BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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NUON CHEA'S REQUEST FOR RECONSIDERATION OF THE SUPREME COURT CHAMBER'S DECISION NOT TO SUMMONS HENG SAMRIN AND ROBERT LEMKIN AND TO ADMIT EVIDENCE PRODUCED BY ROBERT LEMKIN ON APPEAL

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I. INTRODUCTION

1. Over the course of the Case 002/01 appeal process, the Co-Lawyers for Nuon Chea (the "Defence") submitted a series of requests for additional evidence to be admitted on appeal. The Defence sought to summons 16 witnesses to testify, admit 39 additional pieces of evidence, and obtain certain additional evidence, including by initiating an investigation into one alleged event.[1] On 21 October 2015, the Supreme Court Chamber dismissed the vast majority of these requests (the "Decision on Pending Requests").[2] It offered only the Chamber's disposition as to the requests, not its reasons, which the Chamber indicated were to "follow in due course".[3] The Defence now submits this request for the Supreme Court Chamber to reconsider parts of its decision – namely, not to call the witnesses Heng Samrin and Robert Lemkin and admit into evidence the notes (the "Notes") and most of the transcripts (the "Transcripts") that Robert Lemkin provided to the Chamber documenting interviews he and Thet Sambath undertook with senior Northwest Zone Communist Party of Kampuchea ("CPK") cadres (the "Request").

II. BACKGROUND

A. Decision on Pending Requests

2. The Defence's requests for additional witnesses and evidence spanned 10 filings which the Defence submitted between September 2014 and October 2015. Several of these filings related to evidence in the possession of *Enemies of the People* filmmakers Thet Sambath and Robert Lemkin.[4] In addition, two of these filings – its fifth and sixth requests for additional evidence (respectively, the "Fifth Additional Evidence Request and "Sixth Additional Evidence Request") – outlined detailed evidence, much of which was newly disclosed from the case files in Cases 003 and 004. This evidence alleged that

[1] For a comprehensive list of these requests, *see* the attached Annex – List of Witness and Evidence Requests Filed by the Defence in the Case 002/01 Appeal.
[2] **F2/9**, 'Decision on Pending Requests for Additional Evidence on Appeal and Related Matters – Disposition', 21 Oct 2015 ("Decision on Pending Requests").
[3] **F2/9**, Decision on Pending Requests, pp. 6-7.
[4] **F2**, 'Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 1 Sep 2014 ("First Additional Evidence Request"); **F2/4/3/3/1**, 'Nuon Chea's Response to Questions on the Supreme Court Chamber's Additional Investigation into Footage in the Possession of Filmmakers Rob Lemkin and Thet Sambath', 13 Jul 2015 ("Response on Lemkin-Sambath Notes"); **F2/4/3/3/6/1**, 'Nuon Chea's Submissions on Robert Lemkin's Transcripts and the Significance of the "Rift" Within the CPK', 8 Oct 2015 ("Transcript and "Rift" Submissions").

an internal rebellion and coup d'état was being fomented by cadres from the Northwest, North and East Zones together with these zones' affiliated military divisions.[5]

3. The Supreme Court Chamber granted a handful of the Defence's witness and evidence requests during early appeal stages. Most notably, it summonsed three of the requested witnesses[6] and opened an investigation into evidence in Lemkin and Sambath's possession.[7] However, most of the Defence's requests were only addressed in the Chamber's Decision on Pending Requests, issued only three weeks before the final appeal hearings were due to commence, and *13 months* after the Defence had filed its first request.[8] That decision dismissed the bulk of the Defence's requests in one fell swoop, and indicated that reasons were to "follow in due course".[9]

4. The Defence and Nuon Chea himself were astounded by the Decision on Pending Requests. The Defence had argued that all of the additional evidence sought was highly relevant to the Supreme Court Chamber's determination of its appeal against the Case 002/01 Trial Judgement (the "Judgement"), fulfilled the requirements of Internal Rule 108(7), and indeed, that much of it could have been a "*decisive factor in reaching the decision at trial*".[10] On this basis, the Defence's view is that there were no valid reasons whatsoever for rejecting the admission of the evidence, as discussed further below.[11] Nevertheless, the Chamber outrageously failed to offer even a summary of reasons, let alone full reasons,[12] for its Decision on Pending Requests, despite the lapse of time between the Defence's requests and its decision, and the fact that the decision related to matters clearly pivotal to the Defence's case. For this reason, the decision's wholesale rejection of most of the Defence's requests was fundamentally shocking. To rub salt into the wound, the Chamber delivered the decision only during the appeal hearings

[5] **F2/7**, 'Nuon Chea's Fifth Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01', 25 Jun 2015 ("Fifth Additional Evidence Request")2; **F2/8**, 'Nuon Chea's Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01', 11 Sep 2015 ("Sixth Additional Evidence Request").
[6] **F2/5**, 'Decision on Part of Nuon Chea's Requests to Call Witnesses on Appeal', 29 May 2015, para. 26.
[7] **F2/4/3**, 'Interim Decision on Part of NUON Chea's First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01', 1 Apr 2015 ("Interim Decision on Lemkin-Sambath"), para. 26.
[8] The Defence's first request for witnesses to testify on appeal was filed on 1 September 2014: *see*, **F2**, First Additional Evidence Request.
[9] **F2/9**, Decision on Pending Requests, pp. 6-7.
[10] Emphasis added. The ECCC Internal Rules permit new evidence to be admitted and considered on appeal. Under Rule 104(1), the Supreme Court Chamber "may itself examine evidence and call new evidence" in determining an appeal, while Rule 108(7) enables parties to request the Chamber to admit additional evidence "provided it was unavailable prior to trial and could have been a decisive factor in reaching the decision at trial".
[11] *See*, *infra*, para. 32.
[12] The Defence notes that, under Rule 108(4), the Supreme Court Chamber is required to provide at least a summary of reasons, and full reasons "as soon as possible thereafter".

preparation recess – an extremely busy period, and only a few *weeks* before the Defence's window of opportunity to make written submissions to the Supreme Court Chamber would permanently close.[13]

5. Nowhere was the Defence and Nuon Chea's shock and disappointment more acute than with respect to the Supreme Court Chamber's refusal in its decision to summons current National Assembly president and one of Democratic Kampuchea's ("DK") top-ranking military officers, Heng Samrin. As the Defence detailed in its appeal brief[14] and will reiterate below,[15] Heng Samrin is the most crucial Defence witness in Case 002/01. Indeed, he is, without a shadow of a doubt, the most important witness in Case 002 overall.[16] As the senior surviving CPK military commander, not to mention the leader of one of the spearheads during the evacuation of Phnom Penh, Heng Samrin could have provided unparalleled eyewitness testimony into charged events, including but not limited to that evacuation; CPK policy vis-à-vis former Lon Nol soldiers and officials; and Nuon Chea's character, having known Nuon Chea well for over six decades.

6. Nearly as shocking and disappointing as the Chamber's decision not to call Heng Samrin was the Chamber's refusal to summons the witness and respected filmmaker Robert Lemkin, or – even more importantly – to admit into evidence his Notes and most of the Transcripts documenting interviews he and Thet Sambath undertook with senior CPK cadres from the Northwest Zone. As the Defence has argued previously and will also restate below,[17] Robert Lemkin's testimony, Notes and Transcripts offer unique information which directly contradicts the Trial Chamber's most important findings concerning CPK structure.[18]

7. For all of these reasons, the Defence and Nuon Chea regarded the unreasoned, 21 October 2015 Decision on Pending Requests, to put it plainly, as a "game changer".

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[13] Under Rule 92 (applying *mutatis mutandis* to appeal proceedings pursuant to Rule 104 *bis*), written submissions may be made up until the closing statements.
[14] **F16**, 'Nuon Chea's Appeal Against the Trial Judgment in Case 002/01', 29 Dec 2014 ("Appeal"), paras. 59-75.
[15] *See*, *infra*, paras. 35-44.
[16] *See*, *e.g.*, **E314/6**, 'Nuon Chea Application for Disqualification of Judges Nil Nonn, Ya Sokhan, Jean-Marc Lavergne, and You Ottara', 29 Sep 2014 ("Second Trial Chamber Disqualification Application"), paras. 39-40.
[17] *See*, *infra*, paras. 46-55.
[18] *See*, *e.g.*, **F2/4/3/3/4**, 'Nuon Chea's Reply to the Co-Prosecutors' Response to Nuon Chea's Questions on the Supreme Court Chamber's Additional Investigation into Footage in the Possession of Filmmakers Rob Lemkin and Thet Sambath', 29 Jul 2015 ("Reply to OCP Response on Lemkin Notes"), paras. 22-23.

