

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

**FILING DETAILS**

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**Further Request to Put Before the Chamber  
Extracts from Book Authored by Judge Marcel LEMONDE**

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## MAY IT PLEASE THE TRIAL CHAMBER

1. On 15 March 2013, the Defence for Mr Nuon Chea moved the Supreme Court Chamber with a Request to Consider Additional Evidence on appeal<sup>1</sup> The Request relates to extracts from the book authored by Judge Marcel Lemonde, a former ECCC Co-Investigating Judge.<sup>2</sup>
2. On 10 April 2013, the Defence for Mr KHIEU Samphan requested that the extracts of the same book which are relevant to his Application for release<sup>3</sup>, be put before the Chamber.<sup>4</sup>
3. By the present submission, the Defence is requesting in general be put before the Chamber the extracts from the book authored by Judge Marcel Lemonde and for the Chamber to admit them into evidence pursuant to Internal Rule 87(4).<sup>5</sup>
4. Given that the book was published in January 2013, it is beyond dispute that it was not available before the opening of the trial and that no amount of due diligence would have enabled the Defence to discover it prior to this publication date.
5. The selected extracts are conducive to ascertaining the truth and meet the criteria set out in Rule 87(3).<sup>6</sup> They are conducive to assessing the probative value of the evidence gathered during the judicial investigation. Indeed, in his book, Judge LEMONDE describes the conduct of the judicial investigation in Case 002 and offers his assessment of the evidence he collected in the course of that investigation.

### **I. Conduct of the Judicial Investigation**

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<sup>1</sup> Request to Consider Additional Evidence, 15 March 2013, **E189/3/1/7** ("Mr NUON Chea's Request").

<sup>2</sup> *Un juge face aux Khmers rouges, de Marcel Lemonde, avec la collaboration de Jean Reynaud, Editions du Seuil, janvier 2013* (the book authored by Judge Marcel Lemonde).

<sup>3</sup> Mr KHIEU Samphân's Application for Immediate Release on Bail, 29 March 2013, **E275**.

<sup>4</sup> Initial Request to Place Before the Chamber Extracts of the Book Authored by Judge Marcel LEMONDE, 10 April 2013, **E280** ("Initial Request").

<sup>5</sup> "During the trial, either on its own initiative or the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned decision. The Chamber will determine the merit of any such request with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial."

<sup>6</sup> "(...) The Chamber may reject a request for evidence where it finds that it 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) intended to prolong the proceedings or is frivolous".

6. In his book, the former Co-Investigating Judge lays out the difficulties he encountered in the course of the judicial investigation. He avers that he was hindered from obtaining critical evidence. He also describes translation problems and his choices of strategy, which are highly prejudicial to the Accused.

**A. Hindrances to obtaining critical evidence**

7. Judge Lemonde's book reveals that obtaining critical evidence was hindered by politics, and possibly partiality.

**1) Politics**

8. According to the former Co-Investigating Judge, obtaining critical evidence was hindered by both the Cambodian and US governments.

**a) The Cambodian government**

9. In his book, Judge Lemonde speaks publicly about the Cambodian Government's interference in the judicial investigation. Such interference and pressure prevented the hearing of key witnesses who "[TRANSLATION] *should definitely have been heard*"<sup>7</sup> by the Co-Investigating Judges were not heard, and will not be heard by the Trial Chamber.

10. The Defence for Mr KHIEU Samphân agrees with the detailed arguments advanced before the Supreme Court Chamber by the Defence for Mr NUON Chea,<sup>8</sup> and requests that the selected extracts be put before the Trial Chamber.

**b) The US Government**

11. Further, Judge Lemonde outlines the problems he encountered with the US Government, problems that he describes in these terms:

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<sup>7</sup> The Book authored by Judge LEMONDE, p. 172. See Mr NUON Chea's Request, Annex **E189/3/1/7.3**.

<sup>8</sup> Mr NUON Chea's Request, paras. 4-5, 12-14, 15-17, 19-26, 30, and Annexes **E189/3/1/7.1 to E189/3/1/7.4**.

