



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber

Chambre de la Cour suprême



សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក

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:

21 October 2015

Language(s):

Khmer/English

Classification:

PUBLIC

**DECISION ON PENDING REQUESTS FOR ADDITIONAL EVIDENCE ON APPEAL
AND RELATED MATTERS
- DISPOSITION -**

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for NUON Chea

SON Arun
Victor KOPPE

Accused

KHIEU Samphân
NUON Chea

Co-Lawyers for KHIEU Samphân

KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN

Civil Party Lead Co-Lawyers

PICH Ang
Marie GUIRAUD

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”);

BEING SEIZED of the following requests for additional evidence filed by NUON Chea (“NUON Chea Requests”, collectively):

- (i) First Request,¹ in which he asks the Supreme Court Chamber to:
 - (a) admit into evidence the audio recording of an interview given by THET Sambath to Voice of America Khmer on 12 and 13 August 2014 (“THET Sambath Interview”);
 - (b) summon THET Sambath and Robert LEMKIN to testify;
 - (c) seek to obtain the evidence referred to in THET Sambath Interview, that is, the footage of interviews conducted with former members of the Khmer Rouge by THET Sambath and Robert LEMKIN;
- (ii) Second Request,² in which he asks the Supreme Court Chamber to:
 - (a) admit into evidence the video of an interview given at the Aspen Institute in November 2013 by the then Trial Chamber Judge Silvia CARTWRIGHT (“CARTWRIGHT Interview”);
 - (b) admit into evidence excerpts from the book entitled *Un juge face aux Khmer Rouges*, written by former Co-Investigating Judge Marcel Lemonde (“LEMONDE Book Excerpts”);
- (iii) Third Request,³ in which he asks the Supreme Court Chamber to:

¹ Request to Obtain and Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 1 September 2014, F2 (“First Request”). *See also* 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, 16 September 2014, F2/2 (“Co-Prosecutors Response to First and Second Requests”); 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, 25 September 2014, F2/3 (“Reply to Co-Prosecutors Response to First and Second Requests”).

² [Corrected 1] Second Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 2 September 2014 (corrected version filed on 3 September 2014), F2/1 (“Second Request”). *See also* Co-Prosecutors Response to First and Second Requests; Reply to Co-Prosecutors Response to First and Second Requests.

³ Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 25 November 2014, F2/4 (“Third Request”). *See also* Co-Prosecutors’ Response to NUON Chea’s Third Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgment in Case 002/01, 19 December 2014, F2/4/1.

- (a) admit into evidence the Written Record of Interview (“WRI”) of TOAT Thoeun (also spelled TOIT Thoeun) (“TOAT Thoeun WRI”);
 - (b) summon TOAT Thoeun to testify;
 - (c) instruct the Co-Prosecutors to review Case Files 003 and 004 and seek disclosure of potentially exculpatory material included therein, as described in the Third Request (“Disclosure-related Request”);
- (iv) Fourth Request,⁴ in which he asks the Supreme Court Chamber to:
- (a) admit into evidence the two transcripts of PECH Chim’s 23 and 24 April 2015 testimony before the Trial Chamber in Case 002/02 (“PECH Chim Transcripts”);
- (v) Fifth Request,⁵ in which he asks the Supreme Court Chamber to:
- (a) admit into evidence the WRIs of the individuals referred to in this request as Witness 1, Witness 2, Witness 3, Witness 4 and of TOAT Thoeun, and the annex of TOAT Thoeun’s WRI;
 - (b) summon Witness 1, Witness 2, 2-TCW-959, 2-TCW-960 and 2-TCW-961 to testify;
- (vi) Sixth Request,⁶ in which he asks the Supreme Court Chamber to:

⁴ NUON Chea’s Fourth Request to Consider Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01, 15 June 2015, F2/6 (“Fourth Request”). *See also* Civil Party Lead Co-Lawyers’ Response to NUON Chea’s Fourth Request Re Appeal Against Trial Judgement in Case 002/01, 26 June 2015, F2/6/1; 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 June 2015, F2/6/2.

⁵ NUON Chea’s Fifth Request to Consider and Obtain Additional Evidence in Connection with the Appeal Against the Trial Judgement in Case 002/01, 25 June 2015, F2/7 (“Fifth Request”). *See also* 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 July 2015, F2/7/1.

⁶ 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 September 2015, F2/8 (“Sixth Request”) (leave to file in English only, with Khmer translation to follow at the earliest convenience, was granted via Electronic mail sent from Senior Legal Officer and Greffier of the Supreme Court Chamber, entitled “Re: Filing of the sixth additional evidence request”, on 10 September 2015 at 9:27AM, on file with the Supreme Court Chamber). *See also* Civil Party Lead Co-Lawyers’ Response to NUON Chea’s Sixth Request Concerning Additional Evidence on Appeal, 29 September 2015, F2/8/1; Co-Prosecutors’ Request for Additional Pages and to File in One Language in Response to NUON Chea’s Sixth Additional Evidence Request, 30 September 2015, F2/8/2; NUON Chea’s Reply to the Civil Party Lead Co-Lawyers’ Response to NUON Chea’s Sixth Request for Additional Evidence on Appeal, 2 October 2015, F2/8/4; Decision on the Co-Prosecutors’ Request for Page Extension for their Prospective Response to NUON Chea’s Sixth Request for Additional Evidence, 5 October 2015, F2/8/2/1; 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 October 2015, F2/8/5; 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 October 2015, F2/8/6.