B. Impact of the Decision on Pending Requests on the Defence's Appeal

8. As a direct consequence of the Decision on Pending Requests, on 28 October 2015 Nuon Chea informed the Supreme Court Chamber – through an email from his International Co-Lawyer Victor Koppe – that he now regarded the outcome of his appeal of the Judgement as "irrelevant to him". Furthermore, Nuon Chea indicated that he was "considering his options as to the way forward, including the possibility of withdrawing his appeal altogether" and "elect[ing] not to participate in the[] [appeal] hearings".[19] Mr. Koppe likewise indicated that he too was considering not participating in the hearings, as well as "formally withdraw[ing] as appeal defence counsel".[20]

9. When the appeal hearings commenced on 17 November 2015, Nuon Chea was permitted to make an initial statement. Reiterating and expounding on these concerns, Nuon Chea stated, *inter alia*, as follows:

> I have long recognized that some of my fellow Cambodians suffered during the Democratic Kampuchea period. As I have said repeatedly, I am remorseful for their suffering and I accept moral responsibility for it.[21]
>
> I have engaged with this tribunal because I believed that I have a responsibility to the Cambodian people to [help] them learn the truth about what really happened in Democratic Kampuchea [and] to explain to them as the surviving leader of the Communist Party of Kampuchea, the reasons our Party undertook certain actions and what the results were. And I believe that this is what most Cambodians want from this [t]rial as well.[22]
>
> However, from day one, it was my strong impression that this tribunal was not at all interested in exploring the truth. Instead, it seems to operate as though its mission was simply to endorse the instructions of a handful of officials in power and tell a tale approved by the government before the tribunal was established. And I was right.[23]
>
> In August 2014, after seven years of proceedings and hundreds of millions of dollars, the Trial Chamber issued its first trial Judgment against me and sentenced me to life imprisonment in Case 002/01. The Judgment was a shameful failure.[24] […] My lawyers in fact tell me that an academic report was recently released which says the same thing.[25]

10. The academic report to which Nuon Chea referred was, of course, the report released by organisations including Stanford University and entitled *A Well-Reasoned Opinion?*

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[19] E-mail from International Co-Lawyer for Nuon Chea to Supreme Court Chamber Senior Legal Officer, 28 Oct 2015 ("Victor Koppe Email").
[20] Victor Koppe Email.
[21] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 10, lns. 2-5.
[22] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 10, lns. 7-13.
[23] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 10, lns. 13-18.
[24] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 10, ln. 19-22.
[25] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 11, lns. 2-3.

Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge (Case 002/01).[26] That report described the Judgement as "poorly written and well below the standard of most of the other international criminal tribunals [...] inadequate in its failure to meet the expected standards for a final written reasoned decision".[27] In his statement to the Supreme Court Chamber, Nuon Chea detailed some of the Judgement's specific failings, and his general views on his subsequent dealings with the Supreme Court Chamber:

> Despite my lawyer's efforts to encourage a more realistic understanding of events, the Trial Judgment was extremely oversimplifying and inaccurate.[28] [...] They ignored evidence that the Parties [*sic*] was in fact divided internally and that some Zones acted autonomously. They ignored evidence that some Standing and Central committee members, like So Phim and Ros Nhim, had created an opposing faction within the Party that tried to overthrow the legitimate government of Democratic Kampuchea in a coup organized and instructed by Vietnam. They ignored evidence that all of these events related to Vietnam's longstanding ambition to invade, expand, swallow up Cambodia and eliminate the Khmer people and integrate Cambodia into an Indo-Chinese federation with Vietnam at the head.[29] [...]
>
> As disappointing as the Trial Judges and Investigating Judges had been, my lawyers and I still thought that there could be a chance, however small, that things might be different before you Supreme Court Chamber Judges.[30] [...]
>
> At the same time as participating in the second trial, my lawyers have also been very active with the Supreme Court Chamber. In consultation with me, they have filed many requests to admit new evidence when this new evidence has come to light. This new evidence, more than ever before, provides insight into the head and tail of the crocodile and not just the crocodile's body. The evidence confirms that Vietnam attempted a coup d'état during the Democratic Kampuchea period.[31] [...]
>
> In the beginning, my lawyers and I were encouraged by the Supreme Court Chamber response to the evidence request. It seemed as if it was the first time at this tribunal that Judges, including Cambodian Judges, were willing to come to this Case with an open mind to engage in a real discussion about the issues. My lawyers were particularly encouraged by the Chamber's agreement to open an investigation into evidence that was collected by the film makers, Thet Sambath and Rob Lemkin. They were also further encouraged when the Chamber scheduled testimony of three witnesses we had asked to testify on appeal. In light of all of these developments, my lawyers had been preparing for, and carefully and patiently awaiting these appeal hearings.[32]

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[26] David Cohen, Melanie Hyde and Penelope Van Tuyl, *A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge (Case 002/01)*, 2015, available at: https://handacenter.stanford.edu/report/well-reasoned-opinion-critical-analysis-first-case-against-alleged-senior-leaders-khmer-rouge.
[27] *A Well-Reasoned Opinion?*, p. 6.
[28] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 11, lns. 3-5.
[29] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 11, lns. 12-21.
[30] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 12, lns. 7-10.
[31] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 15, lns. 9-17.
[32] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 16, lns. 11-22.

> Their disappointment was immense therefore when the Chamber announced that not one of the witnesses we requested would be called to testify on appeal. None. Not Heng Samrin, not Rob Lemkin, not Thet Sambath. My lawyers had thought that the Chamber would at least call Heng Samrin, that what he has to say is obviously incredibly important. But they were wrong. In the end, you decided in the same way as all the Judges before you. How disappointing. That Supreme Court Chamber decision also dismissed all our new evidence and offered no reasons at all, making it impossible to understand.[33]
>
> Your Honours, because of your decision, the outcome of the appeal is now irrelevant to me. It has become clear to me that the Supreme Court Chamber is just as biased, unwilling, and as afraid as those that have come before you to really explore what the truth was. You refused to give me even just the chance to tell the Cambodian people my side of the story.[34] [...]
>
> Accordingly, following a discussion with me, my international lawyer, Victor Koppe, is not participating in these hearings. I will also leave these proceedings once I have finished making my comments. And I would also like to instruct my national lawyer, Mr. Son Arun, not to participate in these proceedings any further, and not to respond to any kind of questions by the Judges or the other Parties. We choose instead to rest on the arguments made in my appeal brief. However, I have stopped short of withdrawing my appeal altogether in honour of the responsibility I continue to feel to help the Cambodians understand the truth of what really happened in the Democratic Kampuchea period.[35]
>
> I urge you Judges to have courage to consider your commitment to truth and justice when writing your judgment. The Cambodian nation, which has clear and [bright] knowledge, is waiting for you to deliver truth and justice in your judgment. Cambodia will never have this opportunity again.[36]

11. International Co-Lawyer Victor Koppe did not attend the 17 November 2015 appeal hearing, and Nuon Chea's National Co-Lawyer Son Arun left the courtroom after the first session. Son Arun later returned to the courtroom following the Chamber's issuance of a warning to him, and had intended to follow Nuon Chea's instruction not to respond to any questions.[37] Despite Mr. Arun's renewed presence in the courtroom, however, Supreme Court Chamber president Kong Srim announced that:

> in light of the applicable legal framework and in order to ensure the proper representation of the Accused person during the appeal hearings, the Supreme Court Chamber decides to adjourn the appeal hearing and instruct the Defence Support Section to appoint standby counsel for Nuon Chea and to report to the Chamber on the appointment as soon as possible.[38]

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[33] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 16, ln. 24 – p. 17, ln. 8.
[34] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 17, lns. 8-15 (emphasis added).
[35] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 17, ln. 18 – p. 18, ln. 4.
[36] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 17, lns. 4-9.
[37] *See*, **F30/13**, 'Response of Mr Son Arun to the Oral Decision by the Supreme Court Chamber Regarding the Events of 17 November 2015', 18 Nov 2015 ("Son Arun's Statement"), para. 8.
[38] T. 17 Nov 2015 (Appeal Hearings, **F1/4.1**), p. 39, lns. 6-11.

12. The following day, Mr. Arun filed a written response to the Supreme Court Chamber's oral decision. Mr. Arun clarified the reasons for his absence, explained that he intended to attend future appeal hearings under compulsion from the Chamber, and indicated that he nevertheless considered himself duty-bound under the circumstances to follow his client's instructions not to respond to questions.[39] Despite Mr. Koppe's 28 October 2015 email, and Nuon Chea's comments in court on 17 November 2015, on 19 November 2015, the Supreme Court Chamber requested that Mr. Koppe also file submissions explaining his failure to attend the 17 November 2015 appeal hearing.[40] On 23 November 2015, Mr. Koppe did so. Mr. Koppe indicated that due to the Decision on Pending Requests, Nuon Chea considered that the outcome of the appeal had now become irrelevant to him and had accordingly instructed Mr. Koppe not to attend the appeal hearing. However, Mr. Koppe added that he had ultimately decided not to withdraw permanently as International Co-Lawyer,[41] although he noted that he was doing so "despite my deep conviction that a fair trial at the ECCC, both before the Trial Chamber and before the Supreme Court Chamber, is absolutely impossible, and despite my deep conviction that the ECCC is indeed, and always will be, a complete farce".[42]

C. Appointment of Standby Co-Lawyer for Nuon Chea

13. On 24 November 2015, the Defence Support Section ("DSS") chief Isaac Endeley advised the Supreme Court Chamber that, unless the Supreme Court Chamber determined that this would present a conflict of interest, he intended to appoint as standby counsel for Nuon Chea the lawyer Kang Rithkiry, one of the National Co-Lawyers for Kaing Guek Eav *alias* Duch in Case 001.[43] Mr. Rithkiry is surely one of the very few Cambodian lawyers highly likely *to* have a conflict of interest in representing Nuon Chea, as he himself identified to the DSS. *Inter alia*, and as highlighted in the trial judgements in both Case 001 and Case 002/01, Duch testified that Nuon Chea was closely involved in S-21,[44] an accusation which Nuon Chea strenuously denies. On 2 December 2015, President Kong Srim indeed advised Mr. Endeley not to appoint Mr.