“[TRANSLATION] *Greg Lawless, (...) head of political affairs at the US Embassy, who sometimes came to see me at the Court, clearly indicated to me the official reluctance was not to be blamed on the embassy or the Executive, but rather on Congress. Yet, when we attempted to obtain CIA archives on Cambodia containing information of interest for the investigation, we wound up with next to nothing, save for a handful of aerial photos of Phnom Penh emptied of its inhabitants on 18 April 1975. The US Ambassador-at-Large for War Crimes (...) handed them over to us proudly as though they were a major trophy. The reality is that he could not possibly have been unaware that they contained nothing new*”.<sup>9</sup>

## 2) Possible bias

12. In his book, the former Co-Investigating Judge offers his own version of the facts underpinning the Defence applications for his recusal and disqualification due to bias.<sup>10</sup> Those applications were based on statements made by a former member of Judge Lemonde’s staff, to the effect that Judge Lemonde, among others, urged his staff to find more inculpatory than exculpatory evidence.<sup>11</sup>

13. Interestingly, Judge Lemonde denies any bias, and instead, accuses the Defence of engaging in “[TRANSLATION] *a scheme designed to prevent [him] from doing [his] job*”, forgetting that the Defence was simply doing its job:

“[TRANSLATION] *How was the Defence able to convince a former member of my staff to turn against me? I never figured that out. Rumour has it that the individual concerned made reckless statements in a bar, and when the Defence came to find out, it told him that he had to testify or else he would personally be held to account*”. *I am uncertain as to whether that is what actually happened. Whatever the case, this was a scheme designed to prevent me from doing my job*”.<sup>12</sup>

14. So the publication of Judge Lemonde’s book is a factor in favour of summoning Witnesses TCW-383 and TCW-31, as already requested by the Defence, and is warranted by the need to ascertain the truth.

## B. Translation-related issues

<sup>9</sup> The book authored by Judge LEMONDE, p. 52-53. See Mr NUON Chea’s Request, Annex E189/3/1/7.2.

<sup>10</sup> The book authored by Judge LEMONDE, p. 186-193. Annexed hereto.

<sup>11</sup> The book authored by Judge LEMONDE, p. 187. Annexed hereto.

<sup>12</sup> The book authored by Judge. LEMONDE, p. 193. Annexed hereto.

15. On reading Judge Lemonde's book, one becomes keenly aware of the effect that translation-related issues can have on the judicial investigation. According to Judge Lemonde, the investigators "[TRANSLATION] *worked in challenging conditions. For people who had high standards as to how to conduct a proper investigation, the situation in Cambodia was quite a challenge*"<sup>13</sup> especially considering that investigators "constantly had to grapple with translation-related issues" while interviewing witnesses.<sup>14</sup>

16. Such problems were also highlighted during meetings of the Office of the Co-Investigating Judges:

*"[TRANSLATION] Finally, the situation was further exacerbated by the fact that we used English as our working language. It was quite a challenge to hold technical meetings involving as many as 15 people speaking in a whole range of accents from places like Australia, Texas and New Zealand. The ten percent that I missed was precisely what caused the most damage."*<sup>15</sup>

17. Moreover, Judge Lemonde was speaking from experience when he wrote that translation inaccuracies "[TRANSLATION] *could lead to many a meaning error*".<sup>16</sup> The Defence has had to point out such inaccuracies numerous times during witness testimony before the Chamber. This is a critical point for the Chamber to consider given that it has admitted into evidence many witness statements taken by investigators of the Office of the Co-Investigating Judges. It is all the more critical considering that it concerns admitting witness statements which cannot be verified in the course of a witness examination in court.

### **C. Prejudicial choices of strategy**

18. In his book, Judge Lemonde describes the investigation "strategy" he adopted in Cases 001 and 002. His "strategy" is detrimental, not only to the length of Mr KHIEU Samphân's provisional detention, but also to the search for and collection of evidence in Case File 002.

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<sup>13</sup> The book authored by Judge LEMONDE, p. 131. See Initial Request, Annex **E280.6**.

<sup>14</sup> The book authored by Judge LEMONDE, p. 132 (emphasis added). See Initial Request, Annex **E280.7**.

<sup>15</sup> The book authored by Judge LEMONDE, p. 132-133. See Initial Request, Annex **E280.7**.

