

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAIL**

**Case no:** 002/19-09-2007-ECCC-SC  
**Filing party:** Nuon Chea Defence Team  
**Filed to:** Supreme Court Chamber  
**Original language:** English  
**Date of document:** 25 November 2014



**CLASSIFICATION**

**Classification suggested by the filing party:** PUBLIC (Redacted)  
**Classification of the Supreme Court Chamber:**  
**Classification status:**  
**Review of interim classification:**  
**Records officer name:**  
**Signature:**

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**THIRD REQUEST TO CONSIDER AND OBTAIN ADDITIONAL EVIDENCE IN  
CONNECTION WITH THE APPEAL AGAINST THE TRIAL JUDGMENT IN CASE  
002/01**

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Pursuant to ECCC Internal Rule (the ‘Rules’) 104(1) and 108(7), the Co-Lawyers for Nuon Chea (the ‘Defence’) hereby submit this request to consider and obtain additional evidence in connection with its forthcoming Appeal Against the Trial Judgment in Case 002/01:

## I. PROCEDURAL HISTORY

### A. Request to summons Rob Lemkin

1. On 9 July 2013, just weeks before the end of trial, the Defence received an unsolicited email from Rob Lemkin, co-director and co-producer of the films *Enemies of the People* and *One Day at Po Chrey* (‘Lemkin Email’). The email indicated, *inter alia*, that, according to interviews Lemkin had conducted together with Thet Sambath, the crimes alleged to have been committed at Tuol Po Chrey were ‘ordered by [Northwest zone secretary] Ruos Nhim, not central command’. He added that he and Thet Sambath had collected substantial evidence of ‘Nhim’s agenda’.<sup>1</sup> On the morning of 10 July 2013, and in subsequent written submissions, the Defence sought Lemkin’s appearance as a witness and an investigation pursuant to Rule 93 into material in Lemkin’s possession.<sup>2</sup> The Defence argued, *inter alia*, that it had previously sought Lemkin’s appearance before the Chamber and that the Co-Prosecutors relied extensively on Lemkin’s work in both films as supposed evidence of Nuon Chea’s role and knowledge of the crimes charged, and as the only supposed first-hand account of killings at Tuol Po Chrey. The Co-Prosecutors and civil parties opposed the request, which was rejected by the Trial Chamber.<sup>3</sup>

### B. Requests to summons Heng Samrin

2. On 22 July 2013, the Defence filed its sixth and final request to summons Heng Samrin to testify.<sup>4</sup> The motion summarized the Defence’s five prior requests in that regard and the numerous reasons why Samrin was the most important witness in Case 002/01. These reasons included: Samrin’s position near the top of the East zone military as of 17 April 1975, his active participation in the evacuation of Phnom Penh in that

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<sup>1</sup> Document No. **E294**, ‘Request to Admit New Evidence, Summons Rob Lemkin and Initiate an Investigation’, 11 July 2013, para. 2.

<sup>2</sup> Document No. **E1/221.1**, ‘Transcript of Trial Proceedings’, 10 July 2013, pp. 7:8-10:18; Document No. **E294**, ‘Request to Admit New Evidence, Summons Rob Lemkin and Initiate an Investigation’, 11 July 2013.

<sup>3</sup> Document No. **E294/1**, ‘Decision on NUON Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN’, 24 July 2013.

<sup>4</sup> Document No. **E236/5/1/1**, ‘Sixth and Final Request to Summons TCW-223’, 22 July 2013.

capacity, and his unrivaled access to the content of orders issued by the zone leadership in connection with the evacuation; his position at the very top of the East zone military directly subordinate to East zone secretary Sao Phim by 1978; and his statement in an interview with Ben Kiernan that Nuon Chea's instructions were not to kill leaders of the Khmer Republic but to remove them from 'the framework'. While the international judges held that Samrin should be summonsed, the national judges disagreed.<sup>5</sup> Samrin never appeared.

