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Trial Chamber
Chambre de première instance

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

Before:
Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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FINAL DECISION ON WITNESSES, EXPERTS AND CIVIL PARTIES TO BE HEARD IN CASE 002/01

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1 INTRODUCTION

1. Shortly after Case 002 was remitted for trial on 14 January 2011, the Trial Chamber ordered the parties to identify all witnesses, Civil Parties and experts they wished to call in relation to all allegations in the Case 002 Closing Order.¹ In response, the parties sought to hear a cumulative total of 1054 individuals at trial. Following the Trial Chamber's decision to sever proceedings and to proceed to trial in relation to a more limited range of charges and factual allegations in the Case 002 Closing Order ("Case 002/01"), the Chamber adopted a phased approach to the identification of those individuals whose testimony was considered most vital to hear in relation to each phase of this first trial in Case 002.

2. The present decision outlines the Chamber's approach to the identification and selection of individuals considered necessary to hear over the course of trial in Case 002/01, and how the likely probative value of the envisaged testimony of all 1054 individuals sought by the parties in Case 002 was assessed. As a general matter, all individuals sought by the parties in Case 002 and listed in the corresponding Annexes to this Decision fall into one of three categories:

- i. Individuals heard over the course of Case 002/01 (Annex I);
- ii. Individuals requested by the parties in Case 002/01 but not ultimately heard before the Chamber (who were thus rejected in Case 002/01 or deferred to future trials) (Annex II); and
- iii. Individuals included on the parties' original Rule 80 lists concerning the entirety of Case 002 but whose evidence was not requested by any party in Case 002/01 (decisions in relation to which are therefore deferred to future trials) (Annex III).

3. Over the course of trial in Case 002/01, the Chamber heard a total of 92 individuals. In the majority of cases, the remaining individuals sought by the parties in Case 002/01 were not heard either on grounds of irrelevance or as likely to duplicate other evidence already before the Chamber.² All individuals requested by the parties in Case 002/01 were nonetheless kept under review over the course of trial and some were in the event added to the list of individuals ultimately heard. Having since conclusively determined all individuals who shall

¹ Order to File Material in Preparation for Trial, E9, 17 January 2011.

² See Internal Rule 87(3) (providing a number of grounds on which the Chamber may reject a request to hear evidence, including where it finds the proposed evidence to be irrelevant or repetitious).

be called to give evidence in Case 002/01,³ the Chamber outlines the basis for its decision not to hear the remainder of the individuals sought by the parties in this case.

2 PROCEDURAL HISTORY

4. On 14 January 2011, following a three-year judicial investigation during which a large number of individuals were heard by the Co-Investigating Judges (“OCIJ”), the Trial Chamber was seised of the 739-page Closing Order in Case 002 (1133 pages in Khmer and 790 pages in French), formally remitting the Accused NUON Chea, IENG Sary, KHIEU Samphan and IENG Thirith for trial.

5. In response to the Trial Chamber’s Order of 17 January 2011, the parties requested to hear a cumulative total of 1054 individuals to address all allegations in the Case 002 Closing Order. The Co-Prosecutors sought to call 247 witnesses, 32 Civil Parties and 16 experts;⁴ the Civil Party Lead Co-Lawyers sought to call 146 Civil Parties, 18 witnesses and 15 experts;⁵ the NUON Chea Defence sought to call 527 witnesses, 13 experts, and five Civil Parties;⁶ the KHIEU Samphan Defence sought to call 61 witnesses and 32 experts;⁷ and the IENG Thirith

³ Trial Chamber memorandum entitled “Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013”, E288, 31 May 2013.

⁴ Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4, and 5, E9/4, 28 January 2011, para. 2; Annex 1: Proposed Order of Witness Appearance at Trial (Combined Expert, Witness and Civil Party List), E9/4.1, 28 January, 2011; Annex 2: OCP Expert List, E9/4.2, 28 January 2011; Annex 3: OCP Witness List, E9/4.3, 28 January 2011; Annex 3A: OCP Witness List: Protective Measures May Be Sought, E9/4.3.1, 28 January 2011; Annex 4: OCP Civil Party List, E9/4.4, 28 January 2011; Annex 5, E9/4.5, 28 January 2011; *see also*, Co-Prosecutors’ Rule 80 Witness, Civil Party and Expert Summaries, E9/13, 23 February 2011; Witness, Civil Party and Expert Summaries with Points of the Indictment – OCP, E9/13.1, 23 February 2011 (updating their previous Rule 80 list to reflect that the Civil Party applications of two Civil Parties identified in the Co-Prosecutor’s previous Rule 80 list were declared inadmissible and that one witness had been newly admitted as a Civil Party).

⁵ Civil Party Lead Co-Lawyers’ Rule 80 Witness, Expert and Civil Party Lists, Including Confidential Annexes 1, 2a, 2b, 3a, 3b, and 4, E9/4/3, 14 February 2011, para. 5; Annex 1: Civil Party Lawyers’ colour key and statistics of proposed Witnesses, Civil Parties and Experts, E9/4/3.1, 15 February 2011; Annex 2a: Proposed Witness List (where no protective measures are sought) – [Civil Party Lead Co-Lawyers], E9/4/3.2, 17 February 2011; Annex 2b: Proposed Witness List (where protective measures are sought) – [Civil Party Lead Co-Lawyers], E9/4/3.3, 17 February 2011; Annex 3a: Proposed List of Civil Parties (where no protective measures are sought), E9/4/3.4, 17 February 2011; Annex 3b: Proposed List of Civil Parties (where protective measures are sought) [Civil Party Lead Co-Lawyers], E9/4/3.5, 17 February 2011; Annex 4: Proposed List of Experts – [Civil Party Lead Co-Lawyers], E9/4/3.6, 17 February 2011.

⁶ List of Proposed Witnesses, Experts, and Civil Parties, E9/4/4, 15 February 2011; Annex A: Proposed Witness List (where no protective measures are sought) – NUON Chea Defence Team, E9/4/4.4, 22 February 2011; Annex B: Proposed List of Experts – NUON Chea Defence Team, E9/4/4.2, 15 February 2011; Annex C: Proposed List of Civil Parties (where no protective measures are sought) – NUON Chea Defence Team, E9/4/4.3, 15 February 2011.

⁷ Proposed List of Witnesses and Experts, E9/4/6, 21 February 2011 (noting, however, that this list was provisional and requesting the Trial Chamber to permit amendments to it at a later date); Annex 1: Proposed Witnesses List (where no protective measures are sought) – KHIEU Samphan, E9/4/6.2, 27 April 2011

Defence sought to call eight witnesses and one expert.⁸ The IENG Sary Defence proposed five experts, but indicated that it would not otherwise indicate further individuals it wished to summon until all evidence against the Accused had been presented. It also requested that the Chamber allow the Accused IENG Sary to call additional witnesses at any point during the trial should the need arise.⁹ Each party also later filed objections to some of the witnesses, experts and Civil Parties proposed by the other parties.¹⁰

2.1 First Trial Management Meeting and Initial Hearing

6. At a Trial Management Meeting in April 2011 (“first TMM”), and before the severance of proceedings pursuant to Internal Rule 89*ter*, the Trial Chamber advised the parties of its intention to commence the hearing of the substance in Case 002 in the following order:

- 1) the structure of Democratic Kampuchea;
- 2) roles of each Accused during the period prior to the establishment of Democratic Kampuchea including when these roles were assigned;
- 3) role of each Accused in the Democratic Kampuchean government, their assigned responsibilities, the extent of their authority and the lines of communication throughout the temporal period with which the ECCC is concerned; and
- 4) policies of Democratic Kampuchea on the issues raised in the Indictment.¹¹

7. The parties were requested to provide by 20 June 2011 supplementary lists of all individuals from their original Rule 80 lists that they considered most relevant to hear in relation to these initial trial topics.¹² The Chamber observed that there was a need to reduce the number of witnesses to be called at trial in the interests of the Accused’s right to a fair and expeditious trial. It further noted that a significant number of individuals on the parties’ Rule

(indicating that 26 of the witnesses sought by the KHIEU Samphan Defence were also listed on the Co-Prosecutors’ witness list); Annex 2: Proposed list of experts – KHIEU Samphan, E9/4/6.3, 3 March 2011.

⁸ IENG Thirith List of Witnesses and Expert, E9/4/5, 15 February 2011 (also incorporating by reference the Co-Prosecutors’ Rule 80 list); Annex: IENG Thirith List of Witnesses, E9/4/5.1, 15 February 2011.

⁹ IENG Sary’s List of Proposed Experts and Notification Concerning his Witness and Civil Party Lists, E9/4/2, 14 February 2011; Annex: Proposed List of Experts – IENG Sary Defence, E9/4/2.2, 14 February 2011.

¹⁰ See e.g. IENG Sary’s Initial Objection to the OCP Proposed Experts & Request for Leave to File Supplementary Submissions within 30 Days, E9/4/9, 24 February 2011; IENG Sary’s Objection to the OCP’s Proposal to Call [TCE-69] as a Witness, E9/4/8, 24 February 2011; Objection to Calling Certain Experts, E9/4/10, 28 February 2011; IENG Thirith Indication of Intention to Object to Witnesses and Experts on the Co-Prosecutors’, Civil Parties’ and NUON Chea’s Witness Lists, E9/4/11, 28 February 2011; Initial Observations Regarding the Witnesses Proposed by the Parties, E9/4/12, 28 February 2011; Co-Prosecutors’ Objection to the Witnesses and Experts Proposed by the Other Parties with 11 Confidential Annexes, E9/14/1/1, 7 March 2011.

¹¹ Transcript (“T.”), 5 April 2011, p. 52; see also, Agenda for Trial Management Meeting, E9/5/1, 17 March 2011.

¹² Trial Chamber memorandum entitled “Directive in advance of Initial Hearing concerning proposed witnesses”, E93, 3 June 2011; see also, T., 27 June 2011, pp. 23-24.

80 lists were additional to those heard before the OCIJ. The parties were requested to indicate the basis for why these new individuals were now sought and to indicate why they were not suggested for interview before the OCIJ (or, if rejected by the OCIJ, the basis for this, where known).¹³ These supplementary lists identified 728 individuals, of whom 147 had been previously heard by the OCIJ and 581 of whom were new individuals.¹⁴

8. At the Initial Hearing, the Chamber proposed a tentative list of 56 individuals that it suggested be called during the initial trial segments and invited comment from the parties regarding this list.¹⁵ The Trial Chamber allowed the parties to file any further observations on this list in writing, indicating that they could also identify additional witnesses, experts and Civil Parties who they considered vital to hear in relation to these trial segments.¹⁶

9. In response, the Co-Prosecutors requested the addition of 13 further witnesses and two experts.¹⁷ The Civil Party Lead Co-Lawyers requested one new witness and one expert, but indicated their intention to add more Civil Parties to the list given the Pre-Trial Chamber's recent joinder of 1728 Civil Parties to Case 002.¹⁸ On 28 July 2011, the Civil Party Lead Co-

¹³ Trial Chamber memorandum entitled "Directive in advance of Initial Hearing concerning proposed witnesses", E93, 3 June 2011.

¹⁴ Classification of Proposed Witnesses and Experts in Preparation for the Initial Hearing, E93/2, 20 June 2011; Annex 1: Witnesses previously heard before the Co-Investigating Judges, E93/2.1, 29 June 2011 (proposing 20 witnesses previously heard before the Co-Investigating Judges, eight of whom were heard at the Co-Prosecutors' Request); Annex 2: New witnesses and experts, E93/2.2, 5 July 2011; Civil Party Lead Co-Lawyers' Supplemental Information to Witness and Expert List in Relation to the First Four Trial Topics and Request for Clarification of the 4th Heading "Policies of the Democratic Kampuchea", E93/2/1, 20 June 2011; Co-Prosecutors' Response to Trial Chamber Directive in Advance of Initial Hearing Concerning Proposed Witnesses, E93/3, 21 June 2011; Annex 1: Co-Prosecutors' Proposed Witnesses for 1st Phase of Trial, E93/3.1, 21 June 2011; Updated Summaries of Proposed Witnesses, Experts, and Civil Parties, E93/4, 21 June 2011; Materials in Preparation for Trial Proceedings – Primary List: Civil Party Summaries – NUON Chea Defence Team, E93/4.1, 21 June 2011; Materials in Preparation for Trial Proceedings – Primary List: Expert Qualifications and Summaries – NUON Chea Defence Team, E93/4.2, 21 June 2011; Materials in Preparation for Trial Proceedings – Primary List: Witness Summaries: NUON Chea Defence Team, E93/4.3, 21 June 2011; *see also*, IENG Thirith Supplemental Information to Witnesses and Expert List in Relation to the First Four Trial Topics, E93/1, 14 June 2011.

¹⁵ T., 27 June 2011, pp. 7-9, 17-18 22-23. A hard copy of this list was distributed to the parties at the Initial Hearing. It formed the basis of the Chamber's Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002, E131/1.1, 25 October 2011.

¹⁶ T., 30 June 2011, p. 2.

¹⁷ Co-Prosecutors' Request to Hear a Further 2 Experts and 13 Witnesses in the First Phase of the Trial and Notice of Intention to Put 7 Video-Clips Relating to NUON Chea Before the Trial Chamber Pursuant to Rule 87(4), E93/7, 5 July 2011; NUON Chea Interview Clips, E93/7.2, 5 July 2011; Annex 2: 7 Video Clips of NUON Chea Interviews by THET Sambath, E93/7.3, 5 July 2011.

¹⁸ Civil Party Lead Co-Lawyers' Observations on the Trial Chamber Tentative List of Witnesses, Civil Parties and Experts, E93/6, 5 July 2011. On 29 June 2011, the Chamber had granted the Lead Co-Lawyers' request for an extension of time to file an additional Civil Party list in consequence of the Pre-Trial Chamber's decision of 24 June 2011 admitting a further 1728 Civil Parties to participate at trial. It directed the Lead Co-Lawyers to indicate by 28 July 2011 which of the Civil Parties admitted in consequence of that decision may be relevant to the factual issues for determination during the first phase of the trial, as well as to later trial segments: Trial Chamber memorandum entitled "Direction to the parties (in advance of discussion at the Initial Hearing of

Lawyers provided a revised list of Civil Parties in relation to the first four trial topics, requesting that an additional 24 Civil Parties be heard.¹⁹ The NUON Chea Defence requested an additional 95 witnesses and Civil Parties and the KHIEU Samphan Defence a further 18 witnesses and three experts.²⁰ The IENG Sary Defence invited the Chamber to reject several witnesses proposed by other parties but did not suggest that additional individuals be heard.²¹

2.2 Identification of individuals to be heard during the initial trial segments

10. On 22 September 2011, proceedings in Case 002 were severed and the scope of Case 002/01 limited principally to forced population movement phases one and two.²² Having considered the parties' submissions in relation to the original list of individuals proposed at the Initial Hearing, the Chamber on 25 October 2011 presented an expanded list of 65 proposed witnesses, Civil Parties and experts to be heard in relation to the first four trial segments.²³ It clarified that this list did not include witnesses, experts and Civil Parties to be called in relation to population movement phases one and two, which would instead be communicated to the parties at a later date.²⁴

provisional list of witnesses, experts and Civil Parties), E108, 29 June 2011"); *see also*, T., 28 June 2011, pp. 115-121.

¹⁹ Civil Party Lead Co-Lawyers' Supplemental Information to Civil Party List in Relation to the First Four Trial Topics, E108/1, 28 July 2011; Annex: Lead Co-Lawyers Revised List of Civil Parties Relevant to the First Four Trial Segments, E108/1.1, 28 July 2011.

²⁰ Request for Additional Witnesses & Continuation of Initial Hearing, E93/9, 5 July 2011; Annex: Witnesses, Civil Parties and Experts, E93/9.1, 5 July 2011; Request to Add Witnesses to the Tentative List for the First Phases of Trial, E93/8, 5 July 2011; Annexe 1: Témoins déjà entendus par les co-juges d'instruction, E93/8.1, 5 July 2011; Annexe 2: Nouveaux témoins, E93/8.2, 5 July 2011.

²¹ IENG Sary's Joint Observations to Certain Witnesses and Experts Requested by the Co-Prosecutors, Civil Parties and NUON Chea Following the Trial Chamber's Tentative List of Witnesses, E93/12, 15 July 2011.

²² Severance Order pursuant to Internal Rule 89*ter*, E124, 22 September 2011 ("First Severance Decision"); *see also*, Trial Chamber memorandum entitled "Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of closing briefs", E163/5, 8 October 2012 (partially granting the Co-Prosecutors' request to expand Case 002/01 and adding executions committed at Tuol Po Chrey in the aftermath of the fall of Phnom Penh to its scope); Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013 ("Second Severance Decision") (affirming that the scope of the factual portions of Case 002/01 included both forced population movement phases one and two and executions at Tuol Po Chrey).

²³ Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002, E131/1.1, 25 October 2011. This list included 52 witnesses, seven Civil Parties and six experts. 57 of these individuals were sought by the Co-Prosecutors, four by the Lead Co-Lawyers, 21 by the KHIEU Samphan Defence, 17 by the NUON Chea Defence, and five by the IENG Sary Defence.

²⁴ Confidential Annex A: Partial List of Witnesses, Experts and Civil Parties for First Trial in Case 002, E131/1.1, 25 October 2011, p. 1.

2.3 Reductions to 25 October 2011 list at second Trial Management Meeting

11. The hearing of the substance in Case 002/01 commenced on 21 November 2011. In the light of all evidence heard before it during the early phases of trial, the Trial Chamber on 3 August 2012 proposed either to withdraw or to defer the testimony of 15 individuals included on the 25 October 2011 list, considering this testimony as likely to be repetitious of other evidence already before it.²⁵ It further indicated that it had recently determined, in the interests of trial efficiency, that the testimony of a number of experts would also not be heard during the first trial, as (following the severance of proceedings in Case 002) their evidence no longer appeared to be of key relevance to the more limited array of charges and factual allegations at issue in Case 002/01.²⁶

12. On 17 August 2012, a second Trial Management Meeting (“Second TMM”) was convened, where the Chamber invited comment from the parties regarding these proposals. It also invited suggestions from the parties regarding further possible reductions to this list.²⁷ Other mechanisms were nonetheless provided to the parties to enable them to introduce relevant but essentially corroborative evidence at trial without unduly prolonging proceedings.²⁸

13. Following the Second TMM, the Trial Chamber Senior Legal Officer compiled a list of all individuals identified for discussion at that hearing. This compilation was placed on the Case File following confirmation from all parties that it accurately reflected their position regarding which individuals they considered should be heard in Case 002/01.²⁹

²⁵ Trial Chamber memorandum entitled “Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency”, E218, 3 August 2012, para. 5.