- (a) admit into evidence the WRI of the individual referred to in this request as Witness 5;
 - (b) admit into evidence the five transcripts of KEO Loeur's 15 and 16 June 2015, SÈM Hoeun's 22 and 23 June 2015, and LAT Suoy's 12 August 2015 testimonies before the Trial Chamber in Case 002/02;
 - (c) admit into evidence the DC-Cam statements of Witness 6 (dated 16 June 2011), Witness 7 (dated 16 June 2011), LAT Suoy (dated 18 May 2011), and 2-TCW-918 (dated 18 June 2011);
 - (d) admit into evidence 12 intelligence reports and diplomatic cables originating from foreign governments;
 - (e) summon Witness 5 and Witness 6 to testify;
- (vii) Submission on Investigation,⁷ in which he asks the Supreme Court Chamber, *inter alia*, to:
- (a) admit into evidence the unpublished notes, submitted by Robert LEMKIN, in which LEMKIN summarised the content of the interviews he and THET Sambath conducted with the four individuals he mentioned during his interview with the Delegate Judges ("LEMKIN Notes");⁸
- (viii) Submission on LEMKIN Transcripts,⁹ in which he asks the Supreme Court Chamber, *inter alia*, to:
- (a) admit into evidence the transcripts submitted by Robert LEMKIN pursuant to the Delegate Judges' Third Interim Decision¹⁰ ("LEMKIN Transcripts");¹¹

⁷ 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 July 2015, F2/4/3/3/1 ("Submission on Investigation"). See also *Observations de la Défense de M. KHIEU Samphân concernant le supplément d'information ordonné*, 23 July 2015, F2/4/3/3/2; Co-Prosecutors' Response to 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, 23 July 2015, F2/4/3/3/3; NUON Chea's Reply to Co-Prosecutors' Response to 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, 29 July 2015, F2/4/3/3/4.

⁸ Annex - Robert LEMKIN's Notes on RUOS Nhim's Political Agenda, 15 June 2015, F2/4/3/3.1. See also Written Record of Witness Interview – Robert T.F. LEMKIN, 18 May 2015, F2/4/3/1 ("LEMKIN WRI").

⁹ NUON Chea's Submissions on Robert LEMKIN's Transcripts and the Significance of the "Rift" Within the CPK, 8 October 2015, F2/4/3/3/6/1 ("Submission on LEMKIN Transcripts"). See also *Observations de la Défense de KHIEU Samphân sur l'admission des transcriptions fournies par Robert LEMKIN*, 9 October 2015, F2/4/3/3/6/2; Co-Prosecutors' Submissions on Transcripts of Interviews Received from Robert LEMKIN, 9 October 2015, F2/4/3/3/6/3.

- (b) summon TOAT Thoeun to provide further testimony;
- (ix) Appeal Brief,¹² in which he asks the Supreme Court Chamber, *inter alia*, to:
- (a) summon HENG Samrin, Robert LEMKIN, OUK Bunchhoen, SÂM Sithy, SAO Van (also spelled SAO Vorn; *alias* SAO Pok, also spelled SAO Port), THET Sambath, TOAT Thoeun, SCW-1 and SCW-2 to testify;

RECALLING that the Supreme Court Chamber granted the Disclosure-related Request contained in the Third Request,¹³ and that the International Co-Prosecutor accordingly submitted two reports;¹⁴

RECALLING that the Supreme Court Chamber, granting in part NUON Chea's requests contained in his Third Request and Appeal Brief, decided to admit the TOAT Thoeun WRI into evidence and summon SÂM Sithy, SAO Van and TOAT Thoeun to testify,¹⁵ and that these three witnesses were heard during hearings held on 2, 3 and 6 July 2015;¹⁶

RECALLING that the Supreme Court Chamber, granting in part the First Request, decided to initiate an additional investigation pursuant to Internal Rule 93 ("Additional Investigation"), appointing Judge MONG Monichariya and Judge Chandra Nihal JAYASINGHE as Delegate Judges;¹⁷ and that, in the framework of the Additional Investigation, the Delegate Judges interviewed Robert LEMKIN,¹⁸ who consented to provide the LEMKIN Notes and, upon subsequent request,¹⁹ the LEMKIN Transcripts;

¹⁰ Third Interim Decision on the Additional Investigation, 20 August 2015, F2/4/3/3/5 ("Third Interim Decision"). *See also* Decision Pursuant to Internal Rule 39(4)(a), 28 August 2015, F2/4/3/3/5/1.

