



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême

ឯកសារដើម
ORIGINAL/ORIGINAL
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Case File/Dossier N°. 002/19-09-2007-ECCC/SC

Before:

- Judge KONG Srim, President**
- Judge Chandra Nihal JAYASINGHE**
- Judge SOM Sereyvuth**
- Judge Agnieszka KLONOWIECKA-MILART**
- Judge MONG Monichariya**
- Judge Florence Ndepele MWACHANDE-MUMBA**
- Judge YA Narin**

Date:

1 April 2015

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Khmer/English

Classification:

PUBLIC

**INTERIM DECISION ON PART OF NUON CHEA’S FIRST REQUEST TO OBTAIN
AND CONSIDER ADDITIONAL EVIDENCE IN APPEAL PROCEEDINGS OF CASE
002/01**

Co-Prosecutors

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Nicholas KOUMJIAN

Co-Lawyers for NUON Chea

SON Arun
Victor KOPPE

Accused

KHIEU Samphân
NUON Chea

Co-Lawyers for KHIEU Samphân

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Arthur VERCKEN

Civil Party Lead Co-Lawyers

PICH Ang
Marie GUIRAUD

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” or “Chamber”, and “ECCC”, respectively) is seized of the “Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01”, filed by NUON Chea on 1 September 2014 (“Request”).¹ KHIEU Samphân joined the Request on 8 September 2015.² On 16 September 2014, the Co-Prosecutors filed their response to the Request (“Response”),³ to which NUON Chea replied on 25 September 2014 (“Reply”).⁴

A. BACKGROUND

2. On 7 August 2014, the Trial Chamber issued its judgment in Case 002/01 (“Trial Judgment”),⁵ convicting KHIEU Samphân and NUON Chea of the crimes against humanity of extermination (encompassing murder), persecution on political grounds, and other inhumane acts (comprising forced transfer, enforced disappearances and attacks against human dignity), and sentencing them each to life imprisonment.⁶ These convictions were based on the charges in the Closing Order relating to the roles and functions of KHIEU Samphân and NUON Chea within the Communist Party of Kampuchea (“CPK”), and their criminal responsibility in relation to the movements of the population (phases 1 and 2), as well as the executions of former Khmer Republic officials at Tuol Po Chrey.⁷

3. With the Request, NUON Chea *inter alia* asks the Supreme Court Chamber to obtain material emanating from and in the possession of THET Sambath and Robert LEMKIN, with

¹ Document Number F2.

² *Soutien de la Défense de M. KHIEU Samphân aux deux premières requêtes de la Défense de M. NUON Chea aux fins d'admission et d'examen de moyens de preuve supplémentaires en appel (F2 et F2/1)*, F2/1/1, 8 September 2014, para. 6.

³ Co-Prosecutors’ Response to NUON Chea Defence First and Second Requests to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, F2/2, 16 September 2014 (notified on 17 September 2014; re-notified on 25 September 2014 due to technical error).

⁴ Reply to Co-Prosecutors’ Response to Requests to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, F2/3, 25 September 2014.

⁵ Case 002/01 Judgement, E313, 7 August 2014.

⁶ Trial Judgement, p. 622.

⁷ See Trial Judgement, paras 11, 168, 410, 414, 425, 434, 441, 449, 456, 459, 575, 658-659, 723, 838, 943.

a view to introducing this material into evidence on appeal, which NUON Chea submits is exculpatory and could have been a decisive factor in numerous decisions taken at trial.⁸

4. On 29 September 2014, NUON Chea and KHIEU Samphân filed their notices of appeal against the Trial Judgment.⁹ They filed their appeal briefs on 29 December 2014.¹⁰