[39] **F30/13**, Son Arun's Statement, paras. 7, 9.
[40] **F30/14**, 'Decision Requesting Submissions From Mr Victor KOPPE Regarding His Failure to Attend the Appeal Hearing', 19 Nov 2015, p. 4.
[41] **F30/14/1**, 'Victor Koppe's Response to the Supreme Court Chamber's Request for Explanations for his Absence from the Appeal Hearing', 23 Nov 2015 ("Victor Koppe's Statement"), paras. 7-8, 10.
[42] **F30/14/1**, Victor Koppe's Statement, para. 10.
[43] **F30/15/1**, 'First Update on the Supreme Court Chamber's Instruction to Appoint Standby Counsel for Mr. NUON Chea', 24 Nov 2015, paras. 3-4.
[44] *Case No. 001/18-07-2007/ECCC/TC*, **E188**, 'Judgement', 26 Jul 2010, para. 90; **E313**, 'Case 002/01 Judgement', 7 Aug 2014 (the "Judgement"), paras. 342-346.

Rithkiry in light of a possible conflict of interest which might be "viewed as unsuitable for adequately protecting the interests of NUON Chea".[45]

14. On 16 December 2015, Mr. Endeley appointed Mr. Phat Pouv Seang, the former National Co-Lawyer for the late Case 002 co-accused Ieng Thirith, as Standby Co-Lawyer for Nuon Chea[46] – another of the very few lawyers in the country for whom a substantial conflict of interest in representing Nuon Chea would be highly likely. According to Mr. Pouv Seang himself, however, there was "no conflict of interest between his former client and Mr. NUON Chea".[47] Curiously, his assessment ignores various well-documented conflicts that occurred between the late Ieng Thirith and Nuon Chea during the period in which Mr. Pouv Seang served as Ieng Thirith's counsel in Case 002. These include Ms. Thirith's outburst in her first interview with the Co-Investigating Judges – at which Mr. Pouv Seang attended and presumably offered legal counsel – that "I never killed anyone, who told you that? *Nuon Chea is the universal assassin*, you will see!".[48] Several serious incidents also occurred within the detention facility which are detailed at length in confidential reports.[49]

15. Following Mr. Pouv Seang's incomprehensible appointment as the Standby Co-Lawyer for Nuon Chea, on 23 December 2015, the Supreme Court Chamber ordered that the appeal hearings would resume from 16 to 18 February 2016, with 19 February 2016 as a reserve day.[50] Signalling Mr. Pouv Seang's lack of knowledge of the case file as it pertained to Nuon Chea, the Chamber indicated that the delayed resumption was intended to ensure that the Standby Co-Lawyer would be afforded so-called "adequate time to familiarise himself with the case".[51]

D. Sanctions Imposed on the Defence

16. On 27 January 2016, the Supreme Court Chamber issued a decision on the conduct of the Defence at the 17 November 2015 appeal hearing (the "Decision to Sanction the

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[45] **F30/15/1/1**, 'Response to DSS Memorandum of 24 November 2015', 2 Dec 2015, p. 3.
[46] **F30/15/2**, 'Second Update on the Supreme Court Chamber's Instruction to Appoint Standby Counsel for Mr. NUON Chea', 16 Dec 2015 ("Appointment of Standby Counsel for Nuon Chea"), para. 4.
[47] **F30/15/2**, Appointment of Standby Counsel for Nuon Chea, para. 3.
[48] **E3/38**, 'Written Record of Interview of Ieng Thirith', 21 Dec 2009, ERN 00418012 (emphasis added, annotations and Khmer phrase omitted).
[49] *See*, **D139/2**, 'Clarification on Incidents in the Detention Center', 16 Mar 2009; **B37/5**, 'Report on IENG Thirith's Unusual and Unethical Behaviour Within the Detention Facility', 27 Jul 2009.
[50] **F30/17**, 'Order Scheduling the Resumption of the Appeal Hearing', 23 Dec 2015, p. 4 ("Appeal Hearing Resumption Order").
[51] **F30/17**, Appeal Hearing Resumption Order, p. 3.

Defence").[52] The Chamber determined while the International Co-Lawyer's conduct "did not violate any specific law or court order",[53] the National Co-Lawyer's conduct did violate Internal Rule 38 and might also violate Internal Rule 35.[54] Finally, the Chamber directed the DSS to "account[] for" the Defence's "recent decision [...] not to actively engage in the appeal hearings any longer" in the "determination of the fees owed by the ECCC for the International Co-Lawyer's and National Co-Lawyer's legal services relating to Case 002/01".[55] The Defence notes that this last measure is deeply ironic, given that at least one Supreme Court Chamber judge was observed to be asleep during appeal hearings. In addition, at least one other judge in the Chamber appears to have at best a tenuous grasp of the case file (not to mention his own country's history) despite having years to review the case file at leisure, as evidenced by the following question to a witness testifying on appeal: "During the Pol P[o]t time, there was no radio used to broadcast and convince people. So how could you be able to convince people to join you more and more?"[56] Moreover, the punitive measure reveals the Chamber's ignorance of the fact that while the Defence is only remunerated for one full time case load, it has in fact been simultaneously engaged for an extended period on two full time case loads in Case 002/01 and Case 002/02. Not only does this mean that the Defence is essentially severely underpaid and overworked, it also means that any time not devoted to its appeal is diverted instead to full time trial preparation.

E. The Instant Request

17. As noted above, the Defence and Nuon Chea harbour serious misgivings regarding the "farcical" nature of the ECCC and of the appeal process, as a result of which they currently intend not to actively participate in the appeal hearings. Despite this, the Defence nevertheless feels compelled to file the instant Request, even if it may be futile. It does so because it considers that the evidence currently excluded by the unreasonable Decision on Reasoned Requests is of such importance to the public interest and record that the Defence must exhaust all possible avenues available to it to ensure that such critical evidence is not merely buried away.

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[52] **F30/18**, 'Decision on the Conduct of the Co-Lawyers for NUON Chea During the Appeal Hearing of 17 November 2015', 27 January 2016 ("Decision to Sanction the Defence").
[53] **F30/18**, Decision to Sanction the Defence, para. 28.
[54] **F30/18**, Decision to Sanction the Defence, paras. 32-33.
[55] **F30/18**, Decision to Sanction the Defence, para. 35.
[56] T. 6 Jul 2015 (Toat Thoeun, **F1/3.1**), p. 120, lns. 7-9 (Judge Som Sereyvuth).

18. While the Supreme Court Chamber was able to produce the Decision to Sanction the Defence within two months of the actions, as at the date of the instant Request, the Chamber has neither issued the reasons for the Decision on Pending Requests nor indicated when their release can be expected. It has now been over three months since the Supreme Court Chamber issued the dispositive Decision on Pending Requests, and *over 16 months* since the Defence filed the first[57] of the many requests which are addressed in the Decision on Pending Requests.

19. In light of the abovementioned circumstances, the Defence now submits the instant Request for the Supreme Court Chamber to:

(a) reconsider its decision:

(i) not to summons the witnesses Heng Samrin and Robert Lemkin; and

(ii) not to admit into evidence Mr. Lemkin's Notes and Transcripts;

or, in the alternative,

(b) urgently release full reasons for the Decision on Pending Requests prior to the resumption of the appeal hearings.

20. Nuon Chea has instructed the Defence that in the event that either request is granted, the Defence may at that stage consider active participation in the appeal hearings.

III. CONTEXT IN WHICH THE ADDITIONAL WITNESS AND EVIDENCE REQUESTS WERE FILED

A. Impact of the "Original Sin"

(i) Pre-Trial Stage

21. The Defence did not file multiple additional witness and evidence requests simply to ensure that it vigorously exercised what the Supreme Court Chamber described as Nuon Chea's "available procedural rights".[58] The Defence certainly did not file multiple additional witness and evidence requests as part of a devious plot to mislead the Supreme Court Chamber and disrupt and delay the proceedings, as the Co-Prosecutors have

[57] **F2**, First Additional Evidence Request.
[58] *See* ECCC, *Completion Plan (Revision 7)*, 31 Dec 2015, available at: http://www.eccc.gov.kh/sites/default/files/ECCC_Completion_Plan_Rev_7.pdf, para. 45; ECCC, *Completion Plan (Revision 6)*, 30 Sep 2015, available at http://www.eccc.gov.kh/sites/default/files/ECCC_Completion_Plan_Rev_6.pdf, para. 40.

repeatedly suggested.[59] The Defence filed multiple additional witness and evidence requests as a result of one deeply erroneous decision by the Co-Investigating Judges early into Case 002/01, and its subsequent confirmation by the Trial Chamber. The decision in question stood out, even in a sea of other procedural errors, as so plainly contrary to the law that it influenced the Defence's analysis in its substantive appeal brief (the "Appeal") of every other procedural error committed in the Case 002/01 trial. This decision – the "original sin" – was the *total prohibition of Defence counsel from carrying out its own investigation and simultaneously being totally excluded from all aspects of the pre-trial investigation*. As the Defence argued in its Appeal, the civil and common law models *both* recognise that the accused plays a central role in pre-trial investigation: in the civil law, by allowing counsel to attend, participate in and question witnesses during interviews conducted by the Co-Investigating Judges; in the common law, by allowing the accused to conduct his own independent investigation.[60]

22. The prohibition on Defence participation in any investigations began with a letter the Co-Investigating Judges sent to the Defence in which they forbade all of the accused in Case 002 from exercising their universally recognised right to investigate the charges in either the civil or common law form.[61] The Defence was threatened with disciplinary action and even criminal prosecution for conducting its own investigations and was simultaneously prohibited from attending and participating in the interviews conducted by the Co-Investigating Judges. The Co-Investigating Judges justified this prohibition by proclaiming that while the accused had the right to confront the evidence against him, this right may be vindicated "at the trial stage, [by examining] *any witness* against him with whom he was not confronted during the judicial investigation".[62] Even more outrageously, the Co-Investigating Judges summarily dismissed nearly all of the 19 requests for investigative action the Defence filed seeking for the Co-Investigating Judges to undertake meaningful investigations into substantive areas of inquiry relevant

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[59] *See*, *e.g.*, **F2/8/5**, 'Co-Prosecutors' Response to Nuon Chea's Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 14 Oct 2015, paras. 3, 4, 7, 13, 18, 21, 26, 27, 35, 39, 41, 50, 56, 59, 61, 82, 83 90, 92, 97 and 105; **F2/6/2**, 'Co-Prosecutors' Response to Nuon Chea's Fourth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 30 Jun 2015, para. 5; **F2/7/1**, 'Co-Prosecutors' Response to Nuon Chea's Fifth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 13 Jul 2015, para. 3.