²⁶ Trial Chamber memorandum entitled “Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency”, E218, 3 August 2012, para. 4; Decision on Assignment of Experts, E215, 5 July 2012, para. 3.

²⁷ Trial Chamber memorandum entitled “Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency”, E218, 3 August 2012, paras 6, 11.

²⁸ See e.g., Decision on Co-Prosecutors' Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents before the Trial Chamber, E96/7, 20 June 2012 (permitting the parties, under certain circumstances, to put before the Chamber written statements without the oral testimony of their authors where that evidence was likely to be corroborative of other evidence before the Chamber).

²⁹ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012.

2.4 Individuals sought in relation to population movement and Tuol Po Chrey

14. Prior to the Second TMM, the Chamber invited the parties to propose witnesses, Civil Parties and experts to be heard in relation to the portions of the Closing Order concerning forced population movement.³⁰ The parties sought to hear a cumulative total of 53 individuals in relation to these allegations, comprising 21 individuals identified by the Co-Prosecutors, 16 by the Lead-Co Lawyers on a priority basis (and an additional 21 on a supplementary list) and 16 by the NUON Chea Defence.³¹ The IENG Sary and KHIEU Samphan Defence did not request to hear additional evidence in relation to these trial segments.

15. On 2 October 2012, the Chamber identified, from these individuals sought, a list of 25 priority witnesses and Civil Parties and a further reserve list of 11 witnesses and Civil Parties.³² Of the 25 individuals indicated as most likely to be heard in support of this trial segment, 14 were proposed by the Co-Prosecutors, 11 by the Lead Co-Lawyers, three by the NUON Chea Defence and two by the KHIEU Samphan Defence.³³

16. On 8 October 2012, the Trial Chamber granted the Co-Prosecutors' request to incorporate killings at Tuol Po Chrey within the scope of Case 002/01, insofar as these related to incidents occurring immediately after the evacuation of Phnom Penh.³⁴ In support of this extension, the Chamber agreed with the Co-Prosecutors that only two witnesses need be heard in support of this trial segment.³⁵

³⁰ Trial Chamber memorandum entitled "Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency", E218, 3 August 2012, para. 11.

³¹ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012.

³² Trial Chamber memorandum entitled "Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01", E236/1, 2 October 2012.

³³ Trial Chamber memorandum entitled "Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01", E236/1, 2 October 2012.

³⁴ Trial Chamber memorandum entitled "Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs, E163/5", 8 October 2012, para. 3 (finding killings at Tuol Po Chrey in the immediate aftermath of the fall of Phnom Penh to be a logical extension of the existing allegations in Case 002/01, which might be incorporated following a relatively brief extension of trial, but excluding from consideration killings that occurred between 1976 and 1977).

³⁵ Trial Chamber memorandum entitled "Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs", E163/5, 8 October 2012, para. 3; *see also*, Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012 (listing all four individuals sought by the parties in relation to the Tuol Po Chrey trial segment).

2.5 Witnesses sought by the Defence in Case 002/01 following the Second TMM

17. At the Second TMM and subsequently, the parties were granted an opportunity to identify a limited number of additional individuals they considered essential to hear at trial. The Chamber specifically emphasised the need for the Defence teams to indicate which individuals they considered to be vital to hear in order to rebut the allegations against the Accused.³⁶ In response, the IENG Sary Defence proposed two individuals and the KHIEU Samphan Defence six.³⁷

18. In addition, the NUON Chea Defence proposed to hear a further 66 individuals unrelated to the alleged role of the Accused during the Democratic Kampuchea period: 20 in relation to the historical context of events in the Case 002 Closing Order, and a further 46 regarding the course and conduct of the three-year judicial investigation in Case 002 or in support of general allegations regarding the independence of the judiciary and political interference.³⁸

2.6 Identification of individuals relevant to the concluding phases of the trial

19. In February 2013, the Chamber indicated that a fixed amount of time at trial would be allocated to evidence on character and victim impact, inviting the Defence and Lead Co-Lawyers to identify those individuals it considered necessary to hear in relation to these final trial segments.³⁹ The KHIEU Samphan Defence sought to call five character witnesses during the three days allocated for this purpose and the NUON Chea Defence one.⁴⁰ The Lead Co-Lawyers provided a list of 14 individuals (including one expert) whom they proposed to call

³⁶ Trial Chamber memorandum entitled “Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency”, E218, 3 August 2012, para. 12 (inviting the Accused to indicate a limited number of individuals they considered “vital to rebut the allegations against the Accused” but reminding the parties that due to the extremely large number of individuals sought by the parties in Case 002, only a sample of those most relevant can reasonably be heard within the confines of a fair and expeditious trial).

³⁷ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, para. 5.

³⁸ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, para. 5.

³⁹ Trial Chamber memorandum entitled “Further information regarding trial scheduling”, E236/5, 7 February 2013, paras 2, 4.

⁴⁰ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, para. 8; Request to Summon TCW-223 as a Character Witnesses (sic) on Behalf of NUON Chea, E236/5/1, 22 February 2013.

during the hearing devoted to the harm suffered by victims, some of whom testified by video-link.⁴¹

2.7 Final Trial Management Meeting and requests to hear additional testimony before concluding Case 002/01

20. Following hearings on severance in February and March 2013, the Co-Prosecutors on their own motion submitted a list of all individuals they considered necessary to hear during Case 002/01 to enable it to meet its burden of proof at trial, annexing a proposed trial schedule.⁴²

21. On 31 May 2013, the Chamber scheduled a final Trial Management Meeting (“Final TMM”) for 13 June 2013 to enable discussion of any remaining issues before evidentiary proceedings in Case 002/01 were closed.⁴³ Drafts of the Annexes to the present Decision were provided to the parties in advance of the Final TMM in order to facilitate discussion of the Chamber’s proposed definitive list of all individuals to be heard in Case 002/01, and to enable any remaining concerns regarding these Annexes and the individuals they contained to be identified. At the final TMM and immediately afterwards, the parties requested to hear a cumulative total of 16 further individuals in Case 002/01 prior to the conclusion of the hearing of evidence in that case (five in relation to forced movement, two concerning the role of the Accused KHIEU Samphan and nine in relation to Tuol Po Chrey).⁴⁴

⁴¹ Lead Co-Lawyers’ Request to Call the Civil Parties’ Revised List of Civil Parties & Experts to Testify During the Hearings on Impact (With Confidential Annex), E236/5/3/1, 6 May 2013; Annex 1: Civil Parties’ Proposed Schedule for the Hearings on Victim Impact, E236/5/3/1.1, 6 May 2013; *see also*, Order for Video-Link Testimony of Civil Party TCCP 13, E236/5/3/2, 22 May 2013. The Chamber permitted all individuals sought by the Lead Co-Lawyers in relation to victim impact to be heard, setting aside a number of trial days for this purpose. All 16 individuals proffered by the Lead Co-Lawyers in support of this segment were ultimately heard before the Chamber: Annex 1, section x.

⁴² Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013.

⁴³ Trial Chamber memorandum entitled “Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013”, E288, 31 May 2013, para. 2.

⁴⁴ Co-Prosecutors’ Notification in Response to the Senior Legal Officer’s Request to Provide Information Prior to the Trial Management Meeting, E288/3, 11 June 2013 (seeking to hear a further five individuals in relation to forced movement, a further two in relation to the role of the Accused KHIEU Samphan, and three in relation to Tuol Po Chrey); Co-Prosecutors’ Notification of Further Details in Support of Rule 87(4) Request to Call Additional Tuol Po Chrey Witnesses, E292/1, 19 June 2013 (seeking to hear the testimony of an additional five individuals in relation to Tuol Po Chrey in the event the three individuals identified in E288/3 cannot be located); Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013 (supporting the Co-Prosecutors’ request to summon the five witnesses identified in E292/1 in relation to Tuol Po Chrey, and requesting that a sixth also be summoned) ; *see also*, Request to admit new evidence, summons Rob Lemkin and initiate an investigation, E294, 16 July 2013; Request to summons witnesses in respect of alleged

3 FINDINGS

3.1 Legal Framework

22. Under the ECCC legal framework, the Trial Chamber shall select those individuals to testify that it determines to be most conducive to ascertaining the truth, subject to the overall requirement that ECCC proceedings “be fair and adversarial and preserve a balance between the rights of the parties” and that they are “brought to a conclusion within a reasonable time”.⁴⁵ The Chamber may also, within its discretion, hear expert evidence on any subject considered necessary at trial.⁴⁶

23. Pursuant to Internal Rule 87(3), the Chamber may decline to hear evidence that is (a) irrelevant or repetitious; (b) impossible to obtain within a reasonable time; (c) unsuitable to prove the facts it purports to prove; (d) not allowed under the law; or (e) intended to prolong proceedings or frivolous.⁴⁷

24. Although the English version of Internal Rule 84(1) states that the Accused “shall have the absolute right to summon witnesses against him or her whom the Accused had no opportunity to examine during the pre-trial stage”, this formulation is not reflected in the other language versions of this Rule.⁴⁸ This sub-rule must in any case be evaluated in the light of the totality of the ECCC legal framework, which emphasises a balancing of the rights of all parties and the need for a fair and expeditious trial.⁴⁹

25. Procedural rules developed at the international level also establish that in determining which individuals shall be heard at trial, there is a need to balance the right of the Accused to

policy of targeting Khmer Republic officials, E291/2, 25 July 2013 (seeking testimony of a further 110 individuals).

⁴⁵ Internal Rules 21(1)(a) and 21(4); *see also*, Internal Rule 85 (providing that the President shall 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).

⁴⁶ Internal Rule 31(1).

⁴⁷ Internal Rule 87(3) and 87(4); *see also*, *KAINING Guek Eav alias Duch*, Trial Judgement, ECCC Trial Chamber (001/18-07-2007/ECCC/TC), E188, 26 July 2010, para. 41; *Prosecutor v. Karemera et al.*, Decision on Mathieu Ndirumpatse’s Appeal from the Trial Chamber Decision of 17 September 2008, ICTR Appeals Chamber (ICTR-98-44-AR73.14), 30 January 2009, para. 25 (finding that the repetitive nature of testimony is to be considered as a factor in determining whether hearing it is necessary).

⁴⁸ *Cf.* Internal Rule 84(1): “*L’accusé a le droit d’exiger la comparaison d’un témoin avec lequel il n’a pas eu l’occasion d’être confronté au stade de l’instruction*” and “ជនជាប់ចោទមានសិទ្ធិស្នើសុំឲ្យកោះហៅសាក្សីដាក់បន្តកដែលជនជាប់ចោទ មិនទាន់មានឱកាស តទល់នៅដំណាក់កាលមុនពេលជំនុំជម្រះ។”

⁴⁹ *See* Internal Rules 21(1)(a) and 21(4); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, Article 33*new*.

a fair and adversarial trial against the right to be tried without undue delay.⁵⁰ In relation to trials of international crimes, which are often complex and extensive in scope, the Trial Chamber's duty to ensure the fairness and expeditiousness of proceedings will frequently entail a delicate balancing of interests, including the Prosecutor's duty to present the available evidence to prove its case and the rights of the Accused.⁵¹ At the *ad hoc* Tribunals, the parties are primarily responsible for identifying which witnesses shall be heard at trial. In contrast, before the ECCC, it is the Trial Chamber which is in charge of the conduct of the hearing and bears the primary responsibility for selecting all individuals who will be summoned to give evidence at trial. Consequently, the notion of proportionality between the time allocated to the presentation of the Prosecution and Defence cases has limited application before the ECCC.⁵² Nonetheless, the Chamber has endeavoured to hear witnesses, Civil Parties and experts requested by all parties.⁵³

26. A further feature of the ECCC legal framework is the need also to take account of the interests of the Civil Parties, who participate at trial in order to support the Prosecution and to seek collective and moral reparation in relation to harm suffered in consequence of the crimes for which the Accused are charged.⁵⁴ Although the Civil Party Lead Co-Lawyers asserted the exclusive right to determine which Civil Parties shall be heard at trial (and to undertake any necessary reductions of the lists of Civil Parties),⁵⁵ the Chamber emphasised throughout the

⁵⁰ *Prosecutor v. Ndayambaje et al.*, Decision on Joseph Kanyabashi's Motions for Modification of his Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time within which to Respond to the Scheduling Order of 13 December 2006, ICTR Trial Chamber (ICTR-98-42-T), 21 March 2007, para. 30; *Prosecutor v. Karemera et al.*, Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008, ICTR Appeals Chamber (ICTR-98-44-AR73.14), 30 January 2009, para. 29.

⁵¹ *Prosecutor v. Prlić et al.*, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, ICTY Appeals Chamber (IT-04-74-AR73.4), 6 February 2007, paras 14, 16; *Prosecutor v. Gotovina et al.*, Decision on Prosecution's Motion to Add a Witness to its Rule 65ter Witness List and to Add Three Associated Documents to its Rule 65ter Exhibit List, ICTY Trial Chamber (IT-06-90-T), 16 June 2008, para. 3; *Prosecutor v. Gotovina et al.*, Decision on Čermak Defence's Second and Third Motions to Add a Witness to its Rule 65ter (G) Witness List, ICTY Trial Chamber (IT-06-90-T), 22 September 2009, para. 7; *Prosecutor v. Gotovina et al.*, Decision on Čermak Defence's Fourth Motion to Amend the Rule 65ter (G) Witness List, ICTY Trial Chamber (IT-06-90-T), 15 October 2009, para. 3.

⁵² See e.g., *Prosecutor v. Orić*, Interlocutory Decision on Length of Defence Case, ICTY Appeals Chamber (IT-03-68-AR73.2), 20 July 2005, para. 8.

⁵³ Of the 92 individuals heard over the course of Case 002/01, 60 were sought by the Co-Prosecutors, 20 by the Lead Co-Lawyers, 19 by the NUON Chea Defence and 22 by the KHIEU Samphan Defence. Many of the 92 individuals heard at trial were sought by multiple parties (see Annex I).

⁵⁴ Internal Rule 23(1)(a) and (b); see also, Internal Rule 21(1) (stating that the ECCC legal framework "shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims").

⁵⁵ Civil Party Lead Co-Lawyers' Urgent Request for Clarification and for Extension of Time to Respond to Trial Chamber Directive E93, E93/5, 17 June 2011, para. 25.

proceedings that, before the ECCC, decisions as to which evidence shall be heard at trial are within the exclusive competence of the Trial Chamber.⁵⁶

27. It follows that the Chamber must ascertain the truth while, at the same time, avoiding “needless consumption of time”.⁵⁷ Ascertaining the truth need not require the testimony of an unlimited number of witnesses and, provided the Trial Chamber has adequately weighed the complexities of the case and the evidence offered by the Accused, it is well-established that Trial Chambers may order the reduction of the number of witnesses the parties have requested to hear.⁵⁸ Other international courts and tribunals have also sought measures to ensure judicial economy and have on occasion sanctioned significant reductions to the parties’ witness lists, where these reductions are reasoned, follow adversarial discussion and have no adverse impact on the fairness of the trial or on the ability to present an effective defence.⁵⁹

28. Before the ECCC, decisions by the Trial Chamber concerning the summoning of witnesses are open to appeal only at the same time as the judgement on the merits.⁶⁰

3.2 Basis for the Chamber’s criteria for selection of individuals sought in relation to various Case 002/01 trial segments

29. Given the Chamber’s phased approach to the identification of individuals considered most relevant to hear at trial, and the numerous opportunities provided to the parties to comment on that proposed evidence, the focus of this decision is on all individuals specifically identified by the Chamber or the parties as essential to hear over the course of trial in Case 002/01 who were not ultimately summoned to give evidence. The Chamber below provides its rationale for not calling, or for deferring to future trials, a number of individuals whom the Chamber initially indicated it would call (or who were identified by the

⁵⁶ Trial Chamber memorandum entitled “Direction to the parties (in advance of discussion at the Initial Hearing of provisional list of witnesses, experts and Civil Parties)”, E108, 29 June 2011, para. 5; *see also*, Internal Rule 85(1).

⁵⁷ Internal Rule 85(1).

⁵⁸ *Prosecutor v. Nshogoza*, Decision on Defence Motion for Reconsideration of the Chamber’s Further Order for the Defence to Reduce its Witness List, ICTR Trial Chamber (ICTR-07-91-T), 26 February 2009, paras 1, 8.

⁵⁹ *Prosecutor v. Karemera et al.*, Decision on Mathieu Ngirumpatse’s Appeal from the Trial Chamber Decision of 17 September 2008, ICTR Appeals Chamber (ICTR-98-44-AR73.14), 30 January 2009, paras 17-27 (considering as permissible the reduction of an Accused’s witness list from 354 witnesses to 35 as the latter adequately permitted the Accused to present his case); *see also*, *Prosecutor v. Nshogoza*, Decision on Defence Motion for Reconsideration of the Chamber’s Further Order for the Defence to Reduce its Witness List, ICTR Trial Chamber (ICTR-07-91-T), 26 February 2009, paras 1, 8 (permitting reduction of a witness list from more than 40 to no more than ten); *Prosecutor v. Nyiramasuhuko et al.*, Decision on Joseph Kanyabashi’s Appeal Against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, ICTR Appeals Chamber (ICTR-98-42-AR73), 21 August 2007.

⁶⁰ Internal Rule 84(4).

parties as vital to hear over the course of trial in Case 002/01). The remainder of the 1054 individuals sought over the course of Case 002 (who were not identified as relevant to Case 002/01 by either the Chamber or any party) are discussed in Section 3.4.

