decision in Case 002/02. The proposed

⁸⁰ 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.

⁸¹ *See* fn. 1.

⁸² The Chamber later rejected the requests to call HENG Samrin (2-TCW-831), OUK Bunchhoeun (2-TCW-951) and POL Saroeun (2-TCW-962) and granted the request to call Sotheany HIN (2-TCW-1042). *See* in Final List of witnesses, Civil Parties and experts for Case 002/02, E454, 27 December 2016; Email from Trial Chamber to the Parties dated 8 December 2016.

⁸³ Additional Witnesses Decision. The Chamber recalls that it had previously selected MEAS Soeun (2-TCW-917) and TOAT Thoeun (2-TCW-829) to testify during the trial topic of Security Centres and Internal Purges. However, the latter witness died prior to his scheduled testimony. *See* E-mail from Trial Chamber Senior Legal Officer to Parties re: "Internal Purges: lists of witnesses, Civil Parties and experts", E408/6.1, 8 April 2016 (confidential); E-mail from Trial Chamber Senior Legal Officer to Parties re: "Trial Scheduling", E408/6.2, 26 July 2016 (informing parties of death of 2-TCW-829) (confidential).

⁸⁴ Additional Witnesses Decision.

E443/10

witnesses concerned are HENG Samrin (2-TCW-831), OUK Bunchhoeun (2-TCW-951), PEN Sovann (2-TCW-952), POL Saroeun (2-TCW-962) from the Second Request; Walter HEYNOWSKI (2-TCW-946), CHHANG Youk (2-TCW-870), YIN Nean (2-TCW-963) and CHEY Sopheara (2-TCW-81) from NUON Chea's Fourth Request. Meanwhile, the reasons for not calling Robert LEMKIN (2-TCW-877), CHAN Savuth (2-TCW-959) and IN Thoeun (2-TCW-961) – proposed to be expedited in the Third Request – will be provided in this decision.

33. The Second Request contains a request for reconsideration of the decision not to call HUN Sen (2-TCW-1001) and KA Dev (2-TCW-998).⁸⁵ The Chamber recalls that within the ECCC procedural framework it may only consider a request anew where a fresh application is made, justified by showing new evidence or new circumstances.⁸⁶ While the Defence acknowledges that its request does not meet these requirements, it submits that the Chamber should apply “a broader test” which would nonetheless allow for reconsideration in the present circumstances.⁸⁷ The Chamber recalls that it has already considered the Defence's submissions referring to the test applied by the *ad hoc* Tribunals and has ruled on the matter.⁸⁸ In the absence of new evidence or new circumstances, the Chamber will not consider the Defence request anew. The Chamber therefore rejects both the request to reconsider its decision not to hear HUN Sen (2-TCW-1001) and KA Dev (2-TCW-998)⁸⁹ and the related request to interview KA Dev (2-TCW-998) pursuant to Internal Rule 93.

34. For the remaining proposed witnesses, the Chamber finds that only the Fourth Request is timely. The requests to summons HIN Sotheany (2-TCW-1042), Hiroto FUJIWARA (2-TCW-1043) and NUON Maly (2-TCW-1044) stem from documents made available to the Parties in April 2016,⁹⁰ not long before NUON Chea's Fourth Request was filed on 7 June 2016. In contrast, the statements of the proposed witnesses in the First Request were available before the start of Case 002/02 and the Defence's submission that the need to hear them “only became absolute and concrete” during the trial is unpersuasive.⁹¹ As for the Internal Rule 93

⁸⁵ Second Request, paras 2, 8, 37.

⁸⁶ See fn. 78.

⁸⁷ Second Request, paras 15-16.

⁸⁸ Reconsideration Decision, para. 7.

⁸⁹ See Decision on Nuon Chea Request to Expedite two Previously Proposed Witnesses and Summons four Additional Witnesses during the Case 002/02 Trial Topic on the Treatment of the Cham and on National Co-Prosecutor's Request to Admit Written Testimony in Lieu of In-Court Appearance, E370/4, 25 March 2016 (confidential).

⁹⁰ Fourth Request, para. 36.

⁹¹ First Request, para. 24.

