

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

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**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**

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I. INTRODUCTION

1. On 15 June 2015, the Supreme Court Chamber issued an interim decision (the “Decision”) in respect of an additional investigation it had been undertaking, at the request of the Co-Lawyers for Mr. Nuon Chea (the “Defence”), into footage and information in the possession of filmmakers Rob Lemkin and Thet Sambath.¹ During that investigation, the Chamber interviewed Rob Lemkin,² who subsequently provided the Chamber with notes he had prepared for a forthcoming article (the “Notes”).³ At the same time, WESU was able to contact Thet Sambath, who did not consent to provide the footage to the Chamber.⁴ In its 15 June 2015 decision, the Supreme Court Chamber requested the Defence to respond to two questions:
 - (i) whether the Notes should be admitted into evidence; and
 - (ii) whether any further action should be undertaken by the Delegate Judges or the Chamber in relation to the information emerged from the Additional Investigation.⁵
2. Pursuant to the Decision, the Co-Lawyers for Mr. Nuon Chea submit the following responses to the Chamber’s questions.

II. RESPONSE

A. Whether the Notes Should be Admitted into Evidence

3. The Defence notes that the admission of evidence on appeal is governed by ECCC Internal Rule 108(7) and 104(1). The Defence submits that the Notes should be admitted into evidence as they contain key exculpatory evidence that is highly relevant to Nuon Chea’s case and could have been a decisive factor in the Case 002/01 Judgement in satisfaction of Rule 108(7). As explained below, the Notes refute Nuon Chea’s responsibility for crimes that occurred in the Northwest Zone – and in particular, his responsibility for crimes committed at Tuol Po Chrey – by demonstrating that since the beginning of the jurisdictional period, cadres in the Northwest Zone acted under the

¹ F2/4/3/3, ‘Decision Requesting Submissions on the Additional Investigation’, 15 Jun 2015 (“Decision”).

² F2/4/3/1, ‘Written Record of Witness Interview – Robert T.F. Lemkin’, 18 May 2015 (“Lemkin WRI”).

³ F2/4/3/3.1, Annex – Robert Lemkin’s Notes on Ruos Nhim’s Political Agenda, 12 Jun 2015 (“Notes”).

⁴ F2/4/3/2, ‘Report in response to Supreme [Court] Chamber Decision F2/4/3’, 25 May 2015.

⁵ F2/4/3/3, Decision, ERN 01106922.

direction of Standing Committee member⁶ and Zone secretary Ruos Nhim who himself acted independently of the Party line, fomenting rebellion and/or treason in the area⁷. In doing so, the Notes directly refute the Trial Chamber's findings in the Case 002/01 Judgement that the CPK was "strictly hierarchical" and "pyramidal"⁸ and that zones were functionally subordinate to the "Centre", including with respect to the implementation of an alleged policy to target former Khmer Republic soldiers and officials for arrest, disappearance and/or execution.⁹

4. Rob Lemkin and Thet Sambath conducted many interviews for the purposes of their feature-length films *Enemies of the People* and (the provisionally-titled) *Suspicious Minds* and their short film *One Day at Po Chrey*. Through those interviews, they gathered important exculpatory evidence in relation to the Trial Chamber's findings that Nuon Chea is criminally responsible for different crimes that occurred in the Northwest Zone and especially the killings of former Lon Nol soldiers at Tuol Po Chrey.

5. Lemkin's Notes summarised the interviews of four different individuals [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶ The Defence notes that this is not entirely clear, however it appears in one Standing Committee minute which is on the case file: *see*, E3/7328 (E307/5.2.12), 'Excerpts from Minutes of the April 11, 1977 Meeting of the Standing Committee of the Party Central Committee', ERN 01002086.

⁷ *See, e.g.*, F16, 'Nuon Chea's Appeal Against the Trial Judgment in Case 002/01', 29 Dec 2014, paras. 57, 59, 62-69, 82, 83, 85, 163, 178, 179, 184, 225, 228, 236-243, 526-8, 559-596, and 601-614.

⁸ E313, Case 002/01 'Judgement', 7 Aug 2014 ("Judgement"), para. 223 (footnotes omitted, emphasis added).

⁹ E313, Judgement, para. 859 (emphasis added).

¹⁰ F2/4/3/3.1, Notes, ERN 01106929.

¹¹ F2/4/3/3.1, Notes, ERN 01106930.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7. Lemkin's account of the four witnesses' testimonies can be deemed to be accurate. Lemkin and Sambath adopted a strict and careful method to assess the reliability of the individuals they interviewed. Lemkin described this process during his testimony before the Supreme Court Chamber Judges:

A20. The people were interviewed numerous times, more than 10 times. Their information were challenged repeatedly and efforts were made to triangulate or corroborate the information by asking other people about information that one person had given. We would ask other people if they knew anything about it. If that information appeared to be consistent then that was something that would lead towards that person being suitable to be included in the film¹⁴.

8. The Defence further submits that the Notes should be admitted as public evidence. The Defence submits that this would be in the interests of justice pursuant to Rule 104(1), despite Thet Sambath's refusal to provide the Chamber with the underlying footage on which the Notes are based. The Defence notes that a significant portion of evidence admitted in Case 002/01 consisted of secondary sources the underlying evidence of which was not made available to the Chamber. In several instances, the authors of the secondary material testified before the Chamber to explain the methodology they adopted to gather their evidence. Rob Lemkin has already offered such an explanation to the Supreme Court Chamber. Thus, the Defence considers the Notes to be exactly the same type of source as several others which appear on the case file and were heavily relied upon in the Case 002/01 Judgement, including for instance the work of Philip Short, François Ponchaud or Stephen Heder. Furthermore, the Defence notes that while Thet Sambath allegedly feared harm to himself, his family and former staff if the requested footage was provided to the Chamber, this danger would be vastly minimised

¹² F2/4/3/3.1, Notes, ERNs 01106929 and 01106930.

¹³ F2/4/3/3.1, Notes, ERN 01106929.

¹⁴ F2/4/3/1, Lemkin WRI, ERN 01097184.

if the Notes were provided instead. The Notes identify the witnesses only by pseudonym and summarise their testimony.

B. Whether Any Further Action Should be Undertaken by the Delegate Judges or the Chamber in Relation to the Information Emerged from the Additional Investigation

9. The Defence maintains its request that Rob Lemkin and Thet Sambath be summonsed to testify before this Chamber. In addition, the Defence requests that Lemkin be re-interviewed by the Delegate Judges and that Sambath also be interviewed by the Delegate Judges. The primary purpose of these interviews would be to attempt to obtain additional information in respect of the four witnesses, including further details provided during their interviews; other forms of evidence other than the footage (such as its logbooks and transcripts), redacted if necessary to preserve anonymity; and corroborating details of the circumstances and methodology under which the interviews were conducted. There is no doubt [REDACTED]

[REDACTED] Such an interview would also enable the Chamber to better understand the danger to which Thet Sambath claims he would face if the footage were provided, and assess whether this danger would also arise in respect of the Notes or other forms of alternate evidence provided in lieu of the footage. It may also enable the Chamber to better ascertain the extent to which the protective measures at the ECCC's disposal might assist in addressing Mr. Sambath's alleged fears.

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