[60] **F16**, Appeal, para. 32.

[61] **A110/I**, 'Memorandum from the Office of the Co-Investigating Judges entitled 'Response to your letter dated 20 Dec 2007 concerning the conduct of the judicial investigation'', 10 Jan 2008 ("CIJ Letter on Investigation Modalities"); *see*, *also*, **F16**, Appeal, paras. 31-32.

[62] **A110/I**, CIJ Letter on Investigation Modalities, p. 2 (emphasis added); *see*, *also*, **F16**, Appeal, para. 31.

to his defence,[63] either by continuously ignoring the requests or rejecting them with only the thinnest veneer of reasoning.[64]

23. Accordingly, the Defence filed repeated submissions with both the Co-Investigating Judges and the Trial Chamber asking that these fundamental errors be rectified, and emphasising the harm they were causing not only to Nuon Chea's right to present a defence and to confront the evidence against him, but also to enjoy equality of arms. For while Nuon Chea was prohibited from conducting any investigations, the Co-Prosecutors investigated the charges freely for a full year and made extensive and lengthy submissions to the Co-Investigating Judges. These included introductory submissions at the beginning of the investigations, supplementary submissions during the investigation, and final submissions at the end of the investigation. By the Defence's count, these submissions numbered more than *one thousand one hundred pages* altogether.

24. The Co-Prosecutors are fond of saying that the Defence's claim to have been excluded from the investigation is belied by the many requests for investigative action it submitted. They are fond of saying that the decisions of the investigating judges on these requests were reviewed by the Pre-Trial Chamber. It is ironic in the extreme that the Co-Prosecutors now use against the Defence the fact that the Defence did its utmost under difficult circumstances to influence the investigation. Had the Defence not done so, it would almost certainly be accused of a lack of due diligence. It is obvious that the opportunity to file requests for investigative action is not the same as the opportunity to conduct substantive, independent investigations. It is clear that the fundamental right of an accused to investigate the charges against him is not vindicated by an accused asking *someone else to exercise their discretion* to conduct an investigation on his behalf. Indeed, the rulings of the Pre-Trial Chamber on which the Co-Prosecutors rely so heavily do not rule on the substance of the requests at all; these rulings merely state that the investigating judges acted within their discretion in managing *their* investigation.[65]

(ii) Trial Stage

25. The investigation was so profoundly compromised as a consequence of the Co-Investigating Judges' decisions and conduct that when the case came before the Trial Chamber, the Defence (unsuccessfully) sought to challenge the legitimacy of the entire

[63] *See*, **F16**, Appeal, para. 36.
[64] *See*, **F16**, Appeal, paras. 32-33, 36, 39.
[65] *See*, generally, **F17/1**, 'Co-Prosecutors' Response to Case 002/01 Appeals', 24 Apr 2015, para. 79.

case file and stay the proceedings.[66] As the trial progressed, the Trial Chamber demonstrated that they were just as inclined as the Co-Investigating Judges before them to effectively shut down what few avenues the Defence had available to them to participate in developing the evidentiary basis for the trial. In particular, the Trial Chamber refused nearly all of the Defence's reasonable witness requests, including its requests for key witnesses, as will be further discussed below.[67] These decisions ultimately led the Trial Chamber to establish the Judgement upon a deeply flawed, one-sided evidentiary foundation, flagrantly violating Nuon Chea's fundamental fair trial guarantees along the way.

(iii) Appellate Stage

26. The Defence's additional witness and evidence requests to the Supreme Court Chamber can therefore be seen, in part, as a reaction to the developments in the investigation and trial throughout Case 002/01 and the myopic Judgement which inevitably resulted. The Defence filed its requests – and particularly its request to hear its key witnesses on appeal – bearing in mind the Supreme Court Chamber's broad power, under Rule 104(1) of the ECCC Internal Rules, to "itself examine evidence and call new evidence to determine the issues". The Defence filed the requests in the hope that the superior chamber might just adopt a more balanced and fair approach than its predecessors. Having said that, the Defence notes that the Chamber's Decision on Pending Requests signals that this hope has been misguided, given that the Chamber dismissed both the Defence's requests for the Chamber to open an investigation into events alleged in the testimony of Sâm Sithy[68] and to alternatively permit the Defence to conduct its own investigation into the same.[69]

B. Impact of Political Interference

27. The Defence's witness and evidence requests are also a product of the political interference in which this Tribunal is so deeply embedded. For example, just days after

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[66] **E51/3**, 'Consolidated Preliminary Objections', 25 Feb 2011, para. 73; *see*, *also*, **F16**, Appeal, para. 39.
[67] *See*, *infra*, paras. 32-57.
[68] Sâm Sithy was one of the three Defence witnesses which the Supreme Court Chamber agreed to summons (*see*, *supra*, para. 2). The Defence requested him to testify in order to elicit further information from him and test his reliability, given his relative importance in the Judgement and his status as the only eyewitness to an alleged event which in turn was critical to the Trial Chamber's finding that there had been a policy to target Khmer Republic soldiers and officials (*see*, **F16**, Appeal, para. 598). The further investigation it sought related to evidence he gave during live testimony, including that another eyewitness to the alleged event was living – the first the Defence had heard of the existence of such a person; *see*, **F28**, 'Request for Investigative Action Into Events Described During the Testimony of Sâm Sithy', 7 Sep 2015 ("Sâm Sithy Request"), para. 31.
[69] *See*, **F28**, Sâm Sithy Request, 7 Sep 2015, para. 31; **F2/9**, Decision on Pending Requests, p. 7.

the Judgement was delivered, the *Enemies of the People* co-filmmaker Thet Sambath – now living in exile in the US – gave an interview on *Voice of America*. Mr. Sambath described witnesses had told him that "Nuon Chea was not the one[] who initiated the idea of killing the Lon Nol soldiers … *many people who initiated the idea to kill at that time are in the government* and they are still alive",[70] but these witnesses were afraid to testify at the tribunal because they said "*they would be killed* if they spoke about it".[71] This evidence would have gone directly to the Judgement's finding that Nuon Chea could be held criminally responsible for the killing of Khmer Republic soldiers and officials as charged in Case 002/01. Mr. Sambath further explained that his and Robert Lemkin's forthcoming second documentary film would "illustrate[] a conflict called the *secret civil war in the Khmer Rouge* regime; it was the political conflict in the Khmer Rouge regime. *It displays what was behind those killings*."[72] The Defence's first additional evidence request – and several later filings – accordingly focus on obtaining the evidence which the Defence learned about through Mr. Sambath's interview.[73]

28. Furthermore, several other Defence requests focus on evidence which has only become available in the course of the investigations into Cases 003 and 004 and has been disclosed to the Defence in Case 002/02.[74] This evidence has continued to be collected even as the appeal is underway – and some of it, even *after* the Defence had filed its Fifth and Sixth Additional Evidence Requests focused on such disclosures.[75] As the Defence explained in its Sixth Additional Evidence Request, this is unsurprising and has occurred not simply because the scope of Case 002/02 enables the exploration of a much wider range of issues than Case 002/01, but more importantly because suspects in Cases 003 and 004 are drawn from a lower level of responsibility within the CPK. This is a perspective that was deliberately excluded from Case 002/01 due to political interference from the Royal Government of Cambodia, whose highest members were former members of the CPK who would be implicated if such a perspective was to be

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[70] **F2**, First Additional Evidence Request, p. 5 (emphasis added).
[71] **F2**, First Additional Evidence Request, p. 5 (emphasis added).
[72] **F2**, First Additional Evidence Request, p. 7 (emphasis added).
[73] **F2**, First Additional Evidence Request; **F2/4/3/3/1**, Response on Lemkin-Sambath Notes; **F2/4/3/3/6/1**, Transcript and "Rift" Submissions.
[74] **F2/4**, 'Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01', 25 Nov 2014; **F2/7**, Fifth Additional Evidence Request; **F2/8**, Sixth Additional Evidence Request.
[75] *See, e.g.*, the documents disclosed to the Defence which were only made available to the Defence on 3 Feb 2016, mere days before the filing of the instant Request: **E319/40**, 'International Co-Prosecutor's Disclosure of Case 004 Documents Relevant to Case 002 Pursuant to Case 004-D193/61', 29 Jan 2016.

explored,[76] because of the nationwide scope of Case 002/01 and the closer proximity of lower level leaders in the events that took place. This perspective *would* have been explored had the Defence been allowed to participate in any effective sense in the investigation. One might also have cause to wonder if the flood of new and relevant evidence being discovered in Case 003 and 004 may in part be the result of fewer political constraints on the investigations into Cases 003 and 004, where the suspects held equivalent CPK ranks to the current government leaders and were in control of different areas, and may accordingly be less likely to implicate the top leadership. Furthermore, the diminished political controls over the investigations in Cases 003 and 004 may also relate to the fact that they are now being driven only by the international side, since the Royal Government of Cambodia opposes the cases altogether.