E443/10

request to locate defectors based on Ben Kiernan's book *The Pol Pot Regime*, the Chamber notes that the book was first published in 1996 and was placed on the Case File with the Introductory Submission. This request is therefore also untimely.

35. With respect to the Second Request, the submission that the Defence "waited to confirm details" about KUN Kim (2-TCW-1035) during the trial proceedings of 9 March 2016⁹² does not demonstrate the required exercise of due diligence. The information the Defence sought to "confirm" in court stemmed from a WRI dated 15 August 2008 and placed on the Case File before the start of Case 002/02.⁹³ Similarly, for the witnesses proposed in the Third Request, the WRIs of SAMEY Saveng (2-TCW-1038) and CHHUOM Savoeun (2-TCW-1039) are dated from 2013 and 2014 and the Defence had access to these documents since 2015.⁹⁴ The Defence's misguided strategic decision to wait for the close of the Security Centres and Internal Purges segment of the trial before determining whether to request the witnesses⁹⁵ resulted in the request not being filed in a timely manner. Finally, the DC-Cam statements related to the witnesses proposed in NUON Chea's Fifth Request are dated from 2000 and 2001 and they were publicly available before the start of Case 002/02. The submission that the request is timely because the DC-Cam interviews were placed on the Case File on 2 June 2016, after being "uncovered" by the Defence,⁹⁶ only applies to five of the proposed witnesses,⁹⁷ and the delay in "uncovering" these interviews dated from 2000 and 2001 demonstrates a lack of due diligence on behalf of the Defence. The statements of the remaining six proposed witnesses were all already on the Case File and the Defence fails to justify the tardiness of the request. The Chamber therefore finds NUON Chea's Fifth Request to be untimely. The Chamber will now consider whether the witnesses from the four untimely requests should be summoned nonetheless in the interests of justice. This requires a case by case evaluation taking into consideration all relevant circumstances. The requirements of Internal Rule 87(3) need to be fulfilled in any case.

36. The Chamber notes that all six witnesses proposed in the First Request were members Division 1 or Division 310 and are expected to testify on an attempted *coup d'état*, notably on

⁹² Second Request, para. 31.

⁹³ See Written Record of Interview of SALES Ahmat, E3/5209, 15 August 2008, p. 4.

⁹⁴ See NUON Chea's Rule 87(4) Request for Admission of Six Statements and One Annex Relevant to Case 002/02, E319/30, 24 August 2015, paras 12-13 (confidential).

⁹⁵ Third Request, paras 29-30, 35, 40.

⁹⁶ NUON Chea's Fifth Request, paras 39-40.

⁹⁷ MOV Song (2-TCW-1053), BUT Rom (2-TCW-1054), KHAN Pot (2-TCW-1055), TUY Peng Chhorn (2-TCW-1056), and TOB Launh (2-TCW-1059).

E443/10

plots led by Oeun. The Chamber has already heard numerous witnesses, as well as a Civil Party, who were involved with Division 310 and who gave evidence, *inter alia*, on internal purges and on the S-21 Security Centre.⁹⁸ Nonetheless, the Chamber considers it is in the interests of justice to summons the most relevant witnesses proposed in the First Request to provide NUON Chea with a further opportunity to establish his theory of defence, notably in relation to internal factions.⁹⁹ Having reviewed the documents relevant to the proposed witnesses, the Chamber considers the statements of SUOY Sav (2-TCW-1029) and SEM Am (2-TCW-1031) to contain the most pertinent and unique evidence. The Chamber therefore grants the request to hear these two witnesses. The Chamber considers the proposed evidence of the remaining four witnesses¹⁰⁰ to be substantially repetitive of evidence already heard on these matters in Case 002/02 from several witnesses, including KEO Leour (2-TCW-932),¹⁰¹ SEM Hoeurn (2-TCW-943)¹⁰² and CHHAE Heap (2-TCCP-275).¹⁰³ The Chamber notes that the potential to elicit any new information from these proposed witnesses is, by the Defence's own admission, "only revealed in a minimal way" in their statements and the "unique evidence" that the Defence submits they could provide is largely speculative.¹⁰⁴ The Chamber finds that hearing them would not be in the interests of justice, noting additionally the late stage of the proceedings. By the same token, the Chamber considers that conducting additional investigations to potentially identify new evidence related to internal factions would be contrary to the expeditious conduct of proceedings, especially at this stage of the trial. Noting in particular the time that has elapsed since the publication of Ben Kiernan's book, the absence or very limited information on identifying details concerning alleged defectors, the very limited cooperation that can be expected from Ben Kiernan, if any,¹⁰⁵ and the evidence already heard on the existence of factions among the CPK, the Chamber rejects the Defence's Internal Rule 93 request.¹⁰⁶

