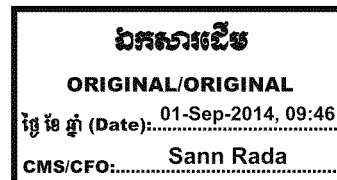


**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAIL**

**Case no:** 002/19-09-2007-ECCC-TC/SC  
**Filing party:** Nuon Chea Defence Team  
**Filed to:** Supreme Court Chamber  
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**REQUEST TO OBTAIN AND 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 obtain and 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 22 February 2011, the Nuon Chea defence filed its initial list of witnesses, experts and civil parties to be heard before the Chamber. The list included Thet Sambath and Rob Lemkin, co-directors and co-producers of two films on the case file: *Enemies of the People* and *One Day at Po Chrey*.<sup>1</sup>
2. On 9 July 2013, the Defence received an unsolicited email from Lemkin (‘Lemkin Email’). The email included a summary of certain material obtained by Lemkin together with Thet Sambath. Lemkin’s email indicated, *inter alia*, that, according to the evidence they had collected, the crimes alleged to have been committed at Tuol Po Chrey were ‘ordered by Ruos Nhim, not central command’. He added that he and Thet had ‘amassed a wealth of evidence about Nhim’s agenda’.<sup>2</sup> On the morning of 10 July 2013, and in subsequent written submissions, the Defence sought admission of the email as evidence pursuant to Rule 87(4), the summoning of Lemkin as a witness and an investigation pursuant to Rule 93 into material in Lemkin’s possession.<sup>3</sup>
3. The Co-Prosecutors and the Civil Parties opposed most of the application. The Co-Prosecutors repeatedly questioned Lemkin’s familiarity with the CPK and even the footage obtained by himself and Thet.<sup>4</sup> The Co-Prosecutors argued that the field work was ‘led by’ Thet Sambath, who had ‘done six or seven years of work’ prior to Lemkin’s involvement, including ‘many years’ of investigation into the events at Tuol Po Chrey.<sup>5</sup>
4. The Trial Chamber held that Lemkin’s email had already been admitted into the record by virtue of having been read out before the Trial Chamber and that its probative value

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<sup>1</sup> Document No. **E9/4/4.4**, ‘Annex A – Witness Lists’, 15 February 2011, nos 253, 456.

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

<sup>3</sup> Document No. **E1/221.1**, ‘Transcript of Trial Proceedings’, 10 July 2013, pp. 7:8-10:18; Document No. **E294**, ‘Request to Admit New Evidence, Summons Rob Lemkin and Initiate an Investigation’, 11 July 2013.

<sup>4</sup> Document No. **E1/223.1**, ‘Transcript of Trial Proceedings’, 11 July 2013, pp. 112:7-117:5.

<sup>5</sup> Document No. **E1/223.1**, ‘Transcript of Trial Proceedings’, 11 July 2013, pp. 113:1, 115:10, 116:11-12.

‘is a matter within the discretion of the Chamber’.<sup>6</sup> The Chamber refused the request to summons Lemkin or initiate an investigation into evidence in his possession. The Chamber held, *inter alia*, that Lemkin ‘speaks little Khmer and was not present during the majority of the interviews with the Accused.’<sup>7</sup> The Chamber further indicated that Thet Sambath, ‘who is a native Khmer speaker and the individual who conducted all of the interviews with the Accused NUON Chea, is best placed to provide details about additional film footage that did not appear in either of the films on the Case File.’<sup>8</sup>

5. 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 Judgment’).<sup>9</sup> 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’).<sup>10</sup> The Case 002/01 Judgment failed to make reference to the Lemkin Email despite numerous references to the documentaries ‘by THET S. and R. LEMKIN’ for inculpatory purposes.<sup>11</sup> The Final Witness Decision failed to further substantiate the decision not to summons Lemkin or initiate an investigation.<sup>12</sup>

## II. ADDITIONAL EVIDENCE

6. On 12 and 13 August 2014, Thet Sambath gave a two-part interview to VOA Khmer (‘Interview’). The Defence seeks admission of the full-length audio recording of that interview, which has been added to the Shared Materials Drive. The following is a transcription created internally by the Nuon Chea defence.<sup>13</sup>

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<sup>6</sup> Document No. **E294/1**, ‘Decision on NUON Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN’, para. 13.