<sup>16</sup> The book authored by Judge LEMONDE, p. 34 (footnote omitted). Annexed hereto.

19. We learn that already in July 2007, Judge Lemonde was keen on giving priority to the *Duch* case. After describing his reading of the Co-Prosecutors' First Introductory Submission concerning five individuals (Duch and the four other leaders of the regime), he writes the following:

*"[TRANSLATION] From the outset, I knew that it would not be possible to proceed that way. We had to set priorities or else we could not make any headway. I had no trouble convincing You Bunleng that we had to start with Duch. First of all, we could not afford to wait, because of the issues relating to his detention. Having been arrested in May 1999, he had been in "pre-trial" detention under the authority of a military tribunal. Secondly, his trial was thought to be fairly straightforward, and we had to bring our teams and teamwork up to scratch. Lastly, a severance had the benefit of enabling the Court to commence its first case in a timely manner, as everyone was anxiously waiting to for that to happen. For some odd reason, the Co-Prosecutors were not in favour of that; instead they wanted a "big trial"; we did not consider that to be realistic in the short term. We decided to proceed otherwise and went ahead with the severance."*<sup>17</sup>.

20. This goes to show that already in July 2007, Judge Lemonde was fully aware that conducting a big trial within a reasonable time was unlikely and that giving priority to a first smaller (and "straightforward") case file would further delay the commencement and, by implication, the conclusion of a second big trial within a reasonable time.

21. This therefore raises the question as to why the detention of the four former leaders was ordered so soon after the Severance Order. Judge Lemonde's book seems to suggest that this decision was based on politics rather than the law.

22. In fact, it emerges that it was after the August 2007 appointment of his Cambodian counterpart Judge You Bunleng to the Appeal Court (which appointment Judge Lemonde tried to oppose) that the latter suggested that he was about to make arrests:

*"[TRANSLATION] Coming back to [Judge] You Bunleng's promotion, I was uncertain about the course of action to take, whether to resign if the government did not go back on its decision. The fact is that I was well aware that resigning was not an option (...). I decided to inform the French ambassador that "some quite spectacular investigative acts were about to be undertaken" with a view to showing everyone that moving forward under such conditions*

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<sup>17</sup> The book authored by Judge Lemonde, pp. 42-43. See Initial Request, Annex **E280.1**.

would amount to sabotage. Of course, I was thinking of making arrests within the next few weeks. (...)”<sup>18</sup>

23. Even so, the investigation in Case 002 was not conducted with due diligence after the arrest of the four suspects. Quite to the contrary:

“[TRANSLATION] *The priority was to complete the Duch case before embarking on Case 002 concerning the four former leaders of Democratic Kampuchea. The two cases could only be conducted successively.*”<sup>19</sup>

24. Yet, while the “*sole strategy in Case 001 was to go to trial as soon as possible*”, its aim was not to embark on Case 002 as soon as possible. Rather, it was aimed at satisfying a civilian society which was anxiously waiting for Duch’s trial to open, because “[TRANSLATION] *the public perception was that nothing was being done*”.<sup>20</sup>

25. It was important to accomplish this, as evidence by the extract of Judge Lemonde’s book where he states that describes the frustration he felt on account of the problems and delays caused by the Co-Prosecutors.<sup>21</sup>

26. Judge Lemonde avers that it was not until the conclusion of the investigation in Case 001 that he became more keenly aware of the scope of Case 002:

“*So long as we were dealing with the Duch case, matters were fairly straightforward, since the strategy was to deal solely with essential issues in order to proceed as quickly as possible. It was not until the investigation as completed that I realised that what we had ahead of us was a real monster*”<sup>22</sup>

27. In reality the “real monster” ahead of them was mainly the four accused persons, four elderly accused persons who were deprived of their liberty.

28. Even though the accused in Case 002 had been in provisional detention for quite a long time, Judge Lemonde adopted an entirely different “strategy” from the one in Case 001. The aim was

<sup>18</sup> The book authored by Judge LEMONDE, pp. 51-52. See Initial Request, Annex **E280.2**, and Mr. NUON Chea’s Request, Annex **E189/3/1/7.2**.

<sup>19</sup> The book authored by Judge LEMONDE, p. 131. See Initial Request, Annex **E280.6**.

