

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

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

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

I. PROCEDURAL HISTORY

1. On 25 April 2012, the Defence filed a request for investigation into political interference in the functioning of the Tribunal based on allegations made by former international Co-Investigating Judge Kasper-Ansermet upon his resignation from the OCIJ.¹ On 22 November 2012, the Trial Chamber rejected that request,² and on 24 December 2012 the Defence filed an immediate appeal.³ In January 2013, Judge Kasper-Ansermet’s predecessor, Marcel Lemonde, published a book in which he revealed previously confidential information concerning judicial investigations at the ECCC which substantially corroborate Kasper-Ansermet’s allegations. On 15 March 2013, the Defence filed a request with this Chamber to consider certain excerpts from Lemonde’s book as additional evidence in the course of its determination of the pending appeal.⁴ On 25 March 2013, the Chamber ruled on the request for additional evidence and the merits of the appeal, rejecting the relief sought in both requests.⁵ With regard to the request to consider additional evidence, the Chamber held that its decision was without prejudice ‘to the Defence submitting a future application on the basis of the evidence and arguments contained in the Request’.⁶
2. On 31 October 2013, the Trial Chamber concluded the hearing of the evidence in Case 002/01 with the final day of oral argument. On 7 August 2014, the Trial Chamber pronounced its judgment in Case 002/01, convicting Nuon Chea and Khieu Samphan of all crimes charged and sentencing each defendant to life imprisonment (‘Case 002/01

¹ Document No. **E189**, ‘Application for Immediate Action Pursuant to Rule 35’, 25 April 2012.

² Document No. **E189/3**, ‘Decision on Application for Immediate Action Pursuant to Rule 35’, 22 November 2012.

³ Document No. **E189/3/1/1**, ‘Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35’, 24 December 2012.

⁴ Document No. **E189/3/1/7**, ‘Request to Consider Additional Evidence’, 15 March 2013.

⁵ Document No. **E189/3/1/8**, ‘Decision on NUON Chea’s “Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35”’, 25 March 2013.

⁶ Document No. **E189/3/1/8**, ‘Decision on NUON Chea’s “Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35”’, 25 March 2013, para. 11.

Judgment’).⁷ Concurrent with the judgment, the Chamber issued a final decision on all witnesses, experts and civil parties sought for testimony before the Chamber (‘Final Witness Decision’).⁸

II. ADDITIONAL EVIDENCE

A. Interview by Judge Cartwright at Aspen Institute

3. The first new document is a video of an interview given by Judge Cartwright at the Aspen Institute in Washington, D.C. in November 2013 (‘Judge Cartwright Interview’). The video exists on the Case 002 case file, but is not admitted into evidence.⁹ The Defence has sought its admission into evidence before the Trial Chamber in Case 002/02, pursuant to Rule 87(4).¹⁰
4. Key excerpts of the video, pursuant to a transcription performed internally by the Nuon Chea Defence, are as follows:

The hybrid model is a result of those very difficult and very politicized negotiations. The Cambodians asked the UN to establish this tribunal, but very quickly it no longer suited their political ends and from that point on, they have done as much, the leaders, have done as much as they can to neutralize the tribunal and keep it within the boundaries of how they would like to see it. [...]

So how well has [the ECCC] worked? At some levels, extremely well. The Khmer Rouge wiped out the intelligentsia, so there are no judges. There were very few judges, if any, that survived that era and very few lawyers, if any, who survived. So, there is no basis for building a judiciary and a legal profession in the country.

[...]

Well, what I said earlier is that I believe that the trials are having an impact. They are showing how a “fairish” trial can be conducted – I don’t believe there is such a thing as totally fair trial and it’s really difficult in this environment. The people are appreciating it. The surveys of the Cambodian people show a rising trust in the Court. So, that’s important. Politically it is not easy. The Hun Sen government would quite like us to go away now, please. And they certainly don’t want any more trials after the one that we

⁷ Document No. E313, ‘Case 002/01 Judgement’, 7 August 2014 (‘Case 002/01 Judgment’).

⁸ Document No. E312, ‘Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01’, 7 August 2014 (‘Final Witness Decision’).