<sup>7</sup> Document No. **E294/1**, ‘Decision on NUON Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN’, para. 16.

<sup>8</sup> Document No. **E294/1**, ‘Decision on NUON Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN’, para. 14.

<sup>9</sup> Document No. **E313**, ‘Case 002/01 Judgement’, 7 August 2014 (‘Case 002/01 Judgment’).

<sup>10</sup> Document No. **E312**, ‘Final Decision on Witnesses, Experts and Civil Parties to be Heard in Case 002/01’, 7 August 2014 (‘Final Witness Decision’).

<sup>11</sup> See Case 002/01 Judgment, fns 970, 1510, 2094, 2096, 2111, 2116, 2119, 2122, 2126, 2133, 2134, 2135, 2136, 2597.

<sup>12</sup> See Final Witness Decision.

<sup>13</sup> The Defence sought an official transcription from the Transcription Unit, but that request was denied on the grounds that the recording is not yet on the case file.

Part I: 12 August 2014

Seng: Hello Mr Thet Sambath.

Sambath: Hello Mr Kimseng.

Seng: On 7 August, Mr Nuon Chea and Mr Khieu Samphan were given life imprisonment by the Khmer Rouge Tribunal. As a researcher interviewing Mr Nuon Chea for years, do you think the conviction fits his responsibilities during the Democratic Kampuchea regime?

Sambath: To me, I don't make a conclusion based on how many years or life imprisonment they were sentenced to by the verdict. I am not interested in this. Why?

Seng: Yes, why?

Thet: Because the ones who actually initiated the idea of starving, arresting and killing people at that time are still living freely. That's why I said that the prosecution of Mr Nuon Chea and Mr Khieu Samphan and else is unjust. There is no justice because those who initiated the idea of starving, arresting and killing people at that time are still living freely. I have found that they caused starvation, arrest and execution in the Mr Nuon Chea or Mr Pol Pot's regime, and they are still living.

Seng: Yes.

Thet: Those people are making their confession of what they did during the regime. This is why I said that the prosecution is unjust. This is why to me, I have reconciled myself as I have learnt the truth while the tribunal, in my opinion, does not.

Seng: Yes.

Sambath: The tribunal has not found anything on this. The tribunal has found only the few top leaders responsible and we know well that these leaders must be responsible, no matter what. Whether or not they committed the acts themselves, they must be responsible as the leaders. However, I could not say anything on the extent of the punishment.

Seng: Yes. You as well as some other analysts and legal experts have raised that it is very difficult to hold the two Khmer Rouge leaders accountable for the crimes without applying the joint criminal enterprise. You talked a bit just now about those who made the regime deviate from its original principles. Could you expand on the extent of responsibilities Nuon Chea and Khieu Samphan held during the regime?

Sambath: For Mr Nuon Chea, he is a top leader with Mr Pol Pot. Thus he must be held accountable and punished. The question is however to what extent he should be punished fairly. For him to receive a fair sentence, the tribunal needs to find the truth. The tribunal needs to find the perpetrators who actually committed the acts in the regime and who even caused Pol Pot and Nuon Chea a major headache. Frankly speaking, I share Nuon Chea's feeling. It is almost like two people sharing exactly the same feeling. Although I am now in the United States while he is in the detention, we understand each other well. We are close to each other although we live far from each other. We have had conversation for years and then I can read his mind. For Khieu Samphan, I don't mean that I support any Khmer Rouge person. I am very clear. Anyone wrong is wrong, anyone right is right. Because of this position that's why Nuon Chea had had confidence in me and told me the truth. Besides Nuon Chea, other Khmer Rouge leaders now living secretly and some even had killed King Sihanouk's children also revealed the truth to me. I've met and known the one who had killed King Sihanouk's children. That person is still alive. This is why I know about this regime and I say the judgment of the KRT does not provide justice. To me, it cannot make me reconcile. For Khieu Samphan, I am not biased towards him because I am in fact close to Nuon Chea. However, I accept that Khieu Samphan did not have any power. In fact, Nuon Chea who was promoted and Nuon Chea told me that he and Pol Pot, only two, no one else...