IV. APPLICABLE LAW

A. Requests for Reconsideration

29. Requests for reconsideration are not contemplated by the Rules. However, the Trial Chamber has ruled that it will entertain such requests "where a fresh application justified by new evidence or new circumstances is made".[77] The Pre-Trial Chamber, following established ICTY Appeals Chamber jurisprudence, has adopted a broader test, ruling that its power to reconsider its decisions applies not only where there is a "change of circumstances" (which could result from "new facts or arguments"[78]), but also where the Chamber "finds that the previous decision was erroneous or [...] caused an injustice".[79]

30. There was no reason for the Trial Chamber to depart from this broader test adopted by the Pre-Trial Chamber, which is the test commonly applied at the ICTY. The Trial Chamber's rationale for setting a narrower test was that parties have the right to appeal its decisions.[80] However, at the ICTY, parties enjoy both the right of appeal (including

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[76] *See*, **F2/8**, Sixth Additional Evidence Request, para. 20; *see*, *also*, **F16**, Appeal, paras. 21-29.
[77] **E238/11/1**, 'Decision on IENG Sary's Request for Reconsideration of the Trial Chamber Decision on the Accused's Fitness to Stand Trial and Supplemental Request', 19 Dec 2012 ("Decision on Ieng Sary Fitness Reconsideration Request"), para. 7.
[78] Case 001/18-07-2007-ECCC/OCIJ (PTC 02), **D99/3/41**, 'Decision on IENG Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File', 3 Dec 2008, para. 6; *Prosecutor v. Galić'*, Case No. IT-98-29, 'Decision on Defence Request for Reconsideration', 16 Jun 2004 ("*Galić* Decision on Reconsideration"), 9th recital.
[79] **D164/4/9**, 'Decision on Request to Reconsider the Decision for an Oral Hearing on the Appeals PTC 24 and PTC 25', 20 Oct 2009 ("Pre-Trial Chamber Reconsideration Decision"), para. 12; **C22/I/68**, 'Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person', 28 Aug 2008, para. 25; *Galić* Decision on Reconsideration, 8th recital.
[80] **E238/11/1**, Decision on Ieng Sary Fitness Reconsideration Request, para. 7, note 24.

an extensive right to file interlocutory appeals, which is not the case at the ECCC), and the right to request the ICTY's Trial Chamber to reconsider its own decisions on the grounds highlighted above. The Defence accordingly submits that the correct standard for reconsideration at the ECCC covers not only "new evidence or new circumstances", but also situations in which the Chamber "finds that the previous decision was erroneous or [...] caused an injustice".

B. Right to a Reasoned Decision

31. Article 14(5) of the *International Covenant on Civil and Political Rights*, which is directly incorporated into Cambodian law[81] and to which Cambodia is a State Party, includes as a basic fair trial guarantee that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". The UN Human Rights Committee has held that giving effect to this right requires that a convicted person "have, *within reasonable time*, access to written judgements, *duly reasoned*, for all instances of appeal".[82] Thus, and as settled in ECtHR,[83] ICTY,[84] and ICTR[85] jurisprudence, the right to a reasoned decision is a component of the right to a fair trial.[86] According to the ECtHR and ICTY, "[t]he extent to which this [right] applies may vary according to the nature of the decision [... and] can only be determined in the light of the circumstances of [each] case".[87] The right to reasons is reflected in the Internal Rule 108(4), which requires that "[d]ecisions issued within the prescribed pursuant to this rule shall include a summary of the reasons. Full reasons shall be delivered as soon as possible thereafter", which the Defence submits should logically apply to decisions of the Supreme Court Chamber issued in the context of an appeal.

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[81] Constitution of Cambodia, Art. 31, provides that "[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, and the covenants and conventions related to human rights, women's and children's rights". *See*, *also*, Constitutional Council of Cambodia, 'Decision of the Constitutional Council No. 092/003/2007 of 10 July 2007 regarding the applicability of the international human rights treaties by the courts in Cambodia', available at: http://cambodia.ohchr.org/WebDOCs/DocPublications/CCBHR%20Constitution/CCBHR-EN.pdf (p. 37 *et seq.*).

[82] *Francis v. Jamaica*, UN HRC, Comm. No. 320/1988, UN Doc. No. A/48/40 (vol. II), 24 Mar 1993, para. 12.2 (emphases added).

[83] *See*, *e.g.*, *Hadjianastassiou v. Greece*, 'Judgement (Merits and Just Satisfaction)', ECtHR, App. No. 12945/87, 16 Dec 1992 ("Hadjianastassiou Judgement"), para. 33; *Ruiz Torija v. Spain*, 'Judgment', ECtHR, App. No. 18390/91, 9 Dec 1994, para. 29.

[84] *See*, *e.g.*, *Prosecutor v. Furundžija*, 'Appeal Judgement', Case No. IT-95-17/1-A, 21 Jul 2000 ("Furundžija Judgement"), para. 69.

[85] *See*, *e.g.*, *Karera v. Prosecutor*, 'Judgement', Case No. ICTR-01-74-A, 2 Feb 2009, para. 20; *Nchamihigo v. Prosecutor*, 'Judgement', Case No. ICTR-2001-63-A, 18 Mar 2010, para. 165.

[86] *See*, *e.g.*, Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN Doc. No. HR/P/PT/9, 2003, p. 293.

[87] Hadjianastassiou Judgement, para. 29; Furundžija Judgement, para. 69.

V. ARGUMENT

32. Without access to the underlying reasons for the Supreme Court Chamber's Decision on Pending Requests, the Defence is obviously prevented from advancing comprehensive arguments seeking its reconsideration. While the Defence considers that all of the witnesses and evidence it requested easily satisfied the requirements for admission on appeal, it will await the Chamber's full reasons before considering its recourse in respect of the majority of the Chamber's decisions in the Decision on Pending Requests.

33. At this stage, however, the Defence nevertheless submits the instant Request seeking reconsideration of certain aspects of the Decision on Pending Requests: namely, the Supreme Court Chamber's decision not to summons the Defence's two most important witnesses, Heng Samrin and Robert Lemkin, and to admit Mr. Lemkin's Notes and remaining Transcripts into evidence on appeal. Despite not having the Chamber's reasoning with regard to these decisions either, the Defence advances the instant Request on the basis that *there are simply no reasons the Chamber could provide* which could possibly overturn the conclusion that the Decision on Pending Requests was made in error, and resulted in gross injustice to Nuon Chea. The requested evidence not only fulfilled the requirements to be admissible on appeal but, as will be discussed further below, was unique, important, relevant and reliable.

34. The one and only way that the Decision on Pending Requests could stand would be if the Supreme Court Chamber ultimately decides to acquit Nuon Chea for all crimes committed at Tuol Po Chrey and charged in connection with extermination during the evacuation of Phnom Penh.[88] Given that it is not possible for the Defence to wait until the issuance of the appeal judgement to verify whether such an acquittal is forthcoming, it must proceed with the instant Request. If an acquittal is not forthcoming, then at most, the Chamber's full reasons not to call Heng Samrin and Robert Lemkin or admit Mr. Lemkin's Notes and Transcripts into evidence would only alter the degree of injustice caused to Nuon Chea. The fundamental error of these decisions would remain.

[88] **F16**, Appeal, para. 75.

A. Request for Reconsideration of Decision Not to Summons Heng Samrin

35. In Case 002/01, Heng Samrin (TCW-223) – the current National Assembly president and second-highest ranking member of the ruling Cambodian People's Party[89] – would have been not only the most important fact and sole character witness for Nuon Chea but also the single most important witness overall.[90] The Defence has already discussed his importance at length in various proceedings at this Tribunal,[91] and devoted two of its 223 appeal grounds and several pages of its Appeal to reiterating it and requesting his appearance as a witness on appeal.[92] However, it evidently bears repeating yet again.

(i) Importance and Uniqueness of Heng Samrin's Evidence

36. Heng Samrin could have offered unique, direct and exculpatory evidence as likely the most senior surviving CPK military officer to participate in and be directly, personally responsible for the evacuation of Phnom Penh. As the Defence argued in its Appeal, Heng Samrin is to the evacuation of Phnom Penh what Duch is to S-21: one of the persons tasked with guiding the implementation of policies which the Co-Prosecutors say were adopted by the CPK at one of the most important crime sites alleged in the Closing Order.[93] As someone only two rungs down from Sao Phim in the East Zone hierarchy in 1975, Heng Samrin would also certainly have first-hand knowledge of the orders issued from the very top of the zone military.[94] Furthermore, Heng Samrin's interview with Ben Kiernan is the only direct evidence on the case file of Nuon Chea's intent vis-à-vis Khmer Republic soldiers and officials.[95] Heng Samrin could thereby have significantly advanced the Tribunal's understanding of the policies and crime bases at issue in Case 002/01, including the evacuation of Phnom Penh, alleged CPK extermination and persecution policies associated with that evacuation, and most importantly the alleged

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[89] See, Cambodian People's Party, 'Members of the Standing Committee', available at http://www.cpp.org.kh/%E1%9E%9F%E1%9E%98%E1%9E%B6%E1%9E%87%E1%9E%B7%E1%9E%80%E1%9E%82%E1%9E%8E%E1%9E%94%E1%9E%80%E1%9F%92%E1%9E%9F%E1%9E%94%E1%9F%92%E1%9E%9A%E1%9E%87%E1%9E%B6%E1%9E%87%E1%9E%93%E1%9E%80%E1%9E%98%E1%9F%92/.