⁹ See Document No. E305/12.38R, Interview with Judge Cartwright, 6 November 2013.

¹⁰ Document No. E307/5.2, ‘Annex A – Initial Document List for Case 002/02’, 29 July 2014, no. 21.

are conducting. It could be said that the negotiations between the UN and the Cambodian government left a group of potential accused handed over to the Court on a platter and by no means we are going to try all of those ones, let alone anyone beyond that small negotiated group of, I think, five to ten people in total. So it's certainly not, as I said before, a perfect model. Politically, the Prime Minister has on a number of occasions made comments that have had an impact on our ability to be seen as objective. And we can't do anything about it except constantly tell the accused that we're not influenced by it; we don't have a jury, so they are not influenced by it; so just ignore him. But he won't stop doing it.

[...]

But for the likes of the Khmer Rouge, this has been so important in Cambodia, for the people to begin to understand who it was that developed this dreadful, dreadful, regime, why they did it. And the leaders have had every chance to, and the accused of this trial, had every chance to explain why they did it. And they occasionally have done so, not very often, but they have occasionally explained, and it hasn't been convincing.

My husband often comes and sits in the body of the Court and he says he can hear them all around him saying: "Oh, what rubbish!" and things like this, you know? And certainly on the bench, the judges around me make really, you know, I can't understand what they are saying, but I imagine it's very rude comments about some of the evidence. And you can hear them sort of growling in antagonism to some of the things they are hearing. This is incredibly important to the people, to see this in action.

But, for me, the most important thing is no impunity. We can't even promise that, because there are a lot of dictators that will get away with blue murder and will never be tried. But, perhaps, the fear of being tried one day might make them moderate their actions a little more. Doesn't seem to be working in Syria, but you never know. I don't think we can promise never again, anywhere in the world. But we can at least promise, occasionally, that one tyrant will be put on trial and humiliated, no longer powerful showing off to the people for the terrible philosophy, the bad thinking that goes into the decisions that they make, the lack of care for their people. They say they've done it because they love their people. Nonsense. And they've done it for personal power or ideology or whatever.

[...]

It's much easier for me and for my international colleagues than for my national colleagues, all of whom lived through this regime.

One of them was a young boy at the time and he told me – I have to say I don't ask my colleagues what their experiences were, but from time to time they volunteer the information, I think it's just too painful for me to cross examine them - but he told me that his parents who were both teachers for a

long time would leave their homes with their children every night and go and sleep on the jungle because it was safer there. And the jungle, in those days, was full of snakes, and tigers and everything. But his job during this period, and he wasn't educated – they stopped the education all together – was to catch mice or frogs in the paddy fields, during the day. And if he didn't catch any, he didn't get any food that night.

Now, if you bear in mind that, at the best, the people who were sent to these, which was most of the population, who went to the workcamps got the equivalent of “this size” [*she shows with her hand*] of rice to eat each day, and that was at the best period, it got reduced and reduced and sometimes they just got the water that the rice is cooked in, so if he didn't get even that to eat and there were starving child. It's worse for him now.

Not so long ago we had a witness who was clearly ideologically on the side of the accused and he was telling us that the children were happy to join children's brigades and search for food and do the tasks that they were assigned. And I sent a note to my colleague, this particular judge, saying: “would you endorse that?” And he just gave me a look that was, you know, very sad.

[...]

But [another unnamed Cambodian Judge] was led off on the first day when Phnom Penh was being evacuated, shackled, because they thought he was from the former deposed Lon Nol regime. He was eighteen at the time and a student, and someone called: “No, no, he wasn't for Lon Nol.” And, for some reason, the Khmer Rouge released him. This is not heard of, because they didn't care with the people were guilty or innocent. That wasn't relevant.

And he couldn't get out of town fast enough to escape them and he went to work on a dam site. And it was only when he was doing the first trial which involved the chair of the notorious Tuol Sleng Prison, that he found out what had happened with the chief of his workcamp, because he had been taken away one day and never seen again, and he was killed at Tuol Slang. And the reason he was taken away was the dam started over there, twenty kilometers away, and it was due to meet “here” and was off, in the middle, because they didn't use any modern instruments to work out how It should be built. So, you know, a lot of the people were killed because the dam didn't meet in the middle. And I say: “what happened to the dam?” And he says: “it's still just the way it is”. And thousands of people died for a useless project like that.