¹¹ Transcripts of Interviews Provided by Robert LEMKIN, 2 October 2015, F2/4/3/3/6.2.

¹² NUON Chea's Appeal Against the Judgment in Case 002/01, 29 December 2014, F16 ("Appeal Brief"). *See also* [Corrected 2] Co-Prosecutors' Response to Case 002/01 Appeals, 24 April 2015 (corrected version filed on 30 April 2015), F17/1; [Corrected 1] Civil Party Lead Co-Lawyers' Response to Defence Appeals Against Trial Judgement in Case 002/01, 25 May 2015 (corrected version filed on 26 May 2015), F17/2.

¹³ Decision on Part of NUON Chea's Third Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 16 March 2015, F2/4/2.

¹⁴ International Co-Prosecutor's Response to Supreme Court Decision F2/4/2 Regarding Disclosure, 3 April 2015, F2/4/2/1; International Co-Prosecutor's Second Response to Decision F2/4/2, 23 June 2015, F2/4/2/2.

¹⁵ Decision on Part of NUON Chea's Requests to Call Witnesses on Appeal, 29 May 2015, F2/5, para. 26.

¹⁶ [Corrected 1] Order Scheduling a Hearing, 2 June 2015 (corrected version filed on 3 June 2015), F24.

¹⁷ Interim Decision on Part of NUON Chea's First Request to Obtain and Consider Additional Evidence in Appeal Proceedings of Case 002/01, 1 April 2015, F2/4/3, paras 25-26.

¹⁸ *See* LEMKIN WRI.

¹⁹ Third Interim Decision, p. 5.

RECALLING that the Supreme Court Chamber, upon receipt of the LEMKIN Transcripts, requested NUON Chea to make submissions, *inter alia*, on “the exact import of the alleged rift within the CPK and of the activities to overthrow POL Pot and NUON Chea’s leadership of the CPK [...] on his individual criminal responsibility”,²⁰ which he did on 8 October 2015;²¹ and that the Chamber, in the same decision, requested the other parties to respond to NUON Chea’s Submission on LEMKIN Transcripts,²² which they did on 16 October 2015;²³

CONSIDERING that the Supreme Court Chamber scheduled the appeal hearing for 16-18 November 2015²⁴ and that it is in the interests of justice to dispose of the pending requests for additional evidence in advance of the scheduled hearing, thereby allowing the parties to prepare their pleadings having a complete and definitive picture of the evidentiary basis on which this Chamber will ground its determination of the appeals;

CONSIDERING, further, that SAO Van gave testimony before the Supreme Court Chamber on 2 July 2015, and that it is in the interests of justice to admit into evidence, on its own motion, the written record of the conversation he previously had at DC-Cam (“SAO Van DC-Cam Interview”);²⁵

HEREBY:

DECIDES to render the following disposition, with reasons to follow in due course:

1. The Second Request is granted and, therefore, the CARTWRIGHT Interview and the LEMONDE Book Excerpts are admitted into evidence pursuant to Internal Rule 104(1);
2. The Fourth Request is granted and, therefore, the PECH Chim Transcripts are admitted into evidence pursuant to Internal Rule 104(1);

²⁰ Decision Requesting Submissions, 2 October 2015, F2/4/3/3/6 (“Decision Requesting Submissions”), p. 4.

²¹ Submission on LEMKIN Transcripts.

²² Decision Requesting Submissions, p. 4.

²³ Co-Prosecutors’s Response to NUON Chea’s Submissions on the Significance of the Alleged “Rift” Within the CPK, 16 October 2015, F2/4/3/3/6/1/1; Civil Party Lead Co-Lawyers’ Response to “NUON Chea’s Submissions on Robert LEMKIN’s Transcripts and the Significance of the ‘Rift’ Within the CPK”, 16 October 2015, F2/4/3/3/6/1/2.

²⁴ Order Scheduling the Appeal Hearing, 9 October 2015, F30.

²⁵ DC-Cam Interview of SAO Van, 21 October 2015, F2/9.1 (renumbering from: [Corrected 1] Statement of SAO Port (DC-Cam), 20 April 2011 (date of interview; corrected English translation filed on 30 June 2015), E305/13.23.405).

3. The requests contained in the Submission on LEMKIN Transcripts are granted in part and, therefore, the transcripts of TOAT Thoeun's interviews are admitted into evidence pursuant to Internal Rule 104(1);²⁶
4. The remainder of the NUON Chea Requests are dismissed;
5. The SAO Van DC-Cam Interview is admitted into evidence pursuant to Internal Rule 104(1);
6. The Additional Investigation is concluded.

Phnom Penh, 21 October 2015

President of the Supreme Court Chamber



KONG Srim

²⁶ Interviews of TOAT Thoeun with THET Sambath and Robert LEMKIN, 21 October 2015, F2/9.2 (excerpts from LEMKIN Transcripts).