3.2.1 Individuals sought in relation to historical context and other events outside the indictment period

30. In view of the limited relevance of these considerations, and the large number of individuals sought to be heard in relation to them, the Chamber indicated at an early stage of proceedings that background contextual issues and events outside the temporal jurisdiction of the ECCC will be considered only when demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber.⁶¹ Over the course of the trial in Case 002/01, the Trial Chamber specifically identified and heard the following individuals in relation to historical context:

TCCP-185 KLAN Fit;
TCCP-123 ROMAM Yun;
TCW-395 LONG Norin; and
TCW-542 PRAK Yut.

31. A significant quantity of documentary evidence pertaining to pre-1975 conditions, and which may place the allegations within the Closing Order in context, has also been put before the Chamber over the course of the trial in Case 002/01. The Chamber in addition heard evidence on events prior to 1975 during the testimony of the following individuals at trial, amongst others:

TCW-536 Francois PONCHAUD;
TCE-11 David CHANDLER;
TCE-65 Philip SHORT; and
TCE-33 Stephen HEDER.

32. The NUON Chea Defence sought, at an early stage of trial proceedings and again at the Second TMM, to hear a significantly larger number of individuals in relation to the historical context of the crimes alleged in the Closing Order, in particular concerning the role of the United States and Vietnam, and pre-1975 social and economic conditions in

⁶¹ Trial Chamber memorandum entitled "Directive in advance of Initial Hearing concerning proposed witnesses", E93, 3 June 2011.

Cambodia.⁶² As the Accused in Case 002/01 are charged with events that occurred after the fall of Phnom Penh on 17 April 1975, and given the significant amount of testimony already heard or otherwise in evidence concerning historical factors, the Chamber exercised its discretion to select the most relevant evidence at trial and considered the hearing of these additional individuals sought by the NUON Chea Defence to be unwarranted.⁶³ The Chamber has thus rejected the NUON Chea Defence request to hear the following individuals identified by it as necessary to hear in Case 002/01 as irrelevant or repetitious (Internal Rule 87(3)(a)):

TCW-122 Avram Noam CHOMSKY;
 TCW-446 Stephen John MORRIS;
 TCW-572 Donald RUMSFELD;
 TCE-10 Nayan CHANDA;
 TCW-656 Frank Warren SNEPP;
 TCW-220 HEM Samin;
 TCW-222 HENG Samkai;
 TCW-266 IN Sivouth;
 TCW-305 Penelope KEY;
 TCW-311 KHANG Sarin;
 TCW-371 Melvin LAIRD;
 TCW-430 MEN Chhan;
 TCW-442 W. Stanley MOONEYHAM;
 TCW-477 Robert H. NOOTER;
 TCW-559 Phillipe RICHER;
 TCW-625 James Rodney SCHLESINGER;
 TCW-74 Timothy CARNEY;
 TCW-768 VO Dong Giang;
 TCW-769 VO Nguyen Giap; and
 TCW-791 YOS Por.

33. The Chamber further notes that many of the above individuals appear to lack direct knowledge of events in Cambodia during the indictment period and were therefore additionally rejected on grounds of relevance. It should also be emphasised that a number of individuals who did testify at trial provided evidence relevant to the conditions that prevailed

⁶² See e.g., List of Additional Witnesses Relevant to Historical Background, E155/1, 9 February 2012; List of Additional Witnesses Regarding Historical Context – NUON Chea Defence Team, E155/1.1, 9 February 2012.

⁶³ See Request to Hear Defence Witnesses and to Take Other Procedural Measures in Order to Properly Assess Historical Context, E182, 16 March 2012; Trial Chamber memorandum entitled “Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01”, E172, 21 February 2012, p. 4 (“The Chamber notes the recent NUON Chea Defence filing of a List of Additional Witnesses Regarding Historical Context (E155/1.1) in which they sought to have heard before the Chamber 47 additional witnesses in connection with the historical background trial segment. These witnesses were considered by the Chamber in formulating its provisional witness list E131/1.1, and the NUON Chea Defence filing of 31 January 2012 fails to demonstrate why any of these 47 witnesses should be heard immediately. The Chamber therefore declines to hear any of these proposed witnesses at this juncture. It further advises the parties that all proposed witnesses, experts and Civil Parties contained on the parties’ proposed lists (comprising a total of 1054 individuals) remain under consideration by the Chamber unless and until they are either called before the Chamber or rejected, as the case may be”).

in Cambodia prior to 1975, and other events leading up to the Khmer Rouge period, including the impact of the American bombings of 1972.⁶⁴

34. Whilst declining to hear TCE-10 in relation to pre-1975 events, the Chamber acknowledges the potential relevance of his testimony to the issue of the existence or otherwise of an armed conflict during the indictment period.⁶⁵ It has therefore deferred his evidence in relation to this area to future trials in Case 002.

3.2.2 Individuals heard over the course of the trial in relation to administrative, communications and military structures and the role of the Accused

35. In addition to the overview evidence of several experts and other individuals in relation to the alleged role of the Accused, the Trial Chamber heard 35 individuals specifically identified as relevant to administrative, communications and military structures of the Democratic Kampuchea (“DK”) period.⁶⁶ The following individuals also testified generally on these areas:

TCE-11 David CHANDLER;
TCE-65 Philip SHORT; and
TCW-281 KAING Guek Eav, *alias* Duch.

36. In February 2012, the Chamber had also indicated that the following individuals to be heard at trial had been identified primarily due to their knowledge of the below areas relevant to the facts at issue in Case 002/01.⁶⁷ It should nonetheless be emphasized that many of these individuals testified at trial in relation to numerous areas of relevance to Case 002/01:

3.2.2.1 Communications structures

TCW-480 NORNG Sophang;
TCW-695 SUON Kanil; and
TCW-307 KHAM Phan.

3.2.2.2 Administrative structures, including ministries

TCW-620 SA Vi;
TCW-617 SAUT Toeung;

⁶⁴ Additional to those individuals identified above, *see e.g.*, T., 22 April 2013, p. 75 (CHHOUK Rin).

⁶⁵ *KAING Guek Eav alias Duch*, Trial Judgement, Case No. 001/18-07-2007/ECCC/TC, E188, 26 July 2010, paras 66-68, 70.

⁶⁶ *See* Annex I, sections iv and v. *See also*, 25 October 2011 List; Trial Chamber memorandum entitled “Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01”, E172, 21 February 2012.

⁶⁷ Trial Chamber memorandum entitled “Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01”, E172, 21 February 2012.

TCW-504 PEAN Khean; and
TCW-488 OEUN Tan.

3.2.2.3 Ministries (Office B-1 (Ministry of Foreign Affairs))

TCW-694 SUONG Sikoeun;
TCW-586 SALOTH Ban;
TCW-323 KHOEM Ngorn;
TCW-487 NY Khan; and
TCW-564 ROCHOEM Ton.

3.2.2.4 Office B-1 (Boeung Trabek)

TCW-490 ONG Thong Hoeng.

3.2.2.5 Ministry of propaganda/political education by the Accused

TCW-475 NOEM Sem;
TCW-609 SA Siek;
TCW-320 KHIEV En;
TCW-338 KIM Vun;
TCW-91 CHEA Say; and
TCCP-28 EM Oeun.

37. In addition, the Chamber summonsed SAR Sarin (TCCP-186) who answered several questions prior to asserting he would not be prepared to testify further unless he was provided certain protective measures, namely the assignment of four police officers for the rest of his life.⁶⁸ The Civil Party was informed before releasing him that in view of the lateness of his request, the Chamber did not have the practical means necessary to provide the protection he requested.⁶⁹ The Co-Prosecutors filed a request to recall SAR Sarin and for a further assessment of the need for protective measures which was opposed by the KHIEU Samphan Defence.⁷⁰ Following consultation with the Witness/Experts Support Unit, the Trial Chamber determined that protective measures were not warranted.⁷¹ The Trial Chamber, noting that Civil Parties cannot be compelled to provide evidence within the legal framework of the ECCC, and that SAR Sarin refused to testify without protective measures, determined that the

⁶⁸ T., 29 April 2013, pp. 41-42, 54.

⁶⁹ T., 29 April 2013, p. 64.

⁷⁰ Co-Prosecutors' Request for the Recall of Civil Party SAR Sarin and an Order for a Formal Assessment of the Need for Protective Measures, E286, 20 May 2013; *Réponse à la demande des co-procureurs demandant le rappel de la partie civile SAR Sarin et l'évaluation de son besoin de mesures de protection*, E286/1, 30 May 2013.

⁷¹ Witness Expert Support Assessment - WESU Assessment 09-VU-00883, E29/460, 26 June 2013.

recall of SAR Sarin was unlikely to be conducive to ascertaining the truth or otherwise in the interests of justice.⁷²

38. The Co-Prosecutors requested the Chamber to reconsider its decision not to recall Civil Party SAR Sarin.⁷³ On 23 July 2013, after hearing the parties' oral submissions and the reply of the Co-Prosecutor, SAR Sarin who was present in the public gallery of the Court, responded to the Chamber's question. Contrary to assertions made by the lawyer representing him, Mr. SAR Sarin was not prepared to testify unless provided the protective measures he originally requested in addition to others. The Chamber rejected the OCP request, ruling that even if considered a fresh application, the Co-Prosecutors did not allege any new circumstances, nor was the Trial Chamber satisfied that the provisions of Internal Rule 35 had been met.⁷⁴

39. The Trial Chamber notes that the Internal Rules do not provide for reconsideration of its decisions, and therefore the Chamber does not entertain applications concerning matters upon which it has already ruled. Instead, a party may appeal a decision at the appropriate time or file a fresh application before this Chamber when justified by new circumstances.⁷⁵ The Co-Prosecutors did not submit that this was a fresh application. The Chamber nevertheless affirms its prior decision that Civil Parties cannot be compelled to provide evidence and recalls that by virtue of their special status, Civil Party statements are voluntary.⁷⁶ Furthermore, in these circumstances, it would be inappropriate to initiate proceedings for knowing or wilful interference with the administration of justice.

3.2.2.6 Ministry of Commerce

TCW-583 SAKIM Lmut; and
TCW-321 KHIEV Neou.

⁷² Trial Chamber memorandum entitled "Disposition of all Requests for Protective Measures sought in Case 002/01 and response to Co-Prosecutors' Request for the Recall of Civil Party SAR Sarin and an Order for a Formal Assessment of the Need for Protective Measures (E286)", E293, 28 June 2013, paras 10-13.

⁷³ Co-Prosecutors' Request for Reconsideration of the Decision Regarding the Denial of the Request to Recall Civil Party SAR Sarin, E293/1, 18 July 2013.

⁷⁴ T., 23 July 2013, p. 67.

⁷⁵ 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, para. 7; see also, *KAING Guek Eav alias Duch*, Appeal Judgement, Case No. 001/18-07-2007/ECCC/SC, F28, 3 February 2012, para. 491.

⁷⁶ Trial Chamber memorandum entitled "Disposition of all Requests for Protective Measures sought in Case 002/01 and response to Co-Prosecutors' Request for the Recall of Civil Party SAR Sarin and an Order for a Formal Assessment of the Need for Protective Measures (E286)", E293, 28 June 2013, para. 13; Internal Rule 23(4); Code of Criminal Procedure of the Kingdom of Cambodia, Arts. 312, 326, 335.

3.2.2.7 Administrative structures (national)

TCW-604 SAO Sarun; and
TCW-797 YUN Kim.

3.2.2.8 Military structures

40. At a later date, the Chamber also scheduled the testimony of the following three individuals included on its 25 October 2011 list, in relation to military structures:

TCW-110 CHHOUK Rin;
TCW-428 MEAS Voeun; and
TCW-126 CHUON Thi.

41. Also primarily in relation to the military structures of the DK period, the Chamber heard the testimony of two further individuals, whose testimony had been sought by the Co-Prosecutors at or immediately after the Second TMM⁷⁷:

TCW-100 CHAOM Se; and
TCW-754 UNG Ren.

3.2.2.9 Further individuals heard during the closing stages of the trial at the parties' request

42. Following a review of all evidence heard to date and the requests of all parties, the Chamber heard the below additional individuals in relation to numerous features of the structure of the DK government and the roles of the Accused during the closing stages of the trial⁷⁸:

TCE-33 Stephen HEDER;
TCW-164 EK Hen;
TCW-648 SIM Hao;
TCW-548 PRUM Sou;
TCW-570 ROS Suy; and
TCW-384 LENG Chhoeung.

43. TCE-33, TCW-648 and TCW-164 were sought by the Co-Prosecutors at the Second TMM and/or the concluding stages of trial for addition to the list of individuals to be heard at trial.⁷⁹ TCE-33, although declining appointment as an expert, nonetheless testified as a fact

⁷⁷ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 3.

⁷⁸ Trial Chamber memorandum entitled "Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013", E288, 31 May 2013, paras 4-6.

⁷⁹ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 3; Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013.

witness.⁸⁰ The testimony of TCW-548, who had been proposed by the Chamber for withdrawal in advance of the Second TMM, was retained at the Co-Prosecutors' request.⁸¹

44. TCW-570 and TCW-384 had been identified by the KHIEU Samphan Defence at the Second TMM as vital to hear in order to rebut allegations made against the Accused.⁸² The Chamber also considered these individuals to be likely to provide relevant and probative evidence and that their hearing was conducive to ascertaining the truth in relation to the allegations at issue in Case 002/01. Their evidence was heard before the Chamber on 25 April 2013 and 17 June 2013, respectively.

3.2.3 Individuals who were unable to be called or deemed unnecessary to hear in relation to various Democratic Kampuchea era structures or the role of the Accused

45. The majority of the evidence sought by the Chamber or identified by the parties as essential to hear in relation to the administrative, communications and military structures of the DK period and the role of the Accused was in fact heard before the Chamber over the course of trial in Case 002/01. A limited number of individuals identified by the Chamber as relevant to these areas were, however, unavailable to testify at trial. A few were also deemed to be unnecessary to hear in light of the significant quantity of other evidence available before the Chamber, or no longer relevant to the facts at issue in Case 002/01 following the severance of two Accused from the proceedings. In relation to two individuals, the Chamber was also unable to reach agreement on their relevance to the facts at issue in Case 002/01. The Chamber has therefore been unable to hear their evidence at trial.

3.2.3.1 Communications structures

46. The following five individuals, identified by the Chamber as likely to be relevant to communications structures, were ultimately not called to give evidence in Case 002/01:

TCW-780 YENG Lin;

⁸⁰ Trial Chamber memorandum entitled "Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013", E288, 31 May 2013, para. 4. Mr. Heder testified from 9-11 & 15-18 July 2013. He was called principally to address the significant number of documents on the Case 002 Case File authored by him. *See also*, T., 23-25 January 2012, (VANTHAN Dara Peou) and T., 1, 2, 6 February 2012, (YOUK Chhang), summoned in relation to the admissibility of documents originating from DC-Cam.

⁸¹ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 1; Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013.

⁸² Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 5.

TCW-645 SIENG Seng;
 TCW-679 SOVAN Han;
 TCW-326 KHUN Kim, *alias* NUON Paet; and
 TCW-398 LONH Dos.

47. At the Second TMM, the Chamber proposed that TCW-780 and TCW-645 be withdrawn, on grounds that their testimony was likely to be repetitive of other evidence already before the Chamber. As their proposed withdrawal was unopposed by any party at the Second TMM or subsequently, the Chamber declined to hear their evidence in Case 002/01.⁸³ In the course of further streamlining its 25 October 2011 list as the trial progressed, the Chamber also adjudged TCW-679 and TCW-326 to be repetitious of other evidence before the Chamber and/or of greater relevance to future trials or Accused severed from Case 002/01 and therefore also declined to hear their evidence in Case 002/01.⁸⁴

48. Finally, and following efforts by the Witness/Expert Support Unit to locate TCW-398, WESU reported that TCW-398 was unable to testify due to ill-health.⁸⁵ Where allegations were made that an individual was deceased or unable to testify due to ill-health, the Chamber sought information through the Witness/Expert Support Unit to verify that the individual's incapacity was genuine, or to obtain a death certificate. Wherever possible, testimony by video-link was used as an alternative to declining to hear an elderly or physically frail witness altogether.⁸⁶

⁸³ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 1; Annex II, section viii(b).

⁸⁴ The latter, a detainee, also alleged ill-health and resisted being summoned before the Trial Chamber: Letter from [TCW-326] to the ECCC, E269, 5 March 2013). *See also*, Annex II, sections xi and viii(a).

⁸⁵ Trial Chamber memorandum entitled "TCW-398 Mr. LONH Dos, Fitness to Travel to the ECCC", E172/29/1, 14 December 2012; WESU memorandum entitled "TCW-398 Mr. LONH Dos, Fitness to Travel to the ECCC", E172/29/1.1, 7 December 2012 (noting that multiple contacts were made with the witness, where it was determined that the witness suffered from kidney problems and required dialysis. He also required the authorization of his military superior to testify).

⁸⁶ *See e.g.*, WESU memorandum entitled "TCW-604", E141.1, 4 November 2011 (indicating village chief report that TCW-604 was deceased); Trial Chamber memorandum entitled "Co-Prosecutors' Request for Investigation into Witness Deaths (E144)", E144/1, 1 December 2011 (ordering investigation into alleged death of TCW-604); WESU memorandum entitled "Response to Trial Chamber's Request – E144/1", E144/1/1, 6 March 2012 (indicating that TCW-604 was elderly but still living). TCW-604 was ultimately heard before the Chamber: T., 5, 6, 7, 11, 12 June 2012. *See also*, T., 7 December 2011, pp. 1-2 (ruling that TCW-395 could be heard by video-link due to his health condition); T., 11 December 2012, pp. 68-71 (granting request that TCCP-1 be heard by video-link); Request for Video-Link for TCW-624 (Sydney SCHANBERG) and admission of Witness' Diary pursuant to Internal Rule 87(4), E236/1/4/3, 10 April 2013.