B. SUBMISSIONS

5. The Request seeks the admission into evidence of the audio recording of an interview given on 12 and 13 August 2014 by filmmaker and producer THET Sambath to Voice of America Khmer (“Interview”).¹¹ Furthermore, NUON Chea requests that the Supreme Court Chamber summons THET Sambath and Robert LEMKIN, who were the co-directors and co-producers of two films that are part of the case file – *Enemies of the People* and *One Day at Po Chrey* – to testify about video footage that was recorded for the purpose of those films and that is referred to in the Interview (“Footage”), and that the Chamber take immediate action to obtain the Footage.¹² NUON Chea submits that the Interview, the testimonies of the proposed witnesses and the Footage are exculpatory and could have been a decisive factor in numerous decisions taken at trial.¹³

6. According to a transcription of the Interview provided by NUON Chea’s defence team and included in the Request, THET Sambath criticised the verdict entered against NUON Chea, stating that his research supports the conclusion that responsibility for the crimes of which NUON Chea was convicted lies primarily with lower-ranking Khmer Rouge cadres, many of whom form part of Cambodia’s current government, and that, for this reason, potential witnesses are reluctant to testify before the ECCC as they perceive it to lack independence and impartiality.¹⁴ NUON Chea argues that the Interview thus constitutes proof

⁸ Request, paras 1, 6, 13-18. See also Reply, para. 1; NUON Chea Appeal Brief, para. 83.

⁹ Notice of Appeal Against the Judgment in Case 002/01, E313/1/1, 29 September 2014; *Déclaration d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, E313/2/1, 29 September 2014.

¹⁰ NUON Chea’s Appeal Against the Judgment in Case 002/01, F16, 29 December 2014 (“NUON Chea Appeal Brief”); *[Corrigé 1] Mémoire d’appel de la Défense de M. KHIEU Samphân contre le jugement rendu dans le procès 002/01*, F17, 29 December 2014 (corrected version filed on 31 December 2014).

¹¹ Request, paras 6, 18(a).

¹² Request, paras 17, 18(b).

¹³ Request, paras 1, 6, 13-18. See also Reply, para. 1; NUON Chea Appeal Brief, para. 83.

¹⁴ Request, pp. 3-6.

that, because of governmental interference, key exculpatory evidence was not included in the record, which impacted on his ability to present a defence.¹⁵

7. NUON Chea argues that the Interview could have been a decisive factor in relation to (i) a number of findings in the Trial Judgment, and (ii) the Trial Chamber's decision of 24 July 2013 ("Decision of 24 July 2013").¹⁶ Firstly, the Interview and the evidence referred to therein are believed to call into question the validity of the Trial Judgment's conclusions concerning the hierarchical nature of the CPK structure, the subordination of lower-level officials, and NUON Chea's responsibility for the executions of Khmer Republic officials at Tuol Po Chrey, which were supported citing THET Sambath's work.¹⁷

8. Secondly, NUON Chea avers that the Interview could have been a decisive factor for the Decision of 24 July 2013, which rejected the NUON Chea's requests to summons Robert LEMKIN or launch an investigation subsequent to an email Robert LEMKIN had sent to NUON Chea's counsel on 9 July 2013 indicating that he and THET Sambath had collected evidence that the crimes at Tuol Po Chrey were not ordered by central command.¹⁸ NUON Chea also contends that the Trial Chamber's failure to procure such exculpatory material while relying on THET Sambath and Robert LEMKIN's work for inculpatory purposes violated his fair trial rights.¹⁹

9. As to the requests that the Supreme Court Chamber summon THET Sambath and Robert LEMKIN to testify about the Footage and take immediate action to obtain it, NUON Chea submits that the Chamber has the power to call new evidence under Internal Rule 104(1) and that this provision authorises the Chamber "to obtain such evidence in whatever manner it deems fit".²⁰

10. In response, the Co-Prosecutors submit that the Request is procedurally defective because, at the time of its filing, no appeal had yet been lodged against the Trial Judgment,

¹⁵ Request, para. 16; NUON Chea Appeal Brief, paras 57, 74. *See also* Reply, para. 1.