Seng: Yes. To this point, can you expand on the Khmer Rouge's organizational structure? Among Pol Pot, Noun Chea, Khieu Samphan, Son Sen, Ta Mok and others, who had the authorities to receive all general information about the regime?

Thet: Generally, everything was decided by only Pol Pot and Noun Chea. They were the decision makers, meaning that they formulated all the plans for the country which were then passed to the low rank people. All plans came from them then. As I've already mentioned, many low rank people – actually most of them – secretly betrayed and opposed Pol Pot and Nuon Chea. They specifically targeted Pol Pot and Noun Chea and they sought to kill and topple Pol Pot and Nuon Chea. The only means they used to remove Pol Pot and Nuon Chea was assassination, but they did not succeed. The ones who developed the plan to kill Pol Pot and Nuon Chea did not participate directly in implementing this plan, but they were partners to the plan. They are still alive now. They confessed to committing acts against Nuon Chea and Pol Pot. This is a Cambodian history and that's why millions of Cambodians still don't understand this regime. I am convinced that my second firm will help ninety if not a hundred percent of Cambodians find it more acceptable and I believe that it is better than the life imprisonment verdict.

Seng: Can you say why those people chose to speak with you and refused to speak with the tribunal? Do you have any hope that those people may one day speak to the tribunal? Is there a need to have other mechanism through which they could speak publicly about that?

Sambath: If this tribunal is fair, independent and impartial, they would go there to speak about it. They really want to speak. However, this tribunal is also aware that it is not independent because it is related to politicians. One party proposed to prosecute someone, but the other party opposed. This is why the tribunal is viewed unfair. This is a general view, not only mine. As a researcher and a journalist, I've travelled and known things a lot. I know people's mind about the kind of tribunal they want to have. I dare to say that this tribunal is supported by only the minority.

Seng: Does it mean then that they are concerned about their security?

Sambath: Yes. When they started talking, they asked me about their security. I asked them why? I actually knew why they were concerned, but I wanted to know their ideas. They asked me if I knew the ones who led this government and they said they would be killed if they spoke about it. They did say this. They will go and speak out if they are provided with a security assurance.

Seng: Yes. This is the first conviction in Case 002 which has been split into two parts. Do you think that the second trial could be easier as there is concrete evidence such as places of torture, skulls and witnesses? Can you cooperate with the tribunal by any means to make these people come to confess?

Sambath: Yes. As for evidence such as human skulls which can be used as evidence, I would say that more people died or were killed during the regime, not only at Tuol Sleng which was only a small representation of the death of the people. Tuol Sleng, a small sample of the death of the people, has been used as evidence while many more people died or were killed at zones, sectors and villages. We need to know this and we must find out and know clearly the truth. You know why I believe this tribunal is unjust because they failed to establish the truth. On one charge for example, Nuon Chea is charged with ordering the execution of Lon Nol soldiers at Tuol Por Chrey in Pursat province. This charge is completely wrong. I heard the tribunal convicting Nuon Chea of this crime and this is very unfair to him. I do not oppose this tribunal if it convicts Nuon Chea of other crimes, but the conviction for the execution of Lon Nol soldiers at Tuol Por Chrey in Pursat province is completely wrong. Nuon Chea was charged with ordering... In fact, Nuon Chea was not the ones who initiated the idea of killing the Lon Nol soldiers and the ones who killed were the ones who betrayed him and Pol Pot and the direct killers are still alive. I've learnt the truth. I believe that many people who initiated the idea to kill at that time **are in the government** and they are still alive. They are both in and out of the government and are living freely. They initiated the idea to kill and put blame on others. I do not say that Nuon Chea and Pol Pot are one hundred percent clean. We are here to talk about the truth.