⁹⁸ *E.g.* KEO Leour (2-TCW-932); SUOY Sav (2-TCW-1029); SEM Hoeurn (2-TCW-943); HIM Han alias Ream (2-TCW-901); CHHAE Heap (2-TCCP-275).

⁹⁹ The Chamber will consider the full impact of NUON Chea's Submissions in its judgement in Case 002/02.

¹⁰⁰ THACH Siek (2-TCW-1030), VUNG Vei (2-TCW-1032), KHOEM Samhuon (2-TCW-1033) and SAU Ren (2-TCW-1031).

¹⁰¹ *See* T. 15 June 2015 (KEO Leour), pp. 6, 30-32, 34-35; T. 16 June 2015 (KEO Leour), pp. 8-10.

¹⁰² *See* T. 22 June 2015 (SEM Hoeurn), pp 77, 82-84; T. 23 June 2015 (SEM Hoeurn), pp 9, 16.

¹⁰³ *See* T. 11 August 2016 (CHHAE Heap), pp 27-29.

¹⁰⁴ First Request, paras 24-25.

¹⁰⁵ Email from KIERNAN Ben (2-TCE-89) to the Trial Chamber, E29/509/1, 12 September 2016; E-mail from KIERNAN Ben (2-TCE-89) to WESU, E29/509, 23 December 2015. *See also* Proposed testimony of Benedict KIERNAN before the Trial Chamber, E166/1/4, 13 June 2012, p.2, where the Chamber refers to him as an "uncooperative expert".

¹⁰⁶ First Request, para. 26.

E443/10

37. With respect to the Second Request, the Chamber notes that the submissions in relation to the overall relevance of KUN Kim (2-TCW-1035)'s testimony are largely speculative, as acknowledged by the Defence.¹⁰⁷ According to the Defence, the main reason to call him is that he "may offer unique insight into the preparations for rebellion and the participation and crackdown on East Zone cadres."¹⁰⁸ The Defence submits that witness VAN Mat alias SALES Ahmat (2-TCW-893) confirmed that KUN Kim was a leader of the rebellion.¹⁰⁹ However, the Chamber notes that while VAN Mat alias SALES Ahmat (2-TCW-893) asserted that KUN Kim (2-TCW-1035) commanded combined forces of around 400 or 500, up to 1,000 soldiers to resist Pol Pot's troops, this witness clarified that he had no idea what position KUN Kim (2-TCW-1035) held between 1975 and 1979, as he only came to know him one month before the liberation.¹¹⁰ Furthermore, VAN Mat alias SALES Ahmat (2-TCW-893) has also inconsistently specified that KUN Kim (2-TCW-1035) did not hold a high rank or senior position within the liberation army and that he commanded a small number of soldiers.¹¹¹ Finally the involvement of KUN Kim (2-TCW-1035) in the liberation army prior 1979 or his position as a leader of the rebellion at that time is not corroborated by any other piece of evidence. In the present circumstances, the Chamber considers that there is not sufficient evidence to establish the *prima facie* relevance of his proposed testimony. The Chamber therefore rejects the request to hear KUN Kim (2-TCW-1035), as well as the related request to interview him pursuant to Internal Rule 93.

38. In the Fifth Request, the NUON Chea Defence proposes five new witnesses, most involved with Division 703, in relation to treasonous rebellion by East Zone cadres. As noted at paragraph 36 of this decision, the Chamber has heard a significant amount of evidence both in relation to treasonous rebellions and to the conditions in the East Zone. Having reviewed the DC-Cam statements of these five proposed witnesses, the Chamber considers their evidence to be of limited relevance to the subject matter of Case 002/02 and, to the degree that it may be generally relevant to internal factions, it is repetitive of evidence already on the

¹⁰⁷ Second Request, para. 29: "Since Kun Kim (Witness G) has not been interviewed, the Defence can only speculate as to the other potential relevance of his testimony."

