BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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WITHDRAWAL OF NOTICE OF INTENT PURSUANT TO INTERNAL RULE 90

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The Co-Lawyers for Nuon Chea (the 'Defence') hereby submit formal notification of Nuon Chea's withdrawal of his intention to respond to questions pursuant to Internal Rule 90:

1. On 23 May 2013, the Trial Chamber by oral instruction requested each Accused to provide notice of whether they intend to respond to questions pursuant to Internal Rule 90 or instead to invoke their right to remain silent. On 27 May 2013, the Defence notified the Chamber that Nuon Chea would answer questions on matters within a defined temporal scope.[1]

2. During the weeks of 8 and 15 July 2013, witness Stephen Heder appeared before the Chamber for questioning. During the Defence's examination of Mr. Heder, repeated objections from both the Co-Prosecutors and the civil parties against simple questions of fact plainly within the proper confines of the examination of the witness were lodged and then sustained by the Chamber. Those objections were systematically unreasonable and designed not to ensure compliance with the instructions of the Chamber but to obstruct and sabotage Nuon Chea's examination. By sustaining these objections, the Chamber not only severely constrained the Defence's ability to confront the witness, but also applied different standards to the Co-Prosecutors and the Defence. The Defence was ultimately allowed to cover less than half of the material it had prepared for its (already highly circumscribed) examination of Mr. Heder. Seen in its entirety, the examination permitted to the Defence failed to accord with any cognizable form of the right of the Accused to confront the evidence against him.

3. Nuon Chea, along with his entire defence team, was outraged by the events of 16 July 2013. A consensus emerged immediately that Nuon Chea should not co-operate with a Tribunal so obviously disinterested in a critical exploration of the facts. On 17 July 2013, Nuon Chea made the final decision to revoke his notice of intention to respond to questioning. He indicated as such before the Chamber that afternoon.[2]

4. The purpose of the instant withdrawal notice is to formalize the indication previously given by Nuon Chea on 17 July 2013 and to state for the record the reasons for that decision. It is not a decision Nuon Chea took lightly. Nor is it how he wanted this trial to end. It was, however, a decision that, following consultation with counsel, he felt compelled to make.

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1 Document No. **E-287**, 'Notice of Intent Pursuant to Internal Rule 90', 27 May 2013.
2 Document No. **E-1/225.1**, 'Transcript of Trial Proceedings', 17 July 2013, pp. 67:9-68:5.

I. TESTIMONY OF STEPHEN HEDER

5. The objections sustained by the Chamber against the Defence's examination of Mr. Heder were inconsistent with Nuon Chea's right to confront the evidence against him – and the Chamber's instructions concerning that examination – in at least three distinct ways.

6. First, the Chamber set arbitrary limits on the form of counsel's questioning by sustaining repeated objections against questions of fact merely because those questions were not posed by way of reading the witness an excerpt from his work and then asking for the factual basis supporting that assertion. The Chamber's description of the parameters for the examination, set in an email delivered by the Senior Legal Officer on 3 July 2013, includes no such limitation. It indicated only that 'questions shall be directed primarily to evidence the witness gathered either during the interviews he conducted prior to or during his employment at the ECCC, **or** the evidence he accumulated during the research which forms the basis for the books or articles authored by him' (emphasis added).[3] Tracking that instruction to the letter, counsel asked Mr. Heder questions about the facts discovered during his interviews. For example: 'Do you have any factual information coming from your interviews or your study of the documents about the role of East Zone troops during the evacuation of Phnom Penh?'[4]

7. Contradicting directly the Chamber's instructions, the Co-Prosecutors objected that the question was impermissible because questions put to Mr. Heder supposedly required a 'reference to [a] book or extract from a book authored by Mr. Heder.'[5] In fact, no part of the Chamber's memorandum required the parties to ask questions by reference to passages in articles written by the witness. Indeed, the memorandum says exactly the opposite: that questions may concern *either* evidence gathered by the witness *or* used as the basis of his work. Any other instruction would have been irrational, because it would render impermissible the exploration of any factual information known to the witness about which he did not happen to write a sentence in an article. Indeed, such a rule has exactly the opposite effect of treating Mr. Heder as a lay witness: it *requires* parties to focus *only* on the basis for the *conclusions he made as an expert* rather than facts of which he might have become aware in some other manner. The mere fact that the Co-Prosecutors proceeded (mainly) in this manner during its examination is completely irrelevant to the form of questioning required of the other parties.