3.2.3.2 *Administrative structures (centre)*

49. In advance of the Second TMM, the Chamber proposed not to hear the evidence of two individuals who were initially identified as relevant to this trial segment.⁸⁷ This suggestion was unopposed by any party at the Second TMM or subsequently.⁸⁸ The Chamber accordingly declined to hear the following two individuals on grounds that their evidence was likely to be repetitious of other evidence already heard before the Chamber:

TCW-638 SENG Lytheng; and
TCW-354 KONG Yeuang.

3.2.3.2.1 *Office B-1 (Ministry of Foreign Affairs)*

50. The Trial Chamber also declined to hear the testimony of the following individuals it had earlier identified on its 25 October 2011 list as relevant to the Ministry of Foreign Affairs:

TCW-724 THIOUNN Prasith;
TCW-796 YUNG Yem; and
TCCP-178 Laurence PICQ.

51. In view of the large quantity of evidence heard in relation to the Ministry of Foreign Affairs (*see* list of individuals heard in Section 3.2.2.3), the Chamber found it unnecessary to summons further witnesses whose evidence would have been in many aspects repetitious, or instead of greater relevance to the Accused IENG Sary (subsequently deceased). The Chamber therefore considered it unnecessary to summons TCW-724 and TCW-796 to give evidence in Case 002/01.⁸⁹ TCCP-178, who resides in France and is the former wife of TCW-694, refused to cooperate with the Chamber and, as a Civil Party, cannot be compelled to give evidence within the ECCC legal framework.⁹⁰ Her evidence was also adjudged as likely to be substantially repetitive of other testimony before the Chamber.

3.2.3.2.2 *Office B-1 (Boeung Trabek)*

52. The following individuals were ultimately not heard in relation to this trial segment, on grounds that they could not be located, were deemed primarily relevant to Accused severed

⁸⁷ Trial Chamber memorandum entitled “Next Group of Witnesses, Civil Parties and Experts to be heard in Case 002/01”, E172, 21 February 2012, p. 2.

⁸⁸ Trial Chamber memorandum entitled “Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency”, E218, 3 August 2012, para. 5; Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 1; *see also*, Annex II, section viii(b).

⁸⁹ Annex II, section xi.

⁹⁰ Internal Rule 23(4).

from the proceedings in Case 002/01, or as their proposed withdrawal was unopposed by any party at the Second TMM or subsequently⁹¹:

TCW-707 – TAN Wardeny;
TCW-794 – Y Phandara; and
TCW-234 – HING Un.

3.2.3.2.3 *Ministry of Propaganda and political education by the Accused*

53. In relation to individuals identified as relevant to political education allegedly conducted by the Accused, and having heard the seven individuals identified as relevant to this segment in Section 3.2.2.5, the Chamber declined to hear the evidence of TCCP-94 (NEOU Sarem).⁹² The Lead Co-Lawyers consistently sought to hear her evidence at trial, primarily due to her significance as a representative of the Cambodian-American diaspora.⁹³

54. On 11 January 2013, the Chamber deferred the hearing of her evidence due to, amongst other reasons, the unavailability of a transcript of a prior Voice of America radio interview given by the Civil Party.⁹⁴ It ultimately considered it unnecessary to hear her evidence at trial in the light of the significant quantity of evidence already before the Chamber in relation to this trial segment, and due to the fact that the Civil Party was not present in Phnom Penh at the time of its forced evacuation. Although acknowledging TCCP-94's significance as a representative of victims of the Cambodian-American diaspora, the Chamber notes that she was not selected by the Lead Co-Lawyers as an individual necessary to hear in relation to the harm suffered by victims.⁹⁵ The Chamber therefore exercised its discretion not to hear her evidence at trial in the interests of judicial economy.

⁹¹ Annex II, sections xii(d), xi and viii(b), respectively. *See also*, Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 1 (in relation to TCW-234); WESU memorandum entitled "Witnesses residing in France", E205, 5 June 2012 (regarding TCW-707, TCW-794 and TCW-234); Trial Chamber memorandum entitled "Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency", E218, 3 August 2012, para. 5 (proposing to withdraw TCW-707 and TCW-234); Notice of Co-Prosecutors' Position on Key Issues to be Discussed at 17 August 2012 Trial Management Meeting (with Confidential Annex A), E218/2, 15 August 2012 (agreeing to withdraw TCW-234 and that TCW-707 and TCW-794 be deferred.).

⁹² Annex II, section viii(a).

⁹³ T., 11 January 2013, pp. 16-19.

⁹⁴ T., 11 January 2013, p. 29.

⁹⁵ Trial Chamber memorandum entitled "Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013", E288, 31 May 2013; Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013. *See also*, Annex I, section x.

3.2.3.3 Administrative structures (national)

55. Having heard two individuals specifically in relation to this segment, and despite earlier requests that he be retained on the Chamber's 25 October 2011 list, the Chamber, likewise for reasons of judicial economy, considered it unnecessary to hear the evidence of the following further individual⁹⁶:

TCCP-142 SENG Soeun

3.2.3.4 Other individuals on the 25 October 2011 list not ultimately heard at trial

56. The Chamber was unable to hear the testimony of a small number of additional individuals considered relevant to the early trial segments in Case 002/01, namely:

TCW-285 KANG Sophat;
 TCW-676 [Redacted];
 TCW-425 [Redacted];
 TCW-297 KE Pich Vannak;
 TCW-601 SAO Phen; and
 TCW-482 NORODOM Sihanouk.

57. The Chamber was unable to hear the evidence of TCW-425 due to the protections against self-incrimination contained in Internal Rule 24(4).⁹⁷ On 15 October 2012, King SIHANOUK passed away, rendering all requests that he be heard at trial, and a number of

⁹⁶ See Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 1 (opposing the Chamber's request to withdraw the testimony of TCCP-142). The Chamber notes, however, that TCCP-142 was not identified by the Co-Prosecutors either on its March 2013 list or at the Final TMM as vital to hear prior to the close of the hearing of evidence in Case 002/01. See Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013; Co-Prosecutors' Notification in Response to the Senior Legal Officer's Request to Provide Information Prior to the Trial Management Meeting, E288/3, 11 June 2013.

⁹⁷ See Annex II, section xii(f); see also, Notice and Waiver – [TCW-425]'s notice of intent to exercise right to remain silent and waiver of any potential conflict of interest, E236/2/4/1.2, 13 June 2013. Internal Rule 24(4) provides that "[t]he Co-Investigating Judges and the Chambers shall not call as a witness any person against whom there is evidence of criminal responsibility, except as provided in Rule 28." See Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 5.

other sundry motions, moot.⁹⁸ TCW-285 and TCW-676 are also deceased, while TCW-601 was unable to testify at trial due to ill-health.⁹⁹

58. In addition, the Chamber deferred or declined to hear a number of experts initially included on its 25 October 2011 list, on grounds that they were either likely to be substantially repetitive of expert testimony already heard and/or of greater relevance to future trials in Case 002¹⁰⁰:

TCE-27 Anne Yvonne GUILLOU;
TCE-80 Elizabeth BECKER; and
TCE-41 Henri LOCARD.

59. Other proposed experts sought by the Chamber declined their appointment as experts in Case 002/01 and were therefore unable to be heard at trial¹⁰¹:

TCE-44 EAR Meng-Try; and
TCE-38 Benedict KIERNAN.

3.2.4 *Individuals sought in relation to population movement*

60. In relation to population movement phases one and two, the Chamber identified – from the list of 53 priority individuals whose testimony was sought by all parties in relation to these trial segments – 25 individuals it considered likely to be most relevant to hear at trial. It further provided a list of 11 reserve witnesses in the event a substantial number of these

⁹⁸ See e.g., Submission on the Modalities for Hearing Norodom Sihanouk, E93/9/1, 21 July 2011; IENG Sary's Motion to Summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Samdech Chea Sim, E85, 10 May 2011; Co-Prosecutors' Response to "IENG Sary's Motion to Summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Samdech Chea Sim", E85/4, 24 May 2011.

⁹⁹ Annex II, section xii(a) and (b); see also, WESU memorandum entitled "Deceased Witness – TCW-285", E140/2, 19 October 2012; WESU memorandum entitled "WESU response to Trial Chamber request for independent medical assessment of TCW-601's fitness to testify before the ECCC", E172/23, 23 May 2012.

¹⁰⁰ Trial Chamber memorandum entitled "Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01", E172, 21 February 2012; Trial Chamber memorandum entitled "Hearing on 17 October 2012", E172/25, 25 May 2012; Decision on Assignment of Experts, E215, 5 July 2012. In view of the Chamber's decision to call only a limited number of experts to testify, objections to the hearing of a number of experts are therefore moot (see e.g., IENG Sary's Initial Objection to the OCP Proposed Experts & Request for Leave to File Supplementary Submissions within 30 Days, E9/4/9, 24 February 2011).

¹⁰¹ See Trial Chamber memorandum entitled "Proposed Evidence of Benedict KIERNAN before the Trial Chamber", E166/1/4, 14 June 2012 (noting that while concerted efforts were made both by the Chamber and United States institutions supportive of the ECCC to obtain his testimony, in reality the ECCC has few practical means at its disposal to compel the attendance of an uncooperative expert. Having exhausted all reasonable means to obtain the testimony of Professor KIERNAN and in view of the proposed expert's reluctance to assist the Chamber in its search for the truth the Chamber therefore decided not to hear his evidence in Case 002/1).

individuals were unavailable.¹⁰² The following 21 individuals, who were predominantly drawn from these latter lists, were ultimately heard at trial¹⁰³:

TCCP-169 YIM Sovann;
 TCCP-25 CHUM Sokha;
 TCCP-64 LAY Bony;
 TCW-661 SOKH Chhin;
 TCW-362 KUNG Kim;
 TCW-690 SUM Chea;
 TCW-89 MOM Sam Oeurn;
 TCW-507 PECHUY Chipse;
 TCCP-82 MEAS Saran;
 TCCP-105 OR Ry;
 TCCP-187 CHAU Ny;
 TCCP-188 TOENG Sokha;
 TCCP-108 PECH Srey Phal;
 TCCP-59 KIM Vandy;
 TCW-247 HUN Chhunly;
 TCCP-1 AFFONCO Denise;
 TCW-565 AI ROCKOFF;
 TCCP-116 PIN Yathay;
 TCW-536 Francois PONCHAUD;
 TCW-253 IENG Phan; and
 TCW-624 Sydney Hillel SCHANBERG.

61. In response to later requests of the parties, the Chamber also summoned the following additional individuals in relation to population movement¹⁰⁴:

TCW-801 NOU Mouk;
 TCW-505 PECH Chim; and
 TCW-386 LEV Lam.

¹⁰² Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 4 (identifying 21 individuals sought by the parties (21 by the Co-Prosecutors, 37 by the Lead Co-Lawyers (and a further 21 on a supplementary list) and 16 by the NUON Chea Defence) to hear in relation to population movement phases 1 and 2); *see also*, Trial Chamber memorandum entitled “Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01”, E236/1, 2 October 2012; Annex II, section vi.

¹⁰³ TCW-565 (AI ROCKOFF) was the sole exception, having been identified by the Chamber as likely to be less relevant to hear at trial: Trial Chamber memorandum entitled “Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01”, E236/1, 2 October 2012, para. 6. In view of the waiver provided by the IENG Sary Defence to the hearing of his testimony in the absence of the Accused, and as he was sought by both the Co-Prosecutors and the NUON Chea Defence, he was heard on 28-29 January 2013 while the Accused NUON Chea was absent from proceedings and unable to participate at trial due to ill-health: T., 28 January 2013, pp. 1-2; T., 29 January 2013, p. 1.

¹⁰⁴ *See e.g.*, Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013; Co-Prosecutors’ Notification in Response to the Senior Legal Officer’s Request to Provide Information Prior to the Trial Management Meeting, E288/3, 11 June 2013; Co-Prosecutors’ Rule 93 Request to Open an Investigation into the Whereabouts of Potential Witness Nou Mouk, E266, 19 February 2013; Trial Chamber memorandum entitled “Co-Prosecutors’ Internal Rule 93 request in relation to potential witness NOU Mouk and request to hear his testimony (E266)”, E266/3, 29 May 2013.

62. Of the remaining individuals on the Chamber's list of individuals initially considered most relevant to hear in relation to population movement, the Chamber was unable to hear the evidence of the following persons:

TCW-285 KANG Sophat;
 TCCP-356 KOY Mon;
 TCW-161 Jean DYRAC;
 TCW-701 Jon SWAIN; and
 TCCP-45 KEANG Vannary.

63. Upon attempting to summon TCW-285 and TCCP-356, the Chamber was advised that both were deceased.¹⁰⁵ TCW-161 was unable to testify due to ill-health, whereas TCW-701 could not be located.¹⁰⁶ TCCP-45 abandoned her civil action, and the request to hear her evidence was later withdrawn by the Lead Co-Lawyers.¹⁰⁷

64. The Chamber determined the following two individuals, who had initially been identified on its priority list to hear in relation to population movement, as likely to be in substance repetitious of other testimony heard to date and thus unnecessary to hear¹⁰⁸:

TCCP-9 CHEN Bun Chinh; and
 TCCP-35 HEM Savann.

65. In light of this significant quantity of evidence heard at trial, the Chamber also considered that the testimony of the following individuals on the Chamber's reserve list were unnecessary to hear in relation to population movement¹⁰⁹:

TCCP-150 SO Sary;
 TCCP-54 KHOEM Sambat;
 TCW-643 William SHAWCROSS;
 TCCP-62 KONG Srey Touch;
 TCW-258 Paul IGNATIEFF;
 TCW-674 SOS Ponyamin;
 TCCP-170 YIN Roumdoul; and
 TCCP-117 PO Dina.¹¹⁰

¹⁰⁵ Annex II, section xii(a); *see also*, WESU memorandum entitled "Deceased Witness –TCW-285", E140/2, 19 October 2012; WESU memorandum entitled "Deceased: TCW-356, HIN Mun, also known as KOY Mon", E236/1/3, 28 January 2013; WESU memorandum entitled "TCW-604: Mr. SAO Saran", E141.1, 22 November 2011; WESU memorandum entitled "TCW-297: Mr. KE Pich", E141.2, 22 November 2011.

¹⁰⁶ Annex II, section xii(b); WESU memorandum entitled "Witness Jean DYRAC (TCW-161)", E236/2/1, 5 December 2012; Annex II, section xii(d).

¹⁰⁷ Annex II, section xii(e); *see also*, Co-Prosecutors' Request Regarding Forced Movement Witnesses, E236/1/2, 13 November 2012; Trial Chamber memorandum entitled "Consolidated schedule of witnesses and experts for early 2013", E236/4, 8 January 2013. An additional Civil Party, TCCP-213 (PHLONG Koem Un) also abandoned his civil action over the course of the trial, following which the Lead Co-Lawyers withdrew their request that he be heard at trial: Annex II, section xii(e); T., 5 December 2012, p. 77.

¹⁰⁸ Annex II, section viii(c).

¹⁰⁹ Annex II, section viii(c).

66. While considered repetitive in relation to population movement, the latter two individuals were, however, heard before the Chamber in relation to the harm suffered by victims.¹¹¹

67. The Chamber also declined to hear the following individual whose evidence was specifically requested by the Co-Prosecutors during the concluding stages of the trial¹¹²:

TCW-269 IT Sen.

68. Despite being identified by the Co-Prosecutors at the Final TMM as essential to hear prior to the close of evidence in Case 002/01, the Chamber considered the testimony of TCW-269 to be more relevant to allegations of genocide and therefore deferred his testimony to future trials.

69. Although the Chamber assessed the testimony of TCW-92 (CHEA Sim) to be of lesser relevance to call in relation to population movement and/or as likely to be repetitive of other evidence, the NUON Chea Defence has, in four motions before the Chamber, specifically requested that he be summoned on the following topics: (1) interference with the administration of justice; (2) his role in and knowledge of the Democratic Kampuchea regime; (3) as one of 82 witnesses indispensable to the Case of NUON Chea, and a participant in the Khmer Rouge advance on Phnom Penh in April 1975; and (4) of 110 individuals relevant to the alleged policy to kill Lon Nol officials.¹¹³ The Chamber considered that the anticipated testimony of TCW-92 – namely that the evacuation of Phnom Penh was ordered from the Centre and was initially presented as a temporary response to the fear that the city would be bombarded by American planes – is in substance repetitive of evidence already before the Chamber.¹¹⁴ Accordingly, the Chamber has reaffirmed its initial assessment of the likely

¹¹⁰ The Chamber notes however that TCCP-170 and TCCP-117 later testified with regards to victim impact.

¹¹¹ Annex I, section x.

¹¹² Co-prosecutors' Notification in Response to the Senior Legal Officer's Request to Provide Information Prior to the Trial Management meeting, E288/3, 11 June 2013; *see also*, Annex II, section vii(a).

¹¹³ *See* Trial Chamber memorandum entitled "Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01", E236/1, 2 October 2012, para. 6; Annex II, section viii(c); *cf.* Request for Investigation Pursuant to Rule 35, E82, 28 April 2011, para. 31; First Consolidated Request for Additional Investigations, E88, 18 May 2011, para. 3(j); Request for Additional Witnesses & Continuation of Initial Hearing, E93/9, 6 July 2011, para. 7; Annex – Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, pp. A-6-A-8; Request to Summons Witnesses in Respect of Alleged Policy of Targeting Khmer Republic Officials, E291/2, 25 July 2013, para. 26; Annex A: Witnesses Cited by CIJs and Co-Prosecutors in Connection with Alleged Policy to Target Lon Nol Soldiers and Officials for Execution, E291/2.1, 25 July 2013, p. 1.

¹¹⁴ *See e.g.*, Interview of CHEA Sim, Phnom Penh, 3 Dec 1991, and HENG Samrin, Phnom Penh, 2 Dec 1991, E3/1568, 16 March 2011.

relevance of TCW-92 in E236/1 and has declined to summon him in Case 002/01. The NUON Chea Defence requests that he be heard are therefore rejected.