¹⁰⁸ Second Request, para. 29.

¹⁰⁹ Second Request, para. 29.

¹¹⁰ T. 9 March 2016 (VAN Mat alias SALES Ahmat), pp. 59-60, 69. The Chamber notes that KUN Kim (2-TCW-1035) was likely a civilian during the DK period. *See* Second Request, para. 30: "he served as district commerce staff for Tbong Kmom district". This was later confirmed by 2-TCW-1065: "I can say that I knew him in 1979, and before that Kun Kim was a civilian." T. 2 November 2016 (2-TCW-1065), p. 89.

¹¹¹ T. 9 March 2016 (VAN Mat alias SALES Ahmat), p. 60.

E443/10

Case File.¹¹² The Defence also requests to hear TOB Launh (2-TCW-1059), who was also part of Division 703, as specifies that he can provide evidence in relation to a process of monitoring potential traitors. The Chamber notes that related evidence is already on the Case File, notably through the testimonies of VAN Mat alias SALES Ahmat (2-TCW 893)¹¹³ and MEY Savoeun (2-TCCP-1040),¹¹⁴ and considers it repetitive. Accordingly, the Chamber rejects the request to hear witnesses MOV Song (2-TCW-1053), BUT Rom (2-TCW-1054), KHAN Pot (2-TCW-1055), TUY Peng Chhorn (2-TCW-1056), SAR Kheng (2-TCW-1057) and TOB Launh (2-TCW-1059). For the same reasons, the Chamber also rejects the request to admit the five statements dated from 2000 and 2001 into evidence.

39. In the Third Request, the NUON Chea Defence proposes four new witnesses who were former Northwest Zone Cadres and are expected to testify in relation to rebellions in the Northwest Zone and internal turmoil within the CPK.¹¹⁵ Likewise, in the Fifth Request, the Defence proposes CHHUM Phuot (2-TCW-1058) to testify on the rebellion in the Northwest Zone.¹¹⁶ As noted above, the Chamber has already heard numerous witnesses who provided evidence in relation to internal factions, and it granted the requests to hear CHEAL Cheoun (2-TCW-960) and LONG Vun (2-TCW-971) in relation to conditions and purges in the Northwest Zone. Nonetheless, the Chamber considers it in the interests of justice to summons the most relevant of these Northwest Zone witnesses to provide NUON Chea with a further opportunity to establish his theory of defence. Having reviewed the documentation of the five witnesses, the Chamber considers the proposed testimonies of CHHORN Vorn (2-TCW-1036) and HUON Choeum (2-TCW-1037) to be the most relevant and potentially conducive to ascertaining the truth. The Chamber therefore grants the request to hear these two witnesses. The Chamber considers the proposed testimonies of the remaining three witnesses¹¹⁷ to be substantially repetitive of evidence already on the Case File, noting in particular that their written statements are already admitted into evidence.¹¹⁸ The Chamber

¹¹² See para. 36. See also T. 17 August 2016 (MEY Savoeun) pp 14-16, 46, 80; T. 29 June 2016 (MEAS Soeun), pp. 35-36, 40-65, 82-85, 97; T. 30 June 2016 (MEAS Soeun), p. 3-6, 13-19, 23, 26-27; T. 8 September 2015 (SOS Min), pp. 68-71, 94; T. 9 September 2015 (SOS Min), p. 36, 39.

¹¹³ See T. 9 March 2016 (VAN Mat), p. 50.

¹¹⁴ See T. 17 August 2016 (MEY Savoeun) pp 21-22.

¹¹⁵ Third Request, paras 26-28. The Chamber is excluding TOAT Thoeun (2-TCW-829) as he is deceased.

¹¹⁶ Fifth Request, para. 28.

¹¹⁷ SAMEY Saveng (2-TCW-1038), CHHUOM Savoeun (2-TCW-1039) and CHHORN Vorn (2-TCW-1036).