<sup>20</sup> The book authored by Judge LEMONDE, p. 144. See Initial Request, Annex **E280.8**.

<sup>21</sup> The book authored by Judge LEMONDE, pp. 145-149. See Initial Request, Annex **E280.9**.

<sup>22</sup> The book authored by Judge LEMONDE, p. 132. See Initial Request, Annex **E280.7**.

no longer to proceed as quickly as possible, but rather to complete the trial before the expiration of the maximum period of re-trial detention:

*“[TRANSLATION] During that period, we as the Office of the Co-Investigating Judges did our level best to complete the investigation in Case 002 within the prescribed time limits. (...) We finally attained our objective on 15 September 2010. This came in the nick of time because Nuon Chea’s pre-trial detention was due to expire within three days”<sup>23</sup>.*

29. Moreover, the focus was no longer on dealing solely with essential issues, but rather on producing a historical record:

*“[TRANSLATION] Regrettably, even at this stage, we cannot entirely rule out the possibility that no trial may take place, since no one knows what the future holds in store given the fragility of the Court and the advanced age of the accused. We thus prepared the Closing Order on the assumption that no trial of the Khmer Rouge would take place. (...) The Order thus deals with legal, historical or factual issues, which, while not absolutely essential, seemed important in the event that our Order would turn out to be the only record left by the Court concerning what happened in Cambodia between 17 April 1975 and 6 January 1979”<sup>24</sup>.*

30. It was against this background that Mr KHIEU Samphân was kept in detention for three years. This amounts to a flagrant failure to exercise the “special diligence” required by international standards in instances where individuals who are presumed innocent are deprived of their liberty.<sup>25</sup>

31. It was also against this background that that the investigation in Case 002 was conducted, as the search for and collection of evidence focused more on historical rather than on legal matters. It therefore clearly emerges that before being hastily concluded, the investigation focused on quantity rather the quality of evidence, much of which is of questionable relevance.

## **II. Assessment evidence collected during the judicial investigation**

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<sup>23</sup> The book authored by Judge LEMONDE, p. 201. See Initial Request, Annex, **E280.11**.

<sup>24</sup> The book authored by Judge LEMONDE, p. 202. See Initial Request, Annex **E280.12**.

<sup>25</sup> See, *inter alia*, the established case-law of the European Court of Human Rights (“ECHR”), for example in *Labita v. Italy*, Judgement, ECHR Grand Chamber, 6 April 2000, para. 153; *Velichko v. Russia*, Judgement, ECHR, 15 January 2013, para. 84.



32. Judge Lemonde's assessment of the evidence he collected says a lot about its probative value. In his book, he gives his views about Mr KHIEU Samphân's case, the evidence adduced by some witnesses, and about some other issues.

**A. Mr KHIEU Samphân's case**

33. In his book, Judge Lemonde states that in the autumn of 2007 he was reluctant to order the detention or bail of the four suspects in Case 002. He adds that discussions on this subject within the Office of the Co-Investigating Judges were "[TRANSLATION] *quite robust*".

34. The book reveals that there the reluctance was greater with regard to the case of Ms IENG Thirith and that of Mr. KHIEU Samphân.

35. After discussing the cases of Mr NUON Chea and Mr IENG Sary, Judge Lemonde turns to that of Ms IENG Thirith, regarding which he writes as follows:

*"[TRANSLATION] In terms of substance, while the charges against IENG Sary were already extremely serious, the evidence available to us in the case against IENG Thirith is a lot more flimsy. Dismissing the proceedings after such lengthy pre-trial detention would be embarrassing, to say the least. After discussing the matter at length, You Bunleng and I finally decided to order her detention also"* (The footnote concerning the Detention Order is available online).

(...)

*Finally, based on the evidence gathered during the investigation, dismissing the proceedings against her was an option when the Closing Order was issued three years on, as there were undoubtedly sufficient charges against her to send her for trial (Footnote referring to paragraphs 1201 to 1298 of the Closing Order)."*<sup>26</sup>

36. Further on in the book, in reference to Mr KHIEU Samphân, Judge Lemonde does not go into detail, but proceeds as above, i.e. he refers to the Detention Order and to paragraphs 1126 to 1200 of the Closing Order.<sup>27</sup>

37. The fact that Judge Lemonde refers to the Closing Order (which concludes the investigation whereas the detention order was issued at the beginning of the investigation) in discussing these

<sup>26</sup> The book authored by Judge LEMONDE, pp. 79-80. See Initial Request Annex E280.3.