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3 Email from Ken Roberts to all Parties, 3 July 2013.
4 Document No. **E-1/224.1**, 'Transcript of Trial Proceedings', 16 July 2013 ('July 16 Transcript'), p. 87:3-5.
5 July 16 Transcript, pp. 87:10-89:10.

8. Even when the Defence did proceed by putting to the witness propositions from his own work, the Co-Prosecutors and the civil parties *still* both objected, and those objections were *again* sustained by the Chamber.[6] The basis of those objections was that no footnote attached to the passages read to the witness and that counsel was therefore able only to ask Mr. Heder what evidence he could offer, instead of asking what *additional* evidence he could offer, in support of that passage. Although this objection was even more irrelevant and irrational (it would seem *more* important to examine Mr. Heder on assertions of fact for which he apparently has no support), even *here* the Chamber paid no heed at all to the rule it was ostensibly applying, cutting off counsel's microphone at the end of his examination precisely while he was in the course of explaining that the passage he had just read included 11 footnotes.[7]

9. That there is a difference between the Co-Prosecutors' preferred mode of questioning Mr. Heder and that of Defence counsel is not accidental. In the most literal sense, Mr. Heder is a prosecution witness: he *worked for* both the Co-Prosecutors and the Co-Investigating Judges and more than any single other academic, he performed the underlying research most directly responsible for the decision to bring charges against Nuon Chea. The Chamber ought not to be surprised that the Co-Prosecutors wanted only to ask Mr. Heder to further support the inculpatory statements he previously made and which are already in evidence before it. The objective of Defence counsel is, of course, very different: to challenge the basis of Mr. Heder's purported knowledge. Yet the absurdly narrow format within which the Chamber allowed the Co-Prosecutors to confine Defence counsel's examination was by definition inconsistent with any such effort. Defence counsel was permitted only to ask *a prosecution witness* whether he had *further support* for his statements on the record. No critical examination of the facts and no genuine cross-examination could possibly arise from proceeding in that manner.

10. Second, the Chamber prevented counsel from asking pertinent and crucial questions about the evidence Mr. Heder collected in writing articles placed before the Chamber – the very core of Mr. Heder's examination as the Chamber described it prior to his appearance. Those questions concerned, for instance, the reliability of the interviewees with whom Mr. Heder spoke and the documentary evidence, such as confessions, that he reviewed.[8] The prosecution itself 'ask[ed] Mr. Heder about his methodology [...] at

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6 July 16 Transcript, pp. 76:15-23, 124:14-125:5.
7 July 16 Transcript, p. 127:21.
8 July 16 Transcript, pp. 58:1-15, 68:19-22.

length.'[9] Inexplicably, the Chamber held that any question about Mr. Heder's treatment of the evidence was impermissible because it concerned his 'methodology' and therefore constituted an assessment of 'the quality of the work of an expert.'[10]

11. With respect, that ruling has no logical connection to the Chamber's instruction concerning the parameters for Mr. Heder's examination or to any relevant criterion for determining the admissibility of questions during testimony. *Everything* Mr. Heder did on which any relevant questions might possibly be based – including the interviews he took, the documents he read and the facts he gathered – were done in his so-called capacity as an expert. That is the nature of his work; he is an academic expert. By the Chamber's rationale, every question on every subject to which Mr. Heder could usefully testify would be impermissible because it would concern an assessment of his work as 'an expert'. For that reason, the question the Chamber should have asked in determining the admissibility of questions was not whether they related in some abstract sense to Mr. Heder's work as an expert but whether they *sought expert opinion*. Mr. Heder's expertise is not in assessing the truth of documents and interviewees but in Cambodian politics and history. A question which seeks to elicit testimony concerning his treatment of primary material by definition cannot seek expert testimony because it is not a subject on which he is an expert. Furthermore, counsel's questions did not seek to elicit Mr. Heder's opinion, for instance about how confessions *should be* read, but simple fact propositions about how *he did* read confessions. That this is a question of fact, and not opinion, cannot be seriously disputed. It therefore falls squarely within the parameters of his examination as the Chamber set them out in its memorandum. The mere fact that a question does not concern the truth or falsity of a specific allegation set out in the Closing Order does not mean it does not seek to elicit relevant facts. Questions of fact which bear on the quality, reliability and probative value of the evidence before the Chamber are integral to the very nature of cross-examination and highly conducive to ascertaining the truth.