¹⁶ Decision on NUON Chea Request to Admit New Documents, to Initiate an Investigation and to Summons Mr. Rob LEMKIN, E294/1, 24 July 2013.

¹⁷ Request, para. 14.

¹⁸ Request, paras 2-4, 15.

¹⁹ Request, para. 5; NUON Chea Appeal Brief, paras 83, 572.

²⁰ Response, para. 17.

and that they could not fully respond to the Request until the scope of the appeal is established and the issues to which the evidence sought would relate is substantiated.²¹

11. In addition, the Co-Prosecutors submit that the Interview is unreliable, being based on unsubstantiated, personal opinions regarding the guilt of NUON Chea and KHIEU Samphân expressed by a person who claims to have a close relationship with NUON Chea.²² The Co-Prosecutors contend that both co-producers have proven uncooperative in the past, with the Trial Chamber being unable to contact THET Sambath.²³ They maintain that the Footage that is supposedly in the co-producers' possession would be more useful than their testimony.²⁴ In this regard, the Co-Prosecutors argue that: (i) since THET Sambath's testimony has already been solicited in Case 002/02, the Supreme Court Chamber "should wait to see whether [he] agrees to appear" before the Trial Chamber";²⁵ and that (ii) Robert LEMKIN's testimony "would be of little to no value to this Court", due to his apparent limited involvement with THET Sambath's primary research.²⁶

12. The Co-Prosecutors accordingly request that the Supreme Court Chamber: (i) dismiss the Request as premature; (ii) provide directions to the parties as to the appropriate timing for filing applications for additional evidence; and, (iii) permit the Co-Prosecutors to expand on their Response after NUON Chea and KHIEU Samphân's appeals have been lodged.²⁷

C. ADMISSIBILITY

13. In respect of the Co-Prosecutors' argument that the Request is procedurally defective because it was filed prematurely, the Supreme Court Chamber notes that, since the filing of the Request and Response, NUON Chea and KHIEU Samphân have filed their notices of appeal and appeal briefs against the Trial Judgment. The Co-Prosecutors' objection to the admissibility the Request as premature is accordingly moot. Should the Co-Prosecutors still wish to further elaborate upon the Response to the Request, they may do so in their brief in response to the appeal briefs.

²¹ Response, paras. 1-5.

²² Response, paras 6, 10-11.

²³ Response, paras 7-8, 14.

²⁴ Response, paras 6, 9.

²⁵ Response, para. 15.

²⁶ Response, para. 16.

²⁷ Response, para. 25.

D. APPLICABLE LAW

14. Internal Rule 104(1) provides *inter alia* that “the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue”. Internal Rule 104*bis* mandates that “[i]n the absence of any specific provision, the rules that apply to the Trial Chamber shall, *mutatis mutandis*, also apply to the Supreme Court Chamber”.

15. With respect to motions for additional evidence on appeal, Internal Rule 108(7) reads in relevant part:

Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable at 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.

The Supreme Court Chamber considers that this rule applies to both newly discovered facts and new means of evidence (*facta noviter producta* and *facta noviter reperta*).

16. In general, admission of evidence before the ECCC is governed by Internal Rule 87(1), pursuant to which all evidence is admissible unless otherwise provided by the Internal Rules. Pursuant to Internal Rule 87(3):

The Chamber may reject a request for evidence where it finds that it is:

- a. irrelevant or repetitious;
- b. impossible to obtain within a reasonable time;
- c. unsuitable to prove the facts it purports to prove;
- d. not allowed under the law; or
- e. intended to prolong proceedings or is frivolous.

It follows that rules governing admissibility of evidence apply to the Supreme Court Chamber’s consideration of calling and administering evidence before it.