¹¹⁸ See 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 (confidential); CHHUM Phuot DC-Cam Interview, E3/9009, 7 December 2010 (confidential). See also T. 12 August 2015 (LAT Suoy), pp. 8-11, 16, 62-64; T. 27 October 2015 (MUN Mut) pp. 21-24, 31-33, 41-42 (CLOSED SESSION).

E443/10

finds that hearing them would not be in the interests of justice, noting additionally the late stage of the proceedings.

40. In the Fifth Request the Defence also proposes two witnesses to provide evidence of prisoners being released from the S-21 Security Centre. The Chamber notes that it has already heard a substantial amount of evidence generally in relation to the alleged release of prisoners from the S-21 Security Centre, *inter alia*, through the testimonies of PRAK Khan (2-TCW-931),¹¹⁹ SUOS Thy (2-TCW-816)¹²⁰ and KAING Guek Eav (2-TCW-916).¹²¹ That would normally lead to reject the evidence proposed as repetitive. However, the Chamber considers it to be in the interests of justice to provide the NUON Chea Defence with a further opportunity to establish his theory. In this regard, it has selected the witness TES Ol (2-TCW-1060) to testify. It considers that hearing SRENG Thi (2-TCW-1061) as well is not justified in the interests of justice. Finally, W4 (2-TCW-1052) is not identified with sufficient precision to either be summoned or to have WESU locate him in order to conduct a risk assessment, and the Chamber's attempts to obtain identifying information for this witness have proved unsuccessful.¹²² The Chamber therefore rejects both requests in relation to W4 (2-TCW-1052).

41. The Third Request includes a request to expedite the testimonies of Robert LEMKIN (2-TCW-877), CHAN Savuth (2-TCW-959) and IN Thoeun (2-TCW-961). While the original request to summons these witnesses is not untimely, the Chamber was unable to locate CHAN Savuth (2-TCW-959)¹²³ and it considers the testimony of IN Thoeun (2-TCW-961) to be repetitive of the evidence proffered by CHEAL Cheoun (2-TCW-960), whom the Chamber selected to testify for the trial topic of Internal Purges. Additionally, the Chamber notes that IN Thoeun (2-TCW-961)'s identity as the person interviewed in the book *Behind the Killing Fields* is uncertain.¹²⁴ As for Robert LEMKIN (2-TCW-877), the Chamber notes that the primary and secondary material that the Supreme Court Chamber obtained from him relates to the Defence's contention that the DK leadership was divided into conflicting factions, notably

¹¹⁹ See T. 28 April 2016 (PRAK Khan), pp. 24-25.

¹²⁰ See T. 2 June 2016, (SUOS Thy), pp. 10, 59.

¹²¹ See T., 15 June 2016 (KAING Guek Eav), pp. 77-79, 81-82; T., 21 June 2016 (KAING Guek Eav), pp. 56-60. See also E3/10264, E3/3992, E3/2285.

¹²² See Lemkin Response E29/489/1.

¹²³ WESU Report Concerning Witness CHAN Savuth (F2/4/3/3/6.2), E29/490, 12 August 2016 (confidential). See also 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, E416/4, 28 December 2016, para. 26, citing 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 (confidential).

¹²⁴ See Response of Rob Lemkin to Trial Chamber Inquiry, E29/489/1, 27 September 2016.

E443/10

RUOS Nhim's attempts to overthrow Pol Pot and NUON Chea's leadership of the CPK. Having granted the requests to hear CHHORN Vorn (2-TCW-1036), HUON Choeum (2-TCW-1037) and MEY Savoeun (2-TCCP-1040) on the same subject-matter, the Chamber considers that Robert LEMKIN (2-TCW-877)'s testimony would be of little additional benefit. Moreover, the Chamber has given due consideration to Robert LEMKIN (2-TCW-877)'s general lack of cooperation with the ECCC, including by refusing to provide the video footage requested by the Chamber that is in his possession.¹²⁵ It has further considered that as Robert LEMKIN (2-TCW-877), who is not a fact witness and can only testify to hearsay, is not a Khmer speaker, his interviews were conducted through THET Sambath (2-TCW-885), who posed the questions and interpreted the answers, and the Chamber has no way to verify the translations or transcripts produced. This obviously impacts on the probative value of the said documents and on his proposed testimony.¹²⁶ The Chamber therefore rejects the request to hear these three witnesses.