### C. Defence closing arguments at trial and the Case 002/01 Judgment

3. On 26 September 2013 the Defence filed its closing brief in Case 002/01 ('Closing Brief').<sup>6</sup> A key line of defence was that the 'Party Center' in Phnom Penh exercised only limited effective control over cadres throughout the CPK hierarchy. Of particular relevance to the instant Request, the Defence argued that zone leaders such as Sao Phim and Ruos Nhim were powerful members of the Standing Committee who exercised considerable independent authority with which Pol Pot and Nuon Chea could not lightly interfere. The Defence further argued that some of these Party leaders leveraged their authority to conspire against Pol Pot and Nuon Chea, probably from the earliest days of Democratic Kampuchea. This opposition was substantially supported by the Vietnamese government and very likely involved an alliance between Sao Phim and Ruos Nhim.<sup>7</sup>
4. On 7 August 2014, the Trial Chamber pronounced its judgment in Case 002/01, convicting Nuon Chea of all crimes charged and sentencing him to life imprisonment ('Judgment').<sup>8</sup> The Judgment found that the CPK structure was 'strictly hierarchical' and that cadres throughout the Party were firmly subordinated to the Party leadership.<sup>9</sup> The Judgment furthermore held that zone leaders such as Sao Phim and Ruos Nhim faithfully implemented the instructions of the Party 'leadership', and 'reported to' and received instructions from Pol Pot and Nuon Chea.<sup>10</sup> The Chamber dismissed the

<sup>5</sup> Document No. **E312**, 'Final Decision on Witnesses, Experts and Civil Parties to be heard in Case 002/01', 7 August 2014, paras 102-111.

<sup>6</sup> Document No. **E295/6/3**, 'NUON Chea's Closing Submissions in Case 002/01', 26 September 2013.

<sup>7</sup> Document No. **E295/6/3**, 'NUON Chea's Closing Submissions in Case 002/01', 26 September 2013, paras 180-7, 435-7. T. 22 October 2013 (Final Submissions, **E1/232.1**), pp. 23-25.

<sup>8</sup> Document No. **E313**, 'Case 002/01 Judgement', 7 August 2014 ('Judgment').

<sup>9</sup> See e.g., Judgment, paras 223, 913,

<sup>10</sup> See e.g., Judgment, paras 276, 773, 798, 851, 893, 956.

possibility that these ‘zone leaders’ acted independently to commit the crimes charged.<sup>11</sup>

**D. Request to summons Thet Sambath**

- 5. On 12 and 13 August 2014, Thet Sambath gave a two-part interview to VOA Khmer (‘Interview’). In the Interview, Thet Sambath stated that he and Lemkin had interviewed numerous people who refused to give evidence to the CIJs because they were scared of being ‘killed’ by ‘the ones who led the government’.<sup>12</sup> Thet Sambath asserted that these interviews establish that the execution of Khmer Republic soldiers at Tuol Po Chrey was ‘initiated’ not by Nuon Chea but by people who ‘are in the government and [...] are still alive’.<sup>13</sup> On that basis, Thet Sambath strongly criticized the Judgment for entering a conviction against Nuon Chea for crimes allegedly committed at Tuol Po Chrey. Thet Sambath furthermore stated that these interviews reveal that cadres throughout the CPK structure – ‘actually, most of them’ – ‘opposed’ and ‘betrayed’ Pol Pot and Nuon Chea. On 1 September 2014, the Defence filed a request with this Chamber to admit the Interview into evidence, summons both Thet Sambath and Rob Lemkin to testify and seek to obtain evidence in their possession (‘First Additional Evidence Request’).<sup>14</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>11</sup> Judgment, paras 859-60.

<sup>12</sup> Document No. **F2**, ‘Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01’, 1 September 2014, para. 6.

<sup>13</sup> Document No. **F2**, ‘Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01’, 1 September 2014, para. 6.

<sup>14</sup> Document No. **F2**, ‘Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01’, 1 September 2014.

<sup>15</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**II. ADDITIONAL EVIDENCE**

7. The additional evidence is comprised of a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8. [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]. He was born in [REDACTED] and joined the CPK after the March 1970 coup in response to an appeal from Prince Sihanouk. He initially worked as a courier in the Northwest zone and reported to zone secretary Ruos Nhim. In 1960, when [REDACTED] was [REDACTED] years old, Ruos Nhim became his [REDACTED].<sup>20</sup>