17. The Supreme Court Chamber also takes note of Articles 298 and 334 of the Cambodian Code of Criminal Procedure, Article 35^{new} of the ECCC Law and Article 14(3) of the International Covenant on Civil and Political Rights (“ICCPR”), which affirm the right to present a defence, as well as rules established in international jurisprudence on point, cited in the NUON Chea Appeal Brief.²⁸

²⁸ See NUON Chea Appeal Brief, para. 80.

18. Depending on the nature of the evidence sought, consideration of certain requests may require additional information, and, if granted, appropriate time to produce the evidence. Accordingly, the Supreme Court Chamber exercises discretion as to when to rule upon the admissibility of any requests for evidence and whether separately or jointly with any other issues raised during the appeal proceedings.²⁹ The limitations are that the parties must generally submit applications for new evidence before the close of the appeal hearing,³⁰ and that appeal proceedings must be concluded within a reasonable period.³¹

19. Moreover, pursuant to Internal Rule 93, read in connection with Internal Rule 104*bis*, the Supreme Court Chamber may decide to carry out additional investigations with a view to deciding whether to hear additional or other evidence on appeal.

E. DISCUSSION

20. As noted above, the Request contains two separate prayers, namely (i) that the Supreme Court Chamber admit into evidence the Interview; and (ii) that the Chamber summon THET Sambath and Robert LEMKIN and obtain the Footage. The first prayer amounts to a request under Internal Rule 108(7) for the admission of additional evidence. The Supreme Court Chamber notes that the Interview is readily available and that there are no practical difficulties as to its admission into evidence, should the Supreme Court Chamber decide to do so. Nevertheless, given the current stage of the appellate proceedings and the fact that other requests for admission of evidence are pending before this Chamber, it does not consider it appropriate to rule on the admissibility of the Interview at this point in time. Accordingly, the decision on this aspect of the Request is deferred to a later point in time.

21. Turning to the second prayer, as recalled above, on 9 July 2013 NUON Chea's counsel received an email from Robert LEMKIN indicating, *inter alia*, that "regarding Po Chrey, this was a massacre ordered by Ruos Nhim, not central command", and that he and

²⁹ See International Criminal Court, *Regulations of the Court* (adopted on 26 May 2004), Regulation 62(2); Rule 115(C) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev. 49, 22 May 2013 ("ICTY Rules").

³⁰ See Internal Rules 109(4) and (5), and 96(2) in conjunction with 104*bis*. Should a motion for additional evidence arise after the appeal hearing, the moving party should provide cogent reasons for filing at such a highly advanced stage of the proceedings. See Rule 115(A) of the ICTY Rules; ICTY, Appeals Chamber, *Prosecutor v. D. Milošević*, IT-98-29/1-A, "Decision on Dragomir Milošević's Third Motion to Present Additional Evidence", 8 September 2009, paras 6, 16.

³¹ Internal Rule 108(4).

THET Sambath had “amassed a wealth of evidence about Nhim’s agenda”.³² NUON Chea requested that the Trial Chamber admit the email into evidence, summons Robert LEMKIN to testify, and initiate an investigation for the material concerning RUOS Nhim’s role at Tuol Po Chrey so that it may also be introduced into evidence.³³

22. The Trial Chamber denied this request in the Decision of 24 July 2013, a decision in relation to which NUON Chea contends, as part of his grounds of appeal, that “the [Trial] Chamber’s failure to even attempt to obtain [such] evidence” was an error of law which led to a violation of NUON Chea’s right to a fair trial.³⁴ The Supreme Court Chamber shall address those arguments when considering the merits of the appeal. Nevertheless, the Supreme Court Chamber is bound to observe that, whereas the Trial Chamber conceded that the material was *prima facie* relevant,³⁵ it refused investigating into its specific content and availability based on concerns about the timely delivery of the judgment and the fear that the investigation would not be completed within a reasonable time.³⁶ In this regard, the Supreme Court Chamber finds itself unable to agree with the Trial Chamber’s statement that the fairness of proceedings must be balanced with the requirement to hold an expeditious trial.³⁷ The Chambers of the ECCC are under an obligation to ensure that proceedings are both fair and expeditious.³⁸ Two aspects of fair trial are relevant here: the right of the accused to be tried without undue delay,³⁹ and the right to “obtain the attendance and examination of witnesses on his behalf”.⁴⁰ In respect of the first aspect, the probative value of proposed evidence *in support* of the charges may be balanced against the time required to obtain it, where it would put in peril the right of the accused to be tried without undue delay.⁴¹ The right to be tried