42. As for the Fourth Request, while timely, it requests two new witnesses to testify on the same topic, specifically the authenticity and reliability of the OCIJ list of S-21 prisoners. Considering that HIN Sotheany (2-TCW-1042) was the analyst who reviewed the Khmer language documents, the Chamber finds it more appropriate to call her to testify and finds the requested testimony of Hiroto FUJIWARA (2-TCW-1043) to be repetitive.¹²⁷ Meanwhile, the Chamber finds that the Defence fails to demonstrate the need to hear NUON Maly (2-TCW-1044). While the Defence expressed concern with the methodology used in establishing the OCIJ list of S-21 prisoners, it failed to explain why it questioned the authenticity and chain of custody of the S-21 photographs listed in the index admitted as E3/9214. The Chamber recalls that none of the Parties raised any objections to admitting the S-21 photographs into evidence.¹²⁸ Additionally, when the NUON Chea Defence used the photographs in court while examining witnesses, it led to them being authenticated by two key staff members of the S-21 Security Centre.¹²⁹ Insofar as NUON Maly (2-TCW-1044) may be relevant to the

¹²⁵ 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, E416/4, 28 December 2016, paras 24-25.

¹²⁶ See 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, E416/4, 28 December 2016, paras 19, 24-25; This resolves the outstanding request noted in the Chamber's Decision on Co-prosecutors' Request to Call THET Sambath as a Priority Witness, E335/3, 7 May 2015.

¹²⁷ Annex 1: Interoffice Memorandum concerning "The OCIJ S21 Prison List and Explanation of the applied methodology" dated 30 March 2016, E393.1, 30 March 2016, para. 5.

¹²⁸ See Decision on the Co-Prosecutor's Request to Admit into Evidence the Photographs Identified as S-21 Photographs in the Corresponding List Admitted as E3/9214, E394/1, 11 July 2016.

¹²⁹ See T. 6 June 2016 (SUOS Thy), pp. 89-93, T. 15 September 2016 (NOEM Oem), pp. 37-42.

E443/10

Defence's case that the vast majority of individuals allegedly registered at S-21 were not detained or executed there,¹³⁰ the Chamber considers his testimony to be repetitive of evidence already on the Case File, including the testimony of HIN Sotheany (2-TCW-1042).

FOR THE FOREGOING REASONS, THE CHAMBER:

GRANTS the requests to hear CHEAL Cheoun (2-TCW-960), HUON Choeum (2-TCW-1037), CHHORN Vorn (2-TCW-1036), SEM Am (2-TCW-1031), LONG Vun (2-TCW-971), TES Ol (2-TCW-1060), SUOY Sav (2-TCW-1029), NIM Kimsreang (2-TCW-854), MEAS Soeun (2-TCW-917) and MEY Savoeun (2-TCCP-1040);

RECALLS that TOAT Thoeun (2-TCW-829), MAM Nai (2-TCW-864), AN Sopheap (2-TCW-1041), and LY Hor (2-TCW-956) are deceased and considers the request to summons them as moot ;

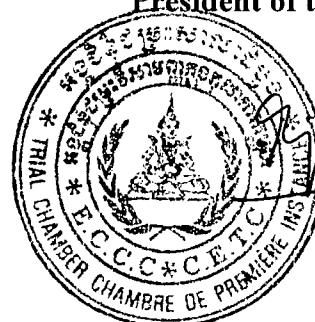
NOTES that it has sought information from Walter HEYNOWSKI (2-TCW-946) regarding his knowledge of relevant documents in lieu of hearing his testimony;

RECALLS that it reserved its ruling on whether to hear HENG Samrin (2-TCW-831), OUK Bunchhoeun (2-TCW-951) and POL Saroeun (2-TCW-962), and later rejected the request to hear them in E454;

RECALLS that it reserved its ruling on whether to hear HIN Sotheany (2-TCW-1042) and later granted the request to hear her; and

REJECTS the remaining requests.

Phnom Penh, 30 March 2017
President of the Trial Chamber



Nonn
Nil Nonn

¹³⁰ Fourth Request, para. 4.