[90] *See*, *e.g.*, **E236/5/1/1**, 'Sixth and Final Request to Summons TCW-223', 22 Jul 2013 ("Sixth Heng Samrin Request") and **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01', 26 Sep 2013 ("Closing Brief").

[91] For a summary, *see*, **E236/5/1/1**, Sixth Heng Samrin Request and **E314/6**, Second Trial Chamber Disqualification Application, paras. 38-40.

[92] *See*, generally, **F16**, Appeal, paras. 58-75.

[93] **F16**, Appeal, para. 62.

[94] **F16**, Appeal, para. 59; **E236/5/1/1**, Sixth Heng Samrin Request, para. 5; *see*, *also*, **E370**, 'Nuon Chea's Urgent and Consolidated Request to Expedite Two Already-Requested Witnesses and Summons Four Additional Witnesses Regarding the Treatment of the Cham', 29 Sep 2015 ("East Zone-Cham Witness Request"), para. 20.

[95] **E3/1568**, 'Retyped from a Handwritten Interview of CHEA Sim, Phnom Penh 3 Dec 1991, and HENG Samrin, 2 Dec 1991', ERN 00651884 ("Kiernan Chea Sim-Heng Samrin Interview"); **F16**, Appeal, para. 59; **E295/6/3**, Closing Brief, para. 36.

CPK policy to execute Khmer Republic soldiers and officials in general and at Tuol Po Chrey in particular.

37. In addition to all of the above, Heng Samrin could also have provided insight into matters at the heart of the Defence's case which were sidelined in Case 002/01: what the Supreme Court Chamber calls the "rift" but what Heng Samrin himself calls a "secret struggle".[96] In particular, and as the Defence has already argued previously, Heng Samrin was personally involved in the inter-zonal conflict among the forces which liberated Phnom Penh and could thereby offer unique, high-ranking testimony in this regard.[97] Moreover, as the leader of the Kampuchean National United Front for National Salvation which collaborated with Vietnam to invade Cambodia in December 1978,[98] and the eventual head of the People's Republic of Kampuchea (the post-DK Vietnamese puppet state),[99] it is clear that Heng Samrin could have offered irreplaceable testimony going to the heart of the Defence's case. He could have described how senior CPK leaders from rival factions in the CPK sought to foment rebellion and/or treason against the CPK and the DK government almost immediately after 17 April 1975,[100] with substantial support from Vietnam which in turn was bolstered by the Soviet Union.[101]

38. Heng Samrin's evidence as a fact witness would directly challenge the Trial Chamber's finding, on which Nuon Chea's criminal liability turns, that the CPK structure was "strictly hierarchical", "pyramidal" and unified and that orders from upper levels were strictly followed without deviation.

39. On top of it all, Heng Samrin could also have provided unique character evidence as Nuon Chea's sole character witness. The two men have known each other for 60 years, and worked together for two decades, with Heng Samrin even serving for a period as Nuon Chea's messenger. Few people still alive in Cambodia today had as long and close a relationship with Nuon Chea during the revolution, and none have yet appeared before this Tribunal.[102]

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[96] **E3/1568**, Kiernan Chea Sim-Heng Samrin Interview, ERN 00651889.
[97] **F16**, Appeal, para. 64.
[98] **F2/8**, Sixth Additional Evidence Request, para. 61.
[99] **F2/8**, Sixth Additional Evidence Request, para. 65.
[100] **F2/8**, Sixth Additional Evidence Request, paras. 31-33.
[101] *See*, *e.g.*, **F2/8**, Sixth Additional Evidence Request, paras. 10-12.
[102] *See*, **E236/5/1/1**, Sixth Heng Samrin Request, paras. 6, 13; **E236/5/1**, 'Request to Summons TCW-223 as a Character Witness on Behalf of Nuon Chea', 22 Feb 2013.

(ii) Error, and Impact of Flawed Institutional Design

40. In short, the value of Heng Samrin's potential testimony in Case 002/01 was simply in a completely different stratosphere to that of every other witness in Case 002/01. Instead of obtaining his testimony, however, the Judgement relied for all of these matters on the testimony of lowest ranking soldiers[103] and foreign "experts", while the national judges concluded that it was sufficient to rely on academics' published interviews of Heng Samrin without affording the parties an opportunity to examine him.[104] The consequence of such a situation aptly fits the description Judge Christine Van den Wyngaert offered in her minority opinion in the ICC's *Katanga* case:

> [T]he complete absence of evidence from those who were really at the centre of things at the time inevitably creates the impression that essential information is missing from the record [...and may lead one to] wonder whether it is at all possible to reach the required threshold [...] where it is obvious that more and better evidence might very well have led to significantly different answers.[105]

41. It is because of Heng Samrin's singular importance as a witness that the Defence consistently and repeatedly requested to summons him or investigate related matters at the pre-trial stage,[106] (six times) at the trial stage,[107] and now at the appellate stage.[108] While the international Supreme Court Chamber judges' positions on Heng Samrin is as yet unclear, each and every international judge seized of these requests at the investigative, pre-trial and trial stage found the requests to be compelling,[109] as did two International Co-Prosecutors.[110] In 2009, Judge Lemonde summonsed Heng Samrin to

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[103] Two examples are the witness Sum Chea, who apparently held the lowest non-commissioned military rank (as an ordinary soldier), and the witness Kung Kim, who held the next lowest rank of squad leader.
[104] **E312**, 'Final Decision on Witnesses, Experts and Civil Parties to Be Heard in Case 002/01', 7 Aug 2014 ("Final Witnesses Decision"), paras. 98, 102.
[105] *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, 'Minority Opinion of Judge Christine Van den Wyngaert', 7 Mar 2014 ("Van den Wyngaert Katanga Opinion"), paras. 148-149 (emphasis added).
[106] *See, e.g.*, **E314/2/7**, 'Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 8 Jun 2010, *cited in* **E312**, Final Witnesses Decision, fn. 158.
[107] For a summary of the procedural history of these requests, *see*, **E236/5/1/1**, Sixth Heng Samrin Request, paras. 3-8.
[108] **F16**, Appeal, para. 730(a).
[109] Regarding CIJ Lemonde, *see, e.g.*, **E312**, Final Witnesses Decision, para. 90, and **189/3/1/7.1.3**, 'Un Juge Face aux Khmers Rouges', p. 172 (in which Judge Lemonde referred to Heng Samrin as "qu'il nous fallait absolument interroger", *cited in* **E236/5/1/1**, Sixth Heng Samrin Request, fn. 10). Regarding PTC Judges Downing and Marchi-Uhel, *see, e.g.*, **D314/1/12**, 'Second Decision on Nuon Chea's and Ieng Sary's Appeal against OCIJ Order on Requests to Summons Witnesses' ("Second PTC Decision on Witnesses"), 9 Sep 2010 (while the public redacted version of this decision does not refer to the witnesses' identities, but the Final Witnesses Decision effectively does: *see*, **E312**, Final Witnesses Decision, para. 91 and fn. 158). Regarding TC Judges Cartwright and Lavergne, *see*, **E312**, Final Witnesses Decision, paras. 104-111 and 119-120.
[110] Regarding International Co-Prosecutor Cayley, *see*, **D314/1/5**, 'International Co-Prosecutor's Observations on Ieng Sary and Nuon Chea's Appeals on the Summoning of Additional Witnesses', 29 Mar 2010; regarding International Co-Prosecutor Koumjian, *see*, T. 30 Jul 2014 (Case 002/02 Initial Hearing, **E1/240.1**), p. 112, lns. 14-22.

an interview, advising that interviewing him would be "conducive to ascertaining the truth".[111] In 2010, Judges Downing and Marchi-Uhel opined that "[p]reventing testimony from witnesses that have been deemed conducive to establishing the truth may infringe upon the fairness of the trial."[112] Most controversially, Judges Cartwright and Lavergne held in their dissenting opinion – buried in the final witnesses decision in Case 002/01 (the "Final Witnesses Decision") rather than addressed in the Judgement – that Heng Samrin's potential testimony was "*prima facie* relevant and could assist the Chamber in ascertaining the truth" and might contain "information [not] accessible to other proposed witnesses in Case 002/01".[113] Nevertheless, they simultaneously declined to rule on the Defence's claim that the failure to summons him therefore violated Nuon Chea's right to a fair trial,[114] as will be discussed further below.[115]

42. In contrast with the position of the international judges and prosecutors, each and every national judge seized of the Defence repeated requests to summons Heng Samrin has dismissed them: investigating, pre-trial and trial judges alike.[116] The National Co-Prosecutor, Chea Leang, has also maintained her longstanding objection to summonsing Heng Samrin.[117] This confirms the existence of a stark and persistent divide between national and international judges and prosecutors on this issue. Indeed, if the full reasons for the Decision on Pending Requests reveal an identical division between the national and international members of the Supreme Court Chamber, then the issue of summonsing Heng Samrin will not only confirm deep divisions between the ECCC judiciary and prosecution's entire national and international cohort, but it will also likely become the emblematic example of the (foreseeable) effect of the deep flaws embedded in the ECCC's very institutional design. This will, in turn, give credence to those who have argued that this Tribunal was doomed to fail from the start. Fuel will certainly be added to this fire if it transpires that the Trial Chamber is likewise going to again refuse the

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[111] **E136/3/1**, 'Letter to Samdech Heng Samrin', 25 Sep 2009, p. 1.
[112] **E314/1/12**, Second PTC Decision on Witnesses, para. 12 (of the minority opinion).
[113] **E312**, Final Witnesses Decision, para. 108.
[114] **E312**, Final Witnesses Decision, para. 70; **F16**, Appeal, para. 70; **E295/6/3**, Closing Brief, paras. 38-43.
[115] *See*, *infra*, paras. 43-44.
[116] Regarding Investigating Judge Bunleng, *see*, *e.g.*, **D314/1/12**, Second PTC Decision on Witnesses, para. 9, and **E312**, Final Witnesses Decision, paras. 90-91. Regarding Pre-Trial Chamber Judges Kimsan, Thol and Vuthy, *see*, *e.g.*, **D314/1/12**, Second PTC Decision on Witnesses. Regarding Trial Chamber Judges Nonn, Sokhan, and Ottara, *see*, **E312**, Final Witnesses Decision, paras. 87-98, 101-103, and 116-120.
[117] *See*, **E9/14/1/1/1**, 'Co-Prosecutors' Further Objections and Observation to the Witnesses and Experts Proposed by the Other Parties', 11 Mar 2011, and **E9/14/1/1/1.1**, 'Additional Annex: Contested Witness List'; **E305/10**, 'National Co-Prosecutor's Objections to the Witnesses and Experts Proposed by the Other Parties', 30 May 2014; T. 30 Jul 2014 (Case 002/02 Initial Hearing, **E1/240.1**), p. 113, ln. 8 – p. 114, ln. 5.