3.2.5 Witnesses sought in relation to killings at Tuol Po Chrey

70. In relation to this trial segment, which was added to Case 002/01 following the Chamber's partial grant of the Co-Prosecutors' request to expand the scope of this trial, the Chamber agreed with the Co-Prosecutors that only two individuals need be heard in support of all allegations in relation to Tuol Po Chrey.¹¹⁵ It therefore summoned the following two witnesses to give evidence in Case 002/01¹¹⁶:

TCW-752 UNG Chhat; and
TCW-389 LIM Sat.

71. At the second TMM, two other individuals had been requested by the remaining parties in relation to this trial segment.¹¹⁷ The Chamber rejected the request of the Lead Co-Lawyers to call the following two Civil Parties, who had not been heard by the Co-Investigating Judges, on grounds that they were likely to duplicate the testimony TCW-752 and TCW-389¹¹⁸:

New, D22/2062 CHAN Phay; and
New, D22/2076 TIT Man.

72. Following the testimony of TCW-752 and TCW-389, the NUON Chea Defence sought to hear six further individuals in order to rebut allegations of the Accused's participation in the alleged Communist Party of Kampuchea ("CPK") policy of targeting former officials of the Khmer Republic, and in view of the allegedly limited or contradictory testimony provided by TCW-752 and TCW-389 in relation to the April 1975 killings at Tuol Po Chrey¹¹⁹:

TCW-223 HENG Samrin;
TCW-644 SIEM Soeum;
TCW-689 SUM Alat;
TCW-699 SUY Seng Chhorn;

¹¹⁵ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 6 (identifying six individuals as necessary to hear in support of the Co-Prosecutors' request to expand the scope of the trial to District 12, five in relation to S-21, and two in relation to Tuol Po Chrey).

¹¹⁶ Annex I, section vii.

¹¹⁷ Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 7.

¹¹⁸ Annex II, section v.

¹¹⁹ Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013.

TCW-803 CHAK Muli; and
TCW-802 ORK Chhoem.

73. The Chamber agreed that the summoning of TCW-689 (SUM Alat) – a former LON Nol soldier present at a meeting at the Pursat provincial town hall prior to the executions at Tuol Po Chrey – was in the interests of justice and likely to assist the Chamber in its search for truth.¹²⁰ His evidence was heard before the Chamber on 4 July 2013.¹²¹ The NUON Chea Defence allege that TCW-223 has specifically denied that NUON Chea ordered the execution of former officials of the Khmer Republic and is therefore exculpatory and essential to hear at trial.¹²² The reasons for the Chamber’s inability to summon TCW-223 are addressed below (Section 3.2.8).

74. Regarding the remaining individuals sought by the parties in relation to Tuol Po Chrey in the concluding stages of the trial, the NUON Chea Defence alleges that TCW-803 is likely to describe trucks transporting Khmer Republic soldiers wearing military uniforms and rank insignia. They submit that absent any direct evidence that a CPK policy to execute Khmer Republic soldiers existed or that any executions at Tuol Po Chrey took place, the number, rank and origin of the alleged victims are all key to an assessment of NUON Chea’s responsibility.¹²³ They contend that the evidence shows that if any executions did take place at Tuol Po Chrey in the days after 19 April 1975, the victims were a collection of ordinary soldiers and low-level officials summoned haphazardly to a provincial town hall by local authorities, and that the “only logical conclusion is that those local authorities acted alone to exact vengeance from their erstwhile rivals”.¹²⁴

75. The Chamber, however, considers it unnecessary to summon TCW-803. The witness was a former LON Nol soldier, whose evidence is likely merely to confirm the fact that executions occurred at Tuol Po Chrey in the aftermath of the evacuation of Phnom Penh, but who is not otherwise likely to shed light on the role of the Accused in relation to these events.¹²⁵ Concerning TCW-802, the NUON Chea Defence concedes that the witness did not attend the relevant meeting at Pursat, know who ran it or what it was about, or see attendees

¹²⁰ Written Record of Interview of SUM Alat, D125/48, 20 January 2009.

¹²¹ T., 4 July 2013.

¹²² Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013, paras 31-33 citing Interview of CHEA Sim, Phnom Penh, 3 December 1991, and HENG Samrin, Phnom Penh, 2 December 1991, E3/1568, 16 March 2011, p. 23.

¹²³ Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013, paras 21, 25.

¹²⁴ Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013, para. 25.

¹²⁵ Written Record of Interview of CHÂK Muli, D125/174, 9 September 2009, pp. 2-4.

taken away.¹²⁶ The Chamber has determined that his testimony is also likely to be merely corroborative and is thus unnecessary to hear at trial.¹²⁷ The proposed testimony of TCW-644, who was 16 years of age at the date of these events, also appears to be largely limited to the transfer of individuals to and from Tuol Po Chrey and is thus also repetitive of other evidence before the Chamber.¹²⁸

76. Finally, the NUON Chea Defence submits that it is essential to summon TCW-699, on grounds that he described to the Co-Investigating Judges, “100 trucks transporting former Khmer Republic army officers, the provincial Governor and civil servants towards Tuol Po Chrey”, estimating that 3000 people were killed there based on the number of trucks he observed and information he heard from others.¹²⁹ On 28 June 2013, WESU informed the Chamber that TCW-699 is deceased.¹³⁰

77. At the final TMM, the Co-Prosecutors also requested that a number of additional individuals be heard in relation to the Tuol Po Chrey execution site. They submit that the five individuals visible in a video recording in evidence in Case 002/01 concerning Tuol Po Chrey should be located and heard before the Chamber, on grounds that these individuals are likely to provide the best evidence of the allegations contained in the Closing Order regarding this site.¹³¹ The Chamber had previously been unable to obtain the evidence of the producer of this video recording, TCW-720.¹³² Should the individuals visible in video-recording E189.1R be unavailable to give evidence, the Co-Prosecutors concurred with the NUON Chea Defence that a number of the individuals identified by them should be heard in the alternative.¹³³

78. The Co-Prosecutors and NUON Chea Defence agreed that TCW-644 should be heard.¹³⁴ He was a local villager who would likely have testified that he saw trucks

¹²⁶ Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013, para. 19.

¹²⁷ Written Record of Interview of ORK Chhoem, D232/13, 11 November 2009.

¹²⁸ Written Record of Interview of [TCW-644], D125/175, 9 September 2009.

¹²⁹ Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013, para. 17.

¹³⁰ WESU memorandum entitled “Deceased Witness – TCW-699”, E292/1/3, 5 July 2013; Death Certificate, E292/1/3.1, 5 July 2013.

¹³¹ Co-Prosecutors’ Notification of Further Details in Support of Rule 87(4) Request to Call Additional Tuol Po Chrey Witnesses, E292/1, 19 June 2013, para. 1.

¹³² Annex II, section xii(e) (noting difficulty in obtaining the testimony of certain individuals who proved uncooperative and where the Chamber had limited alternatives to obtain the testimony, as these individuals do not reside in Cambodia).

¹³³ Co-Prosecutors’ Notification in Response to the Senior Legal Officer’s Request to Provide Information Prior to the Trial Management Meeting, E288/3, 11 June 2013.

¹³⁴ Co-Prosecutors’ Notification of Further Details in Support of Rule 87(4) Request to Call Additional Tuol Po Chrey Witnesses, E292/1, 19 June 2013, para. 1; *see also*, Co-Prosecutors’ Notification in Response to the

transporting people to Tuol Po Chrey and later visited the site shortly after the executions.¹³⁵ Although adding some new elements, the Chamber considers the evidence is largely repetitive of other evidence on this matter and at the late juncture proposed by the parties it was not appropriate to summons this individual.

79. On 4 July 2013, the Witness/Expert Support Unit advised the Chamber that the following five individuals identified in video-recording E186.1R could not be located¹³⁶:

N/A PO Chean;
 N/A IN Thoeun;
 N/A UT Y;
 N/A PRORM Prein; and
 N/A TITH Bun Chan.

3.2.6 *Civil Parties heard regarding Victim Impact*

80. On 3 August 2012, the Chamber notified the parties that it would permit the Lead Co-Lawyers one week of in-court time to present evidence of the suffering of Civil Parties, and hence, the impact of the crimes tried in Case 002/01 on victims.¹³⁷ The following Civil Parties and expert therefore testified on the victim impact of crimes tried in Case 002/01:

TCCP-2 AUN Phally;
 TCCP-4 BAY Sophany;
 TCCP-7 CHAN Socheat/Sopheap;
 TCCP-13 CHHENG Eng Ly;
 TCCP-100 NOU Hoan;
 TCCP-117 PO Dina;
 TCCP-129 SANG Rath;
 TCCP-141 SENG Sivutha;
 TCCP-145 SOEUN Sovandy;
 TCCP-149 SOPHAN Sovany;
 TCCP-151 SOU Sotheavy;
 TCCP-156 THOUCH Phandara;
 TCCP-170 YIN Roun Doul;
 TCCP-172 YOS Phal;
 TCCP-198 HUO Chantha;
 TCE-12 CHHIM Sotheara.

Senior Legal Officer's Request to Provide Information Prior to the Trial Management Meeting, E288/3, 11 June 2013, Annex A.

¹³⁵ Written Record of Interview of [TCW-644], D125/175, 9 September 2009.

¹³⁶ WESU memorandum entitled "Potential Witnesses - Unable to Locate", E292/1/2, 4 July 2013.

¹³⁷ Trial Chamber memorandum entitled, "Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures to promote trial efficiency", E218, 3 August 2012, para. 18; *See also*, Trial Chamber memorandum entitled, "Further information regarding trial scheduling", E236/5, 7 February 2013; Annex 1: Civil Parties' Proposed Schedule for the Hearings on Victim Impact, E236/5/3/1.1, 3 May 2013.

3.2.7 *Additional witnesses sought by the Defence in Case 002/01*

81. At the Second TMM, the Chamber urged the Defence teams to identify, in the interests of a fair and adversarial trial, any additional individuals they considered vital to be heard before the Chamber in order to rebut the allegations made against the Accused.¹³⁸ In response, the KHIEU Samphan Defence sought to hear the following individuals at trial:

TCW-384 LENG Chhoeng;
 TCW-570 ROS Suy;
 TCW-673 So SOCHEAT;
 TCW-665 SOK Roeu;
 TCW-681 SREY Khem; and
 TCW-663 SOKH Song.

82. The first four individuals were heard before the Chamber. The Chamber declined to hear TCW-681 and TCW-663 on grounds that they had very little contact with the Accused and that their testimony was likely to be repetitive of other witness testimony regarding political meetings.¹³⁹

83. The NUON Chea Defence sought to hear the following 13 individuals it considered necessary to challenge inculpatory testimony, and in particular to show the alleged responsibility of subordinate officials:

TCE-33 Stephen HEDER;
 TCW-389 LIM Sat;
 TCW-126 CHUON Thi;
 TCW-676 [Redacted];
 TCW-85 CHEA Choeum;
 TCE-20 Sheila FITZPATRICK;
 TCE-23 John Arch GETTY;
 TCW-24 Wendy GOLDMAN;
 TCE-28 Paul HAGENLOH;
 TCE-40 Hiroaki KUROMIYA;
 TCE-56 Gabor Tamas RITTERSPORN;
 TCE-75 Lynne VIOLA; and
 TCW-301 Keith FINDLAY.

84. TCE-33, TCW-389 and TCW-126 were all heard before the Chamber. The Chamber was unable to hear the evidence of TCW-676, who is deceased.¹⁴⁰ Regarding the remaining

¹³⁸ Trial Chamber memorandum entitled "Scheduling of Trial Management Meeting to enable planning of the remaining trial phases in Case 002/01 and implementation of further measures designed to promote trial efficiency", E218, 3 August 2012, para. 12.

¹³⁹ Written Record of Interview of Srey Khem, E3/546, 9 April 2012.

¹⁴⁰ See Annex II, section xii(f).

nine individuals sought by the NUON Chea Defence in relation to alleged alternative command structures, the Chamber notes that many are experts that appear to have little or no demonstrable relevance to Case 002/01 or to the nature of the role of the Accused. TCE-20, TCE-28, TCE-23, TCE-24, TCE-40, TCE-56, and TCE-75 were described by the NUON Chea Defence as historians of the Soviet Union or Russia.¹⁴¹ Despite the claim of the NUON Chea Defence that the testimony of TCW-85 and TCW-301 is likely to be exculpatory, the Chamber has instead determined that it is likely to have no discernible relevance to Case 002/01 and has therefore declined to summon these individuals at trial.

85. In addition, the NUON Chea Defence have sought in written motions before the Chamber to hear the testimony of a limited number of further individuals, again as allegedly exculpatory evidence in Case 002/01. The NUON Chea Defence sought to hear the testimony of TCW-292 on grounds of his knowledge of “alternative command structures in the Khmer Rouge as well as the state of affairs in the DK.”¹⁴² It sought the summons of TCW-243 to provide insight into political interference with the ECCC and due to his knowledge of pre-1975 conditions based on his purported former positions in the Khmer Republic government and his presence/imprisonment during the DK-era.¹⁴³ In a later motion, the NUON Chea Defence alleged that TCW-292 “was a senior member of the Ministry of Foreign Affairs with substantial contacts with IENG Sary.”¹⁴⁴ In relation to TCW-243, the NUON Chea Defence alleges that he “served at diplomatic posts in Paris and Cuba from 1967-1975 and was imprisoned by the Khmer Rouge at Boeung Trabek from 1975-1979”.¹⁴⁵ Allegations in

¹⁴¹ Annex B: Proposed List of Experts – NUON Chea Defence Team, E9/4/4.2, 15 February 2011.

¹⁴² Request for Additional Witnesses & Continuation of Initial Hearing, E93/9, 6 July 2011; Annex: Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, 6 July 2011, p. A20; *see also*, Request for Investigation Pursuant to Rule 35, E82, 28 April 2011, para. 31.

¹⁴³ Request for Additional Witnesses and Continuation of Initial Hearing, E93/9, 6 July 2011; Annex: Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, 6 July 2011, p. A17.

¹⁴⁴ Motion in Support of IENG Sary's Request to Hear [TCW-243] and [TCW-292], E228/2, 22 October 2012, para. 3; Reply to International Co-Prosecutor's Response to NUON Chea's Motion in Support of IENG Sary's Request to Hear [TCW-243] and [TCW-292], E228/4, 23 November 2012, para. 5 (further alleging that TCW-292 could testify as to “who in the party structure had effective control over who was arrested and purged; the extent to which persons below the Accused were independently responsible for establishing ‘protocol’; the ‘reporting structure’ within the DK ministry and the knowledge that the head of such a ministry was likely to have had; and direct linkages between Pol Pot and individuals below the level of the Accused”). TCW-292 was initially sought for his knowledge of alternative command structures within the Khmer Rouge as well as in relation to generic allegations of political interference: Request for Investigation Pursuant to Rule 35, E82, 28 April 2011, para. 31; Request for Additional Witnesses and Continuation of Initial Hearing, E93/9, 6 July 2011; Annex: Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, 6 July 2011, p. A20.

¹⁴⁵ Request for Additional Witnesses and Continuation of Initial Hearing, E93/9, 6 July 2011; Annex: Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, 6 July 2011, p. A15; *see also*, Motion in Support of IENG Sary's Request to Hear [TCW-243] and [TCW-292], E228/2, 22 October 2012, para. 3 (“according to two witnesses, for some time [TCW-243] was the head of the Boeung Trabek camp for which NUON Chea is alleged to have been ultimately responsible”); Reply to International Co-Prosecutor's Response

relation to Boeung Trabek have little relevance to Case 002/01 and the Chamber considers the likely testimony of both individuals to be primarily relevant to the Accused IENG Sary. It has therefore declined to hear their evidence in Case 002/01.¹⁴⁶

3.2.8 Requests to summons witnesses where no consensus could be reached

86. The Trial Chamber was unable to reach a consensus as to whether to summons proposed witnesses TCW-223 and TCW-494. As an affirmative vote of four judges was not reached pursuant to Article 14^{new} of the ECCC Law, neither witness was summonsed. Two separate opinions follow on this point.

Opinion of Judges NIL Nonn, YA Sokhan and YOU Ottara

87. We conclude that proposed witnesses TCW-223 and TCW-494 should not be summonsed to testify before the Trial Chamber. Our conclusion differs from that of our distinguished colleagues, so we summarise our reasons.

88. The Internal Rules provide that the Trial Chamber has a discretion to summons *any person* as a witness who it deems conducive to ascertaining the truth.¹⁴⁷ The Internal Rules also state in summary form the various bases upon which a Chamber may reject a request for evidence.¹⁴⁸ For the purpose of our decision, without deciding the point, we assume that this power would entitle the Trial Chamber to summons TCW-223 and TCW-494, who are both members of Cambodia's Parliament.

89. We consider that the following principles provide relevant guidance to the application of the Trial Chamber's discretion under Internal Rule 87.¹⁴⁹ A summons is a binding order to

to NUON Chea's Motion in Support of IENG Sary's Request to Hear [TCW-243] and [TCW-292], E228/4, 23 November 2012, para. 5 (alleging that the testimony of TCW-243 was necessary in relation to "the role played by Pang, an intermediary between the Central Committee and S-21 who, according to KAING Guek Eav, carried messages directly between him and Pol Pot; his autonomy in running Boeng Trabek, for which NUON Chea was allegedly responsible, and the relationship between the head of the ministry and his subordinates"); IENG Sary's Rule 87(4) Request to Hear Testimony from [TCW-292 and TCW-243], E228, 14 September 2012; *see also*, T., 11 January 2013, pp. 16, 20, 23-24.

¹⁴⁶ IENG Sary's Rule 87(4) Request to Hear Testimony from [TCW-292 and TCW-243], E228, 14 September 2012, paras 17-22.

¹⁴⁷ Internal Rule 87(4).

¹⁴⁸ Internal Rule 87(3).