Seng: Where do they live now? Do they still hold position of authority?

Sambath: I am sorry I can't speak about their location. However, they are living in Cambodia.

Part II: 13 August 2014

- Seng: Another thing ... Nuon Chea has been found responsible for the movement of the population from cities to countryside and...when you met and interviewed Nuon Chea in the past, did he admit his guilt for imposing the evacuation policy?
- Sambath: On this point, he accepted; he accepted responsibility. He told me about that plan, the plan to evacuate people out of Phnom Penh city. The plan was not developed just during the liberation. In fact, it had been developed and decided almost a year before that. They were working on future plans. Nuon Chea and Pol Pot team examined the country to determine the future direction of the country; the country would need to move toward agriculture. If it would move toward agriculture, would the people be allowed to live in the cities? If...the rice farmland was close to the countryside, how could the people be allowed to live in the cities? That was why there was this policy. First, it was because there was this policy and second, there was fear of war. There was fear that a war would break out in Phnom Penh city. Due to these two factors, they decided to move people to countryside. But those who carried out this work did not do it well. Nuon Chea admitted his guilt for this. He did not intend to force the citizens...that way. It turned out that way because lower rank leaders acted excessively. Those who opposed Pol Pot, I tell you, wanted to topple Pol Pot, not just upon the liberation on 17 April 1975. They had had the intention to topple Pol Pot and Nuon Chea a long time ago, even back to the 50s, 60s...during the wartime. As for Phnom Penh, I am just telling you one thing. At one point, it was not controlled by Nuon Chea and Pol Pot. There must have been other people; other people must have controlled ...Cambodia at that time. But Pol Pot and Nuon Chea were intelligent and managed to take control of the situation at that time. That's all what I want to say; I think you, Mr Kimseng, understand...what happened. There was much happening.
- Seng: One policy or a practice in the Khmer Rouge regime we've observed is the smashing or eliminating the people who could not be corrected, leading to the killing of nearly two million people, as you, Mr Sambath, are aware of. Did Nuon Chea say which persons his regime would be able to correct? and were the corrected persons given high-ranking positions, or were only his team given the high-ranking positions?
- Sambath: No, it is not correct. It was not like that. Nuon Chea and Pol Pot wanted to do whatever for people. Honestly speaking, Nuon Chea is honest. I respect Nuon Chea because he is an honest person. It has been so easy for Nuon Chea to accuse Pol Pot, to shift the blame on Pol Pot. But Nuon Chea is not a person of that kind. He speaks the truth. So, I would like to clarify on the plans for what happened at that time. He wanted people to have enough to eat. The plan for how and on what day people were to eat dessert and rice had already been developed. Why did people not have enough to eat? And even..., for example, it was not that Mr Nuon Chea educated and wanted only his people to rise to high-ranking positions, as you asked me just a moment ago. If he had been the

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person of that kind, I am making one comparison on this point: Did anyone of Nuon Chea's children become a high-ranking cadre? At that time Nuon Chea's children were already grown-up. Were Nuon Chea's children, who were already adults at that time, holding power? Did he appoint his children to serve as...division commander, or not necessarily division commander, just head of battalion, regiment or group? No. His children even worked in the same way as my team. How could we then say that Nuon Chea initiated the idea...appointed only his people. The reasons are what I have mentioned.

Seng: Mr Sambath...mentioned a bit...just a moment ago that you would release your second documentary film about the Khmer Rouge regime. When will it be released? What issues does it focus on? Can you clarify a bit on this?