Defence's requests to summons Heng Samrin in the ongoing Case 002/02 trial, which appears increasingly likely.[118]

43. Moreover, the failure to summons Heng Samrin to testify in Case 002/01 – including now by the Supreme Court Chamber – is by no means a merely academic question. As the Defence argued on appeal, the split amounts to a gross violation of Nuon Chea's right to a fair trial by an independent tribunal.[119] It further violates his right to present a defence by excluding exculpatory evidence directly relevant to both the charges at issue in Case 002/01 and Nuon Chea's broader responsibility for events during DK.[120]

44. In the Final Witnesses Decision, Judges Cartwright and Lavergne ruled, in respect of Nuon Chea's arguments that his right to a fair trial had been violated by the Trial Chamber's failure to summons Heng Samrin and Ouk Bunchhoeun, that:

> We have borne in mind that should there be an appeal, [the fair trial issues] 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. In light of this outcome, we express no view on the issue of the fairness of the trial proceedings raised by our colleagues.[121]

The Defence argued in its Appeal that Judge Cartwright and Lavergne's "cowardly"[122] refusal to rule on the violations of Nuon Chea's right to a fair trial represented the "final, climactic buck-pass after years of highly practiced buck-passing".[123] That buck has now stopped squarely at the foot of the Supreme Court Chamber. In the instant Chamber, the judges have only two effective remedies to offer: to either summons Heng Samrin to testify on appeal, or acquit Nuon Chea on the extermination charge for the evacuation of Phnom Penh as well as all charges associated with the killing of former Khmer Republic soldiers and officials at Tuol Po Chrey.[124] Assuming that the latter situation is mere fantasy, then the only avenue left for the Supreme Court Chamber is to summons Heng Samrin to testify on appeal. The buck can go no further.

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[118] *See*, **E370**, East Zone-Cham Witnesses Request; **E370/3**, 'Decision on Nuon Chea Request to Expedite Two Previously Proposed Witnesses and Summons Four Additional Witnesses During the Case 002/02 Trial Topic on Treatment of the Cham – with Written Reasons to Follow', 18 Dec 2015, which indicates that the Trial Chamber has elected to "defer" its decision in respect of the summonsing of these witnesses.
[119] For evidence that the Cambodian judiciary is not structurally independent from the Royal Government of Cambodia and that the national judges at the Tribunal are incapable of acting contrary to the instructions and wishes of the government, *see*, in particular, **E314/6**, Second Trial Chamber Disqualification Application, paras. 43-49. *See*, *also*, **F16**, Appeal, paras. 54-75.
[120] **F16**, Appeal, paras. 54-75.
[121] **E312**, Final Witnesses decision, para. 111 (emphases added, footnotes omitted).
[122] *See*, *also*, **E314/6**, Second Trial Chamber Disqualification Application, para. 132.
[123] **F16**, Appeal, para. 73.
[124] **F16**, Appeal, para. 75.

45. In sum, the Defence submits that Heng Samrin's evidence was so important, reliable, relevant and unique that there could not have been any legitimate reasons on which the Supreme Court Chamber could have based its decision not to summons him to testify on appeal.

B. Request for Reconsideration of Decision Not to Summons Robert Lemkin and Admit His Notes and Remaining Transcripts into Evidence

46. As with Heng Samrin, the Defence had also made extensive submissions on the importance of Robert Lemkin's testimony and evidence for the Case 002/01 trial and requested his appearance and an investigation into the material in his possession. The Trial Chamber rebuffed these requests in their entirety.[125] In refreshing contrast, the Supreme Court Chamber's (at least initial) approach to Mr. Lemkin departed sharply from that of the Trial Chamber. In particular, after an apparent seven-month deliberation, on 1 April 2015 the Supreme Court Chamber granted the Defence's first additional evidence request[126] – filed on 1 September 2014 in the wake of Thet Sambath's Voice of America interview – to open an investigation into footage in Sambath and Lemkin's possession.[127] Two of the Chamber's judges subsequently interviewed Mr. Lemkin.[128] While Mr. Lemkin did not provide the requested footage to the Chamber following Thet Sambath's refusal to give consent,[129] Mr. Lemkin did provide the Chamber with copies of his Notes[130] and the 189-page long Transcripts,[131] which the Chamber made confidentially available to the parties.

47. In response to multiple invitations from the Supreme Court Chamber to make submissions on this subject,[132] the Defence has expounded at length during the Case 002/01 appeal process on the relevance and reliability of Mr. Lemkin's evidence.[133] Yet again, however, it appears that the Defence's position in this regard – and the relevant context – may bear reiterating.

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[125] **F16**, Appeal, para. 83; *see*, *also*, **E294**, 'Request to Admit New Evidence, Summons Rob Lemkin, and Initiate an Investigation', 11 Jul 2013; **E295/6/3**, Closing Brief, paras. 48-49.
[126] **F2/4/3**, Interim Decision on Lemkin-Sambath, para. 26.
[127] **F2**, First Additional Evidence Request, para. 18.
[128] **F2/4/3/1**, 'Written Record of Witness Interview – Robert T.F. Lemkin', 18 May 2015 ("Lemkin's WRI").
[129] **F2/4/3/2**, 'Report in Response to Supreme [Court] Chamber Decision F2/4/3', 22 May 2015.
[130] **F2/4/3/3.1**, 'CONFIDENTIAL – Unpublished Notes on Khmer Rouge Internal Conflict Investigation', 29 May 2015 (the "Notes").
[131] **F2/4/3/3/6.2**, 'Report in Response to Supreme [Court] Chamber Decision F2/4/3/3/5/1', 15 Sep 2015.
[132] **F2/4/3/3**, 'Decision Requesting Submissions on the Additional Investigation', 15 Jun 2015; **F2/4/3/3/6**, 'Decision Requesting Submissions', 2 Oct 2015.
[133] *See*, **F2/4/3/3/1**, Response on Lemkin-Sambath Notes; **F2/4/3/3/4**, Reply to OCP Response on Lemkin Notes; **F2/4/3/3/6/1**, Transcript and "Rift" Submissions.

(i) Importance and Uniqueness of Robert Lemkin's Evidence

48. As the Defence explained in its rejected request for the Trial Chamber to summons Mr. Lemkin to testify and investigate footage in his possession, on 9 July 2013, Mr. Lemkin sent an unsolicited email to Mr. Koppe. Mr. Lemkin stated, *inter alia*, as follows:

> [R]egarding Po Chrey, this was a massacre ordered by Ruos Nhim, not central command. We have amassed a wealth of evidence about Nhim's agenda but have been so far unable to complete our second film due to [REDACTED] being in US for personal reasons.[134]

49. Mr. Lemkin's email dovetailed neatly with the information his co-filmmaker Thet Sambath divulged to *Voice of America* a year later in August 2014, days after the Judgement. As already noted above, Mr. Sambath explained that "Nuon Chea was not the one[] who initiated the idea of killing the Lon Nol soldiers … *many people who initiated the idea to kill at that time are in the government* and they are still alive",[135] and that their second film would "illustrate[] a conflict called the *secret civil war in the Khmer Rouge* regime; it was the political conflict in the Khmer Rouge regime. *It displays what was behind those killings*."[136]

50. In the written record of his interview before the Supreme Court Chamber's delegate judges, Mr. Lemkin confirmed that he and Mr. Sambath had indeed "amassed a wealth of evidence about Ruos Nhim's political agenda during the period 1975 to 1978". Mr. Lemkin made specific mention of interviews with four individuals who, according to Mr. Lemkin:

> had knowledge of Ruos Nhim's political agenda regarding his view of the control of the Communist Party of Kampuchea; his view of the line of the Communist Party of Kampuchea; his view about what to do about that line; his view and his activities in an attempt to take over control of the Party.[137]

51. The Notes, which summarise the four individuals' accounts, indicate that Sao Phim and Ruos Nhim hosted an audacious meeting in Phnom Penh in May 1975 where several hundred high-ranking participants committed to plot the coup via a separate, secret party and a wide range of concrete, preparatory steps undertaken towards rebellion.[138] The

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[134] **E294**, 'Request to Admit New Evidence, Summons Rob Lemkin and Initiate an Investigation', 11 Jul 2013, para. 2 (Public (Redacted) version) (emphasis added).
[135] **F2**, First Additional Evidence Request, p. 5 (emphasis added).
[136] **F2**, First Additional Evidence Request, p. 7 (emphasis added).
[137] **F2/4/3/1**, Lemkin's WRI.
[138] *See, e.g.*, **F2/8**, Sixth Additional Evidence Request, paras. 31, 33, 37-40.