³² Request to Admit New Evidence, Summons Rob LEMKIN and Initiate an Investigation, E294, 11 July 2013 (“Request to Summons and Investigate”), para. 2.

³³ Request to Summons and Investigate, paras 11-15; Transcript of Trial Proceedings (10 July 2013), E1/221.1, 17 July 2013, p. 10 (lines 5-17).

³⁴ NUON Chea Appeal Brief, para. 572. *See also* NUON Chea Appeal Brief, para. 83.

³⁵ Decision of 24 July 2013, para. 16.

³⁶ Decision of 24 July 2013, para. 24.

³⁷ Decision of 24 July 2013, para. 19.

³⁸ Article 33^{new}(1) of the ECCC Law: “The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious [...]”. *See also* Article 64(2) of the Rome Statute of the International Criminal Court; Article 20(1) of the ICTY Statute; Article 19(1) of the ICTR Statute; ICTY, Appeals Chamber, *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, “Decision on the Prosecutor’s Appeal on Admissibility of Evidence”, 16 February 1999, para. 19.

³⁹ Article 14(3)(c) of the ICCPR.

⁴⁰ Article 14(3)(e) of the ICCPR.

⁴¹ *See, for example, ICTY, Prosecutor v. A. Gotovina et al.*, IT-06-90-AR73.6, “Decision on Ivan Čermak and Mladen Markač Interlocutory Appeal Against Trial Chamber’s Decision to Reopen the Prosecution Case”, 1 July 2010, paras 23-24; *Prosecutor v. Z. Delalic et al.*, IT-96-21-A, “Judgement”, 20 February 2001, para. 290. More generally on the need to preserve the fairness of the proceedings when deciding on requests to introduce evidence for the prosecution, *see, for example, ICTY, Appeals Chamber, Prosecutor v. M. Milutinovic et al.*, IT-

without undue delay, however, does not limit the right of the accused to obtain evidence on his behalf. Rather, general concerns of expeditiousness circumscribe the right of the accused to obtain evidence where the motion for evidence would *de facto* not serve the defence, such as per Internal Rule 87(3), according to which evidence may be rejected if it is irrelevant, repetitious or the motion is meant to prolong the proceedings.⁴² Such determination, however, does not appear in the Decision of 24 July 2013.

23. Regarding the pending Request, the Supreme Court Chamber notes that, based on information available on the record, the Footage primarily consists of THET Sambath's interviews with NUON Chea, while another portion thereof ostensibly includes THET Sambath's interviews with other individuals, most of whom are former Khmer Rouge members. The interviews with NUON Chea were conducted prior to NUON Chea's arrest on 19 September 2007 and there cannot be reasonable doubt as to his and his Co-Lawyers' knowledge of the existence of this material. The Co-Lawyers have had direct contact with THET Sambath,⁴³ and were aware of NUON Chea's agreement of confidentiality with Robert LEMKIN "since at least June 2011".⁴⁴ Had NUON Chea intended to use his interviews with THET Sambath, he would have had every opportunity to do so earlier in the course of the trial. The Supreme Court Chamber accordingly finds that the Request, reasonably interpreted, only refers to the remaining footage. In respect of this footage, NUON Chea declares that he learnt of the existence of supposedly exculpatory material only upon receipt Robert LEMKIN's "unsolicited" email on 9 July 2013.⁴⁵ Accordingly, there is no indication on the record that the request to initiate an investigation should be treated as belated.