¹⁴⁹ See Article 12(1) of the Agreement: "where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level"; and Article 33^{new} of the ECCC Law: if existing procedures do not deal with a particular matter "or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, guidance may be sought in procedural rules established at the international level."

appear before the ECCC.¹⁵⁰ It entails the use of coercive powers that may lead to the imposition of criminal sanctions in the event of non-compliance. If testimony is necessary for the conduct and overall fairness of the trial, we consider that a summons should be issued and enforced, irrespective of the views expressed by non-parties as to whether an individual should be summonsed or not. As the ICTY Appeals Chamber has warned, however, subpoenas should not be issued lightly.¹⁵¹ The initiation of the judicial power to compel should be balanced with the need to serve the overall interests of the criminal process.¹⁵² International tribunals have cautioned that the compulsive mechanism should not be abused or used as a trial tactic.¹⁵³

90. In our assessment, the procedural history of this matter is clear that TCW-223 and TCW-494 have declined to testify before the ECCC. It has been left to the Trial Chamber to decide whether or not to employ coercive measures. At the pre-trial phase, the International Co-Investigating Judge sought to summons TCW-223 and TCW-494, among other persons, for the purpose of interviewing them as witnesses.¹⁵⁴ When the individuals failed to respond, the International Co-Investigating Judge concluded that they had refused to testify.¹⁵⁵ Yet the International Co-Investigating Judge declined to pursue matters further, noting that “implementing such coercive measures is fraught with significant practical difficulties” which, in the “best-case scenario, would unduly delay the conclusion of the judicial

¹⁵⁰ Internal Rule 45(1). *See also* Cambodia Code of Criminal Procedure, Article 477 (The summons shall indicate that: “any failure to appear before the court, refusal to provide information as a witness or giving false testimony shall be punished according to the law”); Cambodian Criminal Code, Article 538 Refusal to appear (“any person, summonsed to be heard as a witness before a prosecuting authority, an investigating judge or a criminal court, refused to appear without proper justification shall be punishable by imprisonment from one month to six months and a fine from one hundred thousand to one million Riels”).

¹⁵¹ *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) (“*Halilović Decision*”), paras. 5-6. *Prosecutor v. Brđanin and Talić*, IT -99-36- AR73.9, *Decision on Interlocutory Appeal*, 11 December 2002, para. 31. *See also Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder* (9 December 2005) at paras. 35 and 48. We consider that this cautionary principle applies equally to summonses at the ECCC because summonses, like subpoenas, are binding orders which envisage the use of coercive powers.

¹⁵² *See Prosecutor v. Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008), para. 5.

¹⁵³ *Halilović Decision*, para. 10; *Prosecutor v. Karadžić*, IT-95-5/18-T, *Decision on the Accused’s Second Motion for Subpoena Interview President Bill Clinton* (21 August 2012), para. 16. *Prosecutor v. Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Subpoenas to Prosecution Witnesses* (10 May 2007), para. 13.

¹⁵⁴ In relation to TCW-223, *see* Witness Summons, D136/3/1, 25 September 2009; in relation to TCW-494, *see* Witness Summons, A298/1, 25 September 2009.

¹⁵⁵ Note by the Co-Investigating Judge, D301, 11 January 2010, p.3 (“It is therefore clearly established that the persons concerned have refused to attend for testimony.”)

investigation”.¹⁵⁶ The International Co-Investigating Judge left it to the Trial Chamber to “decide whether employing such coercive measures is warranted.”¹⁵⁷

91. The matter was subsequently appealed to the Pre-Trial Chamber, which criticised the International Co-Investigating Judge’s reasoning but agreed that the matter should be left to the Trial Chamber to decide. The Pre-Trial Chamber declined to rule on the applicability of any parliamentary immunity, but was satisfied that the “likely invocation of a parliamentary immunity would in any event significantly delay the prospect of the ... individuals testifying in the investigating stage.”¹⁵⁸ There have, therefore, been significant practical difficulties with obtaining testimony from these persons.

92. Dealing firstly with the substance of the proposed testimony from TCW-223, the NUON Chea Defence provided a variety of reasons why it is said that such testimony is needed. In June 2011, the NUON Chea Defence proposed that TCW-223 be called to testify about the role of Vietnam, “alternative command structure[s]” in the Khmer Rouge, and political interference into the ECCC operations.¹⁵⁹ TCW-223 was said to be “indispensable” to NUON Chea’s case. On subsequent occasions, the NUON Chea Defence suggested further reasons why TCW-223 should be summonsed: stating in February 2012 that TCW-223 could testify about the historical background;¹⁶⁰ stating in a filing to the Supreme Court Chamber in 2012 that TCW-223 held “various senior positions”, had participated in a meeting on 20 May 1975 and that there was an issue as to the precise words used by NUON Chea at that meeting;¹⁶¹ proposing in February 2013 that TCW-223 testify as NUON Chea’s only character witness;¹⁶² suggesting in June 2013 that TCW-223 testify in relation to NUON Chea’s intent towards former soldiers and officials of the Khmer Republic, stressing again the words used by NUON Chea at the meeting on 20 May 1975.¹⁶³ Finally, after the Trial Chamber notified the parties of its final witness list, wherein the Trial Chamber indicated that

¹⁵⁶ Note by the Co-Investigating Judge, D301, 11 January 2010, p.3.

¹⁵⁷ Note by the Co-Investigating Judge, D301, 11 January 2010, p.4.

¹⁵⁸ Decision on NUON Chea’s and IENG Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses, D314/2/7, 8 June 2010, para. 69.

¹⁵⁹ Materials in Preparation for Trial Proceedings, E93/4.3, 21 June 2011.

¹⁶⁰ List of Additional Witnesses Relevant to Historical Background, E155/1.1, 9 February 2012. pp.3-4.

¹⁶¹ See Request to Hear Witnesses Concerning Population Movement Phases I and II, E189/3/1/7.1.5, paras. 32-33. See Second TMM, 17 August 2012, E1/114.1, ERN00840238; Request to Hear Witnesses Concerning Population Movement Phases I and II, E189/3/1/7.1.5, 5 September 2012 (summarised in Sixth and Final Request to Summons TCW-223, E236/5/1/1, 22 July 2013. para. 5.

¹⁶² Request to Summon TCW-223 as a Character Witnesses [sic] on Behalf of NUON Chea, E236/5/1, 22 February 2013.

¹⁶³ Urgent Request to Summons Key Witnesses in Respect of Tuol Po Chrey, E291, 17 June 2013, paras. 31-32.

TCW-223 would not be summonsed, the NUON Chea Defence requested that the Trial Chamber reconsider its decision.¹⁶⁴

93. In our view, the NUON Chea Defence overstates TCW-223's significance as a potential witness. Proposed testimony on political interference was already addressed in numerous motions and decisions by the Trial Chamber and denied unanimously.¹⁶⁵ Proposed testimony on the role of Vietnam is not relevant to Case 002/01. The proposed testimony of TCW-223 on military structures is largely repetitious. Numerous witnesses testified to the military structures during the evacuation of Phnom Penh.¹⁶⁶ The NUON Chea Defence points to the record of interviews with TCW-223 conducted by Benedict KIERNAN in 1991 and 1992. We note, however, that TCW-223 did not claim to have attended the planning meetings at which the evacuation of Phnom Penh was announced.¹⁶⁷ The interview record upon which the NUON Chea Defence relies suggests that, in April 1975, TCW-223 commanded the 126th Regiment, one of three Regiments within the 1st Division of the Eastern Zone.¹⁶⁸ In this role at that time, he apparently commanded between 1500 to 2000 troops.¹⁶⁹ His Regiment apparently arrived at the Independence Monument in Phnom Penh at about 9am on 17 April 1975.¹⁷⁰ Therefore, while we accept that TCW-223 could potentially provide relevant testimony in relation to the expulsion of the population from Phnom Penh, many other witnesses have already done so in Case 002/01 and we are not persuaded that TCW-223 possesses unique information which requires the Trial Chamber to compel testimony from him. Accordingly, on 2 October 2012, the Trial Chamber notified the parties that it considered

¹⁶⁴ Sixth and Final Request to Summons TCW-223, E236/5/1/1, 22 July 2013.

¹⁶⁵ See e.g., Decision on Application for Immediate Action Pursuant to Rule 35, E189/3, 22 November 2012, paras. 15-16; Decision on Rule 35 Request Calling for Summary Action Against Minister of Foreign Affairs HOR Namhong, E219/3, 22 November 2012, para. 18.

¹⁶⁶ See only the testimony of witnesses KAING Guek Eav *alias* Duch, TCW-428, TCW754, TCW-100, TCW126, TCW-253.

¹⁶⁷ Interview of CHEA Sim, Phnom Penh, 3 Dec 1991, and HENG Samrin, Phnom Penh, 2 Dec 1991, E3/1568, 16 March 2011, ERN 00651878

¹⁶⁸ Interview of CHEA Sim, Phnom Penh, 3 Dec 1991, and HENG Samrin, Phnom Penh, 2 Dec 1991, E3/1568, 16 March 2011, ERN 00651878-80

¹⁶⁹ Interview of CHEA Sim, Phnom Penh, 3 Dec 1991, and HENG Samrin, Phnom Penh, 2 Dec 1991, E3/1568, 16 March 2011, ERN 00651886 ("my Division ... there were only 6-8,000 troops in readiness"); ERN 00651892 ("In a division there were three regiments, each of three battalions. 1500 – 2000 men per regiment ["battalion – later corrected, he said]. Some divisions were 7000-8000, some 5000-6000 combat ready." ERN00651893 (A battalion had 400-500. [Not 1500-2000 like [unclear] said before]. A regiment 1500 to 2000."))

¹⁷⁰ Interview of CHEA Sim, Phnom Penh, 3 Dec 1991, and HENG Samrin, Phnom Penh, 2 Dec 1991, E3/1568, 16 March 2011, ERN 00651879. Thereafter, he stayed in Phnom Penh for three weeks before being sent back to the East.

TCW-223 “to be of lesser relevance to [the population movement] trial segments, and shall therefore not hear [him].”¹⁷¹

94. The NUON Chea Defence also referred to evidence that TCW-223 attended a meeting on 20 May 1975 at which NUON Chea spoke.¹⁷² However, the Trial Chamber received evidence regarding this meeting and therefore any additional evidence is largely repetitious. Perhaps in order to persuade the Trial Chamber that such testimony would not be entirely repetitious, the NUON Chea Defence emphasises one particular part of the KIERNAN interview notes. TCW-223 is recorded as saying to KIERNAN that, when addressing the meeting on 20 May 1975 and referring to the people of the old government, NUON Chea used the word “*komchat*” rather than “*komtec*”. KIERNAN has apparently interpreted “*komchat*” as “scatter”¹⁷³ (an interpretation upon which the NUON Chea defence relies).¹⁷⁴ The NUON Chea Defence contrasts “*komchat*” with “*komtec*”, the latter of which it concedes would be interpreted as smash, meaning to kill. It is argued that the use of the term “scatter” (rather than kill) reveals NUON Chea’s intent towards former soldiers and officials of the Khmer Republic.¹⁷⁵

95. We are not persuaded of the relevance of whether NUON Chea said “*komchat*” or “*komtec*”. In particular, we reject the NUON Chea Defence’s contention that the word “*komchat*” would have been exculpatory because we do not understand the word “*komchat*” to mean merely to scatter or disperse.¹⁷⁶ We also note that the NUON Chea Defence did not challenge Stephen HEDER’s evidence that it would be incorrect to interpret “*komchat*” as “scatter”.¹⁷⁷ According to Stephen HEDER, “*komchat*” is “stronger [than scatter] and means

¹⁷¹ Preliminary indication of individuals to be heard during population movement trial segments in Case 002/01, E236/1, 2 October 2012.

¹⁷² Request to Summon TCW-223 as a Character Witnesses [sic] on Behalf of NUON Chea, E236/5/1, 22 February 2013, para. 6.

¹⁷³ Book by Ben Kiernan entitled “The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979”, E3/1593, p.57

¹⁷⁴ NUON Chea Closing Brief, para. 384; T. 24 October 2013 (NUON Chea Closing Statements), p. 4.

¹⁷⁵ See Sixth and Final Request to Summons TCW-223, E236/5/1/1 22 July 2013. para. 12.

¹⁷⁶ The NUON Chea Defence submits that Professor David CHANDLER accepted that there was a “real difference” between the two Khmer words. (See Request to Hear Witnesses Concerning Population Movement Phases I and II, E189/3/1/7.1.5, para. 33) We do not understand Professor CHANDLER to have expressed any opinion on whether it would actually be correct to interpret “*komchat*” as merely “to scatter” (see T. 23 July 2012, pp.57-58).

¹⁷⁷ T.16 July 2013, p. 105, ll. 6-7.

get rid of, eliminate.”¹⁷⁸ In our view, Stephen HEDER was right to say that “komchat” does not mean “to scatter”.¹⁷⁹

96. Therefore, although we accept that testimony from TCW-223 could conceivably be relevant to limited aspects of Case 002/01, we are not persuaded that it is necessary or appropriate to compel his testimony. TCW-223 is recorded as stating that he was one of “thousands of people” to have attended the 20 May 1975 meeting.¹⁸⁰ We have weighed the potential value of testimony from TCW-223 against the practical reality that he has already refused to comply with a summons issued by an International Co-Investigating Judge such that the Trial Chamber has been invited to compel witness testimony through the imposition of criminal sanctions. Given that we are not persuaded that such testimony is actually needed, we are not prepared to issue a summons.

97. We have assumed that TCW-223 would have no immunity with respect to being summonsed. It would, however, in our assessment be unrealistic to ignore TCW-223’s refusal to testify before the Co-Investigating Judges and the fact that Pre-Trial Chamber clearly stated that the issue for the Trial Chamber is not merely whether to issue a summons, but whether to employ coercive measures. Therefore, even assuming that a valid summons could be issued, any summons would need to be followed by enforcement measures and contempt proceedings. Questions of immunity and the competence of the Trial Chamber will arise. Consequently such a summons would lead to further delay and lead the Trial Chamber into a situation full of difficulties. There is a significant risk that it would be impossible to obtain TCW-223’s testimony within a reasonable time. The underlying question, however, is whether we are prepared to compel such testimony and face issues of immunity. We are not prepared to venture into such areas when we are not persuaded of the importance of such testimony to Case 002/01.

98. Any rejection of a witness should be balanced with the right to a fair trial and the right to call witnesses in one’s own defence. As we have sought to explain, however, in our view NUON Chea is not prejudiced by the fact that TCW-223 was not summonsed. We have had

¹⁷⁸ T.16 July 2013, p.105, ll.12-14. We note that the NUON Chea Defence did not pursue the interpretation of “komchat” with other witnesses.

¹⁷⁹ In any event, the allegation contained in the Closing Order was as follows: “At the May 1975 conference in Phnom Penh, NUON Chea explained that former Lon Nol soldiers and officials would not be allowed to stay in the framework of the new regime.” Closing Order (OCIJ), D427, 15 September 2010, para. 977.

¹⁸⁰ Interview of CHEA Sim, Phnom Penh, 3 Dec 1991, and HENG Samrin, Phnom Penh, 2 Dec 1991, E3/1568, 16 March 2011, ERN 00651883.

regard to the entirety of the aforementioned interview record. We do not consider it plausible that testimony from TCW-223 would materially advance NUON Chea's defence. In fact, based on the notes upon which the NUON Chea Defence relies, testimony from TCW-223 could have damaged NUON Chea's defence. Moreover, we note that NUON Chea wishes to confirm interview notes by the statement maker, TCW-223, which are already before the Chamber.¹⁸¹ We are of the opinion that the admitted interview notes of Ben KIERNAN sufficiently and reliably demonstrate that Witness TCW-223 uttered the words and opinions upon which the NUON Chea Defence seeks to rely.¹⁸² Even calling the witness to confirm the contents of the interview notes does not demonstrate that a policy to eliminate LON Nol officials did not exist. That question should be assessed in light of the totality of the evidence. In all the circumstances, we do not think that NUON Chea is prejudiced by our refusal to summons TCW-223.

99. Turning next to TCW-494, the NUON Chea Defence proposed that TCW-494 be summonsed to testify on (i) political interference, (ii) the role of Vietnam and (iii) military structures.¹⁸³ This individual has been referred to in interviews with Ben KIERNAN and Stephen HEDER.¹⁸⁴

100. With regard to the proposed evidence of Witness TCW-494 on the role of Vietnam, we consider that such evidence is not relevant to Case 002/01. With respect to allegations of political interference, the Trial Chamber has repeatedly referred to the holding of the Supreme Court Chamber that there is no basis upon which to call witnesses to testify on such allegations.¹⁸⁵

101. Other witnesses testified about alternate command structures, including CHHOUK Rin, Philip SHORT and David CHANDLER. Therefore the proposed testimony of Witness TCW-494 is largely repetitive.¹⁸⁶ Any evidence that TCW-223 might have given as to the conflict between the Eastern Zone and the Centre in the late 1970s is, in our view, of very low importance to the issues in Case 002/01.

¹⁸¹ Interview notes of TCW-92, Phnom Penh, 3 Dec 1991, and TCW-223, Phnom Penh, 2 Dec 1991, E3/1568.

¹⁸² *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge*, E3/1593, 1996.

¹⁸⁵ Request for Additional Witnesses & Continuation of Initial Hearing, E93/9, 6 July 2011; Annex: Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, 6 July 2011, pp. A29-A30.

¹⁸⁴ Ben Kiernan Interview of TCW-494, E3/432, 30 September 1980; Stephen Heder Interview of TCW-494, E3/387, 4 August 1990.

¹⁸⁵ SCC Appeal Judgement, Case 001, F28, 3 February 2012, paras 79-80.

¹⁸⁶ See also, testimony of witnesses KAING Guek Eav, TCW-428, TCW-754, TCW-100, TCW-126, TCW-253.

102. We note that an interview of TCW-494 with Stephen HEDER has been admitted into evidence wherein TCW-494 states that in February 1975 plans were made to build houses to receive the population of the evacuated persons from Phnom Penh and that this plan was disseminated.¹⁸⁷ This statement does not directly implicate the Accused or refer to their acts and conduct. Nor does it address the actual circumstances of the evacuation in April 1975. Therefore the document may be considered by the Trial Chamber as such, with the necessary safeguards applicable to hearsay and documentary evidence. Moreover, it is noted that the NUON Chea Defence submits that the testimony is exculpatory in nature. In that respect we consider that the written record is sufficient. We therefore conclude that it is unnecessary to call the statement maker to confirm the interview notes. In all the circumstances, and recalling the factors considered above in relation to TCW-223, we do not consider it to be necessary to summons TCW-494 in relation to Case 002/01.