12. Related to this discussion was the Chamber's blanket prohibition on questions which concerned Mr. Heder's assertions in relation to the work of Mr. Kiernan. Defence counsel

[9] July 16 Transcript, p. 51:20-21.

[10] July 16 Transcript, pp. 67:16-68:4, 72:17-25. The Co-Prosecutors' objection was on a slightly different ground: that in questioning Mr. Heder the Co-Prosecutors had extracted all references to confessions and discussed only the material admissible into evidence. *See id.*, pp. 68:25-69:17. Irrespective of the Co-Prosecutors' line of questioning, Mr. Heder's writings which he authored on the basis of confession material is in evidence and before the Chamber. The manner in which Mr. Heder used that material is clearly relevant to the Chamber's assessment of the probative value of those articles. If Mr. Heder is able, during his appearance as a witness, to answer questions of *fact* about how he used confessions which would then bear on the Chamber's assessment of his expert opinion, those questions should have been at the heart of the Defence's examination.

asked questions of Mr. Heder by quoting a passage from a review article by Mr. Heder and asking him whether he was in possession of any direct factual information which corroborated the assertion in his work on the case file.[11] The passages from Mr. Heder's article, which concerned for instance Mr. Kiernan's claims in relation to East Zone structures and leadership styles, were presumably based on factual information of which Mr. Heder was aware. Defence counsel formulated his questions in exactly the same way as the Co-Prosecutors, asking the witness whether, without speculating or giving an opinion, he was in possession of any factual information to support the passage read. The Chamber disallowed these questions merely because the work on which they were based 'was presumably written by Mr. Heder in his capacity as an expert.'[12] That ruling once again failed to ask the relevant question: whether counsel was seeking to elicit factual information or opinion evidence.

13. Third, contrary to its standing jurisprudence, the Chamber set an absolute bar on any questions concerning any activity which occurred during the judicial investigation. Contrary to the Co-Prosecutors' characterization of that jurisprudence in their objections to counsel's questioning,[13] on 7 December 2012 the Chamber held that under some circumstances, it will hear 'specific and reasoned' submissions in relation to the methods of evidence collection employed during the investigation.[14] The Co-Prosecutors failed to give any reasoning in support of their objections beyond the bare fact that the questions posed to the witness concerned events during the judicial investigation.[15] Nor did the Chamber offer any reasoning in sustaining those objections.[16] In so doing, the Chamber reverted to the *de facto* absolute rule it applied for some time during 2012, which prohibited parties from examining any witness on any subject pertaining to the investigation – even when those examinations directly concerned the substance of the evidence placed before the Chamber.[17]

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[11] July 16 Transcript, pp. 75:18-76:1.
[12] July 16 Transcript, pp. 77:6-10, 81:12-19.
[13] July 16 Transcript, pp. 24:25-25:5.
[14] Document No. **E-251**, '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)', 7 December 2012, para. 26.
[15] July 16 Transcript, pp. 24:23-25:12, 27:10, 27:24-25.
[16] July 16 Transcript, pp. 26:2-8, 26:18-23, 27:12-15.
[17] *See* Document No. **E-234**, 'Ieng Sary's Request that the Trial Chamebr Seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview', 27 September 2012 ('Ieng Sary Request'), para. 2; Document No. **E-234/2**, 'Notice of Joinder to Ieng Sary's Request E-234', 2 November 2012 ('Nuon Chea Joinder to Ieng Sary Request'), paras 3, 5.

14. As the Defence argued at that time, rules applicable to 'procedural defects' cannot be invoked to prevent parties from exploring questions of fact directly relevant to the probative value of the evidence before the Chamber.[18] Mr. Heder is an extraordinary witness who was responsible for writing the introductory submissions and then investigating the allegations contained therein on behalf of the CIJs. He witnessed first-hand the events in which Judge Lemonde is alleged to have instructed his staff to search only for inculpatory evidence. No reasonable court could fail to see the relevance of these facts for the probative value of the evidence before it. No reasonable court would be uninterested in understanding as much as possible about the role Mr. Heder played in the judicial investigation and the extent of his influence over the decisions taken by both offices in which he was employed.