24. The Supreme Court Chamber recalls that, as a result of the Trial Chamber's Decision of 24 July 2014, there is no information on the record regarding whether the Footage can be obtained and whether it is actually relevant to the issues arising in the case. Therefore, in order to make the necessary determinations on the relevance and availability of the Footage, the Supreme Court Chamber considers it appropriate to make use of its powers under Internal Rule 93, read with Internal Rule 104*bis*, and engage in a limited additional investigation. Its

05-87-AR73.1, "Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65th Witness List", 20 April 2007, paras 17-20.

⁴² See also ICTR, Trial Chamber II, *Prosecutor v. J. Kanyabashi*, ICTR-96-15-T, "Decision on Kanyabashi's Motion to Re-open his Case and to Recall Prosecution Witness QA", 2 July 2008, paras 23 *et seq.*

⁴³ See First Response, para. 10 (describing how NUON Chea's Defence team helped Thet get illicit access to the ECCC detention facilities).

⁴⁴ Decision of 24 July 2013, para. 22.

⁴⁵ Transcript of Trial Proceedings (10 July 2013), E1/221.1, 17 July 2013, p. 7 (lines 8-16).

purpose is primarily to explore whether the Footage, excluding NUON Chea's interviews with THET Sambath, could be obtained within a reasonable period of time and what specific information could be derived from it.

25. Whether the Footage may be obtained promptly depends upon a number of factors. Critical is the willingness of the co-producers to provide the material in their possession to the Court. The Chamber notes the history of unpreparedness by THET Sambath and Robert LEMKIN to cooperate with the Court, which appears to be the main reason for the Footage still remaining outside the case file and which might render the present attempts to gain possession of it equally futile. It is noted, however, that over four years have elapsed since the last attempt by the Court to contact the co-producers,⁴⁶ which may have brought about a change of circumstances. This matter is to be determined by seeking to establish direct contact with the co-producers. In order to expedite the investigation, the Supreme Court Chamber decides to appoint two delegate judges ("Delegate Judges"), who shall conduct the investigation pursuant to Internal Rule 93. The Delegate Judges may interview witnesses in the absence of the parties and, where necessary, by means of audio or video-link technology.⁴⁷ The Delegate Judges shall keep the parties informed of the status of the investigation, affording them, as appropriate, with an opportunity to make representations thereupon. On the basis of the information obtained through the additional investigation, the Delegate Judges or the Supreme Court Chamber will then make a decision as to how to proceed further in this matter.

F. DISPOSITION

26. For the foregoing reasons, the Supreme Court Chamber:

GRANTS the Request, in part;

DECIDES to initiate an additional investigation aimed to establish whether the Footage may be obtained within a reasonable time and, if so, procure it;

⁴⁶ Decision of 24 July 2013, footnote 31. *See also* Interoffice Memorandum: Potential Witnesses – Unable to Locate, E292/1/2, 4 July 2013, (in which it appears that the Witness and Expert Support Unit ("WESU") was unable to retrieve the contact details of Thet as of 4 July 2013).

⁴⁷ Internal Rules 26, 55(7) and 60(2). *See also* Internal Rule 55(6); Code of Criminal Procedure of the Kingdom of Cambodia, Article 153.

APPOINTS Judge MONG Monichariya and Judge Chandra Nihal JAYASINGHE as Delegate Judges to conduct the investigation on behalf of the Chamber;

DIRECTS the WESU to use its best efforts to contact THET Sambath and Robert LEMKIN and report the outcome of its efforts to the Delegate Judges no later than 27 April 2015;

REQUESTS the parties to assist the WESU by providing any contact details of THET Sambath and Robert LEMKIN that they might be aware of;

REMAINS SEIZED of the remainder of the Request.

Phnom Penh, 1 April 2015

President of the Supreme Court Chamber



KONG Srim