So, their experiences, I don't know how they sit through some of it. And, the fact that I can hear them growling, they don't lose their impassive face, but I can hear them, I think that is minimalist, compared to what they could say and do. (emphasis added)

B. Excerpts of Judge Lemonde's Book

5. The second new document consists of the collective excerpts from Marcel Lemonde's book *Un Juge Face aux Khmers Rouges* previously filed with this Chamber ('Lemonde Book').¹¹ The Defence notes that the Khieu Samphan defence sought admission of the Lemonde Book into evidence before the Trial Chamber in Case 002/01.¹² That request was denied.¹³ The Nuon Chea defence has recently sought to admit these same excerpts in Case 002/02.
6. Key excerpts include:
 - a. It is clear that behind the Cambodian judges there are people pulling strings from within the government. (p. 32)
 - b. Much later I realized that they were one step ahead of us, as they were preparing for the need to obstruct any proceedings that might be considered politically embarrassing. (p. 37-38)
 - c. In hindsight, I rather doubt the Cambodian government had a carefully thought-out plan. More probably, the leaders followed a very simple and well-rehearsed logic: what harm is there in replacing a judge since, in any case, a judge is only there to obey orders? (p. 50)
 - d. In this uneasy situation, I received an expression of support from another Cambodian judge, which I found gratifying as it revealed a considerable amount of trust on his part. He explained, without beating about the bush, that the government was waiting for one thing alone: for me to leave. With my reactions that were so different from those it was used to getting from diplomats or politicians, I could only be a troublemaker. As he went on with his depiction of Cambodian society, the judge added that I had to be wary of all Cambodian magistrates: either they lived in fear of the political establishment or they were closely connected to it, but either way, not one of them was reliable or independent. This was the only time someone spoke to me so frankly during my entire stay in Cambodia. (p. 51)
 - e. There is no response from the other side. I tell the greffier to get to work over the phone and to note down all of his conversations. For several weeks, he is passed from department to department, from "no one to take your call" to "wrong number". When he eventually does get through to someone, he is usually told that the matter will be taken up at a higher level and that they will

¹¹ See Document No. **E189/3/1/7.1.1**, 'Attachment 1'; Document No. **E189/3/1/7.1.2**, 'Attachment 2'; Document No. **E189/3/1/7.1.3**, 'Attachment 3'; Document No. **E189/3/1/7.1.4**, 'Attachment 4'; Document No. **E189/3/1/7.1.5**, 'Attachment 5'.

¹² Document No. **E280**, 'Initial Request to Place Before the Chamber Extracts of the Book Authored by Judge Marcel Lemonde', 10 April 2013; Document No. **E280/2**, 'Further Request to Put Before the Chamber Extracts from Book Authored by Judge Marcel LEMONDE', 8 May 2013.

¹³ Document No. **E280/2/1**, 'Decision on Khieu Samphan Second Request Pursuant to Internal Rule 87(4) to Admit Extracts of Former Co-Investigating Judge Lemonde's Book (E280/2)', 13 August 2013.

call him back, which they never do. Only the chief of staff of one of the people summoned ventures to state the real issue, namely that such a high ranking official cannot be summoned because it could damage his political career! You Bunleng discreetly asks whether it is truly necessary to include this comment in the report...To do him a favour, the unfortunate expression is deleted. As usual, it is necessary to smooth some ruffled feathers if we are not going to jeopardize the future. (p. 176)

- f. A few months later, Hor Namhong returns to the matter, justifying his refusal to testify with pseudo-legal considerations and stating quite unreservedly during a press conference that I had “breached the law” by signing the summons myself:

- According to the rules established between Cambodia and the United Nations, two signatures are necessary: one from the Cambodian side and one from the international side.