<sup>27</sup> The book authored by Judge LEMONDE, p. 86. See Initial Request Annex E280.4.

two cases alone shows the weakness of the original reasons for ordering the provisional detention of these two suspects.

38. Yet, under the law, the premise for provisional detention must be positively established. According to the Supreme Court Chamber:

*“Internal Rule 63(3) states that detention may be ordered where two conditions are met. The first condition from Internal Rule 63(3)(a) is the requirement for a well-founded suspicion that the person who is to be detained has committed a crime charged. This is a general premise that must be **positively** established in order for any of the specific conditions for detention from point (b) to be considered”.*<sup>28</sup>

39. The absence of a positively established premise and the unsound reasons are further reflected in what Judge Lemonde had to say about Mr KHIEU Samphân’s case following his original decision to order his provisional detention.

40. According to Judge Lemonde, the Defence counsel in attendance at Mr KHIEU Samphân’s initial appearance “[TRANSLATION] raised a number of issues and challenged the merits of some of the charges, because, among the four, the former head of State did not have the strongest case against him.”<sup>29</sup>

41. Further on in the book, Judge Lemonde writes the following regarding Mr KHIEU Samphân:

*“[TRANSLATION] The case of Mr Khieu Samphan is more complex. He was the public force and, overall, the most respected figure within Democratic Kampuchea. (...) His entire defence consists in saying, “You must prove to me that I knew what was happening”. Admittedly, he left no leads. There is no evidence whatsoever that he took specific decisions in regard to arrests and executions. It is also true that he is not listed anywhere in prisoners’ confessions as being among the recipients thereof, unlike Ieng Thirith, for example. However, considering the speeches he made and the public stance he took at the time, as well as his regular attendance of standing committee meetings and working closely with the other leaders, he could not possibly have been unaware of the purges and the enslavement of people all across the country. Given that he knew what was happening and that he made impassioned speeches in praise of the regime’s achievements, he can, at the very least, be regarded as an accomplice. Ultimately, it is safe to say that Khieu Samphan is a coward, if, as he claims, his main concern was the wellbeing of his people and that he was unaware of the horrors until*

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<sup>28</sup> Decision on Immediate Appeal by KHIEU Samphân contre on Application for Release, 6 June 2011, **E50/3/1/4**, para. 39 (emphasis added).

<sup>29</sup> The book authored by Judge LEMONDE, p. 89. See Initial Request, Annex **E280.5**.

*after had ended, it is perhaps simply because he is reluctant to admit that he was terrified and his only concern was to find a way out.*"<sup>30</sup>

42. In the final analysis, the Judge who spent months conducting a judicial investigation into Mr KHIEU Samphân's case and collecting evidence to that effect is not in a position to offer anything more than mere assumptions.

43. Moreover, it is shocking that the charges which Judge Lemonde included in the Closing Order against Mr KHIEU Samphân are not limited to complicity alone. Does this mean that the rest, namely all the charges against Mr KHIEU Samphân as main perpetrator, will be part of the "legal, historical and factual records, which, while not essential, seemed important" to him should the Closing Order turn out to be "the only record the Court leaves"? Based on what Judge Lemonde has written, this seems question deserves to be asked.

#### **B. Assessment some testimonies**

44. Judge Lemonde also offers his assessment of the testimony that that he heard (and which was later tendered into evidence).

45. For example, Judge Lemonde writes the following regarding Kaing Guek Eav, alias *Duch*, who discovered the evidence as the trial progressed:

*"[TRANSLATION] The problem is obviously to decide at what point testimony stops to reflect reality, i.e. based on one his own experience, and focuses on comments that he may have found while reading the case file in recent months. This makes things arguably more interesting, because it means that he is gaining a better of understanding, but the danger is that he may be tempted to rewrite history instead of simply describing what he witnessed at the time. A major discovery was the minutes of the Central Committee meeting dated 30 March 1976. The document itself is poorly written and unclear, becomes the historical record he needed."*<sup>31</sup>.