103. By way of summary, we are not persuaded that testimony from either TCW-223 or TCW-494 is necessary for Case 002/01. We are not persuaded that testimony from either person would materially assist the Accused. The difficult practical reality of enforcing any such summonses militates against summoning these individuals. If the Trial Chamber sought to compel testimony from TCW-223 and/or TCW-494, difficult and probably protracted questions would arise in relation to their immunity from prosecution.¹⁸⁸ Without expressing any view as to whether or not they would be so immune, we are not prepared to seek to compel their testimony when we are not persuaded that testimony from either witness is actually necessary. We do not think that the Trial Chamber should venture unnecessarily into an area of such legal and practical difficulty. In the circumstances, we reject the NUON Chea Defence's various requests on the basis of IR 87(3)(a), (b), (c) and (e).

Opinion of Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE

104. We write separately because we differ from the majority as to whether TCW-223 and TCW-494 should be summonsed to testify in this case.

105. The NUON Chea Defence filed numerous motions seeking to hear the evidence of TCW-223 for the following reasons: (1) his knowledge of interference with the administration

¹⁸⁷ Stephen HEDER Interview of TCW-494, E3/387, 4 August 1990.

¹⁸⁸ See Constitution of the Kingdom of Cambodia, Articles 80 and 104, providing that except in case of *flagrante delicto*, the accusation, arrest or detention of a National Assembly member or a Senator shall be made only with the permission of the National Assembly or Senate respectively.

of justice; (2) his knowledge of alternative command structures of the Khmer Rouge due to his high position in the Khmer Rouge prior to his defection; (3) as a character witness for NUON Chea; and (4) as he is the senior-most Khmer Rouge military officer still living to have participated in the evacuation of Phnom Penh and is one of two witnesses purportedly in possession of direct evidence of any kind of the intentions of the Party Centre regarding whether there was a policy to kill Lon Nol officials.¹⁸⁹

106. At the outset, we note that requests to summons government officials do not implicate the officials as suspects, charged persons, or Accused.¹⁹⁰ They are instead proposed witnesses, and as any citizen they have a duty to assist the judges of the ECCC to ascertain the truth in a case that is of fundamental importance to the Cambodian people.

107. The privilege or immunity granted to members of parliament in Cambodia may be invoked only to prevent the enforcement of a court order to testify. The possibility that, once summonsed, these individuals might claim immunity from testifying does not remove the obligation of a Chamber to seek to hear their evidence. The Chamber's judicial obligation is to seek to hear all relevant and probative testimony, irrespective of an individual's official position. Further, and before it can prevent the hearing of evidence, an immunity must be invoked by the individual who possesses it, rather than anticipated by the Chamber. Even if during the judicial investigation conducted four years ago, TCW-223 and TCW-494 did not comply with a summons to testify, the Chamber has no information to suggest that any of these potential witnesses have personally expressed an unwillingness to be heard in court. Therefore no attempt to invoke parliamentary immunity has been made. To the contrary, these potential witnesses have yet to be informed of a request concerning their testimony before the Trial Chamber. Only if the potential witnesses refuse to testify would coercive measures be considered. Such measures are invoked rarely and are not embarked upon lightly. The fact that these witnesses might in due course invoke immunities that may ultimately prevent them from testifying is also speculative and irrelevant to whether they should be summonsed.

¹⁸⁹ Request for Investigation Pursuant to Rule 35, E82, 28 April 2011, para. 31; Request for Additional Witnesses & Continuation of Initial Hearing, E93/9, 6 July 2011; Annex: Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, 6 July 2011, pp. A13-A15; Request to Summon TCW-223 as a Character Witness on Behalf of NUON Chea, E236/5/1, 22 February 2013; Sixth and Final Request to Summons TCW-223, E236/5/1/1, 22 July 2013, paras 11-13.

¹⁹⁰ See Constitution of the Kingdom of Cambodia (2010), Arts. 80, 104 new; Law on the Status of Members of Parliament (Kram n° NS/RPM/1006/025 entered into force 21/08/2006 National Assembly, Chapter 2, art. 4-16; Law on the Status of Senators (Kram n° NS/0108/001) entered into force 18/01/2008, Chapter 2, art. 4-16.

108. In view of these principles, we consider that TCW-223 and TCW-494 should be summonsed to testify. Both witnesses appear to have been privy to information that may not have been accessible to other proposed witnesses in Case 002/01. TCW-223 appears to have played a significant role within the armed units who conducted the evacuation of Phnom Penh and is likely to be able to offer unique and relevant testimony regarding the DK-era policies, the course of the forced evacuation of Phnom Penh and command structures.¹⁹¹ We agree with our national colleagues that the testimony of TCW-494 concerning allegations of political interference and the role of Vietnam is irrelevant. We consider, however, that his proposed testimony – as a zonal leader who fought against Central troops in the late 1970s as put forward by the NUON Chea Defence – might provide directly relevant and probative evidence concerning that period, as might his ability to provide evidence on the directive of February 1975 which concerned plans to accommodate those evacuated from Phnom Penh. In sum it is clear that the proposed testimony of TCW-223 and TCW-494 is *prima facie* relevant and could assist the Chamber in ascertaining the truth. We do not consider it appropriate to go further and to speculate as to the possible details of their testimony by scrutinising prior interviews. Indeed the Chamber has refrained from making this type of detailed analysis in considering the need to summons other proposed witnesses.

109. The Trial Chamber must be perceived as treating equally, without fear or privilege all those whose testimony is deemed conducive to ascertaining the truth or furthering justice. Many witnesses and experts, who have travelled long distances to reach the court and who have serious responsibilities to support themselves and their families, have complied with summonses without demur. These proposed witnesses have not been summonsed, and have not therefore claimed that their responsibilities are so onerous as to preclude them from assisting the Chamber. They may well wish to further the objective of achieving long awaited justice. The ECCC trials are intended to promote national reconciliation, heightening the duty to serve justice to which Cambodian officials are presumably not indifferent. For these reasons we consider that both individuals should summonsed to be heard in Case 002/01.¹⁹²

¹⁹¹ See e.g., Interview notes of TCW-92, Phnom Penh, 3 Dec 1991, and TCW-223, Phnom Penh, 2 Dec 1991, E3/1568, p. 31 (“In the period we fought the imperialists and their lackeys and won victory on 17 April 1975. After that struggle ended in victory on 17.4.75, the people’s forces of Kampuchea, the revolutionary army, some units of the Zone were gathered into a division of the Center. There were two divisions. My own, the first that had fought in Phnom Penh, and the second, later changed to the 290th [...]”).

¹⁹² Request for Additional Witnesses & Continuation of Initial Hearing, E93/9, 6 July 2011; Annex: Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, 6 July 2011, pp. A29-A30.

110. Furthermore, we do not agree that the expeditious conduct of trial should be invoked to justify the failure to summons witnesses who might be important to the case. Although the International Co-Investigating Judge decided near the end of the time-limited investigation that summoning these individuals might lead to a delay in concluding the investigation, the Trial Chamber could have issued summonses at an early stage of trial, had there been a supermajority on this point. It would have been preferable, in our view, to issue summonses and to determine the willingness of these witnesses to testify. The possible issue of parliamentary immunity could then have been addressed, if invoked. Undue delay was not a foregone conclusion. Nor do we accept the argument that the request to summons these potential witnesses can be construed as a trial strategy. We respectfully disagree with our national colleagues on this point and would have summonsed Witnesses TCW-223 and TCW-494 to testify.

111. We acknowledge that as the result of the disagreement, the witnesses cannot be summonsed. The Chamber, however, ultimately summonsed 20 witnesses requested by the NUON Chea Defence and 23 witnesses requested by the KHIEU Samphan Defence and considered the extensive documentary evidence that was put before the Chamber. A few documents were rejected usually for reasons of untimeliness. We have borne in mind that should there be an appeal, this issue can be resolved given that the Supreme Court Chamber has the power to summons witnesses, and the responsibility to determine finally any impact arising from failure to summons them.¹⁹³ In the light of this outcome, we express no view on the issue of fairness of the trial proceedings raised by our colleagues.

3.2.9 Witnesses sought in relation to the character of the Accused

112. Finally, the Trial Chamber allocated a set number of trial days to enable the Accused to present evidence regarding their character.¹⁹⁴ As was the case in relation to testimony regarding harm suffered by victims, and while imposing time limits for the presentation of the evidence sought by the parties, the Chamber did not otherwise seek to limit the discretion of

¹⁹³ See International Covenant on Civil and Political Rights, Article 14 (3)(e). See also Internal Rule 104(1); See also, *Prosecutor v. Bagosora et. al.* ICTR Appeals Chamber (ICTR-98-41-A), Judgement. 14 December 2011 paras 537, 546 (although the Trial Chamber abused its discretion in failing to enforce a subpoena issued to then Rwandan Minister of Defence Gatsinzi who had been sought by the Accused, any prejudice to the Accused was remedied due to the witness ultimately being heard at the appeal hearing).

¹⁹⁴ Trial Chamber memorandum entitled "Further information regarding trial scheduling", E236/5, 7 February 2013.

the relevant party to determine the most relevant evidence to call in relation to this trial segment.¹⁹⁵

113. The KHIEU Samphan Defence sought to call the following individuals in relation to the Accused's character, all of whom were heard before the Trial Chamber:

TCW-277 Philippe JULLIAN-GAUFRES;
TCW-84 CHAU Sockon;
TCW-673 SO Soheat;
TCW-742 TUN Soeun; and
TCW-665 SOK Roeu.

114. The NUON Chea Defence sought to hear only one witness in relation to the Accused's character: TCW-223.¹⁹⁶ In the light of the Chamber's inability to summons TCW-223 as detailed above, TCW-223 was unable to be heard before the Chamber and was thus unavailable to the Accused also in relation to this trial segment.

115. The Trial Chamber was not able to reach a consensus in relation to whether proposed witnesses TCW-223 should be summonsed as a character witness for NUON Chea. Therefore, two separate opinions follow.

Opinion of Judges NIL Nonn, YA Sokhan and YOU Ottara

116. We reiterate our opinion above as to the request to summon TCW-223. However, with respect to the request that TCW-223 was also sought as a character witness, we furthermore note that much of the proposed evidence in relation to the good character of the Accused relates to events prior to the charged conduct.¹⁹⁷ However, it evidence of the good character of the Accused prior to the indicted events is largely irrelevant. In *Kupreskić* it was held that:

i) generally speaking, evidence of the accused's character prior to the events for which he is indicted before the International Tribunal is not a relevant issue inasmuch as

(a) by their nature as crimes committed in the context of widespread violence and during a national or international emergency, war crimes and crimes against humanity may be committed by persons with no prior convictions or

¹⁹⁵ See, however, Order for Video-Link Testimony of KHIEU Samphan Character Witnesses TCW-277 and TCW-84, E236/5/4, 24 April 2013 (requiring that TCW-277 and TCW-84 be heard by video-link in the interests of judicial economy).

¹⁹⁶ Request to Summon TCW-223 as a Character Witnesses [sic] on Behalf of NUON Chea, E236/5/1, 22 February 2013.

¹⁹⁷ Request to Summon TCW-223 as a Character Witnesses (sic) on Behalf of NUON Chea, E236/5/1, 22 February 2013, paras 3 and 4.

history of violence, and that consequently evidence of prior good, or bad, conduct on the part of the accused before the armed conflict began is rarely of any probative value before the International Tribunal, and

- (b) as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity therewith.¹⁹⁸

117. The NUON Chea Defence submitted that TCW-223's "working relationship" with NUON Chea continued "as reflected in the notes of Ben Kiernan's interview, in which TCW-223 participated on 20 May 1975 with NUON Chea and others."¹⁹⁹ In our view this does not accurately reflect the contents of the KIERNAN interview.²⁰⁰ We are left with the impression that the NUON Chea Defence's varied requests to summons TCW-223, in particular the request in February 2013 that TCW-223 should be summonsed as NUON Chea's only character witness, are suggestive of trial tactics. We have concerns that the NUON Chea Defence made that request in an attempt to generate controversy - a further attempt to invite coercive measures against a member of Cambodia's Parliament - rather than a genuine and reasonable belief that testimony from TCW-223 would materially assist NUON Chea.

118. We did consider the possibility that any questions of relevance could also be solved by according little weight to such testimony. But given our conclusion that the summoning of this particular witness would have likely prolonged the proceedings and our impression that the NUON Chea Defence's approach to character evidence was tactical, in our view this request should be rejected. The Chamber should not sever charges in order to ensure an expeditious trial and at the same time allow parties to adduce irrelevant evidence at a late stage which it has already determined to be of little or no weight. In the circumstances, we reject this request on the basis of IR 87(3)(a), (b), (c) and (e).

Opinion of Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE

¹⁹⁸ *Prosecutor v. Kupreškić et al.*, Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999; *See also Prosecutor v. Bagilishema*, ICTR Appeals Chamber (ICTR-95-1A-A), Judgement, para. 105; *Prosecutor v. Stakić*, ICTY Appeals Chamber (IT-97-24-A), Judgement, para. 406; and *Prosecutor v. Blagojević*, ICTY Trial Chamber (IT-02-60), Judgement, para. 853.

¹⁹⁹ Request to Summon TCW-223 as a Character Witnesses (sic) on Behalf of NUON Chea, E236/5/1, 22 February 2013, para. 5.

²⁰⁰ Interview of CHEA Sim, Phnom Penh, 3 Dec 1991, and HENG Samrin, Phnom Penh, 2 Dec 1991, E3/1568, 16 March 2011, ERN 00651883. TCW-223 describes the meeting as follows: "It was Pol Pot and Nuon Chea who did the speaking about the plan. There were many people in the audience, representatives from all over the country. Thousands of people, from all districts and regions, districts and regional secretaries came from all over the country. And representatives from all armed forces and units and regions. So there were thousands"

119. We, Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE, consider that the fact that TCW-223 is the sole character witness sought by the NUON Chea Defence is a further reason why he should be summonsed in Case 002/01. As the Chamber has not sought to limit the discretion of other Accused to summons individuals considered by them to be relevant to issues of character, TCW-223 should therefore also be summonsed.

120. We further consider that the character evidence of TCW-223 is likely to be relevant and probative. We agree with the international jurisprudence which rarely, if ever, constrains a party's ability to offer character evidence. While a Chamber is likely to accord little weight to the evidence of individuals who are poorly acquainted with an Accused's character, the *ad hoc* Tribunals have permitted character testimony unless the number of such witnesses requested is considered excessive.²⁰¹

3.3 Basis for the Chamber's decision not to hear the remaining individuals sought during the course of Case 002/01

3.3.1 Witnesses sought in support of generic allegations regarding fairness of the proceedings, independence of the judiciary, corruption or regularity of the Case 002 judicial investigation

121. In response to the Chamber's invitation at the Second TMM to identify individuals considered vital to hear in order to rebut the allegations against the Accused, the NUON Chea Defence sought instead to hear a large number of individuals in support of generic allegations regarding the fairness of ECCC proceedings, independence of the Cambodian judiciary, alleged corruption or the regularity of the course and conduct of the Case 002 judicial investigation.²⁰² None of these individuals were sought to rebut any of the allegations against the Accused or were otherwise alleged to be relevant to the facts at issue in Case 002/01.

122. The NUON Chea Defence sought to call, amongst others, current and former members of the Office of the Co-Investigating Judges, in order to examine the "course and calibre" of the investigation in Case 002.²⁰³ Alleged procedural defects during the investigative phase

²⁰¹ *Prosecutor v. Kupreškić et al.*, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, ICTY Trial Chamber (IT-95-16-T), 17 February 1999; *Prosecutor v. Nindiliyimana et al.*, Decision on Sagahutu's Second Request for Variation of his Witness List, ICTR Trial Chamber (ICTR-00-56-T), 11 July 2008, para. 11.

²⁰² Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, para. 5 (identifying 46 individuals as relevant to these general allegations).

²⁰³ Annex D: Witness Summaries with Points of the Indictment — NUON Chea Defence Team, E9/10.1, 23 February 2011; Annex 3: Materials in Preparation for Trial proceedings – Primary List: Witness Summaries –

must be challenged before the Co-Investigating Judges during the pre-trial stage, if necessary through appeal to the Pre-Trial Chamber. The parties in Case 002 availed themselves fully of these avenues during the lengthy Case 002 judicial investigation. Although under the ECCC legal framework, no procedural defects of this type may therefore be raised before the Trial Chamber, the Chamber permitted the parties at trial to allege irregularities in the conduct of interviews before the Co-Investigating Judges at trial, where this may have had a demonstrable impact on the fairness of trial proceedings.²⁰⁴ The Chamber therefore considers it to be neither appropriate nor necessary in the interests of justice to hear those individuals requested by the NUON Chea Defence in relation to the course and conduct of the Case 002 judicial investigation.²⁰⁵

123. The NUON Chea Defence also sought to call three individuals regarding the negotiations that led to the creation of the ECCC.²⁰⁶ Such allegations are also outside the proper scope of inquiry for the Trial Chamber. It further requested to hear staff of the Office of the Co-Prosecutors in order to explore the basis of selection of suspects for investigation.²⁰⁷ The Supreme Court Chamber has clearly indicated that the determination of which individuals are most responsible for crimes within Democratic Kampuchea and who are therefore investigated by the Co-Investigating Judges is primarily a policy matter to be determined by the Co-Prosecutors. There is accordingly no basis upon which these witnesses should be called to testify at trial in Case 002/01.²⁰⁸

124. Finally, the NUON Chea Defence sought the testimony of two Cambodian government spokespersons for their alleged roles in preventing six Cambodian officials from responding to summonses from the Co-Investigating Judges.²⁰⁹ This request does not allege this conduct amounts to an interference with the administration of justice punishable under Internal Rule 35, and the requested evidence would otherwise be irrelevant to Case 002/01.

NUON Chea Defence Team, E93/4.3, 21 June 2011; Request for Additional Witnesses & Continuation of Initial Hearing, E93/9, 6 July 2011; Annex: Request for Additional Witnesses & Continuation of Initial Hearing, E93/9.1, 6 July 2011.