Sambath: My second documentary film illustrates 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. It is because my first documentary film only presents the perpetrator/s who say he killed people; the perpetrator/s did this and that killing. But who were behind those killings? So, my second documentary film shows the reasons why? Who were behind those killings? So, if we go deeper, the responsibility for the Khmer Rouge regime is not limited only to our country. There are some countries bearing the same responsibility as the Khmer Rouge for...the killing of the Khmer people.

Seng: Yes! So, ... has your finding on the killing been based on the explanation of Nuon Chea alone? Or have you interviewed some other perpetrators or those who were behind imposition of the policy or those who spoiled the policy?

Sambath: I am speaking about Nuon Chea. When I interviewed him, he never introduced me to any cadre. This is Nuon Chea's position. He is not like some other people. He told me if he introduced me to any cadre for an interview, it would mean that cadre was his supporter. This is Nuon Chea's position; he clearly told me that I would need to find the truth on my own. That is why I respect Nuon Chea. I say he is a man; he is said to be a real man, not a false man. Some men are false just in the sense that they are happy together when they are in power and that they accuse each other when they are out of power. Nuon Chea is not a person of that kind. Yes, he is different from others. I did not believe one hundred percent or even ten percent what Nuon Chea had told me at that time. I did not believe what he was telling me because I was just recording it and did not feel that I believed him. I keep doing research until I... struck it lucky, meeting both prison chief and supervisors, spies, i.e. investigators of those killings, and perpetrators—the ones who.... planned the killings of the people. I met all of them. They told me about all the plans - what Nuon Chea had said was true. Nuon Chea had told me many things, but I did not believe him at that time; for example, the killings of Lon Nol soldiers, pilots... the Lon Nol soldiers were sent... from Thailand to Cambodia. At the time, an order was given by Nuon Chea, Pol Pot to receive them back because Thailand, the Thai government, sent them back. Therefore, we had to take them back to live in our country... as happily as others. At that time, a high-ranking cadre ordered the killings of the military pilots. Who would believe



Nuon Chea? Even me, I did not believe him while he was telling me at that time. However, I have had the recordings, and kept them for years; I did not believe what he had told me. One day, I went to meet the prison chief and other cadres responsible for the killing of those pilots. I asked them who ordered the killings of the pilots. They told me that they were not Nuon Chea, Pol Pot. Someone else gave the order secretly. That's why I say what Nuon Chea had said was true; and he never exaggerated a single word. If it is wrong, it is just about dates, the day or the year.

Seng: So, in the end, what achievements and legacies do you want to see the current Khmer Rouge Tribunal have for Cambodia and the younger generations?

Sambath: I want to have a research for national reconciliation. But for the tribunal, I want it to conduct thorough research before trying any persons including Nuon Chea or Khieu Samphan. And the trial should be large. Do not bring only four, three or two persons to trial. It is imperative to conduct research. Anyone – at any rank and both in and out of the government - must be summoned for questioning. Through this, the truth will then come out. One hundred percent, it will come out. I believe. If the tribunal has the power to summon anyone, I believe that perpetrators and those who know the truth will speak out. There are so many people who want to speak out. But when they see the tribunal like this, they find it pointless speaking out. They don't go there and it's pointless to them. That's why I request that the tribunal do whatever to have...research, not necessarily count Number One, Number Two or Number Three. There is no need to number it. Summon anyone, no matter what position the person holds, to the tribunal and act accordingly. It is unnecessary to give numbers. Summon them and conduct research before trying them. What the tribunal has done is that while the research had yet been completed, the tribunal turned to try leadership apparatus. First, Duch was tried. The tribunal turned to try "the leadership apparatus" while trying Duch. How about the "tail"? And where is the "middle"? And then where is the truth? I say that the trial cannot...cannot find justice for people. To me personally, I say that the tribunal cannot...cannot find justice for me and my family. I am saying it honestly.