Transcripts are English translations transcribing the four individuals' interview footage, and therefore offer a complete picture of the individuals' interviews.

52. As the Defence has already argued during the appeal process, the Notes and Transcripts substantiate Nuon Chea's central contention that the CPK was wracked by internal divisions and undermined by fomenting rebellion intended to culminate in a coup d'état led by Sao Phim and Ruos Nhim and sponsored by Vietnam. The Notes and Transcripts constitute a dramatic departure from the carefully crafted image of the Party in the Judgement as a strictly "hierarchical", "pyramidal" entity in which cadres throughout the entire country and over the course of the regime consistently acted pursuant to Party policy as formulated by Pol Pot and Nuon Chea.[139] As the Appeal has already demonstrated, the evidence cited by the Trial Chamber in support of these extremely broad conclusions – which were critical to its findings on Nuon Chea's criminal responsibility in respect of killings at Tuol Po Chrey – was vanishingly thin.[140]

53. The Co-Prosecutors slung copious mud in Mr. Lemkin's direction in increasingly desperate attempts to undermine the reliability of the Notes and Transcripts and thereby exclude them entirely.[141] This is, of course, richly ironic considering that the Co-Prosecutors had previously sought to rely heavily on Robert Lemkin and Thet Sambath's film footage during the Case 002/01 trial.[142] In any event, the Defence offered careful refutations for each of the Co-Prosecutors' assertions. The Defence detailed Mr. Lemkin's clear expertise as an Oxford-educated filmmaker and journalist with decades of professional experience, and who also happens to have been a cousin to Raphael Lemkin (who famously coined the term "genocide" and whose legacy reportedly "motivated much of the filmmaker's work").[143] The Defence outlined the detailed methodology employed in the taking of the interviews, including efforts to "triangulate or corroborate" their testimony,[144] and Mr. Lemkin's intimate involvement throughout the interview

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[139] *See*, *e.g.*, **E313**, Judgement, paras. 223, 859-860. *See*, *also*, **F16**, Appeal, paras. 225-249.
[140] **F16**, Appeal, paras. 225-249.
[141] The Defence has summarised the Co-Prosecutors' spurious and offensive allegations in this regard at **F2/8/6**, 'Nuon Chea's Reply to the Co-Prosecutors' Response to his Sixth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01', 19 Oct 2015 ("Reply to OCP Response to Sixth Additional Evidence Request"), fn. 22.
[142] **F2/4/3/3/4**, Reply to OCP Response on Lemkin Notes, paras. 13-15; **F2/8/6**, Reply to OCP Response to Sixth Additional Evidence Request, fn. 22.
[143] **F2/4/3/3/4**, Reply to OCP Response on Lemkin Notes, para. 11; **F2/4/3/3/4.1.2**, Naomi Pfefferman, 'The Second Lemkin's Genocide Story Frames the 'Enemies'', *Jewish Journal*, 13 Jan 2011, available at: http://www.jewishjournal.com/film/article/the_second_lemkins_genocide_story_frames_the_enemies_20110113.
[144] **F2/4/3/3/4**, Reply to OCP Response on Lemkin Notes, para. 11.

process.[145] The Defence also highlighted the absurdity of the Co-Prosecutors' attempts to distinguish between the expertise of Robert Lemkin and Thet Sambath;[146] write off the interviews as "a mere mouthpiece for Nuon Chea";[147] and, most misguidedly, suggest that the interviews were somehow *less* reliable than the interviews gathered by Stephen Heder, Philip Short and François Ponchaud and cited heavily in the Judgement (when the interviews gathered by Robert Lemkin and Thet Sambath are the most recent, are based on eyewitness testimony rather than hearsay, and are the only ones to be videotaped).[148]

54. In addition, the Defence has already noted that any protection issues in respect of three of the four individuals interviewed appear to have been nullified, since selected parts of their testimony have already been featured in Thet Sambath and Gina Chon's book *Behind the Killing Fields*,[149] which has been publicly available since its release in 2010. Indeed, one of those three witnesses, Toat Thoeun, has in fact already testified on appeal, although his in-court testimony differs substantially from what he said to Robert Lemkin and Thet Sambath on camera.[150] Furthermore, the Tribunal has protective measures at its disposal which it could order if it deems them necessary in order to obtain the testimony of the fourth individual.[151]

(ii) Error in Deciding Not to Summons Robert Lemkin or Admit into Evidence the Notes and Remaining Transcripts

55. In short, Mr. Lemkin's testimony, and the Notes and remaining Transcripts, are highly relevant and reliable and go directly to the heart of the Defence's case. As the Defence has already noted, in particular in its Sixth Additional Evidence Request, the information that Mr. Lemkin, the Notes and remaining Transcripts can provide is increasingly being corroborated by evidence admitted into Case 002/02 from the investigations in Cases 003 and 004, and by documents in the public domain, including academic work, media reports, intelligence reports, and (recently disclosed) diplomatic cables.[152] The Supreme Court Chamber itself made strenuous efforts to obtain the information in Mr. Lemkin's possession. Under these circumstances, therefore, the Defence can see no valid basis for

[145] **F2/4/3/3/4**, Reply to OCP Response on Lemkin Notes, para. 12.
[146] **F2/4/3/3/4**, Reply to OCP Response on Lemkin Notes, para. 14.
[147] **F2/4/3/3/4**, Reply to OCP Response on Lemkin Notes, para. 15.
[148] **F2/4/3/3/4**, Reply to OCP Response on Lemkin Notes, paras. 17-20.
[149] **E3/4202**, Gina Chon and Sambath Thet, *Behind the Killing Fields: A Khmer Rouge Leader and One of His Victims*, 2011.
[150] **F2/4/3/3/6/1**, Transcript and "Rift" Submissions, para. 11.
[151] **F2/4/3/3/6/1**, Transcript and "Rift" Submissions, para. 9.
[152] *See*, **F2/8**, Sixth Additional Evidence Request, paras. 24-148.

the Chamber's decision not to summons Mr. Lemkin as a witness, or to admit the Notes or three remaining Transcripts. It is critical that Mr. Lemkin be summonsed on appeal – if necessary, by audio-video link – so that the Defence at least has the opportunity to examine him. It is even more critical that his Notes and remaining Transcripts be admitted into the evidence before the Supreme Court Chamber in Case 002/01. The Supreme Court Chamber's continued failure to do so would not only flagrantly violate Nuon Chea's right to a fair trial by prohibiting him from presenting a defence, but would also vindicate Mr. Lemkin's own assessment, in the aftermath of the Decision on Pending Requests, that:

> I can only conclude that the SCC was in reality engaged in an intelligence-gathering fishing expedition and not on a genuine journey towards discovering the truth of the Khmer Rouge period. [...]
>
> It seems that the ECCC has been content to use the material from those films selectively and, often, erroneously when it serves to assist conviction. When the material points in another direction – not, incidentally, necessarily away from the guilt of the accused – the court recoils.[153]

56. In sum, and as with Heng Samrin, the Defence submits that Robert Lemkin's evidence was so important, reliable, relevant and unique that there could not have been any legitimate reasons on which the Supreme Court Chamber could have based its decision not to summons him to testify on appeal or to admit into evidence his Notes and the remaining Transcripts.

C. In the Alternative, Provision of Full Reasons for the Decision on Pending Requests

57. As discussed above, the additional witness and evidence requests which were addressed in the Decision on Pending Requests were of great significance to the Defence's case, and could often have played a decisive factor in its appeal. Thus, the admission of the evidence was pivotal to Nuon Chea's ability to fully enjoy his right to review of the Judgement. The Defence is therefore confident that the Decision on Pending Requests would fall within the class of decisions for which the Defence should be entitled to receipt of reasons. On the question of timing, the Defence submits that it is essential that the reasons be delivered prior to the resumption of appeal hearings given that the end of appeal hearings marks the end of the Defence's opportunity to file written submissions to

[153] Robert Lemkin, 'A Letter to the Editor: Robert Lemkin', *Phnom Penh Post*, 18 November 2015, available at: http://www.phnompenhpost.com/analysis-and-op-ed/letter-editor-rob-lemkin.

the Supreme Court Chamber.[154] Given the importance of the requests to the Defence, the nature of the reasons provided by the Chamber for their rejection might give rise to requests from the Defence to reconsider further aspects of its decision. For this reason, delivery of the reasons prior to the resumption of appeal hearings is essential in order to provide the Defence with a genuine opportunity, however fleeting, to undertake a final attempt to litigate these essential issues. Indeed, it is the Defence's view that under Rule 108(4), the Supreme Court Chamber was obligated to provide at least a summary of reasons in its Decision on Pending Requests, and to issue full reasons as soon as possible thereafter.

VI. RELIEF

58. The Defence hereby requests that the Supreme Court Chamber:

(a) reconsider its decision:

(i) not to summons the witnesses Heng Samrin and Robert Lemkin; and

(ii) not to admit into evidence Mr. Lemkin's Notes and Transcripts;

or, in the alternative,

(b) urgently release full reasons for the Decision on Pending Requests prior to the resumption of the appeal hearings.

CO-LAWYERS FOR NUON CHEA

SON Arun

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[154] *See*, *supra*, fn. 24.