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. As Ruos Nhim's [REDACTED] [REDACTED] became the [REDACTED] reporting to the Northwest zone leadership.<sup>21</sup> After April 1975, [REDACTED] was appointed [REDACTED] [REDACTED] of the Northwest zone. In that capacity, he was [REDACTED] [REDACTED].<sup>22</sup> His [REDACTED] [REDACTED] demonstrate his extensive knowledge of personnel, command structures and events within the Northwest zone.<sup>23</sup>
10. According to [REDACTED], in January 1976, [REDACTED] [REDACTED] [REDACTED] [REDACTED]<sup>24</sup> [REDACTED] supposedly returned to Cambodia in November 1977 and, contrary to Ruos Nhim's wishes, refused to continue his studies [REDACTED]. According to [REDACTED] Ruos Nhim became angry and relegated him to a variety of menial tasks, including making fertilizer and driving trucks, which he did for several months.<sup>25</sup>
11. [REDACTED] told [REDACTED] [REDACTED] that in April 1978 he fled to the forest amidst purges in the Northwest and East zones.<sup>26</sup> Although he claims to have been either away from Democratic Kampuchea or performing low-level tasks since the end of 1975, [REDACTED] describes leading 2,000 troops into the forest, and commanding those troops in attacks against Southwest zone soldiers beginning the following month, May 1978.<sup>27</sup> [REDACTED] and his troops made use of 20,000 weapons which he had collected from Lon Nol troops and hidden in a warehouse in 1975 prior to leaving [REDACTED]. [REDACTED] states that after Sao Phim 'was arrested'<sup>29</sup> in May 1978, Ruos Nhim asked him, [REDACTED] [REDACTED]<sup>30</sup> [REDACTED] sent Ruos Nhim [REDACTED], and subsequently encouraged Ruos Nhim to join him and his troops and the forest.<sup>31</sup> [REDACTED] claims to have established a 'group' opposed to Pol Pot at some point in 1978, claims to have taken control of six of the seven

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<sup>21</sup> [REDACTED]

<sup>23</sup> See e.g., [REDACTED] pp. 5-8 (describing key figures in the Northwest zone leadership), 10-14 (describing personal familiarity with key events within the Northwest zone), 15-19 (describing key figures in the Northwest zone), 22 (same).

sectors in the Northwest zone, and describes contacting and meeting with Heng Samrin’s troops whom he knew to be launching attacks against Phnom Penh.<sup>32</sup>

**III. APPLICABLE LAW**

**A. Admission of New Evidence on Appeal**

- 12. Within the ECCC framework, the admission of new evidence on appeal is governed by Rules 104(1) and 108(7). Pursuant to Rule 104(1) ‘may itself examine evidence and call new evidence’ to determine any appeal. Rule 108(7) provides, in relevant part:

Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable prior to trial and could have been a decisive factor in reaching the decision at trial. The request shall clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence is directed.

- 13. The Chamber has previously exercised its discretion to admit new evidence pursuant to Rule 108(7) in connection with appeals filed against the trial Judgment in Case 001.<sup>33</sup>

**IV. ARGUMENT**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>32</sup> [REDACTED]

<sup>33</sup> Case No. 001/18-07-2007-ECCC/SC, *Prosecutor v. Kaing Guek Eav*, Document No. **F2/5/1**, ‘Decision on Group 1 Civil Parties’ Co-Lawyers’ Supplementary Request to Admit Additional Evidence’, 29 March 2011, ERN 00657389-00657391; Case No. 001/18-07-2007-ECCC/SC, *Prosecutor v. Kaing Guek Eav*, Document No. **F2/4**, ‘Decision on Requests by Co-Lawyers for Accused and Civil Parties Groups 1, 2, 3 to Admit Additional Evidence’, 25 March 2011, ERN 00656514-00656517.

**B. ██████████'s evidence is of considerable importance to the appeal against the Judgment**

i – ██████████ is a critical witness with regard to Tuol Po Chrey

15. In the Judgment, the Trial Chamber found that an order to kill Khmer Republic soldiers and officials was given by Ruos Nhim to Sector level civilian and military officials a few days after the liberation of Pursat.<sup>34</sup> The Trial Chamber found that this order was implemented at the Pursat town hall and at Tuol Po Chrey. The Trial Chamber furthermore found this order constituted the implementation of a JCE policy adopted by Ruos Nhim and Nuon Chea, among others, to ‘target for arrest, execution and/or disappearance’ all former elements of the Khmer Republic.<sup>35</sup>
16. The evidence upon which the Chamber rested these conclusions was limited and highly circumstantial. The only evidence that an order to kill Khmer Republic soldiers was issued by the zone committee was given to the CIJs by ordinary soldier Lim Sat. Not only was Lim Sat not an eyewitness to this alleged order, he retracted his testimony in this regard during his appearance before the Trial Chamber.<sup>36</sup> No evidence of meetings or communications between the ‘Party Center’ (which did not exist as such prior to 17 April 1975) and officials in the Northwest zone in the relevant time period exists. No evidence of meetings or communications within the Northwest zone administrative or military structure in the relevant time period exists. No Northwest zone official of any significance testified in the Case 002/01 trial.
17. ██████████, by contrast, claims to have been ██████████ of the Northwest zone military at the time the crimes at Tuol Po Chrey were allegedly committed. He had an intimately close personal and working relationship with Ruos Nhim. ██████████ almost certainly knows whether Ruos Nhim ordered the execution of soldiers and officials at Tuol Po Chrey, and if so, when this order was issued, how it was disseminated, what was its scope, and most importantly, whether and to what extent it originated in the Standing Committee or from Nuon Chea and Pol Pot. Credible testimony from ██████████ on any of these issues, no matter what its content, would overwhelm the probative value of the evidence already on record.