I simply answered that it is not befitting of a judge to argue publicly with a witness. The local media was of course under no illusions, and reported that the argument lacked substance. However, such disingenuousness on the part of a government official was unsettling: in the absence of any reaction, the freedom of manoeuvre of the international judges could be directly compromised in the future. We discussed this among ourselves and, as we felt the minister’s statements raised a fundamental ethical problem, we decided to refer it to the United Nations.

Silvia Cartwright therefore sent a letter on behalf of all of the international judges to Patricia O’Brien, the UN legal advisor. Her answer was disappointing. In a nutshell, O’Brien “shared our concerns” but noted with satisfaction that the comments following the minister’s statements had clarified the facts. There was therefore no need to take the matter further. In fact, had not Deputy Prime Minister Sok An recently confirmed that the government supported and respected the independence of the ECCC? When all was said and done, there was no cause for concern.

This was the “support” we had to make do with. (pp. 179-180)

III. APPLICABLE LAW

A. Admission of New Evidence on Appeal

7. 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), the Supreme Court Chamber ‘may itself examine and call new evidence.’ 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.

8. 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 001.¹⁴

IV. ARGUMENT

A. The Request for Additional Evidence is Admissible

9. Rule 108(7) expressly contemplates a request for additional evidence before the Supreme Court Chamber provided such evidence ‘was unavailable prior to trial’.
10. The Judge Cartwright Interview was given in November 2013, after the conclusion of the hearing of the evidence. The interview contains Judge Cartwright’s personal opinions and descriptions of the conduct of other members of the Chamber, all of which was unknown to the Defence during the Case 002/01 trial. At the time the interview was given, no further applications or submissions were permitted before the Trial Chamber.¹⁵ The interview was accordingly ‘unavailable at trial’.
11. Although there are no further timeliness requirements in Rule 108(7), the Defence notes that, for the foregoing reasons, the material has been tendered into evidence at the earliest possible opportunity. There is furthermore ample time for all parties to exercise their right to respond.¹⁶
12. While the Lemonde Book was not technically unavailable prior to the close of the Case 002/01 trial, the Defence interprets the prior instructions of the Supreme Court Chamber as an invitation to file a further request to consider it in any case.¹⁷ As noted, the Trial Chamber has already refused a request to admit the Lemonde Book in Case 002/01.¹⁸ The Defence has filed no immediate appeals with this Chamber since March 2013 to which the Lemonde Book would have been relevant. Accordingly, this request is filed at the earliest possible moment since this Chamber authorized the Defence to

¹⁴ 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.

¹⁵ See Rule 96(2).

¹⁶ Document No. **E189/3/1/8**, ‘Decision on NUON Chea’s “Immediate Appeal Against Trial Chamber Decision on Application for Immediate Action Pursuant to Rule 35”’, 25 March 2013, paras 10-11.

¹⁷ See para 1, *supra*.

¹⁸ Document No. E280/2/1, ‘Decision on Khieu Samphan Second Request Pursuant to Internal Rule 87(4) to Admit Extracts of Former Co-Investigating Judge Lemonde’s Book (E280/2)’, 13 August 2013.

submit a ‘future application on the basis of the evidence and arguments’ presented in its first request to admit the book into evidence.

B. The New Evidence Could Have Been a Decisive Factor in Reaching the Decision at Trial

13. The Defence notes that it will be able to fully demonstrate the importance of both documents to various decisions reached at trial only as part of its appeal against the final judgment. The Defence files the present motion at this time to ensure (out of an abundance of caution) that no controversy arises as to timeliness. The Defence submits that the importance of both documents is so apparent that the requirements of Rule 108(7) are satisfied on the basis of the truncated arguments presented here. However, should the Chamber conclude otherwise, or determine that this request is best made together with the appeal briefing, the Defence reserves the right to raise it again at that time.