Kimseng: Thank you very much, Mr Thet Sambath, for giving this short interview to the VOA. I wish to say goodbye to you.

Sambath: Goodbye. Thank you, Mr Kimseng.(emphasis added)

### 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 Chamber 'may itself examine evidence and call new evidence' to determine any appeal. Rule 108(7) provides, in relevant part:

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

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.<sup>14</sup>

#### IV. ARGUMENT

##### A. The Instant Request Should be Classified as Public

9. Although the instant request makes reference to individuals who are potential witnesses in Case 002/02 and have been assigned pseudonyms, the Defence notes that the Trial Chamber's decision concerning the Lemkin Email was publicly filed without redactions or the use of pseudonyms.<sup>15</sup> The information set out herein is either repetitive of the Defence's last request, or derived from these individuals' own public statements. Accordingly, no further interest in confidentiality exists.

##### B. The Request for Additional Evidence is Admissible

10. Rule 108(7) expressly contemplates a request for additional evidence before the Supreme Court Chamber provided such evidence 'was unavailable prior to trial'.
11. The Interview was given in August 2014, after the issuance of the Case 002/01 Trial Judgment. The relevant facts, which include Thet Sambath's descriptions of material in his possession, were furthermore unknown to the Defence prior to the interview. As the document did not previously exist, it was 'unavailable at trial'.
12. 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

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<sup>14</sup> Case No. 001/18-07-2007-ECCC/SC, *Prosecutor v. Kaing Guek Eav*, Document No. **F2/5/1**, 'Decision on Group 1 Civil Parties' Co-Lawyers' Supplementary Request to Admit Additional Evidence', 29 March 2011, ERN 00657389-00657391; Case No. 001/18-07-2007-ECCC/SC, *Prosecutor v. Kaing Guek Eav*, Document No. **F2/4**, 'Decision on Requests by Co-Lawyers for Accused and Civil Parties Groups 1, 2, 3 to Admit Additional Evidence', 25 March 2011, ERN 00656514-00656517.

<sup>15</sup> Document No. **E294/1**, 'Decision on NUON Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN', 24 July 2013.

earliest possible opportunity. There is furthermore ample time for all parties to exercise their right to respond.<sup>16</sup>

**C. The Interview 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 the Interview 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 the Interview 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.
14. The Case 002/01 Judgment makes numerous sweeping conclusions concerning the hierarchical nature of CPK structure, the subordination of lower level officials to the Party Center and the latter's responsibility for the alleged execution of Khmer Republic officials at Tuol Po Chrey.<sup>17</sup> The interview with Thet Sambath, who has conducted extensive interviews with witnesses reluctant to speak with the CIJs, including 'many years' of investigation into the events at Tuol Po Chrey, is directly inconsistent with all of these conclusions. The Case 002/01 Judgment cites Thet Sambath's work repeatedly, including his own descriptions of the evidence he gathered and the narrative he presented in both of his films, to support conclusions concerning Tuol Po Chrey, Nuon Chea's role and the structure of the CPK.<sup>18</sup> The interview would have required the Chamber to reassess this evidence and accordingly 'could have been a decisive factor at trial.'
15. The Interview could furthermore have been a decisive factor in numerous other decisions at trial. By corroborating Rob Lemkin's assessment of the footage underlying *One Day at Po Chrey*, the interview would have – by the reasoning of both the Co-Prosecutors and the Trial Chamber – substantially enhanced the reliability of the

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<sup>16</sup> 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.

<sup>17</sup> See e.g., Case 002/01 Judgment, paras 203, 217, 223, 269, 286, 859-860, 918-939.

<sup>18</sup> Case 002/01 Judgment, fns 719, 970, 1037, 2490, 2597.