<sup>34</sup> Judgment, paras 663-666.

<sup>35</sup> Judgment, para. 829.

<sup>36</sup> Judgment, para. 664.



ii – [REDACTED] is a critical witness with regard to CPK structure

18. [REDACTED] evidence, even if slightly exaggerated, is equally significant to larger questions concerning CPK structure and the relationship between the Northwest zone leadership and Pol Pot and Nuon Chea. [REDACTED] admits to having been actively involved in Northwest zone opposition to Pol Pot, and indeed he claims to have led it. He expressly describes liaising with Heng Samrin's troops during their respective conflicts with the Southwest zone army and the Party Center. His evidence accordingly corroborates the Defence's submissions, advanced during closing submissions and ignored in the Judgment, that leading figures within the Northwest and East zone formed a united opposition faction against Pol Pot.
19. Importantly, [REDACTED] describes personally planting the seeds of this open armed conflict as early as 1975. As [REDACTED] of the Northwest zone, [REDACTED] describes collecting a massive arsenal of 20,000 weapons from surrendered Khmer Republic troops and hiding them in a warehouse. Given his position in the zone military and his personal relationship with Ruos Nhim, it is extremely likely that he was acting pursuant to Ruos Nhim's instructions or with his acquiescence and support. It is however impossible to fathom why zone officials loyal to Pol Pot within a 'strictly hierarchical' structural 'pyramid' would have sought to conceal this windfall from the Party Center. On the face of the statement, the only reasonable inference is that these weapons were stored for precisely the purpose they were ultimately used: as the climax in a gradually escalating conflict between competing factions within the Party.
20. Documentary evidence on the case file resonates with [REDACTED] evidence in this regard. Thet Sambath's book *Behind the Killing Fields* describes his interviews with numerous Northwest zone administrative and military officials personally familiar with plans within the Northwest zone to oppose Pol Pot and Nuon Chea, in some cases as early as 1976.<sup>37</sup> Ruos Nhim's role in leading this opposition is described specifically. Two of these individuals were military officers, including a division commander whom [REDACTED] [REDACTED]; is very likely to have known. [REDACTED] appearance to corroborate these accounts is critical to Nuon Chea's defence.

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<sup>37</sup> Document No. E3/4202, 'Behind the Killing Fields: A Khmer Rouge Leader and one of his Victims', ERN 00757531-2 (describing interviews with In Thoeun, Chan Savuth and Chiel Chhoeun).



Chea began at least as early as 1975. And it proves that zone level cadres made significant decisions – such as building an arsenal of 20,000 weapons and keeping it hidden from Pol Pot and Nuon Chea – of which the latter most certainly did not approve. The Chamber’s (already unreasonable) decision to exclude the possibility that zone leaders could have acted independently of or contrary to Party Center instructions is accordingly rendered even more untenable.

25. The significance of [REDACTED] [REDACTED] is accentuated by its resonance with the evidence adduced by the Defence in its First Additional Evidence Request.<sup>39</sup> Thet Sambath and Rob Lemkin claim to be in possession of evidence demonstrating that executions at Tuol Po Chrey were initiated not by the Party Center but by cadres at the zone level acting pursuant to ‘[Ruos] Nhim’s agenda’. These cadres ‘opposed’ and ‘betrayed’ Pol Pot and Nuon Chea, and are currently authorities of sufficient influence ‘in the government’ that witnesses are afraid they could be ‘killed’ if they testified. All of these claims dovetail with the content [REDACTED].