i – Judge Cartwright Interview

14. Judge Cartwright’s interview includes numerous statements expressing severe criticism of the CPK, such as her claim that the ‘Khmer Rouge wiped out the intelligentsia’, and disparaging the credibility of Nuon Chea’s testimony given at trial. These statements were made publicly prior to the issuance of the Case 002/01 Judgment and accordingly bear on the public’s reasonable apprehension of her bias against both the CPK and Nuon Chea. The interview also describes the inability of the Cambodian members of the Trial Chamber to assess the evidence impartially without reference to their own personal experience in Democratic Kampuchea. According to Judge Cartwright, Cambodian judges growl in anger at testimony favorable to Nuon Chea, and react ‘sadly’ to exculpatory evidence given by witnesses ‘ideologically on the side of the Accused’. Judge Cartwright is apparently untroubled by these reactions, since it is ‘minimalist, compared to what they could say and do’.
15. The Trial Chamber dismissed Defence objections concerning its independence and impartiality and held that it would ‘disregard any irrelevant information not put before

it pursuant to Internal Rule 87'.¹⁹ Judge Cartwright's interview establishes that this conclusion is erroneous, and could therefore have been a decisive factor at trial.

ii – Lemonde Book

16. For substantially the same reasons previously outlined by the Defence,²⁰ the Lemonde Book provides compelling support for the Defence's contention that political interference has compromised Nuon Chea's right to an independent and impartial tribunal. Judge Lemonde's experience as a Co-Investigating Judge confirms and augments Judge Kasper's conclusion that 'such serious irregularities and dysfunctional situations' exist at the ECCC as to amount to a 'breach of due process of law and the proper administration of justice.'²¹ Numerous features of Judge Lemonde's book resonate directly with Judge Kasper's experience, including his trenchant criticisms of Judge Bunleng,²² the refusal of national-side staff to execute their functions,²³ and improper and *ultra vires* judicial conduct,²⁴ all of which establish that basic requirements of the rule of law are routinely ignored at the ECCC.
17. The fact that these irregularities predate Judge Kasper's tenure and extend all the way to the inception of the Tribunal disproves the basic premise of ECCC jurisprudence concerning judicial independence: that irregularities in Cases 003 and 004 are distinct from and have no effect on Case 002.²⁵ The Case 002/01 Judgment rejected all Defence arguments concerning independence and impartiality on the basis of this standing jurisprudence,²⁶ or otherwise failed to address them.²⁷ Accordingly, the Lemonde Book could have been a decisive factor in all of these decisions at trial.

C. The Chamber has Discretion to Examine any Evidence

¹⁹ Case 002/01 Judgment, para. 43.

²⁰ Document No. **E189/3/1/7**, 'Request to Consider Additional Evidence', 15 March 2013.

²¹ Case Files No. 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, Document No. **D38**, 'Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004' ('Judge Kasper Note'), 21 March 2012, para.1.

²² Kasper Note, paras 10-17.

²³ Kasper Note, paras 33-38, 44-50.

²⁴ Kasper Note, paras 28-32.

²⁵ See e.g., Document No. **E189/3**, 'Decision on Application for Immediate Action Pursuant to Rule 35', 22 November 2012, paras 9-10.

²⁶ Case 002/01 Judgment, para. 43.

²⁷ Document No. **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01', 26 September 2013, paras 80-82 (lodging numerous objections to the independence of the Tribunal not directly addressed by the Chamber).

18. In the event the Chamber determines that the requirements of Rule 108(7) are not satisfied with respect to either the Judge Cartwright Interview or the Lemonde Book, the Defence notes that the Internal Rules expressly authorize the Supreme Court Chamber to examine any evidence.²⁸ The Defence submits that for the foregoing reasons, both documents are essential to the determination of numerous decisions of the Trial Chamber currently subject to appeal, including the Case 002/01 Judgment. As neither document is presently admitted into evidence in Case 002/01, they merit admission pursuant to Rule 104(1).

V. CONCLUSION AND RELIEF SOUGHT

19. The Defence hereby seeks the admission into evidence of:
- a. the video of Judge Cartwright's interview at the Aspen Institute in November 2013 at E305/12.38R; and
 - b. the excerpts from the Lemonde Book filed as E189/3/1/7.1.1, E189/3/1/7.1.2, E189/3/1/7.1.3 and E189/3/1/7.1.4.

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²⁸ See Rule 104(1).