15. These concerns are especially acute in light of the developments before this Chamber concerning Tuol Po Chrey – the only specific crime site to undergo any thorough examination before this Chamber. The Defence has made reasoned and substantiated allegations in a recent filing – uncontested by the Co-Prosecutors in their response – that the examination of Ung Chhat and Lim Sat at trial demonstrated that the CIJs failed to critically examine any of the evidence they collected in connection with the allegations at Tuol Po Chrey, and instead accepted as received truth every one of the most inculpatory statements they could find.[19] This mode of proceeding mimics exactly the difficulty with the Chamber's conduct of Mr. Heder's examination: asking him to *corroborate the truth of* statements he has already made, instead of exploring possible ways in which the basis for those statements might have been unreliable to begin with.

16. The Defence notes that the only rulings issued at the investigative stage in relation to Mr. Heder's role at the OCP and the OCIJ or Judge Lemonde's instruction to search only for inculpatory evidence concerned bias – either as a basis for disqualification pursuant to Rule 34[20] or as a trigger for annulment pursuant to Rule 76(2).[21] In both cases, the Pre-

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[18] Ieng Sary Request, paras 5-7; Nuon Chea Joinder to Ieng Sary Request, paras 11-12.

[19] Document No. **E-291**, 'Urgent Requset to Summons Key Witnesses in Respect of Tuol Po Chrey', 17 June 2013, paras 26-27.

[20] *See e.g.*, Case No. 002/09-10-2009/ECCC/PTC(01), Document No. 7, 'Decision on Ieng Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde', 9 December 2009; Case No. 002/13-10-2009/ECCC/PTC(02), Document No. 7, 'Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde', 14 December 2009; Case No. 002/08-07-2009-ECCC-PTC, Document No. 3, 'Decision on the Charged Person's Application for Disqualification of Drs. Stephen Heder and David Boyle', 22 September 2009.

[21] *See e.g.*, Document No. **D-263/2/6**, 'Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-Trial Chamber with a View to Annulment of All Investigations (D263/1)', 25 June 2010; Document No. **D-402/1/4**, 'Decision on Ieng Sary's Appeal Against the OCIJ's Order Rejecting IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Acts Performed by or with the Assistance of Stephen Heder & David Boyle and IENG

Trial Chamber held only that the fair trial rights of the accused had not been violated and that that the legal standard for a showing of bias had not been established – in Mr. Heder's case, because the bias construct did not apply to staff, and in Judge Lemonde's case, because the presumption of impartiality had not been overcome.[22] In neither case was there any consideration of the issue which ought to concern this Chamber: the probative value of the material in evidence.

17. In these three principal respects, the Co-Prosecutors, together with the Chamber, successfully interfered with any real exploration of the facts within Mr. Heder's knowledge, and hence any substantive cross-examination. His appearance was fundamentally not an effort to ascertain truth, but an excuse to rubber-stamp the conclusions in his work already in existence on the case file.[23]

II. NUON CHEA'S DECISION NOT TO TESTIFY

18. Nuon Chea seeks to emphasize for the Chamber, the civil parties and the public that his decision not to appear is a new one. It was not planned. It is a decision that he regrets. It is a decision he has chosen to take because it has again become apparent to him that this Chamber will not critically assess the evidence before it. It has become apparent to him that the Chamber is not seeking his testimony in order to gain a fuller understanding of the CPK or of the reasons and justifications for his conduct. The Chamber is instead seeking to gather extracts from his testimony for use in substantiating a guilty verdict. That is a process in which Nuon Chea cannot and will not participate.

CO-LAWYERS FOR NUON CHEA

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Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against the OCIJ Rejection of a Stay of Proceedings', 30 November 2010, paras 28-36.

22 *See* fns 20-21, *supra*.

23 In sustaining these objections, the Chamber repeatedly reminded the Defence of its own insistence during the Co-Prosecutors' examination that Mr. Heder be treated as a witness and not an expert. Indeed that was true: the Defence objected to the substance of the Co-Prosecutors' questions six times. The difference, of course, is that not a single one of those objections (nor any of those lodged by the Khieu Samphan defence) was sustained. *See* Document No. **E-1/221.1**, 'Transcript of Trial Proceedings', 10 July 2013, pp. 58:5-19, 89:1-90:6, 106:11-25; Document No. **E-1/222.1**, 'Transcript of Trial Proceedings', 11 July 2013, pp.25:10-27:25, 48:9-49:15; Document No. **E-1/223.1**, 'Transcript of Trial Proceedings', 15 July 2013, pp. 51:11-52:25. Instead, the Co-Prosecutors were allowed to proceed provided that each question was prefaced by an instruction to the witness that he limit his response to facts within his personal knowledge. The Chamber was less persuaded by Defence counsel's use of the same language.