46. Moreover, it was apparently François Ponchaud who rescued François Bizot's credibility in the eyes of Judge Lemonde.<sup>32</sup> It would seem that Judge Lemonde had reservations about the "credibility" of François Bizot's testimony.<sup>33</sup> After having heard François Ponchaud's testimony,

<sup>30</sup> The book authored by Judge LEMONDE, pp. 158-159. See Initial Request, Annex E280.10.

<sup>31</sup> The book authored by Judge LEMONDE, p. 69. Annexed hereto.

<sup>32</sup> The book authored by Judge LEMONDE, p. 101-106. Annexed hereto.

<sup>33</sup> The book authored by Judge LEMONDE, p. 105. Annexed hereto.

and knowing that the latter was “*as demanding towards others as he was towards himself, and was sparing with compliments*”, he wrote the following:

“[TRANSLATION] *Even though he spoke well of Bizot, it does not mean that his criticisms he made against him was unjustified? In the end, the biggest concern is the weight that the courts afford to vice voce testimony in the sense that in the absence of actual evidence courts tend to base the bulk of their decisions on entirely subjective accounts (assuming that those accounts are given in good faith) and that the credibility of a given witness can be assessed differently depending on whether it is challenged by that of another witness (which may not necessarily be more credible) or, on the contrary, corroborated by that of yet another witness (deemed more credible for entirely personal reasons); that in itself is frightening.*”<sup>34</sup>.

47. Judge Lemonde also offers his assessment of the testimony of SUONG Sikoeun and that of the latter’s ex-wife.<sup>35</sup> He came to the conclusion that:

“[TRANSLATION] *In the end, Suong Sikoeun’s testimony, much like that of his wife, was a disappointment. It makes one wonder if anything worthwhile transpired from the two testimonies, except in essence... a quarrel between a husband and his wife*”.<sup>36</sup>

### **C. Assessment of other evidence**

48. In his book, Judge Lemonde offers his assessment of other forms of evidence.

49. This is what he has to say about statements made by the late “King Father” Norodom Sihanouk:

“[TRANSLATION] *I always wondered if Sihanouk would be conducive to ascertaining the truth, given over the past 30 years he has shown a knack for inconsistency regarding a whole range of subjects (including whether he would testify in court). Nonetheless, as he has somehow dominated the history of Cambodia since 1941, it was difficult to not hear him, or at least try*”.<sup>37</sup>

50. Interestingly, according to Judge LEMONDE who collected evidence for many years, his Cambodian counterpart, who lived under the Khmer Rouge “*was lucky to land on a moderate village chief and to live under the regime without actually experiencing any atrocities*”.<sup>38</sup>

<sup>34</sup> The book authored by Judge LEMONDE, p. 106. Annexed hereto.

<sup>35</sup> The book authored by Judge LEMONDE, pp. 160-169. Annexed hereto.

<sup>36</sup> The book authored by Judge LEMONDE, p. 168. Annexed hereto.

<sup>37</sup> The book authored by Judge LEMONDE, p. 170. See Mr NUON Chea’s Request, Annex **E189/3/1/7.3**.

<sup>38</sup> The book authored by Judge LEMONDE, p. 31. See Mr NUON Chea’s Request, Annex **E189/3/1/7.1**.

51. In conclusion, the extracts selected from the book authored by Judge LEMONDE provide insight into the probative value of the entire body of evidence collected during the judicial investigation, and are conducive to ascertaining the truth.

52. **FOR THESE REASONS**, the Defence for Mr KHIEU Samphân requests the Trial Chamber to:

- ALLOW that the extracts from the book authored by Judge LEMONDE be put before the Chamber<sup>39</sup> and to ADMIT them into evidence;
- TAKE THEM INTO ACCOUNT in assessing the probative value of the entire body of evidence collected during the judicial investigation;
- SUMMON Witnesses TCW-383 and TCW-31.

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Anta GUISSÉ	Phnom Penh	
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<sup>39</sup> Including: the extracts annexed hereto, the annexes to Mr NUON Chea's Request (E189/3/1/7.1 to E189/3/1/7.4), as well the annexes to the Initial Request (E280.1 to E280.12).