**D. [REDACTED] [REDACTED] should be admitted and [REDACTED] summonsed pursuant to Rule 104(1)**

26. [REDACTED] appearance for testimony and cross-examination on appeal is also essential. Although [REDACTED] is far more important a witness in relation to the alleged events at Tuol Po Chrey than anyone who testified before either the Trial Chamber or the CIJs, his [REDACTED] makes no reference to the treatment of Khmer Republic personnel, the Pursat town hall or Tuol Po Chrey. With the possible exception of Heng Samrin, he is the only living person of whom the Defence is aware who is likely to be in possession of first-hand information which would directly determine Nuon Chea’s criminal responsibility for the alleged events at Tuol Po Chrey. [REDACTED] furthermore establishes that [REDACTED] is the best placed witness to test Nuon Chea’s key overarching defence in both segments of Case 002: that the CPK was a deeply fragmented Party at its highest levels because some of its leaders – chief among them, [REDACTED] – were set against the Party’s putative leadership in a bitter power struggle. For both of these reasons, the Defence would have vigorously sought [REDACTED] testimony at trial had it known of his existence.

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<sup>39</sup> See para. 5, *supra*.

27. As the international judges of the Pre-Trial Chamber have held, the failure to summons witnesses sought by the Accused would prevent them ‘from obtaining possible advantage[s] that may emerge’ from such testimony.<sup>40</sup> This Chamber has similarly held that the failure to summons key witnesses would impact the right of an Accused to a fair trial where ‘exculpatory evidence might be improperly prevented from entering the trial.’<sup>41</sup> Whether this is the case depends on ‘whether the Defence persists in its requests for evidence, whether such requests are admissible under Rule 87, whether the facts for which the testimonies are proposed are disputed, whether the called witnesses appear and, if they fail to do so, whether the facts upon which they had been called to testify may be established otherwise.’<sup>42</sup> This holding is consistent with international practice, which recognizes that where relevant and exculpatory testimony is improperly excluded at trial, the Accused’s right to a fair trial requires the appearance of the witness before the appeals chamber.<sup>43</sup>
28. While these rulings of the Pre-Trial Chamber and the Supreme Court Chamber both concerned Heng Samrin, the analogy to ██████████ is apt. Assuming ██████████ identity ██████████ ██████████ is accurate, he is to Ruos Nhim what Heng Samrin is to Sao Phim: the loyal deputy in a position of unparalleled access at the time the crimes charged in Case 002/01 were committed, who later took up the fight against Pol Pot and Nuon Chea after their principals were defeated. For these reasons, ██████████ evidence, like Heng Samrin’s, is absolutely essential to the proceedings.

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██  
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<sup>40</sup> Document No. **D314/1/12**, ‘Opinion of Judges Catherine Marchi-Uhel and Rowan Downing’ in ‘Second Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses’, 9 September 2010, para. 12.

<sup>41</sup> Document No. **E116/1/7**, ‘Decision on Immediate Appeal by NUON Chea Against the Trial Chamber’s Decision of Fairness of Judicial Investigation,’ 27 April 2012, para. 32.

<sup>42</sup> Document No. **E116/1/7**, ‘Decision on Immediate Appeal by NUON Chea Against the Trial Chamber’s Decision of Fairness of Judicial Investigation,’ 27 April 2012, para. 32.

<sup>43</sup> *Prosecutor v. Theoneste Bagosora and Anatole Nsengiyumva*, ICTR-98-41-A, ‘Judgement’, 14 December 2011, para. 532-533.

██  
██

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30. [REDACTED] evidence is, however, of obvious importance to Case 002/01. The Defence notes that [REDACTED] [REDACTED] just weeks before the parties in Case 002 presented extensive argument before the Trial Chamber concerning Northwest zone policy as to Khmer Republic soldiers and officials. Ruos Nhim’s relationship to Pol Pot and Nuon Chea, including his willingness and ability to act independently of or contrary to their instructions, was a key point of dispute between the parties. The CIJs’ failure to interview [REDACTED] in connection with the charges in Case 002 raises renewed concerns as to the thoroughness of the Case 002 investigation, and in particular, whether it gave adequate consideration to the responsibility of senior officials in the CPK hierarchy other than the Accused for the crimes charged in Case 002.<sup>46</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

- [REDACTED]

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- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**V. CONCLUSION AND RELIEF SOUGHT**

34. The Defence hereby requests that:

- a. the evidence of [REDACTED], be admitted into evidence;
- b. [REDACTED] be summonsed to testify before this Chamber; and
- c. [REDACTED]

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

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<sup>51</sup> See paras 1-5, 17-23, *supra*.