Lemkin Email. Nuon Chea's interest in obtaining footage not yet on the case file (including his right to present a defence) would accordingly have been far greater, causing the Trial Chamber to reassess its decision not to initiate an investigation. Even if the material then proved impossible to obtain, the infringement of Nuon Chea's right to a fair trial would have been even more serious.<sup>19</sup> The interview would furthermore have added substantial weight to the Defence's submission that the film *One Day at Po Chrey* must be assessed in conjunction with the Lemkin Email, which explains its broader significance, or otherwise not at all.<sup>20</sup> The Case 002/01 Judgment cites extensively to *One Day at Po Chrey* without reference to Lemkin's email.<sup>21</sup>

16. The Interview also establishes that the absence of key exculpatory evidence from the record is a direct consequence of government intimidation and interference.<sup>22</sup> Accordingly, the interview directly refutes the longstanding fiction at this Tribunal that active and proven interference by a government composed of the former subordinates of the Accused has no 'tangible impact' on the Defence's ability to prove that those subordinates acted independently to commit the crimes charged.<sup>23</sup> It could therefore have been decisive in the Defence's many applications concerning its right to an independent and impartial tribunal, which it reiterated in closing submissions.<sup>24</sup>

**D. The Supreme Court Chamber Should Seek to Obtain Exculpatory Evidence Pursuant to Rule 104(1)**

17. For these same reasons, the Supreme Court Chamber should exercise its discretion to call new evidence pursuant to Rule 104(1) and summons Lemkin and Thet to testify and obtain the material described in the Interview. An Appeals Chamber has an inherent power to admit new evidence where its exclusion would lead to miscarriage of

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<sup>19</sup> See e.g., Code of Criminal Procedure of the Kingdom of Cambodia, Art. 334 ('Until the end of the trial hearing, the accused [...] may make written statements and submit all documents or evidence that they think will be conducive to ascertain the truth.');

ECCC Law, Art. 35<sup>new</sup> ('In the determination of any criminal charge against him, the accused shall equally entitled to the following minimum guarantees [...] (e) [...] to obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them.');

ICCPR, Art. 14(3) (same); ICC Statute, Art. 67(1)(e) (same).

<sup>20</sup> Document No. **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01', 26 September 2013, para. 438.

<sup>21</sup> See fn 11, *supra*.

<sup>22</sup> See para. 6, *supra*.

<sup>23</sup> Document No. **E189/3**, 'Decision on Application for Immediate Action Pursuant to Rule 35', 22 November 2012, paras 9-10.

<sup>24</sup> Document No. **E295/6/3**, 'Nuon Chea's Closing Submissions in Case 002/01', 26 September 2013, paras 80-86.


justice.<sup>25</sup> Appeals Chambers at the ICTY and ICTR have the authority to summons witnesses and order their attendance.<sup>26</sup> The open-ended language of Rule 104(1), viewed in light of the inquisitorial nature of proceedings before the ECCC, confers broad discretion on the Supreme Court Chamber to seek to obtain such evidence in whatever manner it deems fit. Immediate action is necessary in this case to ensure that key exculpatory evidence from sources expressly deemed reliable by both the Trial Chamber and the Co-Prosecutors and relied on heavily in the Case 002/01 Judgment is entered into the record on appeal.

## V. CONCLUSION AND RELIEF SOUGHT

18. The Defence hereby

- a. seeks the admission into evidence of the audio of Thet Sambath's interview with VOA Khmer on 12 and 13 August 2014 at ERN T01022159 and T01022160; and
- b. requests the Supreme Court Chamber to summons Thet and Lemkin to testify and seek to obtain the evidence referred to in the Interview.

CO-LAWYERS FOR NUON CHEA



SON Arun



Victor KOPPE

<sup>25</sup> *Prosecutor v. Kupreskic*, IT-95-16, 'Appeal Judgment', 23 October 2001, para. 58.

<sup>26</sup> ICTY and ICTR Rules of Procedure and Evidence, Rules 98, 107; *Bagosora et al., v. The Prosecutor*, ICTR-98-41-A, 'Decision on Theoneste Bagosora's Motion for Admission of Additional Evidence', 7 February 2011, para. 10.