²⁰⁴ See Internal Rules 48 and 76; Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), E251, 7 December 2012.

²⁰⁵ Namely, TCW-61, TCW-731, TCW-736, TCW-792, TCW-206, TCW-301, TCW-558, TCW-511, Laurent Kasper-Ansermet, TCW-25, TCW-274, TCW-575, TCE-1, TCE-19, TCE-39, TCW-31 and TCW-383; *see also*, *Deuxième demande visant à faire verser aux débats des extraits du livre de M. Marcel LEMONDE*, E280/2, 8 May 2013.

²⁰⁶ Namely, TCW-212, TCW-7 and TCW-658.

²⁰⁷ Namely, TCW-86 and TCW-513.

²⁰⁸ *KAING Guek Eav alias Duch*, Appeal Judgement, Case No. 001/18-07-2007/ECCC/SC, F28, 3 February 2012, paras 79-80.

²⁰⁹ Namely, TCW-317 and TCW-524.

These issues, and indeed many others for which this additional evidence is sought, have also previously been raised and adjudicated before the Chamber over the course of the trial, and in many cases have been subject to appellate scrutiny before the Supreme Court Chamber.²¹⁰ For these reasons, the Chamber does not consider the testimony of any of the following individuals to be relevant or necessary to hear in Case 002/01, as the NUON Chea Defence has failed to satisfy the threshold conditions of relevance in relation to them (Internal Rule 87(3)(a)):

TCW-108 CHHORN Uth;
TCW-568 Knut ROSANDHAUG;
TCW-57 Patricia O'BRIEN;
TCW-58 Joel BRINKLEY;
TCW-61 Bernard BRUN;
TCW-731 David TOLBERT;
TCW-704 Peter TAKSOE-JENSEN;
TCW-736 Ignacio TREDICI;
TCW-792 YOU Bunleng;
TCW-206 Yash GHAI;
TCW-30 Cat BARTON;
TCE-42 Elizabeth F. LOFTUS;
TCE-78 YSA Osman;
TCE-77 Jeffrey N. YOUNGGREN;
TCW-558 Jean REYNAUD;
TCW-212 Thomas HAMMARBERG;
TCW-7 Brad ADAMS;
TCW-541 PRAK Kimsan;
TCW-533 Amanda PIKE;
TCW-530 Margot PICKEN;
TCW-86 CHEA Leang;
New Laurent KASPER-ANSERMET;
TCW-25 Anna AUSTIN;
TCW-274 Helen JARVIS;
TCW-31 Wayne BASTIN;
TCW-383 Marcel LEMONDE;
TCW-513 Robert PETIT;
TCW-575 Heather RYAN;
TCW-630 SEAN Visoth;
TCE-1 Carl ASK;

²¹⁰ See e.g., Decision on Application for Disqualification of Judge Silvia CARTWRIGHT, E171/2, 9 March 2012; Decision on Motions for Disqualification of Judge Silvia CARTWRIGHT, E137/5, 2 December 2011; Decision of IENG Thirith and IENG Sary's Applications for Disqualification of Judge YOU Ottara from the Special Bench & Requests for a Public Hearing, E63/5, 9 May 2011; Decision on Application for Immediate Action Pursuant to Rule 35, E189/3, 23 November 2012; Decision on IENG Sary's Application to Disqualify Judge NIL Nonn and Related Requests, E5/3, 28 January 2011; Decision on NUON Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Application for Summary Action, E176/2/1/4, 21 September 2012; Decision on NUON Chea's "Immediate appeal against Trial Chamber decision on application for immediate action pursuant to Rule 35", E189/3/1/8, 26 March 2013.

TCE-19 Keith A. FINDLAY;
 TCE-39 Petrus Johannes van KOPPEN;
 TCW-511 Christophe PESCHOUX;
 TCW-132 Hans CORELL;
 TCW-248 HUN Sen;
 TCW-292 KEAT Chhon;
 TCW-243 HOR Namhong;
 TCW-317 KHIEU Kanharith;
 TCW-658 SOK An;
 TCW-353 KONG Sam Ol;
 TCW-524 PHAY Siphon;
 TCW-649 SIM Kar; and
 TCW-494 OUK Bunchhoen.

125. Although the Chamber declined to hear TCE-78 and TCW-649 in support of these generic allegations, it acknowledges the expertise of the former in relation to the Cambodian Cham Muslim population, and of the latter in relation to the existence of armed conflict. TCW-649 also appears to have knowledge regarding incursions by the Khmer Rouge into Vietnamese territory in January 1977.²¹¹ Although irrelevant to the scope of Case 002/01, this evidence is deferred to future trials in Case 002.

126. While agreeing that it is unnecessary to hear his evidence in relation to these allegations, the Chamber has nonetheless been unable to agree on whether TCW-494 should be heard regarding forced movement and/or the roles of the Accused and policies and structures of Democratic Kampuchea (Section 3.2.8).

3.3.2 Individuals considered more relevant to future trials in Case 002 or primarily relevant to those Accused severed from proceedings in Case 002/01

127. In consequence of the First and Second Severance Decisions, the request of the Co-Prosecutors to include S-21 and executions in District 12 within the scope of Case 002/01 was rejected and the scope of the first trial in Case 002 limited primarily to population movement and latterly, executions at Tuol Po Chrey. In its decision on immediate appeals against the

²¹¹ See e.g. Transcript of recorded interview with SIM Kar and Chea Chhoem on 07-08-1990, D210/6, 25 September 2009 p. 12 (1990 interview of SIM Kar by Stephen HEDER, in which the former discusses January 1977 attacks by the Khmer Rouge into Vietnamese territory: "In general terms, the overall orders came from 870, which gave the commands to the zones. Then the Zone set up another Command Committee in which both the sectors and the Zone participated. This committee then achieved unity with the Centre on attacking into Vietnamese territory."); see also, Annex 3: Materials in Preparation for Trial Proceedings – Primary List: Witness Summaries – NUON Chea Defence Team, E93/4.3, 21 June 2011, pp. 49-50 (NUON Chea Defence motion seeking the testimony of Prime Minister HUN Sen because he "can offer insight into the state of affairs in the DK, alternative command structures in the Khmer Rouge and the role of Vietnam. Moreover, he can offer insight into political interference and allegations of corruption at the ECCC."). The Chamber disposes of this motion on the same basis.

Trial Chamber's second decision on severance of Case 002, the Supreme Court Chamber affirmed the Trial Chamber's decision and did not modify the scope of Case 002/01.²¹² As a consequence, in the absence of any direction to the contrary from the Supreme Court Chamber, the Chamber has therefore deferred the following individuals sought by the parties in Case 002/01 to future trials²¹³:

*In relation to District 12:*²¹⁴

TCW-651 SIM Tun;
 TCW-162 DY Yet;
 TCW-160 DUY Dok;
 TCW-422 MAUT Manh; and
 TCW-298 KEP Moeun.

*In relation to S-21:*²¹⁵

TCW-540 PRAK Khan;
 TCW-698 SUOS Thy;
 TCCP-21 CHUM Mey;
 TCW-232 HIM Huy;
 TCW-316 KHIEU Ches;
 TCW-348 KOK Sros;
 TCW-367 LACH Mean;
 TCW-379 LAY Chan;
 TCW-405 LY Hor;
 TCW-479 NORNG Chanphal;
 TCW-512 PESS Matt;
 TCW-523 PHAOK Khan;
 TCW-53 BOUT Thon;
 TCW-598 SAOM Met;
 TCW-632 SEK Dan;
 TCW-88 CHEAM Sour;
 TCCP-22 CHUM Neou;
 TCCP-93 NAM Mon;
 TCW-410 MAM Nai;
 TCW-441 MOM Chhot;
 TCW-470 NHEM En;

²¹² Decision on Immediate Appeals Against Trial Chamber's Second Decision on Severance of Case 002, E284/4/8, 25 November 2013; *see also*, Summary of Reasons of Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, E284/4/7, 23 July 2013.

²¹³ Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013.

²¹⁴ Annex II, section x; *see also*, Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, sections 6-7; Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013.

²¹⁵ Annex II, section ix; *see also*, Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, sections 6-7; Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013.

TCW-474 NIM Kimsreang;
 TCW-49 BOU Meng;
 TCW-115 CHIEM Neuan;
 TCW-125 CHUM Phal;
 TCW-140 DENG Chhiv;
 TCW-290 KA Sunbaunat;
 TCW-499 PAN Sokhon;
 TCW-655 Francoise SIRONI-GUILBARD; and
 TCW-118 CHIN Met.

128. Following the severance of the Accused IENG Thirith and the termination of proceedings against the Accused IENG Sary on 14 December 2012 and 14 March 2013 respectively, the Chamber determined a number of individuals sought in Case 002/01 to have been relevant principally to those Accused and thus, no longer necessary to hear at trial. In addition to the above-mentioned TCW-724, TCW-794, TCW-796, TCW-679, TCW-243 and TCW-292, the Chamber also identified a number of further individuals as unnecessary to hear, on grounds that their testimony was likely to be relevant primarily to the role of the Accused IENG Thirith or IENG Sary or otherwise of limited relevance to Case 002/01.²¹⁶

TCW-725 THUCH Sithan;
 TCW-600 SAO Nay;
 TCW-778 YANG Rin;
 TCW-90 CHEA Phan;
 TCW-18 ANG Neang; and
 TCW-325 KHO Vanny.

129. Although specifically sought to be summonsed by the Co-Prosecutors during the latter phases of the trial prior to the conclusion of the hearing of evidence in Case 002/01, the Chamber considered the following individuals to be of greater relevance to other portions of the Case 002 Closing Order and has therefore deferred the evidence of the following individuals to future trials in Case 002²¹⁷:

TCW-79 CHAN Man;
 TCW-696 SUON Ri; and
 TCW-781 YEN Kuch.

²¹⁶ Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith, E138/1/10/1/5/7, 14 December, 2012; Termination of the proceedings against the accused IENG Sary, E270/1, 14 March 2013.

²¹⁷ Co-Prosecutors' Notification in Response to the Senior Legal Officer's Request to Provide Information Prior to the Trial Management Meeting, E288/3, 11 June 2013, para. 5 (seeking to hear the evidence of TCW-781 in relation to the role of the Accused KHIEU Samphan); Annex A: OCP Proposed Trial Schedule for Final Phase of Case File 002, E273.1, 27 March 2013 (seeking to hear TCW-696 and TCW-79 at trial); *see also*, Written Record of Interview of CHÂN Mân, D166/116, 4 May 2009; Biography of KHAT Khann alias SUON Ri, E3/172, 1 February 2012; Written Record of Interview of YEN Kuch, E3/437, 9 April 2012.

3.3.3 *Individuals included on early Case 002/01 lists but neither identified by the Chamber as relevant to hear in Case 002/01 nor subsequently sought by the parties*

130. Following a request by the Chamber that the parties identify (from their larger Rule 80 lists in Case 002) those individuals potentially relevant to the early trial segments in Case 002/01, the parties submitted revised lists in mid-2011. All individuals included on these lists were reviewed by the Chamber for likely relevance and probative value, following which the Chamber issued its 25 October 2011 list of individuals it considered most relevant to hear in relation to these early trial segments. A large number of individuals from these mid-2011 lists were neither identified by the Chamber as most relevant to hear in Case 002/01 nor subsequently requested by any party to be heard in relation to any trial segment at a later date (Annex II, Section xiii). All individuals in Annex II, Section xiii(a) were accordingly not heard before the Chamber as irrelevant or repetitious (Internal Rule 87(3)(a)). Other individuals in this section were identified solely in relation to allegations regarding the course and conduct of the judicial investigation or other generic allegations regarding trial fairness (Annex II, Section xiii(b)) and are rejected on the same basis of those described above (Section 3.3.1).

131. Other individuals in this annex were insufficiently identified, in contravention of the Trial Chamber's Order E9 (Annex II, Section xiii(c)).²¹⁸ In the pre-trial phase, the parties were ordered to identify with sufficient specificity each proposed witness, Civil Party or expert sought, in order to permit the Witness/Expert Support Unit to locate the individual within a reasonable time, to put the other parties on notice of which individuals are requested to be called, and to enable the Chamber to determine their relevance.²¹⁹ The Chamber rejected this evidence on grounds of its likely limited relevance, repetitiousness and/or as likely to be impossible to obtain within a reasonable time (Internal Rules 87(3)(a) and (b)).²²⁰

²¹⁸ See also, Annex II, section i (indicating that TCW-491, who was included in E236 (Individuals sought by the parties to be heard at trial as communicated during or immediately after the Trial Management Meeting to the Trial Chamber Senior Legal Officer, E236, 2 October 2012, section 7) has also been identified with insufficient particularity).

²¹⁹ Order to File Material in Preparation for Trial, E9, 17 January 2011, paras 2, 6. The details required include the full name, gender, date and place of birth, current address and/or contact details of each proposed witness, Civil Party and expert. The Chamber also required the parties to provide: "i) a summary of facts on which each proposed witness is expected to testify, or one which each Civil Party is to be heard concerning the facts or the impact of the alleged crimes. [...] the summary should be sufficiently detailed to allow the Chamber and the other parties to understand fully the nature and content of the proposed testimony; and ii) a summary of the proposed expertise and qualification of each proposed expert. [...] the summary should be sufficiently detailed to allow the Chamber and the other parties to understand fully the nature and content of the proposed expertise."

²²⁰ A number of individuals were proffered without adequate identifying information, or explanation as to their relevance. For example, the NUON Chea Defence sought to call several historians of the Soviet Union or Russia

3.4 Individuals on the parties' original Rule 80 lists concerning the entirety of Case 002 whose evidence was not requested by any party in Case 002/01

132. The remainder of the 1054 individuals sought by the parties at trial in Case 002 are those who were contained in the parties' original Rule 80 witness lists but who were neither sought to be heard by any party in Case 002/01 nor considered by the Chamber to be relevant to this trial (Annex III). As some of these individuals may nonetheless be relevant to other portions of the Case 002 Closing Order, decisions in relation to them are deferred to future trials. A number of these individuals also appear to have been identified with insufficient particularity, or are likely to be deceased (Annex III(b)).

3.5 Conclusion

133. In view of the large number of individuals cumulatively sought by the parties at trial, the Chamber identified those individuals it considered likely to be most relevant and probative of the facts at issue in Case 002/01. It tended to exclude oral testimony from individuals that was likely to merely repeat other evidence before the Chamber. Given the lengthy pre-trial phase in Case 002, during which a large number of individuals were heard by the Co-Investigating Judges, the Chamber also considered whether the testimony of additional individuals sought at trial had been sought during the pre-trial stage, and the reasons this evidence was not heard by the Co-Investigating Judges, where known. Where several individuals were proposed to be heard on similar facts or issues, preference was given to those whose proposed evidence was sought by one or more parties to the proceedings, covered multiple trial topics, or were considered likely to have greater relevance or probative value.

134. The Chamber also adopted a phased approach to the selection of individuals to be heard at trial, in order to grant the parties successive opportunities to identify individuals considered essential to hear in relation to each trial segment. In advance of the hearing of the substance in Case 002/01, the Chamber provided a tentative list of individuals it considered most relevant to the initial Case 002 trial segments. The 25 October 2011 list followed the severance of proceedings in Case 002 and the submissions of the parties in relation to this

without providing any indication of their relevance to Case 002 (*see e.g.*, TCE-20 (Sheila FITZPATRICK), TCE-23 (John ARCH GETTY), TCE-24 (Wendy GOLDMAN) and TCE-56 (Gabor Tamas RITTERSPORN). In relation to other individuals sought, the Defence concedes that there is doubt as to whether they are still living (*see e.g.*, proposed Witnesses TCW-101, TCW-154, TCW-222, TCW-266, TCW-279, TCW-311, TCW-337, TCW-419, TCW-430, TCW-499, TCW-577, TCW-618, TCW-633, TCW-660, TCW-705, TCW-734, TCW-735; TCW-791; TCW-14, TCW-39, TCW-85, TCW-209, TCW-220 and TCW-573). Many of these additional individuals were also not heard during the investigative phase.

tentative list. The list was nonetheless kept under review over the course of the trial, and reduced in the interests of judicial economy. It was also supplemented with additional individuals where the interests of justice so required.²²¹ At the Second TMM, the Chamber invited comment from the parties regarding proposed reductions to this list. The parties were provided an opportunity to identify individuals relevant to the remaining Case 002/01 trial segments and others considered by the parties as vital to hear over the course of Case 002/01, with particular emphasis on the need for the Defence to identify witnesses who might provide exculpatory evidence. On the basis of input provided at the Second TMM, the Chamber later identified those witnesses it considered most relevant to be heard on population movements one and two and Tuol Po Chrey, as well as a number identified by the Defence as vital to rebut allegations made against the Accused. Finally, the Chamber reviewed all additional individuals sought by the Co-Prosecutors on their March 2013 list, as well as those identified by all parties as necessary to hear prior to the close of the evidentiary proceedings in Case 002/01 at the Final TMM in June 2013.

135. In issuing the present decision, the Chamber has weighed all submissions of the parties in support of the calling of particular individuals at trial made during all Trial Management Meetings and other witness hearings, as well as in a large number of written motions filed by the parties over the course of the trial in Case 002/01.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DECLINES to summons all individuals included in Annex II to this decision to testify at trial in Case 002/01, and/or defers this evidence to future trials in Case 002; and

DEFERS decisions in relation to all individuals included in Annex III to this decision to future trials in Case 002. *RD*

Phnom Penh, 07 August 2014
President of the Trial Chamber



[Signature]
Nil Non

²²¹ See e.g., Trial Chamber memorandum entitled “Next group of witnesses, Civil Parties and experts to be heard in Case 002/01”, E172, 21 February 2012 (sequencing the hearing of individuals contained in the 25 October 2011 list, and indicating that a number of other individuals would also be heard at trial); Trial Chamber memorandum entitled “Directions to parties following hearing of 21 September 2012”, E233, 25 September 2012, para. 5 (declaring that TCW-754 and TCW-100 would also be heard).